No. 126116

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Appellate Court of Illinois, First Judicial District,
Plaintiff-Appellant,	No. 1-18-0014
v.	There on Appeal from the Circuit Court of Cook County, No. 16 CR 60199
DENZAL STEWART,	The Honorable Joseph M. Claps,
Defendant-Appellee.	Judge Presiding.

PLAINTIFF-APPELLANT'S REPLY BRIEF AND RESPONSE TO REQUEST FOR CROSS-RELIEF

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ORAL ARGUMENT REQUESTED

E-FILED
3/15/2022 8:52 AM
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SUPREME COURT CLERK

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ARGUMENT

Defendant concedes that he forfeited his sentencing claim by failing to raise it in the circuit court and, therefore, he is required to prove that a "clear or obvious error occurred." Def. Br. 44.[1] As the People's opening brief demonstrated, defendant cannot carry his burden because the circuit court correctly found that he is a Class X offender pursuant to 730 ILCS 5/5-4.5-95(b) (2017) (Section 95(b)).

I. Under the Plain Language of Section 95(b), Defendant's 2013 Conviction for Residential Burglary in Adult Court Is a Qualifying Prior Conviction.

The parties' dispute centers on whether defendant's 2013 conviction for residential burglary in adult court when he was 17 years old is a qualifying prior conviction under Section 95(b). Def. Br. 15.[2] At the time defendant was sentenced in this case, Section 95(b) provided that a defendant convicted of a Class 1 or 2 felony is subject to Class X sentencing if he previously has twice

> been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony[.]

730 ILCS 5/5-4.5-95(b) (2017). Therefore, a prior conviction is a qualifying conviction if two requirements are met: (1) defendant previously was "convicted" of an offense, and (2) that offense has "the same elements" of an

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[1] The parties' briefs are cited as "Peo. Br." and "Def. Br."

[2] Though two prior convictions are necessary under Section 95(b), defendant admits that his 2014 conviction for possession of a stolen motor vehicle (PSMV) is a qualifying prior conviction, and only the 2013 conviction is at issue here. *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 26.

offense that is "now" classified as a Class 2 or greater felony. *Id.*; *see also* Def. Br. 17-19, 29-36. Defendant's 2013 residential burglary conviction in adult court meets both requirements.

A. Defendant's 2013 Residential Burglary Conviction in Adult Court Meets the Statutory Definition of "Conviction."

The first requirement of Section 95(b) looks to the past: was the defendant previously "convicted in any state or federal court." 730 ILCS 5/5-4.5-95(b). There is no basis for defendant's contention that his 2013 conviction for residential burglary in adult court is not a "conviction" because he was 17 years old at that time. *See* Def. Br. 33-37.

The parties agree that "conviction" is defined by statute as a judgment entered on "a plea of guilty or upon a verdict or finding of guilty" in a "court of competent jurisdiction." 730 ILCS 5/5-1-5; Def. Br. 28. And, as noted in the People's opening brief, this Court and the appellate court consistently have held that "the plain meaning" of this definition includes "the conviction of [a defendant] while a juvenile in adult court." *Fitzsimmons v. Norgle*, 104 Ill. 2d 369, 372-73 (1984); *see also, e.g., People v. Irrelevant*, 2021 IL App (4th) 200626, ¶¶ 35-39; *People v. Bryant*, 278 Ill. App. 3d 578, 586 (1st Dist. 1996); *People v. Banks,* 212 Ill. App. 3d 105, 107 (5th Dist. 1991). Thus, the definition of "conviction" includes defendant's 2013 conviction for residential burglary in adult court, even though he was 17 at the time of that conviction.

Defendant's attempts to distinguish this longstanding precedent fall short. *See* Def. Br. 33-37. His observation that *Fitzsimmons* and some

appellate court decisions following it involve other recidivist sentencing provisions is irrelevant because the opinions address the meaning of "conviction," which must be construed consistently, *i.e.*, by applying the definition provided by the legislature. *See e.g.*, *People v. Fiveash*, 2015 IL 117669, ¶ 13 (terms "must be construed by applying the statutory definition provided by the legislature"). Applying that definition, a defendant's prior conviction when he was 17 is a qualifying "conviction" under Section 95(b). *People v. Reed*, 2020 IL App (4th) 180533, ¶¶ 26-29; Peo. Br. 7-8.

Defendant is also incorrect that this Court overruled *Fitzsimmons* in *People v. Taylor*, 221 Ill. 2d 157 (2006) (cited in Def. Br. 34-35). *Taylor* addressed a different statutory construction issue and held that a juvenile's prior adjudication as a *delinquent minor in juvenile court* does not constitute a "prior felony conviction" necessary to prove the offense of escape. *Id.* at 163-64. Indeed, rather than overruling *Fitzsimmons*, *Taylor* expressly noted that the two cases address different issues. *Id.* at 181. Defendant's reliance on two appellate cases that hold, as *Taylor* does, that juvenile delinquency adjudications in juvenile court are not felony convictions is misplaced for the same reasons. Def. Br. 34 (citing *People v. Wallace*, 331 Ill. App. 3d 822 (5th Dist. 2002), and *People v. Rankin*, 297 Ill. App. 3d 818 (4th Dist. 1998)).

Defendant's argument that *Fitzsimmons* is no longer good law because the definition of "conviction" was changed in 2014 when the Juvenile Court Act (JCA) was amended to potentially extend its jurisdiction to 17-year-old

offenders, Def. Br. 34-36, is rebutted by the statutory definition of "conviction" itself, which remains unchanged, *compare* 730 ILCS 5/5-1-5 (2021) *with* 730 ILCS 5/5-1-5 (2013); *see also Reed*, 2020 IL App (4th) 180533, ¶¶ 26-29 ("Nothing in [the JCA] indicates criminal convictions entered against 17-year-old offenders should be considered juvenile adjudications after the amendment became law."); *People v. O'Neal*, 2021 IL App (4th) 170682, ¶¶ 102-03 (similar).

Lastly, defendant's argument that "conviction" does not include a conviction of a 17-year-old in adult court would have negative consequences far beyond this case, given the number of other statutes that rely on the term "conviction." For example, Illinois laws prohibit someone who has been "convicted of a felony" from purchasing or owning a firearm. *E.g.,* 720 ILCS 5/24-1.1(a). Under defendant's interpretation of "conviction," a person convicted as a 17-year-old of residential burglary in adult court (or felonies such as sexual assault or attempted murder) would not be prohibited from buying or possessing a gun, which cannot be what the legislature intended.

In sum, the first requirement of Section 95(b) looks to the past — was the defendant previously convicted in any court — and this defendant undeniably was convicted of residential burglary in adult court in 2013.

B. The Elements and Classification of Residential Burglary Have Not Changed.

The second requirement of Section 95(b) requires a statutory analysis of the prior offense's elements and classification. That is, a prior offense is a

qualifying offense if it "contains the same elements as an offense now . . . classified in Illinois as a Class 2 or greater Class felony." 730 ILCS 5/5-4.5-95(b) (2017). In this case "now" means August 2016, when defendant was 20 years old and committed the PSMV offense that gave rise to this case. *See id.* ("now" means the date the present offense "was committed").[3] Thus, under the plain language of Section 95(b), defendant's 2013 conviction for residential burglary is a qualifying offense if that offense "contains the same elements" as an offense that was a "Class 2 or greater" felony in 2016.

The People's opening brief established that residential burglary was a Class 1 felony in 2013 and remains so now, and the elements of that offense have not changed. *Compare* 720 ILCS 5/19-3 (2021) *with* 720 ILCS 5/19-3 (2013); Peo. Br. 8. Defendant admits that the elements of residential burglary were the same in 2013 as they are "now," and that the elements of an offense do not change regardless of which court (adult or juvenile) has jurisdiction. Def. Br. 41. Moreover, he does not dispute that residential burglary has remained a Class 1 felony. *See id.* Accordingly, under the plain language of Section 95(b), defendant's 2013 conviction for residential burglary is a qualifying prior conviction. *See, e.g., Reed*, 2020 IL App (4th) 180533, ¶¶ 26-29 (prior conviction for burglary when defendant was 17 was a qualifying prior conviction under Section 95(b)).

[3] Defendant incorrectly defines "now" as 2017 not 2016, Def. Br. 18, but his error is irrelevant given the lack of change in the law of residential burglary.

Defendant's argument that residential burglary is not a qualifying prior offense misreads Section 95(b). To begin, defendant's brief presents a novel argument, not previously raised in this case or adopted by any court:

> Section 95(b)'s reference to "elements" pertains to offenses from other jurisdictions. The word "elements," contained in the phrase "contains the same elements as an offense classified in Illinois," describes offenses from foreign, out of state jurisdictions, as demonstrated by the other language in that same sentence: "convicted in any state or federal court."

Def. Br. 41. But the plain meaning of "any state" includes Illinois, rather than excluding it; if the legislature, for some unexplained and unobvious reason, wanted to exclude Illinois offenses, it would have said "any *other* state." Moreover, defendant's construction would lead to absurd results that the legislature plainly did not intend. By its own terms, Section 95(b) applies where a defendant previously has "twice been convicted in any state"; if, as defendant contends, "any state" means any state other than Illinois, then that would mean an Illinois conviction could never be a prior qualifying conviction. Defendant cites no case adopting this view and his argument is contrary to the appellate court's conclusion and his concession that his 2014 PSMV conviction in Illinois state court is a qualifying prior conviction. *Stewart*, 2020 IL App (1st) 180014-U, ¶ 26.

Defendant also argues, based on the 2014 amendment to the JCA, that his 2013 residential burglary offense now "would be resolved through delinquency proceedings rather than in the criminal court, and thus it is not

an offense *now* . . . classified as a Class 2 or greater felony." Def. Br. 15 (emphasis by defendant). That argument fails for four independent reasons.

First, and most importantly, the plain language of Section 95(b) is not concerned with jurisdictional matters or a defendant's characteristics such as his age at the time of the prior offense. Rather, under Section 95(b) the only question is whether the prior "offense" has the "same elements" of an offense that is "now . . . classified" as a Class 2 or greater felony. 730 ILCS 5/5-4.5-95(b). That question requires an analysis of the statute defining the offense (its elements and felony class), not an analysis of a particular defendant's personal circumstances or which division of the circuit court would try his case if he were charged today. Defendant's contention that it is insufficient to "look at the elements of the offense," and that courts instead must examine various other issues, Def. Br. 40-41, is contrary to the plain language of Section 95(b).

Second, defendant's focus on an individual's personal circumstances (rather than an analysis of the statute defining the offense) would lead to absurd results. For example, under defendant's view, someone with a prior conviction for stealing $800 of government property (a Class 2 felony and thus a qualifying offense) could argue that the value of the goods had since declined due to deregulation or depreciation, and so "now" he could only be convicted of theft of $400 if he stole the same goods (a Class 4 felony and thus

not a qualifying offense).[4] Or a defendant with a prior conviction for smuggling cannabis into prison while a penal employee (a Class 2 felony) could argue that due to his criminal record or changes in prison hiring rules he "now" would not be hired and so if he "now" were convicted of smuggling cannabis into a prison it would be as a non-employee, which is a Class 3 felony (and thus not a qualifying prior conviction).[5]

Not only are these results absurd, but defendant's approach would be unworkable in practice. For example, defendant contends that it is now the People's burden to prove that if his residential burglary case had been tried in 2016 (rather than 2013), a court would have granted a motion to transfer the case to adult court. Def. Br. 24. And in the examples cited above, the court would be effectively required to retry the defendant. But nothing in the plain language of Section 95(b) suggests that the legislature intended sentencing hearings to become burdensome mini re-trials of settled matters. To the contrary, Section 95(b) asks only whether the "offense" has the "same elements" of an offense that is now "classified" as "a Class 2 or greater Class felony," and residential burglary indisputably does.

Third, as defendant recognizes, Def. Br. 41, the elements of an offense are the same regardless of whether the offense is adjudicated in juvenile or adult court, *e.g., In re Greene*, 76 Ill. 2d 204, 212 (1979). Nor does the division

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[4] *See* 720 ILCS 5/16-1(b)(1.1) & (4.1) (penalties for theft).

[5] *See* 720 ILCS 5/31A-1.2 (e)(1) & 720 ILCS 5/31A-1.1(d)(2) (penalties for prison contraband).

of the circuit court in which a defendant is tried affect the offense's classification under the criminal code. Thus, it is irrelevant that a residential burglary charge might have resulted in a juvenile adjudication for some 17-year-olds in 2016.

Finally, even assuming for the sake of argument that it is relevant whether defendant's prior offense would now be adjudicated in juvenile court, his argument still fails. Defendant's entire theory is premised on his contention that "the 2013 residential burglary, if committed in 2017" (defendant means August 2016, *see supra* n.3), "would have fallen under the jurisdiction of the Juvenile Court, and not the adult criminal court." Def. Br. 20; *see also, e.g., id.* at 26 & 39 (arguing that his residential burglary conviction "would be a juvenile adjudication if committed in 2017 [sic]"). That argument fails on its face because defendant was 20 years old in August 2016, so any crime he committed then would necessarily be resolved in adult court. *See* SC4 (defendant was born June 1, 1996). Thus, the factual premise upon which defendant's argument is based is objectively incorrect.

In sum, defendant's residential burglary conviction is a qualifying offense under the plain language of Section 95(b).

C. Defendant's Interpretation Is Untenable for Several Additional Reasons.

The People's opening brief established that defendant's interpretation is untenable for several additional reasons. Peo. Br. 9-13. Defendant's counterarguments are meritless.

1. Defendant's interpretation impermissibly applies the amendment to the JCA retroactively.

The parties agree that the 2014 amendment to the JCA expanding the jurisdiction of juvenile courts to potentially include 17-year-olds is not retroactive. *See* Def. Br. 37-38; *see also* 705 ILCS 405/5-120. However, the People's opening brief demonstrated that by creating the legal fiction that his 2013 residential burglary conviction in adult court should be treated as if it had been a delinquency adjudication in juvenile court, defendant is effectively doing exactly that: giving retroactive effect to the expansion of the juvenile courts' jurisdiction. Peo. Br. 9-10.

Defendant contends that his interpretation does not require retroactive application of the JCA amendment because he "is not asking that his 2013 residential burglary [conviction] be reclassified as a juvenile adjudication, but explaining that it would be a juvenile adjudication if committed in [2016]." Def. Br. 39. But, as explained above, defendant was 20 years old in 2016 and, therefore, he automatically would be tried in adult court for any offense committed that year. *Supra* Part I.B. Because defendant was indisputably an adult in 2016, his argument relies on a sleight of hand: he is asking this Court to treat him as if he were the same age in 2016 as he was at the time of his 2013 conviction — 17 years old — even though he cites no basis for doing so. *See* Def. Br. 26, 39. And that is no different than reclassifying his 2013 conviction as a juvenile adjudication, which indisputably requires, at a minimum, retroactive application of the 2014 amendment to the JCA.

Put another way, defendant's interpretation requires this Court to either (1) pretend that defendant was a juvenile in 2016 (even though he was actually 20 years old and he provides no basis for this Court to pretend he was a different age), or (2) pretend that his 2013 conviction for residential burglary in adult court was actually a juvenile adjudication (even though both parties agree that the amendment to the JCA did not retroactively convert his conviction to a delinquency adjudication). Both options are untenable, and, for this additional reason, defendant's argument is meritless.

2. Defendant's interpretation leads to absurd results.

The People's opening brief also showed that defendant's interpretation leads to absurd results because it treats 17-year-old offenders differently than younger offenders. Peo. Br. 12-13. For example, suppose that in 2013 a 16-year-old and a 17-year-old were charged with residential burglary, the People successfully moved to transfer the prosecution of the 16-year-old to adult court (the 17-year-old automatically would be in adult court because juvenile courts lacked authority to try 17-year-old offenders at that time), and both were convicted. Under defendant's interpretation of Section 95(b), the 17-year-old's conviction would not be a qualifying prior conviction because under the subsequent expansion of the juvenile courts' jurisdiction, he could have been adjudicated in juvenile court. But the 16-year-old's conviction *would* be a qualifying prior conviction under Section 95(b) because the amendment of the JCA did not affect 16-year-olds.

Thus, defendant's interpretation would lead to the absurd result where the 16-year-old had a qualifying conviction, but the 17-year-old did not, even though both were convicted in adult court for the same offense at the same time. Defendant's brief does not dispute that his interpretation leads to this absurd result which is yet another reason his interpretation must be rejected.

3. Defendant's interpretation rests on an incorrect premise that nullifies parts of the JCA.

There is another fatal flaw in defendant's interpretation: it is expressly based on the premise that offenses committed "now" by a 17-year-old would necessarily lead to a juvenile delinquency adjudication in juvenile court rather than a criminal case in adult court. *E.g.*, Def. Br. 15, 17 (arguing that now the juvenile court would have "exclusive jurisdiction"). But, as the People's opening brief noted, even now there are a number of ways that a 17-year-old offender could still be prosecuted in adult court and/or otherwise receive an adult conviction and sentence, including but not limited to:

- Extended Jurisdiction Juvenile Prosecution (EJJP): on the People's motion, a juvenile adjudicated in juvenile court may be tried like an adult and receive an adult conviction and adult sentence that are stayed unless the defendant commits a new offense. 705 ILSC 405/5-810.

- Automatic Transfer: certain offenses must be tried in adult court, such as aggravated criminal sexual assault. 705 ILCS 405/5-130(1)(a).

- Presumptive Transfer: other cases are presumptively transferred to adult court, depending on the offender's prior criminal history and gang activity. 705 ILCS 405/5-805(2).

- Discretionary Transfer: other cases are subject to discretionary transfer to adult court. 705 ILCS 405/5-805(3).

As the People's opening brief noted, defendant's interpretation must be rejected because it assumes that no 17-year-old offender would ever receive an adult conviction or sentence, thus nullifying these provisions. *E.g.*, *Nelson v. Artley*, 2015 IL 118058, ¶ 25 ("Construing a statute in a way that renders part of it a nullity offends basic principles of statutory interpretation"); *Reed*, 2020 IL App (4th) 180533, ¶ 24 (rejecting defendant's interpretation of Section 95(b) because it failed to consider that the JCA "contains exceptions under which a juvenile can be tried in the criminal court"); *see also O'Neal*, 2021 IL App (4th) 170682, ¶ 102 (similar); *Irrelevant*, 2021 IL App (4th) 200626, ¶ 38 (similar).

This Court's decision in *Fiveash*, 2015 IL 117669, is also instructive. There, the defendant was 23 years old when he was indicted for sex crimes that he had committed by age 15; he argued that under the JCA he should be treated as if he had been charged while a 15-year-old, not an adult, and he thus could not be tried in adult court now. *Id.* ¶¶ 10-15. This Court rejected that interpretation for several reasons, including that it "fails to recognize that if he had been charged while a minor, he could still have been properly tried as an adult through the [JCA's] discretionary transfer mechanism" and thus "the legislative scheme in the [JCA] could well have subjected him, while still a juvenile, to trial in adult criminal court, the very fate that he asks this court to reject outright now that he is an adult." *Id.* ¶ 19. Notably, this Court did not require the People to prove that the defendant would have

been transferred to adult court; rather, it rejected the defendant's interpretation because it failed to account for the *possibility* of transfer. *Id.*

Defendant's interpretation suffers from the same infirmity and should likewise be rejected. Importantly, defendant does not dispute that his residential burglary case could be tried under the first provision identified by the People (EJJP, which allows juvenile courts to impose an adult conviction and sentence). Peo. Br. 11. Because defendant's interpretation of Section 95(b) fails to account for this fact, it must be rejected.

Defendant's arguments regarding the other three transfer provisions are meritless. To begin, defendant contends that he personally would not be subject to automatic or presumptive transfer because residential burglary is not an offense subject to those two provisions. Def. Br. 20-21. But that argument misses the point: defendant's interpretation of Section 95(b) would apply not only to his case, but to all defendants, some of whom may have prior offenses that would be subject to automatic or presumptive transfer.

As for the discretionary transfer provision of the JCA, defendant's brief for the first time acknowledges that it is possible a juvenile court would grant a motion to transfer his residential burglary case to adult court, but he argues that it is "unlikely" a court would do so. Def. Br. 23-26. That admission is a significant change in defendant's position because in the appellate court he argued (and the court accepted) that the juvenile court would have "exclusive" jurisdiction over all 17-year-old offenders with no

possibility their cases would be in adult court. *Stewart*, 2020 IL App (1st) 180014-U, ¶ 26; *see also id.* ¶ 38 (defendant's argument "rest[s]" on the idea that the amendment to the JCA gave juvenile courts "exclusive jurisdiction" over 17-year-olds).

Because the possibility of transfer is a fatal flaw in his interpretation, defendant now contends that it is the People's burden to prove that a hypothetical motion for discretionary transfer to adult court would have been granted if he hypothetically had been charged with residential burglary in 2016 (and was hypothetically 17 years old at that time, even though he was really 20). Def. Br. 24. Defendant cites no authority for his contention that it is the People's burden to prove he hypothetically would have been transferred. *See id.* Moreover, his contention is inconsistent with this Court's decision in *Fiveash* and appellate court decisions that (1) hold that a defendant's statutory interpretation must be rejected if it requires a court to ignore the possibility of transfer to adult court, and (2) do not hold that the People must prove that the case hypothetically would have been transferred to adult court. *Fiveash*, 2015 IL 117669, ¶ 19; *supra* p. 13 (collecting cases).

Moreover, as discussed above, requiring the People to prove that a transfer motion would have been granted would be unworkable for lower courts. This case demonstrates the practical difficulties with defendant's interpretation. Here, as in every other case to which defendant's interpretation would apply, the People did not present evidence during the

2013 residential burglary proceedings regarding whether the defendant should be transferred to adult court because under the law that existed at the time, his case was *automatically in adult court*. Therefore, evidence of key factors that relate to whether a case should be transferred to adult court (such the defendant's attitude before the juvenile court, his interest in rehabilitation, and his willingness to use services to improve himself, *see* 705 ILCS 405/5-805(3)(b)) was not presented at the relevant time and may be impossible to reliably recreate now. Defendant's assertion that the People have not presented evidence that he would be transferred fails to account for this reality.

Defendant also fails to acknowledge that he did not raise his argument that his 2013 conviction is not a qualifying conviction until this case reached the appellate court, which prevented the People from presenting evidence at the sentencing hearing in this case.

Defendant relies on a pre-sentence investigation report to argue that he would not have been transferred to adult court, Def. Br. 22-23, but that report was (1) created when he was 21 years old, (2) to determine his adult sentence for another offense, and (3) does not address whether juvenile adjudication would have been appropriate for a different offense when he was 17, *see* SCR 44. In any event, the report shows that he is not a person with respect for the judicial system, an interest in rehabilitation, or a desire to take advantage of available services to improve himself (factors relevant to

whether juvenile adjudication is appropriate). To the contrary, defendant has multiple felony convictions, including one for escape, and a history of violating probation and a suspended driver's license; he has ignored opportunities to obtain a high school diploma; and he has no verified work history. SCR46-48.

Defendant's claim that, as a statistical matter, it is "unlikely" that his residential burglary offense would have been transferred to adult court in 2017 fares no better. Def. Br. 24. Although defendant relies on statistics from the Illinois Juvenile Justice Report, the report notes the difficulty of collecting data regarding juvenile transfers because "there is no one system or database which contains this data" and "no single criminal justice stakeholder" has such information "readily available in all cases." Def. Appx. A96 at pp. 4, 5. In addition, while defendant notes that only two juveniles were tried for residential burglary in adult court in 2017 based on available data, the report does not provide the total number of 17-year-olds charged with residential burglary that year (either in juvenile or adult court), so it cannot be known whether transfer of such offenders is rare. Most importantly, the report shows that a court granted a motion to transfer a residential burglary case involving a 15-year-old, and other courts granted transfer motions for similar theft or burglary offenses, *id.* at 16, 21, which belies any argument that a juvenile court would have exclusive jurisdiction over defendant's case.

Lastly, contrary to defendant's argument, Def. Br. 25, this Court can and should address whether his interpretation nullifies parts of the JCA. While the People did not raise this specific argument below or in their PLA, they have always maintained that defendant's interpretation contradicts the JCA. *See* PLA at 5. Moreover, forfeiture is not a limitation on this Court and the People were appellee in the appellate court, so they may raise any argument that is supported by the record. *People v. Donoho*, 204 Ill. 2d 159, 169 (2003) (addressing issue not raised in PLA or appellate court).

4. Defendant's other arguments are meritless.

Defendant's brief contains an extended argument that a prior juvenile delinquency adjudication in juvenile court is not a "conviction" required for Section 95(b). Def. Br. 26-33. That argument is both unnecessary and irrelevant because (1) as defendant notes, the People agree that juvenile delinquency adjudications in juvenile court are not prior "convictions," *id.* at 37, but (2) defendant was never adjudicated in juvenile court, and so (3) the question here is whether this Court should engage in the fiction that defendant's 2013 conviction for residential burglary in adult court was a juvenile delinquency adjudication in juvenile court. Defendant's observation that some statutes expressly treat delinquency adjudications as "convictions" (but Section 95(b) does not, thus suggesting that they are not included in Section 95(b)) is irrelevant for the same reason: defendant was convicted of a felony in adult court, not adjudicated delinquent in juvenile court. *Id.* at 29-33.

For similar reasons, defendant is incorrect that the People have switched positions regarding *Taylor*, 221 Ill. 2d at 157 (cited in Def. Br. 37-38). The People have consistently agreed that *Taylor* holds that a juvenile delinquency adjudication in juvenile court is not a conviction for purposes of the crime of escape. *E.g.,* PLA at 6-7. But, as the People have explained, that does not compel defendant's interpretation of Section 95(b) because he was never adjudicated in juvenile court. *E.g.,* Peo. Br. 13.

Defendant is also incorrect that other statutes and Supreme Court Rule 411 have "the implication" that the conviction of a juvenile offender in adult court is not really a "conviction." Def. Br. 27-30. For example, the primary statute he cites, 730 ILCS 5/5-5-3.2(b)(7), permits an extended term sentence for a defendant who is "17 years of age" and "is convicted of a felony" — which is directly contrary to defendant's contention that a felony conviction in adult court is not really a conviction if the defendant was 17. Similarly, the second statute, 705 ILCS 405/5-810, provides circumstances in which a juvenile court can impose "an adult criminal sentence" on a minor and it refers to such minors as having been "convicted." The remaining statutes do not support defendant either, as they recognize the distinction between a minor adjudicated delinquent in juvenile court and a minor tried in adult court. *See* 730 ILCS 150/3-5(i) (juvenile registration provision "does not apply to minors prosecuted under the criminal laws as adults"); 20 ILCS 2630/5 (it is unnecessary to forward arrest records of minors to the FBI

"unless those records relate to an arrest in which a minor was charged as an adult").

Similarly, Rule 411 provides that discovery rules "shall be applied in *all criminal cases* wherein the accused is charged with a felony, and *all juvenile delinquency cases* wherein the accused is charged with an offense that would be a felony if committed by an adult." Ill. Sup. Ct. R. 411 (emphasis added). Defendant's contention that this language implies that a minor tried for a felony in adult court is not really a felony case is incorrect. *See* Def. Br. 28. The phrase "all criminal cases wherein the accused is charged with a felony" obviously must include cases where a minor is tried in adult court because such a minor does not fit within the second category of Rule 411, *i.e.*, a juvenile delinquency case in juvenile court. To hold otherwise would mean that no discovery rules apply in adult court when a 17-year-old is tried for an offense such as residential burglary, murder, or sexual assault. Put simply, when Rule 411 or any statute or case cited by defendant refers to "juvenile delinquency cases wherein the accused is charged with an offense that would be a felony if committed by an adult," it is not implying that a felony conviction of a 17-year-old in adult court is something other than a felony conviction. Rather, it is merely recognizing that a juvenile delinquency adjudication in juvenile court is not usually considered a conviction, which, as noted, is not relevant here.

In addition, defendant's suggestion that the Third District has adopted his interpretation of Section 95(b) is incorrect. *See* Def. Br. 39-40. The only Third District case he cites is *People v. Foreman*, 2019 IL App (3d) 160334, which does not involve a defendant who had a prior conviction as a juvenile. Moreover, *Foreman* holds that the "clear and unambiguous" language of Section 95(b) "focus[es] is on the elements of the prior offense," *id.* ¶ 46, which is contrary to defendant's argument that it is insufficient to "look at the elements of the offense," Def. Br. 40-41. Given the parties' agreement that the Fourth District has rejected defendant's interpretation of Section 95(b), *see* Def. Br. 40, it is more accurate to say that, of the three appellate districts cited by the parties, only the First District's interpretation is consistent with defendant's view.[6]

Defendant's argument that this Court should apply the rule of lenity is meritless. *See* Def. Br. 43. The rule of lenity "applies only to statutes containing 'grievous ambiguities,' leaving us unable to do more than merely 'guess' the legislature's intent," *Fiveash*, 2015 IL 117669, ¶ 34, and here, defendant agrees that Section 95(b) is unambiguous, Def. Br. 18, 39.

Similarly, because defendant agrees that Section 95(b) and the definition of "conviction" are unambiguous — and thus must be interpreted based solely on their plain language — he is wrong to suggest that this

[6] Most of the cases defendant cites from the First District are unpublished decisions issued before 2021, Def. Br. 39, and should be struck because Illinois Supreme Court Rule 23(e) prohibits reliance on such decisions.

Court's interpretation should be affected by "increased understanding of juvenile culpability by scientists and the courts." Def. Br. 36; *see e.g., Fiveash*, 2015 IL 117669, ¶ 34 ("If the statutory language is unambiguous, we will not resort to additional statutory construction tools."). The amicus curie brief, which relies on social science arguments and not the plain language of Section 95(b), is irrelevant and meritless for the same reason.

In any event, defendant's sentence is entirely consistent with courts' understanding of the science concerning "juvenile culpability" because (1) defendant was 20 years old when he committed his current offense, not a juvenile, (2) it is settled that an adult sentence may be based in part on a defendant's juvenile criminal history, and (3) defendant was sentenced to only six years in prison. *See, e.g., People v. Harris*, 2018 IL 121932, ¶ 56 ("The Supreme Court has never extended its reasoning [regarding juvenile sentences] to young adults age 18 or over."); *People v. Jones*, 2016 IL 119391, ¶¶ 1, 29 (affirming 24-year extended-term sentence based on defendant's prior juvenile adjudication); *People v. Dorsey*, 2021 IL 123010, ¶¶ 40-49 (Eighth Amendment precedent regarding juvenile sentencing is inapplicable where juvenile is sentenced to fewer than 40 years).

Defendant's contentions regarding the recent amendments to Section 95(b) are also meritless. Def. Br. 42-43. The People's opening brief noted that, in 2020, as part of numerous changes to the Criminal Code and Code of Corrections, the legislature amended Section 95(b) to provide that a prior

conviction is not a qualifying conviction unless the offense was committed after the defendant turned 21 years old. *See* Peo. Br. 13-14 (citing 730 ILCS 5/5-4.5-95(b) (eff. July 1, 2021)). However, the legislature provided that this amendment would not become effective until July 1, 2021, which is four years after defendant was sentenced. *Id.* Defendant agrees that these amendments are not retroactive and thus do not apply to him. Def. Br. 42.

Nevertheless, he argues — without citation to any authority — that the new amendments "make clear" that the legislature intended under the 2017 version of Section 95(b) that applies here, "to exclude convictions of juveniles in adult court from serving as predicate convictions." *Id.* But defendant fails to consider that this Court long ago interpreted "conviction" to include the conviction of juveniles in adult court, *Fitzsimmons*, 104 Ill. 2d at 372-73, and the legislature has never amended that definition, *see* 730 ILCS 5/5-1-5. Therefore, it is presumed that the legislature agrees with the Court's construction of that term, *i.e.*, that "conviction" includes convictions of juveniles in adult court. *See, e.g., In re Marriage of Mathis*, 2012 IL 113496, ¶ 25 (discussing legislative acquiescence).

Moreover, although the legislature recently amended Section 95(b), it is settled that amendments are presumed "to change" the existing statute substantively, not to clarify or reveal the intent of that statute at the time it was enacted. *People v. Stoecker*, 2014 IL 115756, ¶ 25. Thus, prospective amendments do not affect the interpretation of the existing statute. *See, e.g.,*

People v. Hicks, 119 Ill. 2d 29, 34-35 (1987) (prospective amendment of statute did not affect court's interpretation of current version of statute because "an amendatory change in the language of a statute creates a presumption that it was intended to change the law").

Lastly, if the recent amendments to Section 95(b) have any import, it is to show that when the legislature intends to exclude a group of people due to their age, it does so in clear and express language; because the version of the statute existing in 2017 did not expressly include such an exception, this Court should not read one into it. *See, e.g., People v. Carlson*, 2016 IL 120544, ¶ 17 (courts "should not read into the statute exceptions, conditions, or limitations not expressed by the legislature").

II. Defendant's Ineffective Assistance of Counsel Claim Is Meritless.

Defendant's derivative claim that his trial counsel erred by failing to object to his Class X sentence under Section 95(b) is also meritless. *See* Def. Br. 45-46. To prevail, defendant must prove that (1) counsel's performance was deficient, and (2) there is a reasonable probability that, had counsel objected, he would have received a different sentence. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). As discussed, the circuit court correctly found that defendant is a Class X offender pursuant to Section 95(b). Therefore, defendant cannot show that counsel was deficient for failing to object or that he was prejudiced by the lack of objection.

III. Defendant's Cross-Relief Claims Are Forfeited and Meritless.

After litigating this case for more than five years, defendant argues for the first time in his cross-appeal that Section 95(b) is unconstitutional "as applied" to him because his eligibility turns on his age when he was *convicted* of his third felony, rather than his age when he *committed* his third felony. Def. Br. 48-69.[7] Because defendant did not raise this argument in his post-trial motion or in the appellate court, it is forfeited. *E.g., People v. Robinson*, 223 Ill. 2d 165, 173-74 (2006). Defendant's argument that constitutional challenges are not subject to forfeiture goes too far. Def. Br. 65-66. While this Court allows facial challenges to be raised at almost any time, it has clarified that as-applied challenges, like defendant's here, are subject to forfeiture. *People v. Thompson*, 2015 IL 118151, ¶ 32; *see also People v. Dorsey*, 2021 IL 123010, ¶ 69. Defendant is also incorrect to think that because he is appellee in this Court, he may raise any argument that is supported by the record to affirm the appellate court's judgment. Def. Br. 66. This Court has explained that "where the trial court is reversed by the

[7] Defendant does not raise a facial challenge, nor could he credibly do so. A facial challenge "requires a showing that the statute is unconstitutional under any set of facts, *i.e.*, the specific facts related to the challenging party are irrelevant." *People v. Rizzo*, 2016 IL 118599, ¶ 24. But defendant's claim that Section 95(b) is unconstitutional is based on a specific set of facts: a defendant who turns 21 after committing his third felony but before being convicted. Because, as defendant recognizes, Section 95(b) may be validly applied to offenders who were 21 when they committed their third felony, any facial challenge fails. It fails also because defendant's as-applied challenge is meritless. *Id.* ¶ 26 (facial challenge necessarily fails if as-applied challenge fails).

Appellate Court and the appellee in that court brings the case here for further review, he may raise any questions properly presented by the record to sustain the judgment of the trial court," *People v. Artis*, 232 Ill. 2d 156, 164 (2009), but defendant was not appellee in the appellate court and thus cannot rely on that rule. And his assertion that he could not raise a constitutional challenge in the lower courts because it was foreclosed by this Court's decision *People v. Smith*, 2016 IL 119659, fails because defendant states that *Smith* does not address constitutional issues, Def. Br. 66.

Forfeiture aside, defendant's claims are meritless. To establish that a statute is unconstitutional, a defendant must carry the "heavy burden" of rebutting "the strong judicial presumption that statutes are constitutional." *People v. Patterson*, 2014 IL 115102, ¶ 90. Courts must uphold the constitutionality of a statute "whenever reasonably possible, resolving any doubts in favor of the statute's validity." *Id.* To succeed, therefore, defendant "must clearly establish" that Section 95(b) violates the constitution. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). Defendant fails to carry this burden.

A. Background: Defendant Knew He Was at Risk of Aging into Section 95(b).

Police found defendant in possession of a stolen car on August 13, 2016, and charged him with PSMV the following day. C14. At that time, defendant was 10 months shy of his 21st birthday and was on supervised release for two prior convictions. SCR4, 46; R14. Two months later, after he

escaped custody, defendant was apprehended and charged with felony escape in Case No. 16 CR 1601401. R14, SCR46.

Defendant was still 20 years old on February 2, 2017, when the People offered him a plea bargain with a sentence "less than a Class X" on his PSMV charge. R42, 45. Defendant requested several weeks to consider the offer, then rejected it. R42, 45. Defendant did not ask to set a trial date. *See id.*

The next month, in March 2017, defense counsel stated that she had advised defendant that, "On June first of this year, he turns 21 years old. As a result of that birthday, he will then be X mandatory by law, by statute. I did let my client know that." R50-51. Defense counsel then requested a Rule 401 conference because the prosecutors had offered a plea bargain. R51. After the conference was held off the record, the trial judge stated that he would approve the People's offer of three years in prison for PSMV plus two years consecutive for escape. R53. The judge stated: "defendant has been advised that his birthday will change the sentencing mandatory minimum significantly." *Id.* Defendant did not ask to set a trial date; rather, at his request, the case was continued 35 days so he could consider the plea offer. R53, 56.

In May 2017, defendant rejected the offer and did not request a trial date. R60-61. At that hearing, the defense for first time asserted that it was possible the triggering date for Class X sentencing was the date of the offense and that therefore defendant could not be Class X mandatory because he was

20 when he stole the car. R60. However, based on further research, defense counsel ultimately agreed once again that Class X sentencing was triggered by the defendant's age at the time of his conviction, so he would be Class X mandatory if he turned 21 before his conviction. R80-81. Counsel noted that "[t]his was explained to [defendant] prior to the 402 conference." R80.

In August 2017, after defendant turned 21, prosecutors offered him a plea bargain in which (1) the People would dismiss the escape charge, and (2) he would plead guilty to PSMV and receive a six-year sentence, which was the minimum possible sentence now that he was Class X mandatory. R82. Defendant rejected the offer, and his counsel stated: "At no point in time has my client expressed interest in pleading guilty." R81. The defense agreed to set a trial date and stated that defendant did "not wish to go into negotiations with the State at this point. He's unwilling to listen to any sort of offer that would involve prison time[.]" R90. At the final status hearing in September 2017, the People re-offered the same plea bargain (dismissal of the escape charge and six years for PSMV), and defendant rejected it. R100.

Following a jury trial in October 2017, defendant was convicted of PSMV. R347. At the sentencing hearing, the defense agreed that defendant was required to be sentenced as a Class X offender. R367. The court found that defendant was a Class X offender and sentenced him to six years in prison. R370-71. Defendant did not move to reconsider his sentence.

That same day, defendant pleaded guilty to escape (a Class 3 felony) and received a two-year consecutive sentence. R375-77. He does not challenge that sentence.

B. Applying Section 95(b) to Defendant Does Not Violate the Proportionate Penalties Clause.

Pursuant to Section 95(b), defendant was sentenced as a Class X offender, which has a mandatory minimum sentence of six years in prison. 730 ILCS 5/5-4.5-95(b). Defendant argues that applying this mandatory sentence to him is cruel or degrading in violation of article I, section 11, of the Illinois Constitution (proportionate penalties clause). *See* Def. Br. 48-52. Defendant fails to overcome the strong presumption that Section 95(b)'s minimum sentence is constitutional as applied to him.

Aside from an identical elements challenge — which is not at issue here, *see generally People v. Clemons*, 2012 IL 107821, ¶ 30 — the only basis for challenging a mandatory sentence under the proportionate penalties clause is under the "cruel or degrading standard," *People v. Rizzo*, 2016 IL 118599, ¶ 28, which requires a defendant to show that the challenged penalty is "so wholly disproportionate to the offense committed as to shock the moral sense of the community," *People v. Coty*, 2020 IL 123972, ¶ 31 (citation omitted). In determining whether a sentence shocks the moral sense of the community, this Court reviews "the gravity of the defendant's offense in connection with the severity of the statutorily mandated sentence within our community's evolving standard of decency." *Rizzo*, 2016 IL 118599, ¶ 37.

But this Court has consistently presumed that the legislatively mandated sentence "represents the general moral ideas of the people." *Id.* ¶ 37 (collecting cases). And the Court has "*often* emphasized" that a defendant raising such a claim has the "heavy burden" of "*clearly* establishing" that that presumption is incorrect, and that his sentence shocks the moral sense of the community. *Id.* ¶¶ 23, 48 (emphasis in original).

Applying the mandatory six-year sentence to defendant does not shock the moral sense of our community. PSMV is a serious offense because it robs the victim of valuable personal property that is expensive and difficult to replace, and that is typically needed for a variety of important reasons, *e.g.*, allowing the victim to go to work and earn a living, take children to school or elsewhere, go to medical appointments, or respond to emergencies. And because PSMV is a serious offense, it is subject to serious penalties: PSMV is a Class 2 felony that (even when Section 95(b) does not apply) is subject to a 3-to-7-year sentencing range, or an extended sentencing range of 7-to-14 years if certain aggravating factors — such as if the defendant has a prior criminal history or the victim was over 60 years old — are present. *See* 625 ILCS 5/4-103(b); 730 ILCS 5/5-4.5-35(a); 730 ILCS 5/5-5-3.2.

Here, the victim was 77 years old, R256, and defendant has an extensive criminal history:

- Defendant was convicted of residential burglary in 2013 (a Class 1 felony);
- While on probation for that offense, he committed his first PSMV offense and was sentenced to four years in prison;

- Shortly after he was released from prison in 2016, defendant stole another car, and was charged with the present PSMV offense; and
- A month later, he escaped from custody and, following his re-arrest, was charged with felony escape (to which he pleaded guilty).

SCR46; C14; R373-76; *see also, e.g., Coty*, 2020 IL 123972, ¶ 42 (analysis must consider offender's criminal history).

In these circumstances, where defendant had a lengthy criminal history and committed a Class 2 felony against a 77-year-old victim, applying the legislatively mandated six-year sentence to him cannot be said to be "so wholly disproportionate to his offense" that it "shocks the moral sense of the community." *See, e.g., People v. Porter*, 2021 IL App (1st) 192467-U, ¶ 41 (rejecting proportionate penalties claim and affirming 10-year extended sentence for PSMV based on defendant's prior criminal history); *People v. Cook*, 279 Ill. App. 3d 718, 727-28 (1st Dist. 1995) (15-year sentence for PSMV was not excessive given the defendant's history).[8]

Rather than analyze the proportionality of the mandatory sentence under the established cruel or degrading standard — *i.e.*, by evaluating the gravity of his offense against the severity of the sentence — defendant posits a novel theory for why the sentence violates the proportionate penalties clause. He argues that Section 95(b) is "arbitrary" because his eligibility

[8] To be clear, the People are not arguing that it is irrelevant if Section 95(b) is unconstitutional because defendant could have received the same sentence even if it did not apply. Rather, the People are noting that given his offense, criminal history, and the victim's age, as well as the sentencing range commonly applied in such situations, defendant cannot "clearly establish" that his six-year sentence shocks the moral sense of the community.

turns on his age when he was convicted of his third felony, rather than his age when he committed his third felony. Def. Br. 50-55. According to defendant, a person's age at the time of his conviction is an "arbitrary factor" and the legislature should have based the application of Section 95(b) on a defendant's age at the time the offense is committed because the date of a defendant's conviction is outside of his control and is not the best measure of his culpability. *Id.* But these arguments, which criticize how the legislature designed Section 95(b) rather than analyze the seriousness of defendant's offense against the severity of the sentence, are due process arguments, not proportionate penalties arguments. *See Sharpe*, 216 Ill. 2d at 486-533 (explaining differences in claims and standards); *see also infra* Part III.C (discussing defendant's due process claim).

Even setting that aside, defendant fails to carry the "heavy burden" of clearly establishing that it shocks the moral sense of the community for a defendant to age into Section 95(b). First, defendant's argument is based on an incorrect premise and is counterfactual. Defendant argues that it shocks the moral sense of the community for a defendant to age into Section 95(b) because "the passage of time" between committing an offense and being convicted is an arbitrary factor "outside every defendant's control." Def. Br. 52-54. Defendant suggests hypothetical delays that could occur in a case, such as that a prosecutor could deliberately wait to file charges or the trial court or public defender could be too busy to hold a trial. *Id.* As a general

matter, defendant's hypotheticals fail to account for safeguards that prevent or limit delay in criminal actions, such as the statute of limitations and a defendant's speedy trial rights. *See, e.g.*, 720 ILCS 5/3-5(b) (statute of limitations); 725 ILCS 5/103-5 (speedy trial provision). And defendant fails to cite a single case showing that such hypothetical situations have ever caused someone to age into Section 95(b).

More importantly, none of these hypothetical delays occurred in this case, and therefore they are irrelevant to defendant's as-applied challenge. *See, e.g., People v. Gray*, 2017 IL 120958, ¶ 58 (as-applied challenges focus "exclusively" on the "facts of the case," not "hypothetical facts"); *Rizzo*, 2016 IL 118599, ¶ 24 ("An as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party."). Defendant does not — and cannot — contend that any delay outside of his control caused him to age into Section 95(b). When defendant was charged with PSMV, he was 10 months shy of his 21st birthday. C14; SCR4. Under the speedy trial provision, he could have insisted on going to trial before his birthday, but he declined to do so even though he was told that he would become Class X mandatory if he were convicted after turning 21. *See* 725 ILCS 5/103-5 (120-day speedy trial provision). In addition, the People offered defendant plea bargains that did not include Class X sentencing, and he rejected them. *Supra* Part III.A.

Thus, the basis for defendant's claim — that it was outside of his control whether he aged into Section 95(b) — is rebutted by the record.

Second, the available evidence shows that the public is *not* shocked by defendant's "aging into" Class X sentencing. As this Court said in *Rizzo*, "this court has stated — more than once: 'When the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people[.]'" *Rizzo*, 2016 IL 118599, ¶ 37 (collecting cases); *accord Coty*, 2020 IL 123972, ¶ 43. Therefore, the legislature's decision to allow defendants to age into Section 95(b) creates the presumption that it does not shock the moral sense of the community.

Supporting that presumption is this Court's decision in *People v. Smith*, 2016 IL 119659, ¶¶ 28-31, which held that the plain language of Section 95(b) allows a defendant to age into Class X sentencing. Notably, this Court did not suggest that this was an unfair result, let alone a shocking one. *Id.* Defendant notes that *Smith* does not address constitutional issues, but that is exactly the point. Def. Br. 63. That *Smith* held that Section 95(b) allows defendants to age into Class X sentencing, without the Court suggesting that doing so was obviously unfair, itself shows that aging into Class X sentencing does not "shock the moral sense of the community." *See generally People v. Scheib*, 76 Ill. 2d 244, 252 (1979) ("[W]e do not favor any construction that would raise legitimate doubts as to the constitutional validity of a statutory provision.").

Underscoring this conclusion is that, although Section 95(b) has existed for decades, defendant does not cite a case holding that it shocks the moral sense of the community for a defendant to age into its application. Rather, the cases he cites do not address Section 95(b) at all, but instead involve inapposite issues such as whether a 15-year-old can be sentenced to life in prison for murder based on an accountability theory or whether it offends due process not to award credit for time served to an inmate who was too poor to afford bail. *See People v. Miller*, 202 Ill. 2d 328, 341 (2002) (cited in Def. Br. 52); *People ex rel. Carroll v. Frye*, 35 Ill. 2d 604, 607-10 (1966) (cited in Def. Br. 54); *see also* Def. Br. 51-53 (collecting cases).

Lastly, defendant's criticisms of the legislature's design of Section 95(b) lack merit. As discussed below when addressing defendant's due process claim, this Court and others have consistently held that a sentencing provision is neither unconstitutional nor arbitrary if it increases a defendant's sentence based on an event that occurs after his offense is completed, even if that event is outside the defendant's control. *Infra* Part III.C. Indeed, there are good reasons for making the date of conviction the determinative date, including identifying defendants who are the best candidates for rehabilitation based on their present characteristics. *Id.* And in all events, as noted, regardless of whether defendant is judged as a 20-year-old (his age when he committed his third felony) or a 21-year-old (his age at conviction), his six-year sentence is proportionate to the seriousness of

his offense, including the advanced age of his victim, and defendant's long criminal history.

In sum, defendant has failed to carry the "heavy burden" of "clearly establishing" that his six-year sentence for committing a Class 2 felony against an elderly victim "shocks the moral sense of the community."

C. Section 95(b) Does Not Violate Due Process.

Defendant next argues that Section 95(b) violates due process because (1) it does not provide fair notice to defendants as to whether they will be subject to Class X sentencing, and (2) there is no rational basis to predicate Class X eligibility on a defendant's age at the time of conviction. Def. Br. 55-57. Defendant fails to "clearly establish" either claim.

1. Section 95(b) provides sufficient notice.

Defendant has failed to clearly establish that Section 95(b) provided insufficient notice that he would be Class X mandatory if he were convicted of his third felony after turning 21. Under the due process clauses of the United States and Illinois constitutions, a sentencing provision provides sufficient notice, and is not void for vagueness, if it is "sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning." *Sharpe*, 216 Ill. 2d at 527. Importantly, this Court and the United States Supreme Court have explained that what renders a statute unconstitutionally vague "'is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what

that fact is.'" *People v. Plank*, 2018 IL 122202, ¶ 23 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)). Therefore, "[i]f the plain language of the statute sets forth clearly perceived boundaries, the vagueness challenge fails, and our inquiry ends." *Id.* ¶ 12; *see also Sharpe*, 216 Ill. 2d at 528-29 (statute provided sufficient notice where it plainly stated facts that triggered sentencing enhancement).

Defendant cannot clearly establish that Section 95(b) is impermissibly vague because it is settled that the "plain language" of Section 95(b) "clearly provides" that a defendant is Class X mandatory if he is 21 "when he is convicted" of his third felony. *Smith*, 2016 IL 119659, ¶¶ 28, 31. Indeed, defendant concedes that "the plain language" of Section 95(b) means "that defendant's age on the date of conviction would determine whether he was Class X eligible." Def. Br. 49. Because Section 95(b) states in plain, understandable language exactly what fact triggers its application, it is not unconstitutionally vague.

Defendant nevertheless argues that Section 95(b) is void for vagueness because he did not have control over the date he was convicted and "[p]roviding defendants notice that they may or may not be subject to a mandatory enhanced sentence based on some future event (or events), which may or may not happen, fails to provide the fair warning which is required at the time of the offense." Def. Br. 56. Defendant's argument is counterfactual, and thus his as-applied challenge fails, because he had control over whether

Section 95(b) would apply: he could have insisted on his speedy trial rights and thereby ensured that he was tried before he turned 21. *Supra* Part III.B.

Defendant's argument is also legally meritless. Tellingly, defendant cites no case finding a statute void for vagueness because an offender did not control the facts that triggered its application. The sole case he cites is an inapposite ex post facto case, not a due process case. *See Fletcher v. Williams*, 179 Ill. 2d 225, 238 (1997) (cited in Def. Br. 56).

This is unsurprising, given the weight of authority against his position. To begin, the appellate court has expressly rejected defendant's claim that Section 95(b) fails to provide the notice required by due process. *See People v. Brown*, 2017 IL App (1st) 140508-B (cited in Def. Br. 57, 60). The defendant in *Brown* raised the same argument that defendant raises here: Section 95(b) violates due process because individuals "under the age of 21 have no way of knowing when they commit their offenses whether they will be subject to Class X sentencing" because "the date of conviction is affected by a wide variety of factors outside a defendant's control." *Id.* ¶ 20. The appellate court rejected that argument because due process does not require that a defendant know his sentencing range "with mathematical certainty." *Id.* ¶ 22 (collecting cases). And, as the court held, a person of ordinary intelligence in the defendant's position would understand the risk that, if he were caught and his case went to trial, a conviction could occur after he was 21. *Id.*

That same analysis applies here. Defendant was 10 months shy of his 21st birthday when he committed the present PSMV offense. SCR4. Under those circumstances, a person of ordinary intelligence would understand that it was possible he would not be immediately apprehended if he committed PSMV. And such a person would also understand that, once he was caught, he would not be tried instantaneously. Thus, a person of ordinary intelligence would understand the possibility that if he committed PSMV, he could become Class X mandatory because he might not be convicted until after his 21st birthday.

Further, this Court has consistently held that due process requires neither absolute certainty nor for the defendant to have complete control over the fact that triggers a sentencing provision. *See, e.g., People v. Hickman*, 163 Ill. 2d 250, 256-257 (1994) (due process requires neither "mathematical certainty" nor "perfect" notice); *Plank*, 2018 IL 122202, ¶ 22 (a statute is not vague even if it is not "readily apparent" that it will apply to the defendant because "courts fairly require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line"); *People v. Falbe*, 189 Ill. 2d 635 (2000) (similar).

For example, the defendants in *Falbe* were charged with possession of cocaine, and the prosecution sought to apply a sentencing enhancement provision that made the offense mandatory Class X because it occurred within 1,000 feet of a church. 189 Ill. 2d at 637. The defendants argued that

the offense occurred near the church only due to the actions of a police officer who chose to stop them there. *Id.* at 640-41. This Court rejected the defendants' argument that the statute failed to provide the notice required by due process because it was triggered by the officer's actions, *i.e.*, something outside of the defendants' control. *Id.* at 641. As the Court explained, the only question was whether the provision gave "fair warning" of the fact that triggered the enhancement, and it indisputably did. *Id.*

People v. Johnson, 182 Ill. 2d 96 (1998), is also apt. There, the Court rejected a due process challenge to a statute that imposed an enhanced sentence for murder if the defendant had a prior "conviction" for murder. *Id.* at 108-09. The statute plainly provided that the sequence of convictions, and not the sequence of offenses, determined whether the enhanced sentence applied. *Id.* at 109. The defendant argued that the statute impermissibly based a defendant's eligibility for an enhanced sentence on conduct that occurred after his offense and over which he had no control, *i.e.*, based "solely upon the fortuitous circumstance" of which case was tried first. *Id.* at 109-110. This Court found that the statute complied with due process because it put defendants "on notice" of the circumstances in which they could receive an enhanced sentence, even though those events occurred after the commission of the offense and defendants lacked control over which case was tried first. *Id.* Thus, defendant's contention that Section 95(b) provides insufficient notice is meritless.

2. Section 95(b) is rationally related to a legitimate state interest.

Defendant's argument that Section 95(b) violates due process because it has no rational basis is also meritless. Def. Br. 56-57. Under the rational basis test, this Court's inquiry is twofold: (1) the Court must determine "whether there is a legitimate state interest behind the legislation" and (2) "if so, whether there is a reasonable relationship between that interest and the means the legislature has chosen to pursue it." *People v. Pepitone*, 2018 IL 122034, ¶ 14. The parties agree that Section 95(b) serves a legitimate purpose: it seeks to enhance punishment for habitual offenders, while exempting people under the age of 21 based on the belief that, in general, they may be more amenable to rehabilitation. Def. Br. 56-57. Therefore, to succeed on his due process challenge, defendant must prove that there is no "rational relationship" between the purpose of Section 95(b) and the means that the legislature has chosen to pursue it.

This is an extremely heavy burden for defendant to carry. Rational basis review "is highly deferential," *Gray*, 2017 IL 120958, ¶ 61, and courts may not "second guess the wisdom of legislative enactments or dictate alternative means to achieve the desired result," *In re M.A.*, 2015 IL 118049, ¶ 55. This is true even when legislation creates "harsh results." *Hayashi v. Ill. Dept. of Fin. & Prof'l Reg.*, 2014 IL 116023, ¶ 32. A statute "need not be the best" method of accomplishing a legislative goal; "it must simply be reasonable." *Pepitone*, 2018 IL 122034, ¶ 30. Defendant thus must prove

that there is no "conceivable basis for determining that the statute is rationally related" to the legislature's goal. *Gray*, 2017 IL 120958, ¶ 61.

Defendant cannot prove that it was irrational for the legislature to condition application of Section 95(b) on whether the defendant is 21 years old at the time of his conviction. To begin, basing the statute on the defendant's age at the time of conviction is rational because it makes the statute easier for courts to administer given that a defendant's date of conviction is easily known at sentencing. This may not always be true for the precise date of the offense, such as for cases that involve continuing crimes, crimes that were covered up, or offenses involving minor victims who may not know the exact date of the offense. It also reasonably provides lesser sentences to defendants under the age of 21 who promptly take responsibility for their actions (showing potential for rehabilitation), and thus avoid aging into Section 95(b), as compared to defendants who conceal their offense, evade arrest or escape custody, or otherwise fail to take responsibility for their actions (signs of a lack of rehabilitative potential), causing delays that allow them to age into Section 95(b).

Similarly, it is not irrational for the legislature, when fixing sentencing ranges, to consider the defendant's potential for rehabilitation based on his characteristics (including his age) at the time of his conviction because (1) that is the point that the rehabilitation process often begins, and (2) when determining how long rehabilitation might take, and thus how long the

defendant should be imprisoned to protect the public, it is relevant who defendant is now (including his age). *See, e.g., In re Griffin*, 92 Ill. 2d 48, 51-53 (1982) (basing juvenile's eligibility for commitment to the Department of Corrections on his age at the time of dispositional hearing is "no more arbitrary" than basing it on his age at the time the offense was committed); *United States v. Lopez*, 860 F.3d 201, 210 (4th Cir. 2017) (rational to depend on offender's current age and prospects for rehabilitation rather than at the time of the offense).

Indeed, defendant's own authority defeats his argument that Section 95(b) does not pass the rational basis test. *See Brown*, 2017 IL App (1st) 140508-B, ¶ 30 (cited in Def. Br. 57, 60). As the appellate court explained, this Court has consistently upheld as rational sentencing provisions that are based on a defendant's age at the time of sentencing or indictment rather than the defendant's age at the time the offense was committed. *Id.* ¶¶ 26-30 (collecting cases); *see also People v. Stokes*, 392 Ill. App. 3d 335, 345 (1st Dist. 2009) (rejecting claim that Section 95(b) violates due process); *People v. Williams*, 358 Ill. App. 3d 363, 365-68 (1st Dist. 2005) (same).[9]

Brown relied in part on this Court's decision in *Fiveash*, 2015 IL 117669. The defendant in *Fiveash* was a minor at the time of his offense but

[9] Defendant's other three cases do not support his argument either. Two do not address any constitutional claims. *See People v. Mendoza*, 342 Ill. App. 3d 195 (2nd Dist. 2003); *People v. Storms*, 254 Ill. App. 3d 139 (2nd Dist. 1993). And the third does not address a due process claim. *See Roper v. Simmons*, 543 U.S. 551 (2005); *see also Patterson*, 2014 IL 115102, ¶ 97 (noting *Roper* does not address, and cannot support, due process claims).

because he was 23 and had aged out of juvenile court by the time his crime was discovered and charged, his sentencing range was determined by his age when he was charged (an adult), not when he committed his offense (a juvenile). *Id.* ¶ 43. He claimed that this result violated due process because it subjected him to a harsher sentence without consideration of the differences between juvenile and adult offenders. *Id.* ¶¶ 43-45. Noting that the defendant was not facing the death penalty or life imprisonment, this Court disagreed, holding that it was unnecessary for the sentencing scheme to account for the differences between when the defendant was a juvenile and when he was an adult. *Id.*

Plainly, if it did not violate due process for the defendant in *Fiveash* to receive an adult sentence because he was not charged until he was 23 without consideration of the fact that he committed his offense when he was 14 or 15 and had much different physical and mental characteristics, then it does not violate due process that defendant received a six-year sentence when he was 21 for an offense committed when he was 20, without consideration of the supposed differences between a 20-year-old and a 21-year-old.

At bottom, defendant's complaint reduces to an assertion that it would be *better* to rely on a defendant's age at the time he commits his offense. As explained, it would not necessarily be better to do so. *Supra* pp. 42-43. But more importantly, whether it would be better is irrelevant. As this Court has consistently held: "the rational basis test does not require narrow tailoring;

it only requires rationality. That is, the means chosen by the legislature need not be the best; they need only to be reasonable." *Pepitone*, 2018 IL 122034, ¶ 30; *see also In re M.A.*, 2015 IL 118049, ¶ 55 ("A statute need not be the best means of accomplishing the stated objective" and courts may not "dictate alternative means to achieve the desired result"); *Gray*, 2017 IL 120958, ¶ 61 (similar). Because defendant cannot show that it is irrational for Section 95(b) to be triggered by the defendant's age at the time of his conviction, the provision passes the rational basis test, and his claim fails.

D. Defendant's Ex Post Facto Claim Is Meritless.

Defendant's claim that Section 95(b) violates the ex post facto clause is meritless. Def. Br. 57-62. It is settled that "[t]o fall within the ex post facto prohibition" of the United States or Illinois constitutions, a law must be punitive and "retrospective — that is, 'it must apply to events occurring before its enactment.'" *Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *see also People v. Ramsey*, 192 Ill. 2d 154, 157 (2000) (same).

The purpose of the ex post facto clause is obvious: to prevent the government from punishing a person based on a statute that did not exist when the person committed his offense. But here the parties agree that defendant's criminal conduct occurred *after* Section 95(b) was enacted. Def. Br. 59. Accordingly, Section 95(b) does not violate the ex post facto clause.

Defendant's argument that Section 95(b) violates the ex post facto clause because its application is triggered by an event occurring after a defendant's offense — *i.e.*, defendant turning 21 — flips the ex post facto

clause on its head. Again, the purpose of the ex post facto clause is to prohibit the application of punitive laws enacted after the defendant's offense. Under defendant's theory, a law enacted *before* the defendant committed his offense could not be applied to that defendant, even though he was on notice that this would be the penalty when he committed the crime.

But this Court has consistently rejected ex post facto claims that were based on a law enacted before the defendant committed his offense. *E.g., People v. Coleman*, 111 Ill. 2d 87, 93-94 (1986) (claim failed where sentencing provision was enacted seven months before defendant committed his offense). For example, in *Hill v. Walker*, 241 Ill. 2d 479, 488-89 (2011), the defendant argued that after he committed his offenses, the parole board changed its interpretation of a statute in a way that required him to serve more time in prison. Although that change occurred after the defendant committed his offense, and was out of his control, this Court held that the defendant's ex post facto claim was meritless because he "failed to allege that [the State] based its denial of parole on a new or amended statute or rule." *Id.* at 489.

The Court reached a similar result in *Johnson*. There, the defendant committed murder and then a separate offense one year later; however, he was convicted of the second offense before he was tried for the murder. 182 Ill. 2d at 99-100. Because that second offense counted as a "prior conviction," a sentencing enhancement provision applied in his murder case. *Id.* at 109-110. The defendant argued that the provision violated the ex post facto

clause because it was triggered by "conduct which occurs after the [murder] offense is completed" and was outside of his control, namely which case was tried first. *Id.* at 110-111. This Court rejected that argument because the sentencing enhancement provision was not a new law and, thus, when the defendant committed murder he knew it was possible he could receive an enhanced sentence based on events that occurred after the murder. *Id.*

Indeed, defendant's own authority defeats his claim that Section 95(b) violates the ex post facto clause. *Brown*, 2017 IL App (1st) 140508-B, ¶¶ 14-15 (cited in Def. Br. 57, 60). The appellate court there explained: "[t]he courts of this state, as well as the United States Supreme Court, have defined a retrospective law as one that applies to events occurring prior to its enactment," and Section 95(b) was not retrospective because it "was enacted on January 1, 1977, well before [the defendant] committed his offense." *Id.* ¶ 14 (collecting cases). The court also rejected the claim (raised by defendant here) that retrospectivity is established "by a second effective date contained within the terms of [Section 95(b)] itself — *i.e.*, a defendant's 21st birthday":

> [The defendant] is asking us to collapse the two prongs of *ex post facto* analysis and hold that any law that "make[s] the punishment for a crime more burdensome after its commission" is automatically a prohibited *ex post facto* law, irrespective of the date of its enactment. We decline to adopt this proposed expansion of the definition of an *ex post facto* law. As cited above, courts have consistently defined retrospectivity by reference to the date of the law's enactment, and [the defendant] does not cite any cases to the contrary.

Id. ¶ 15 (internal citations and alterations omitted).

Other courts likewise have rejected claims that the ex post facto clause prohibits sentencing enhancements that are based on events that occur after the commission of the offense, even if those events are not within the defendant's control, such as the timing of convictions. *E.g., United States v. Torrez*, 869 F.3d 291, 310-11 (4th Cir. 2017); *Smith v. State*, 199 P.3d 1052, 1067-69 (Wyo. 2009). Notably, defendant fails to cite a case that supports his reading of the ex post facto prohibition. In fact, even apart from *Brown*, defendant's cases undermine his claim because they find an ex post facto violation only where new laws punished behavior that occurred before their enactment. *See* Def. Br. 58-62; *see, e.g., Miller v. Florida*, 482 U.S. 423, 427-32 (1987) (ex post facto clause barred trial court from applying new version of sentencing statute that did not exist when the defendant committed his offense).

In sum, because Section 95(b) was enacted before defendant committed the present PSMV offense, his ex post facto claim is meritless.

E. Defendant's Equal Protection Claim Is Meritless.

Defendant's final claim is that Section 95(b) violates the equal protection clauses of the United States and Illinois constitutions because it predicates Class X eligibility on his age at the time of his third conviction. Def. Br. 62-65. Defendant is correct that, because age is not a suspect classification, he bears the burden of establishing that Section 95(b) lacks a rational basis. *Id.* at 62-63. The standards for evaluating due process and equal protection claims under the rational basis test are "identical." *People v.*

Alcozer, 241 Ill. 2d 248, 262-63 (2011). Therefore, where a due process claim fails, an equal protection claim fails too. *E.g., People v. Hollins*, 2012 IL 112754, ¶ 42. As discussed, defendant's due process claim fails because there is a rational basis for predicating Section 95(b) on defendant's age at the time of his conviction, and defendant cannot clearly establish otherwise. *Supra* Part III.C. Accordingly, defendant's equal protection claim fails as well.

CONCLUSION

This Court should reverse the appellate court's judgment and affirm defendant's sentence.

March 15, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a), is 49 pages.

/s/ Michael L. Cebula
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Ill. v. Porter

Appellate Court of Illinois, First District, Sixth Division

July 16, 2021, Order Filed

No. 1-19-2467

Reporter
2021 IL App (1st) 192467-U *; 2021 Ill. App. Unpub. LEXIS 1208 **

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. THOMAS PORTER, Defendant-Appellant.

Notice: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

Prior History: [1]** Appeal from the Circuit Court of Cook County. No. 17 CR 11593. Honorable Dennis J. Porter, Judge, presiding.

Disposition: Affirmed.

Core Terms

sentence, trial court, gunman, Lyft, photographs, stolen, gun, driver's, phone, passenger, driving, rear, convictions, depicted, motor vehicle, imprisonment, aggravation, front, door, possessed, Street, blue, police vehicle, rehabilitation, hijacking, vehicular, exited, curb, license plate number, reasonable doubt

Judges: JUSTICE HARRIS delivered the judgment of the court. Justices Connors and Oden Johnson concurred in the judgment.

Opinion by: HARRIS

Opinion

ORDER

Held: Defendant's conviction for possession of a stolen motor vehicle affirmed where the evidence established the vehicle defendant possessed was the same vehicle stolen from the victim; 10-year extended-term sentence is not excessive.

[*P2] Following a bench trial, defendant Thomas Porter was convicted of possession of a stolen motor vehicle (*625 ILCS 5/4-103(a)(1)* (West 2016)) and sentenced to an extended term of 10 years' imprisonment. On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt because the evidence did not prove the vehicle he possessed was the same vehicle stolen from the victim. Defendant also contends his sentence is excessive because the trial court failed to give adequate consideration to his youth and drug abuse at the time of the offense and at the time of his prior convictions. We affirm.

[*P3] Defendant was charged with two counts of aggravated vehicular hijacking, one count of armed robbery, one count of possession of **[**2]** a stolen motor vehicle, and two counts of aggravated unlawful restraint. At trial, Shaakira Sutton testified that about 11:30 p.m. on July 20, 2017, she requested a Lyft ride to pick her up from her friend's apartment building near the intersection of 62nd Place and Washtenaw Avenue. Shortly before midnight, Sutton received a notification that her ride had arrived. As Sutton exited the building, she looked to her right and observed someone walking down the street. She did not pay attention to that person because she was talking on her phone. Sutton approached the Lyft vehicle which was parked along the curb directly in front of the building. Sutton checked to make sure it was the correct vehicle and entered the rear passenger door. It was a four-door vehicle. She could not recall the make or model. The Lyft driver, later identified as Edgar Martes, confirmed who Sutton was and entered her destination on his phone. Sutton closed the vehicle's door, ended her call, and placed her belongings on the seat to her left.

[*P4] Sutton looked up and observed a man standing directly in front of the Lyft vehicle with his arm extended out in front of him, pointing a gun into the vehicle. The gunman told **[**3]** Martes not to move the vehicle. Sutton described the gun as "weird" and testified that it did not look like a "usual gun." She did not recall the color of it. The gunman was "medium-tall" with "a haircut," and wore a white T-shirt with dark-colored jeans. The gunman's face was not covered and nothing blocked Sutton's view of him. The gunman walked to the driver's side of the vehicle and opened the door. The gunman pointed the gun at Martes, made him put his head down, asked what he had, and searched his pockets. Sutton opened the rear passenger door and began to exit the vehicle. The gunman pointed the gun at her and told her to get back inside the vehicle. She complied and closed the door. After taking items from Martes, the gunman told Martes and Sutton to exit the vehicle. They complied and stood on the curb. The gunman directed them to turn around and face away from him. The gunman entered the vehicle, made a left turn, and sped away down Washtenaw.

[*P5] Sutton returned to her friend's apartment with Martes. She then realized she had left her phone inside the vehicle. Sutton called her cousin and asked her to track her phone using the Find My iPhone app. Martes called the police. When **[**4]** the police arrived, Sutton and Martes told them what happened. Sutton's cousin updated Sutton with the tracking information and Sutton relayed that information to the police. Sutton's cousin then spoke directly with the police and updated them with each location as Sutton's phone was moving.

[*P6] Sutton left the apartment with the police. In the police vehicle, they continued tracking her phone. They drove to a location near 74th Street and Marshfield Avenue. The police recovered her phone from someone at that location. Sutton identified her phone and unlocked it with her passcode. The phone displayed a photograph of her daughter. The screen on Sutton's phone was cracked. It was not cracked before the carjacking. The police showed Sutton the man who had her phone. Sutton did not recognize him. It was not the same man who had taken the Lyft vehicle.

[*P7] The police drove Sutton to a second location near 76th and Paulina Streets. In a show-up at that location, Sutton identified the gunman who took the Lyft vehicle, later identified as defendant. Sutton recognized defendant from his height, haircut, and clothes. Sutton also identified a vehicle at that location as Martes' vehicle in which she had **[**5]** been a passenger. The vehicle was pulled over near a curb and the driver's door was open.

[*P8] In court, Sutton testified that she "maybe" recognized defendant, whom she identified as the person wearing "[t]he DOC uniform," but she was "[n]ot for sure." In court, Sutton testified that six photographs depicted "[t]he Lyft driver's car," and accurately depicted the vehicle she observed near 76th and Paulina.

[*P9] On cross-examination, Sutton acknowledged she was not certain the gunman's weapon was real, but she did not want to "take that chance." When the gunman was pointing the gun inside the vehicle, Sutton was looking at the gunman more than the gun.

[*P10] Edgar Martes testified that on July 20, 2017, he was working as a Lyft driver. He "believe[d]" he was driving a Hyundai Elantra that night. The vehicle was a rental from Enterprise through Lyft that had been loaned to him to drive. Shortly before midnight, Martes received a call to pick up a passenger near 62nd and Washtenaw. When he arrived at the location, he pulled over to the curb on 62nd Street. Sutton exited the building and approached his vehicle. As Sutton entered the rear passenger seat of his vehicle, Martes observed a man walking northbound **[**6]** on Washtenaw. The man turned left and walked westbound on 62nd Street, away from Martes' vehicle. The man walked between some vehicles and Martes lost sight of him.

[*P11] As Martes began driving, the man "popped out" in front of Martes' vehicle. Martes stopped his vehicle in the middle of the intersection because he did not want to run over the man. The man ran towards the front hood of Martes' vehicle. The man had his arm raised in front of him holding a gun. Martes described the gun as "unusual" with a large barrel. It was "probably grayish," but Martes could not tell. It was not a revolver or "common" semiautomatic weapon. When asked if he believed the weapon was an actual gun, Martes replied that he did not want to "take the chance." The man pointed the gun directly in Martes' face through the vehicle's window the entire time. The man appeared to be trying to block his face. Martes glanced up and down at the gunman but was not able to get a good look at his face. The gunman was wearing a white shirt and blue jeans.

[*P12] The gunman approached the driver's side of Martes' vehicle and yelled at Martes to give him all his "stuff." As Martes opened his driver's door, the gunman

opened the door **[**7]** the rest of the way while pointing the barrel of the gun in Martes' face. As Martes exited his vehicle, he threw some cash towards the seat. Martes walked to the rear of his vehicle. The gunman entered Martes' vehicle and drove away heading southbound. Martes had his back to the gunman most of the time. When Martes turned around he only saw the gunman's back as he entered Martes' vehicle.

[*P13] Martes entered a residence with Sutton and called the police. Martes still had his phone in his hand. The police arrived and Martes and Sutton told them what happened. Sutton told the police she left her phone inside the vehicle. Shortly thereafter, the police drove Martes to an area near 74th and Marshfield. During a show-up at that location, Martes viewed a man but was not sure if it was the gunman. In court, Martes viewed six photographs and testified that they depicted "the vehicle I was driving that was taken from me."

[*P14] On cross-examination, Martes acknowledged he was not certain the gun was real.

[*P15] Chicago police officer Craig Lancaster testified that about 12:20 a.m. on July 21, 2017, he was on patrol in a marked police vehicle with his partner, Officer Wells,[1] near 76th and Paulina Streets when **[**8]** they received a radio call regarding a vehicular hijacking in the area. The subject vehicle was a dark blue Hyundai Elantra with Illinois license plate number E496914. Lancaster observed a vehicle matching that description drive past them and turn southbound onto Paulina from 76th Street. The officers turned and followed directly behind the Hyundai. The Hyundai stopped in the middle of the block and pulled into the first available empty parking space. The officers pulled up directly behind the Hyundai at an angle. The Hyundai immediately went into reverse. The rear passenger corner of the Hyundai struck the front driver's side corner of the police vehicle. The driver jumped out of the Hyundai and fled on foot. In court, Lancaster identified defendant as the driver of the Hyundai.

[*P16] Lancaster exited the police vehicle and chased after defendant. As they ran and turned on several streets, Lancaster reported his locations over the radio. Several officers responded to the call. A police vehicle pulled alongside Lancaster, and Lancaster pointed in defendant's direction. When defendant ran through a gangway, Lancaster lost sight of him. As Lancaster returned to Paulina, he heard over the radio **[**9]** that defendant was in custody. Lancaster arrived at an address in the 7600 block of South Paulina and observed that other officers had defendant in custody. At the scene, Lancaster identified defendant as the man he saw exit the driver's side of the blue Hyundai and flee from the vehicle.

[*P17] In court, Lancaster testified that six photographs depicted "the same vehicle that was used in the vehicular hijacking and the same vehicle that the defendant jumped out of." Lancaster pointed out that the fifth photograph, which depicted the rear of the Hyundai, showed a white mark on the passenger's side of the bumper which was a transfer mark from the police vehicle.

[*P18] The State's six photographs were admitted into evidence without objection. This court viewed the photographs which depict different angles of a blue Hyundai Elantra parked about two feet from a curb. The vehicle has four doors. The first photograph is a front view of the vehicle depicting the hood and windshield. There is an oval-shaped "lyft" sign on the lower corner of the passenger's side of the windshield. The fourth and fifth photographs depict the rear of the vehicle with Illinois license plate number "E49 6914". The fifth photograph **[**10]** shows white scrape markings on the passenger's side of the rear bumper as identified by Lancaster, and a blue and white airplane sticker on the passenger's side of the rear windshield.

[*P19] Defendant moved for a directed finding arguing that Martes never identified the offender and Sutton failed to make an in-court identification. Defense counsel acknowledged defendant was caught in possession of the vehicle but argued there was no evidence as to how or when he came into possession. Nor was there any evidence a gun was recovered. In response, the State argued that Sutton identified defendant at the scene as the man who had taken the Lyft vehicle. In reply, defense counsel argued that Sutton's show-up at the scene was highly suggestive.

[*P20] The trial court granted defendant's motion for a directed finding as to the two counts of aggravated vehicular hijacking and two counts of aggravated unlawful restraint, noting that Martes and Sutton were not certain the gun was real. The court denied the motion for the lesser include offense of vehicular hijacking. The court also granted a directed finding as to the charge of armed robbery but denied the motion for the lesser included offense of robbery. **[**11]** The court

[1] Officer Wells' first name does not appear in the record.

denied the motion for the charge of possession of a stolen motor vehicle.

[*P21] Following closing arguments, the trial court found the evidence established defendant knowingly possessed a stolen motor vehicle where Sutton identified defendant within 30 minutes of the vehicle being stolen, defendant was found in possession of the vehicle within those 30 minutes, and he fled from the vehicle. Accordingly, the trial court found defendant guilty of possession of a stolen motor vehicle. The court pointed out that no gun was recovered and found defendant not guilty of all the remaining charges.

[*P22] At sentencing, the State amended the presentence investigation report (PSI) by adding a missing 2011 conviction for armed robbery with a firearm to which defendant pled guilty and was sentenced to 10 years' imprisonment. The PSI indicates defendant had three prior adult felony convictions: two separate convictions for armed robbery with a firearm in 2011 for which he was sentenced to concurrent terms of 10 years' imprisonment, and a 2012 conviction for aggravated battery of a government official/employee for which he served 3 years' imprisonment. Defendant was also found guilty in six juvenile **[**12]** cases: retail theft in 2007; possession of a controlled substance, theft, and aggravated battery in three separate cases in 2008; a second aggravated battery case in 2008 for which he was sentenced to 18 months of probation; and a 2009 case charging him with resisting/obstructing a police officer and reckless conduct for which he was sentenced to 30 days in the Juvenile Temporary Detention Center. The PSI indicates defendant obtained his GED in 2015 while in prison, and that he was employed at McDonalds for six months and lost that job when he became incarcerated in this case. Defendant also reported that he began abusing marijuana when he was 15 and smoked approximately 10 "blunts" a day.

[*P23] In aggravation, the State argued that defendant was subject to an extended-term sentence based on his criminal background and the facts in this case.

[*P24] In mitigation, defense counsel argued that defendant was "very young" when he committed the prior offenses, either 15 or 16 years old, and that one of his adult convictions was the result of an automatic transfer. Counsel argued, "[i]t's pretty well established people of that age do not have a fully developed mind and oftentimes will make irrational **[**13]** decisions based on that, Judge." Counsel argued that the court should not impose an extended sentence because it would be based on a crime that occurred when defendant was "a child basically, a kid."

[*P25] In allocution, defendant stated that he was young at the time of his prior offenses, that he "didn't know nothing about anything," and that he made "horrible decisions." Defendant stated that he graduated, was returning to school and doing what he was supposed to do, and was moving to Peoria to start a new life. He stated that he never wanted to see "this place" again.

[*P26] The trial court noted, in aggravation, that defendant had a lengthy criminal record starting from when he was a juvenile and continuing as an adult. The court found the sentence was "necessary for the protection of the public." It further stated the sentence was "necessary for the rehabilitation of the defendant, should such a thing be possible, although I have great questions about that quite frankly." In mitigation, the court noted defendant maintained a good relationship with his daughters and family and had some family support. It further noted defendant obtained his GED while in custody and was working at the time of **[**14]** the offense until he lost his job. The court expressly stated that it considered the statutory factors in aggravation and mitigation, defendant's character and background, and the evidence at trial. The court concluded that an extended-term sentence was appropriate, and sentenced defendant to 10 years' imprisonment.

[*P27] Defendant immediately filed a written motion to reconsider the sentence arguing, *inter alia*, that the 10-year sentence was excessive considering his background and the nature of his participation in the offense. The trial court denied the motion.

[*P28] On appeal, defendant first contends the State failed to prove him guilty beyond a reasonable doubt because the evidence did not prove the vehicle he possessed was the same vehicle stolen from Martes. Defendant argues that the State presented no testimony from Martes or other evidence regarding the title, registration, vehicle identification number (VIN), or license plate number of Martes' vehicle. He further argues that Sutton did not testify regarding the make, model, color, or license plate number of Martes' vehicle. Nor did the State introduce any vehicle records from Lyft. Defendant claims the only evidence of the vehicle's **[**15]** license plate number came from Lancaster's testimony, which was hearsay. Defendant points out Martes testified he "believe[d]" he was driving

a Hyundai Elantra that night, and claims Martes was uncertain about what vehicle he was driving. Defendant asserts the State only proved he was in a vehicle that looked similar to the one taken from Martes.

[*P29] The State responds that the evidence established defendant possessed the same vehicle stolen from Martes where Martes and Sutton identified photographs of the subject vehicle as Martes' vehicle, and Lancaster testified the photos were of the same vehicle he observed in defendant's possession. The State points out the police found defendant in possession of the vehicle within 30 minutes after it was stolen from Martes.

[*P30] When defendant claims the evidence is insufficient to sustain his conviction, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense proved beyond a reasonable doubt. *People v. Brown, 2013 IL 114196, ¶ 48, 377 Ill. Dec. 1, 1 N.E.3d 888* (citing *Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*). This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment **[**16]** for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 328 Ill. Dec. 1 (2009)*. Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd, 2013 IL 113510, ¶ 42, 987 N.E.2d 386, 369 Ill. Dec. 759*.

[*P31] In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito, 235 Ill. 2d 213, 228, 920 N.E.2d 233, 336 Ill. Dec. 223 (2009)*. In weighing the evidence, the fact finder is not required to disregard the inferences that naturally flow from that evidence, nor must it search for any possible explanation consistent with innocence and raise it to the level of reasonable doubt. *Jackson, 232 Ill. 2d at 281*. We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt. *People v. Beauchamp, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 348 Ill. Dec. 366 (2011)*.

[*P32] To prove defendant guilty of possession of a stolen motor vehicle in this case, the State was required to show that he was in possession of Martes' 2016 Hyundai Elantra, knowing it was stolen or converted, and he was not entitled to possession of the vehicle. *625 ILCS 5/4-103(a)(1)* (West 2016)). The State is not required to prove ownership of a stolen vehicle, but instead, **[**17]** must show that someone other than defendant had a superior interest in the vehicle specified in the indictment. *People v. Smith, 226 Ill. App. 3d 433, 438, 589 N.E.2d 895, 168 Ill. Dec. 495 (1992)*. This element may be established by circumstantial evidence and reasonable inferences drawn therefrom. *People v. Fernandez, 204 Ill. App. 3d 105, 109, 561 N.E.2d 1131, 149 Ill. Dec. 435 (1990)*. When evidence of ownership is used to prove the vehicle was stolen, evidence that defendant possessed the same vehicle owned by the victim is required. *People v. Frazier, 2016 IL App (1st) 140911, ¶ 18, 407 Ill. Dec. 159, 62 N.E.3d 1081* (citing *Smith, 226 Ill. App. 3d at 438*). Evidence that establishes only the make and model of a stolen vehicle, without more, is insufficient to prove ownership. *People v. Walker, 193 Ill. App. 3d 277, 279, 549 N.E.2d 904, 140 Ill. Dec. 253 (1990)*. Absent proof of ownership, the State may present chain of custody evidence linking the vehicle found in defendant's possession to the vehicle named in the indictment, which may form the basis for a proper inference of identification. *Smith, 226 Ill. App. 3d at 438*.

[*P33] Here, viewed in the light most favorable to the State, the record reveals the combined testimony from Martes, Sutton, and Lancaster was sufficient for the trial court to find defendant possessed the same vehicle stolen from Martes half an hour earlier. The indictment specified that the stolen vehicle was a 2016 Hyundai Elantra that was the property of Martes. Martes testified that on the night of the offense, he was working as a Lyft driver driving a Hyundai **[**18]** Elantra that was a rental vehicle loaned to him through Lyft. Although Martes did not testify to any details regarding the vehicle, he identified six photographs in court as "the vehicle I was driving that was taken from me." Sutton testified that she entered Martes' Lyft vehicle shortly before midnight. She described it as a four-door vehicle. Approximately half an hour later, the police took Sutton to 76th and Paulina where she identified defendant as the gunman who took the Lyft vehicle and identified a vehicle parked near a curb as Martes' vehicle in which she had been a passenger. Sutton also identified the six photographs in court as "[t]he Lyft driver's car" and testified that they accurately depicted the vehicle she observed at 76th and Paulina.

[*P34] In addition, Lancaster testified that about 12:20 a.m., he received a radio call regarding a vehicular hijacking of a dark blue Hyundai Elantra with Illinois license plate number E496914. He and his partner observed a vehicle matching that description drive past them and followed the vehicle. Moments later the vehicle stopped. When the officers pulled up behind the Hyundai, that vehicle went into reverse and struck their vehicle. Lancaster **[**19]** observed defendant jump out of the Hyundai and flee on foot. Lancaster identified the six photographs in court as "the same vehicle that was used in the vehicular hijacking and the same vehicle that the defendant jumped out of." He identified a white mark on the rear bumper of the Hyundai as a transfer mark that occurred when it struck the police vehicle.

[*P35] The photographs identified by Martes, Sutton, and Lancaster depict a blue, four-door, Hyundai Elantra parked about two feet from a curb. There is an oval-shaped "lyft" sign on the front windshield indicating it is a Lyft vehicle, and a blue and white airplane sticker on the rear windshield. From these photographs, Martes and Sutton positively identified this particular vehicle as Martes' vehicle, and Lancaster identified it as the vehicle defendant was driving and from which he fled. Based on the testimony from the three witnesses coupled with the photographs, the evidence was sufficient for the trial court to find that defendant possessed the same vehicle stolen from Martes. *People v. Frazier, 2016 IL App (1st) 140911, ¶ 18, 62 N.E.3d 1081, 407 Ill. Dec. 159*; *Smith, 226 Ill. App. 3d at 438*. Accordingly, defendant was proven guilty beyond a reasonable doubt of possession of a stolen motor vehicle.

[*P36] Defendant next contends his 10-year extended-term **[**20]** sentence is excessive because the trial court failed to give adequate consideration to his youth and drug abuse at the time of the offense and at the time of his prior convictions. Defendant acknowledges he was eligible for an extended-term sentence based on his prior adult conviction. He argues, however, that the court failed to consider that his juvenile offenses occurred before he was 16 years old. He further claims the court failed to weigh other factors in mitigation, including his potential for rehabilitation and that he was convicted of a nonviolent offense. Defendant asks this court to reduce his sentence or vacate it and remand his case for resentencing.

[*P37] The State responds that defendant has forfeited the issue for appeal because he did not object to the sentence at the sentencing hearing and his motion to reconsider the sentence did not raise these specific arguments. Alternatively, the State asserts that defendant's sentence is proper where the trial court considered all the factors in aggravation and mitigation and imposed a term within the statutory range that was proportionate to defendant's criminal history and the offense.

[*P38] To preserve a sentencing error for appellate **[**21]** review, both a contemporaneous objection during the sentencing hearing and a written postsentencing motion raising the issue are required. *People v. Hillier, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 342 Ill. Dec. 1 (2010)*. Here, the record shows that defendant filed a motion to reconsider his sentence immediately after it was imposed. In that motion, defendant asserted, *inter alia*, that his 10-year sentence was excessive considering his background and the nature of his participation in the offense. During the sentencing hearing, defense counsel and defendant emphasized that defendant was only 15 or 16 years old at the time of his prior offenses. Accordingly, we find that, although defendant did not specifically delineate the claim in his written motion that his sentence was excessive based on his age and drug abuse, he sufficiently apprised the trial court of his objection to his sentence, and therefore, the issue is not forfeited. *People v. Latto, 304 Ill. App. 3d 791, 804, 710 N.E.2d 72, 237 Ill. Dec. 649 (1999)*.

[*P39] Possession of a stolen motor vehicle is a Class 2 felony with a normal sentencing range of 3 to 7 years' imprisonment and an extended range of 7 to 14 years' imprisonment. *625 ILCS 5/4-103(b)* (West 2016); *730 ILCS 5/5-4.5-35(a)* (West 2016). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory **[**22]** range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones, 168 Ill. 2d 367, 373-74, 659 N.E.2d 1306, 213 Ill. Dec. 659 (1995)*. An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Alexander, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 346 Ill. Dec. 458 (2010)*.

[*P40] The Illinois Constitution mandates criminal penalties be determined according to the seriousness of the offense, and with the objective of restoring the offender to useful citizenship. *Ill. Const. 1970, art. I, § 11*; *People v. Ligon, 2016 IL 118023, ¶ 10, 48 N.E.3d 654, 400 Ill. Dec. 367*. In light of these objectives, "[t]he

trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *People v. Fern, 189 Ill. 2d 48, 55, 723 N.E.2d 207, 243 Ill. Dec. 175 (1999)*. The court's sentencing decision is entitled to great deference because, having observed the defendant and the proceedings, it had the opportunity to weigh defendant's demeanor, credibility, general moral character, mentality, habits, social environment, and age. *Alexander, 239 Ill. 2d at 213*. "The sentencing judge is to consider 'all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding.'" *Fern, 189 Ill. 2d at 55* (quoting *People v Barrow, 133 Ill. 2d 226, 281, 549 N.E.2d 240, 139 Ill. Dec. 728 (1989)*). The trial court need not give defendant's potential **[**23]** for rehabilitation greater weight than the seriousness of the offense. *People v. Anderson, 325 Ill. App. 3d 624, 637, 759 N.E.2d 83, 259 Ill. Dec. 603 (2001)*. In addition, when the trial court determines that a more severe sentence is warranted, defendant's age has little import. *People v. Rivera, 212 Ill. App. 3d 519, 526, 571 N.E.2d 202, 156 Ill. Dec. 615 (1991)*.

[*P41] Here, we find no abuse of discretion by the trial court in sentencing defendant to an extended term of 10 years' imprisonment, which falls in the middle of the statutory range. The court expressly stated that it considered the statutory factors in aggravation and mitigation, defendant's character and background, and the evidence at trial. The trial court pointed out that defendant had a lengthy criminal record starting from when he was a juvenile and continuing as an adult. The PSI shows defendant's numerous prior convictions, including two convictions for armed robbery with a firearm in 2011 for which he was sentenced to concurrent terms of 10 years' imprisonment, and a 2012 conviction for aggravated battery of a government official/employee. His juvenile history included two additional cases of aggravated battery. The trial court expressly stated that the 10-year sentence was "necessary for the protection of the public." It further stated the sentence was "necessary for the rehabilitation **[**24]** of the defendant, should such a thing be possible, although I have great questions about that quite frankly." The record thus shows the court considered defendant's potential for rehabilitation but had doubts if he could be rehabilitated.

[*P42] Defendant's argument that the trial court failed to give adequate consideration to his youth and drug abuse at the time of the offense and the time of his prior convictions is unpersuasive. The record shows that defense counsel emphasized that defendant was "very young" when he committed the prior offenses, either 15 or 16 years old, and that one of his adult convictions was the result of an automatic transfer. Counsel argued that people at that age do not have fully developed minds and make irrational decisions. In allocution, defendant also stated that he was young at the time of his prior offenses, that he "didn't know nothing about anything," and that he made "horrible decisions." The PSI indicated that defendant began abusing marijuana when he was 15 and smoked approximately 10 "blunts" a day. The record thereby indicates that the trial court was well aware of defendant's youth and drug abuse but found the 10-year sentence was necessary based **[**25]** on defendant's extensive criminal history, which included violent offenses, in order to protect the public and attempt to rehabilitate defendant.

[*P43] This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court. *Alexander, 239 Ill. 2d at 213*. Based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *Fern, 189 Ill. 2d at 56*. Accordingly, we find no basis to disturb the trial court's judgment.

[*P44] For these reasons, we affirm the judgment of the circuit court of Cook County.

[*P45] Affirmed.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 15, 2022, the **Plaintiff-Appellant's Reply Brief and Response to Cross-Relief Request** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email address below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Michael L. Cebula

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