Nos. 121306 & 121345 (Consolidated)

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- KEVIN HUNTER & DRASHUN WILSON Defendants-Appellants	)))))))))))	Appeal from the Appellate Court of Illinois, Nos. 1-14-1904 and 1-14-1500. There on appeal from the Circuit Court of Cook County, Illinois, Nos. 11 CR 9381 and 12 CR 19490. Honorable Evelyn B. Clay and Honorable Thaddeus L. Wilson, Judges Presiding.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS

A. The Procedural Amendments to Section 5-130 Apply to Cases Pending on Direct Appeal as of January 1, 2016, the Effective Date of the Statutory Amendments. Thus, Kevin's Case Should be Remanded to Juvenile Court to Give the State an Opportunity to Petition to Transfer Him to Adult Criminal Court.

The State agrees that because the amendment to Section 5-130 contains no statement of temporal reach, this Court should look to Section 4 of the Statute on Statutes ["Section 4"] to determine whether the amendment applies to Kevin. (Defs. Br. 11-19); (St. Br. 6-7, 26-29.) The State concedes that the amendment is procedural and that, pursuant to Section 4, procedural amendments are given retroactive effect. (St. Br. 6-7, 26-29.) Finally, the State also admits that in *People ex. rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 28, this Court determined that the amendment applies to"pending cases" and to "ongoing proceedings." (St. Br. 7, 27-28.)

As Kevin argued in his opening brief, the foregoing unequivocally establishes

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that the amendment to Section 5-130 applies to his case, which was pending on direct appeal at the time of its passage, because Section 4 applies to cases pending on direct appeal the same way it applies to cases pending in the trial court. (Defs. Br. 14-19.) In spite of the unavoidable conclusion that the amendment applies to pending cases like Kevin's, the State urges this Court to hold that a case on direct appeal is not "pending" or "ongoing." This argument, made without citation to authority, is frivolous.

The State reasons that as the amendment to Section 5-130 merely determines which division of the court will try a defendant, does not address appellate proceedings, and Kevin's trial court proceedings "were already complete" as of the amendment's effective date, the amendment to Section 5-130 cannot apply to Kevin under Section 4. (St. Br. 25-27.) However, the State cites no authority to support its position that the subject of the procedural amendment affects its retroactivity, or that a procedural amendment that otherwise applies retroactively does not apply to a case that was pending on direct appeal on the amendment's effective date. Furthermore, the State does not allege the existence of a constitutional bar that would prevent the amended Section 5-130 from applying to Kevin. *See Howard*, 2016 IL 120729, ¶ 28 ("The State does not argue that applying the amendment retroactively would offend the constitution . . . Because there is no constitutional impediment to retroactive application [of Section 5-130], the amendment applies to pending cases.").

The State argues that procedural amendments are retroactive yet limited "to proceedings occurring after the new law's effective date." (St. Br. 26.) This

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argument is foreclosed by *Howard*, which characterized the proceedings after the defendant's automatic transfer as "ongoing proceedings" when deciding that the amendment applies retroactively and required a new transfer hearing. 2016 IL 120729, ¶ 28. In *Howard*, the State similarly argued that "[S]ection 5-130 was fully complied with when the indictment was filed, and no further proceedings will take place under [S]ection 5-130." 2016 IL 120729, ¶ 30. This Court rejected that argument, and the State offers no new reason for this Court not to reject it again. (St. Br. 27) The State's argument wholly ignores this aspect of *Howard*.

The State also ignores that a direct appeal following a conviction, including the appeal to this Court, are "proceedings thereafter" within the ambit of Section 4. Nothing in the language of Section 4 indicates that "proceedings thereafter" exclude appeals. 5 ILCS 70/4. *See also In re Michael D.*, 2015 IL 119178, ¶ 9 ("It is never proper to depart from plain language by reading into a statute exceptions, limitations, or conditions which conflict with the clearly expressed legislative intent."). While the State contends that only those amendments that address appellate procedures are applicable on direct appeal, the State offers no authority for this novel concept.

As direct appeal proceedings are, by their very nature, "proceedings thereafter," they must conform with the new rule pursuant to Section 4; meaning a challenge to the procedure used to transfer Kevin to adult court, made on appeal, must be analyzed under the newly amended statute. This is consistent with this Court's approach to retroactivity in regards to the temporal reach of new judicial decisions. Judicial decisions that apply retroactively are applied to cases pending

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on direct review at the time the decision is announced. *People v. Neal*, 179 Ill. 2d 541, 552 (1997) ("As a general rule, this court's decisions apply retroactively to causes pending at the time they are announced, including cases pending on direct review.") (citing *Miller v. Gupta*, 174 Ill.2d 120, 128 (1996)).

As the State has declined to cite any authority that holds that procedural amendments that apply retroactively under Section 4 do not apply to cases pending on direct appeal, its brief relies extensively on attempting to distinguish the authorities cited in Kevin's opening brief. For example, the State argues that the holding in *Howard* does not apply to cases pending on direct appeal on the effective date of the amended Section 5-130, claiming that "proceedings thereafter" do not include proceedings on direct appeal. (St. Br. 26-28.) However, under *Howard*, procedural amendments that operate retroactively apply to "pending cases" and "ongoing proceedings." *Howard* at ¶ 28 ("Because there is no constitutional impediment to retroactive application, the amendment applies to *pending cases*.") (emphasis added). *See also People v. Ziobro*, 242 Ill. 2d 34, 46 (2011) (a procedural Illinois Supreme Court Rule that is silent as to its temporal reach applies to "ongoing cases" under Section 4). This Court has held that a case is "pending" for retroactivity purposes when it is up on appeal. *See People v. Price*, 2016 IL 118613, ¶ 26 (holding that *People v. Castleberry* applied retroactively to the case at bar, "*which was pending before this court* [i.e., pending on appeal] when *Castleberry* was decided") (emphasis added). This Court should reject the State's argument.

In an attempt to limit the scope of the term "proceedings," the State argues that "contrary to Hunter's suggestion, 'proceedings' are not synonymous with

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'prosecution,' as defined by 720 ILCS 5/2-16 (2016)." (St. Br. 28) (citing *People v. Crawford*, 337 Ill. App. 3d 624, 628 (4th Dist. 2003)). But the State's citation to *Crawford* proves the opposite – "proceedings" has been broadly defined. At issue in *Crawford* was the definition of "pending legal proceedings" in 720 ILCS 5-32-4a(a)(2), which criminalizes harassment of family members of jurors, witnesses, and expected witnesses in pending legal proceedings. 337 Ill. App. 3d at 626; 720 ILCS 5-32-4a(a)(2). In that case, the defendant threatened the mother of a teenager who alleged that the defendant's brother sexually assaulted her. At the time the threat was made, the defendant's brother "had been interviewed by the police, but he had not been arrested." 337 Ill. App. 3d at 626. The *Crawford* court held that "'pending legal proceeding' is not limited to a prosecution, and it need not be a matter already pending in court." *Id.* at 627.

If a "pending legal proceeding" encompasses the time *before* criminal charges are brought, thus initiating the court process, it must include appellate proceedings, which have been included in the definition of nonfinal judgment. *See Allen v. Hardy*, 478 U.S. 255, 258 n.1(1986) (defining cases that have reached a "final" judgment as those "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed.") (citing *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)). Thus, *Crawford* stands for the proposition that "pending legal proceedings" are even broader than the definition of prosecution, which supports Kevin's argument that "proceedings thereafter" under Section 4 encompass appellate proceedings. Indeed, the State acknowledges that a prosecution "is comprised of any number of 'proceedings,' including . . . 'the final

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disposition of the case upon appeal.'" (St. Br. 28.) Yet the State fails to acknowledge that because the final disposition of the case on appeal constitutes ongoing proceedings, the amended Section 5-130 can and should apply to these ongoing proceedings.

The State rejects the remainder of the authorities cited in Kevin's opening brief as "inapposite." (St. Br. 28.) The majority of these cases – *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318 (2006), *People v. Atkins*, 217 Ill. 2d 66 (2005), *People v. Glisson*, 202 Ill. 2d 499 (2002), *Johnson v. Edgar*, 176 Ill. 2d 499 (1997), and *People v. Digirolamo*, 179 Ill. 2d 24 (1997) – were cited to demonstrate that this Court's retroactivity analysis is the same, regardless of whether a case was pending in the trial court or on direct appeal on the applicable statutory amendment's effective date. The State does not directly challenge this assertion, or cite authority to the contrary, but instead argues that these authorities are distinguishable. This misses the mark, as Kevin never argued these cases were identical to the case at bar.

For example, Kevin cited *Allegis* because it is an example of a procedural statute that was applied to a case pending on direct appeal on that statute's effective date. (Defs. Br. 18-19.) The State claims that *Allegis* is inapplicable because the legislature expressly stated that the statute was to apply retroactively, and therefore Section 4 was not implicated. (St. Br. 28-29.) This argument ignores the fact that the legislature is not limited to one way of expressing its intent that a statute apply retroactively. *See Allegis*, 223 Ill. 2d at 332 ("If the General Assembly has clearly expressed an intention that a statute be given retroactive effect, we must

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honor that intention unless the constitution prohibits us from doing so."). Where *Allegis* sanctions retroactive application of an amendment taking effect on direct appeal based on legislative intent, it does not matter whether that intent was expressed in the plain language of the statute or via Section 4. The State also attempts to distinguish *Allegis* on the basis that the statutory amendment there "related directly to a party's entitlement to relief rather than court procedures." (St. Br. 28-29.) This is irrelevant under this Court's retroactivity jurisprudence, which classifies statutes as either procedural or substantive. *See, e.g., Caveney*, 207 Ill. 2d at 92 ("[S]ection 4 represents a clear legislative directive as to the temporal reach of statutory amendments and repeals: those that are procedural in nature may be applied retroactively, while those that are substantive may not."). In sum, although the State attempts to distinguish *Allegis*, it fails to disprove Kevin's argument that "*Allegis* demonstrates that when a procedural statute becomes effective while a case is pending on direct appeal, absent a legislative statement to the contrary, the statute applies to the pending case." (Defs. Br. 29.)

Several of these cases also demonstrate that the State has previously taken the position that statutory amendments that become effective while a case is pending on direct appeal do apply to that case. *Atkins*, 217 Ill. 2d at 68, 72 (State argued that statutory amendment that became effective while case was pending on direct appeal applied to that case under Section 4 to preserve defendant's conviction because the amendment was "merely procedural"); *Digirolamo*, 179 Ill. 2d at 49 (State argued that statutory amendment that became effective while case was pending on direct appeal applied to that case because the amendment was

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procedural). The State did not attempt to explain its contradictory, inconsistent opinion as to this point.

In short, the State has failed to supply authority that supports its position that Section 5-130 cannot apply retroactively to Kevin under Section 4 of the Statute on Statutes. It has also failed to meaningfully distinguish the authorities cited in Kevin's opening brief. This Court should reject the State's argument that if a statute applies retroactively under Section 4, it does not apply retroactively to cases pending on direct appeal on the amendment's effective date.

The State also argues that even if Section 5-130 applies retroactively, it is impossible to apply the amendment to Kevin because he is now 22 years old, and has aged out of the juvenile court system. (St. Br. 30-32.) This argument is foreclosed by *People v. Fort*, 2017 IL 118966, which the State cites approvingly in its brief, and then proceeds to ignore. (St. Br. 6, 24, 30.) In that case, the juvenile defendant was automatically transferred to adult criminal court, where he was acquitted of the automatic transfer offense, but convicted on a lesser charge that was not an automatic transfer offense. 2017 IL 118966, ¶ 1. This Court held that it was error for the trial court to sentence the defendant as an adult without first holding a discretionary transfer hearing, and that the proper remedy was to vacate the defendant's sentence and remand the case to the trial court so that the State could have the opportunity to file a petition for a discretionary transfer to criminal court for sentencing. *Id.* at ¶¶ 30-31, 41. This Court then stated that, "Should the trial court find after the hearing that defendant is not subject to adult sentencing, the proper remedy is to discharge the proceedings against defendant

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since he is now over 21 years of age and is no longer eligible to be committed as a juvenile under the Act." *Id.* at ¶ 41.

Thus, under *Fort*, Kevin's age does not preclude application of the amended Section 5-130. *See also People v. Brazee*, 316 Ill. App. 3d 1230 (2d Dist. 2000) (defendant who should have been sentenced as a juvenile, and who has aged out of the juvenile court's jurisdiction, should be sentenced to time served). Despite this clear authority, the State maintains that "because Hunter is 22 years old, [a retrospective transfer hearing] is impossible under the Act." (St. Br. 30.) *Fort* addresses this argument directly, yet the State offers no response. Clearly, the circuit court may hold a transfer hearing, and either affirm Kevin's transfer and current sentence, or discharge the proceedings, as outlined by this Court in *Fort*.

The State also argues that the amendment to Section 5-130 cannot apply to Kevin because the Act refers to "minors," which it defines as "a person under the age of 21 years subject to this Act." (St. Br. 30-31.) Just as this was not a bar to a juvenile court remand in *Fort*, this is also not a bar to juvenile court remand here. *See* IDOC webpage for Cameron Fort, located at https://www.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx (noting that Fort's date of birth is November 7, 1992; therefore, Fort was 24 years old – two years older than Kevin – when the *Fort* decision was issued).

This position is also supported by *People v. Brown*, 225 Ill. 2d 188 (2007), which the State cites in a footnote. (St. Br. 32.) In *Brown*, this Court remanded a case in which the defendant was over 21 for a retrospective transfer hearing. The State claims *Brown* is inapplicable because it was decided before *People v.*

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Fiveash, 2015 IL 117669, which held in a completely different context that the juvenile court only has authority over defendants who are under the age of 21. However, as *Fort* also held that a defendant who has aged out of the juvenile court system is entitled to a discretionary transfer hearing, and *Fort* was decided after *Fiveash*, it cannot be argued that *Brown* is no longer good law in light of *Fiveash*.

Thus, Kevin's age does not render a transfer hearing impracticable. The State does not offer any reason that a hearing could not easily be held. And with good reason. In determining whether Kevin should be transferred to adult court, the trial court will be able to consider his age at the time of the offense, the seriousness of the offense, and public safety concerns – all factors not affected by Kevin's current age. 705 ILCS 405/5-805(2), (3) (eff. Aug. 21, 2007 - Jan. 24, 2013). *See also People v. Morgan*, 197 Ill. 2d 404, 424-25 (2001) ("It is clear that the purpose of a transfer proceeding is to balance the best interests of a juvenile offender, particularly as the offender's interests relate to his potential for rehabilitation, against society's legitimate interest in being protected from criminal victimization perpetrated by minors.").

Finally, the State does not respond to Kevin's argument that *People v. Hunter,* 2016 IL App (1st) 141904, should be overturned because it relies on the retroactive impact test in analyzing the temporal reach of Section 5-130. However, the State does not contend anywhere in its brief, including the portion of its brief that describes Illinois' analysis for determining the temporal reach of an amended statute, that Illinois courts use the retroactive impact test as part of its retroactivity analysis. The State also does not argue that *Hunter* should be upheld; it merely argues

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that neither statute applies to Kevin or Drashun. Thus, regardless of the outcome of this case, this Court should expressly overturn *Hunter* based on its retroactive impact analysis.

In sum, the State has failed to cite any authority to support its position that under Section 4, a procedural statute does not apply to a case that is pending on direct appeal of the amendment's effective date. The State's own authorities demonstrate that it is not impracticable to apply the amended Section 5-130 to Kevin. This Court should hold that the amended Section 5-130 applies to cases pending on direct appeal on its effective date, and remand Kevin's case to the trial court so the State can have an opportunity to seek discretionary transfer if it so chooses.

B. Kevin Hunter and Drashun Wilson are Entitled to New Sentencing Hearings under Section 5-4.5-105(b) of the Illinois Code of Corrections, at Which the Trial Court has the Discretion as to Whether to Impose the Firearm Add-On.

Kevin and Drashun argued in their opening brief that they are entitled to new sentencing hearings under 730 ILCS 5/5-4.5-105(b) (West 2016), which was enacted during the pendency of their direct appeals and grants the courts discretion over whether to impose previously mandatory firearm enhancements on juveniles who were under the age of 18 at the time of their offense. Indeed, based on the plain language of the statute, it is clear that the legislature intended subsection (b) to apply retroactively, as it does not contain a temporal restriction like the one expressly included in subsection (a), which states that it applies only "[o]n or after the effective date" of the statute. 730 ILCS 5/5-4.5-105(a). Furthermore, since subsection (b) is strictly procedural, Section 4 of the Statute on Statutes

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likewise dictates that it applies retroactively to pending cases, including those currently on direct appeal. Thus, Kevin and Drashun respectfully requested that this Court remand for new sentencing hearings at which, pursuant to Section 5-4.5-105(b), the court will have discretion as to whether to impose a firearm enhancement.

In response, the State argues that the "effective date" language of subsection (a) likewise applies to subsection (b) – despite its notable omission from that portion of the statute – and thus applies prospectively. (St. Br. 10-12.) The State also contends that, if subsection (b) does not clearly indicate its temporal reach, it nevertheless applies prospectively under Section 4 because it is a "substantive enactment[.]" (St. Br. 9, 12-21.) Finally, the State claims that even if subsection (b) constitutes a procedural change, it does not apply to cases that were pending on direct appeal when it became effective. (St. Br. 21-24.) For the reasons addressed in Kevin and Drashun's opening brief and below, the State's arguments fail.

As an initial matter, the State repeatedly asserts that the Section 5-4.5-105 "clearly indicates its temporal reach, providing that it applies only to a juvenile ***who commits an offense*** on or after the public act's effective date – here, January 1, 2016." (St. Br. 9) (emphasis added). *See also* (St. Br. 11) ("the legislature plainly intended that the new statute apply prospectively in its entirety to juveniles who commit crimes after its effective date."). However, as this Court has acknowledged, Section 5-4.5-105 applies to ***sentencing hearings*** held on or after its effective date, regardless of the date of the offense. *See People v. Reyes*, 2016 IL 119271. In *Reyes*, this Court vacated a mandatory *de facto* natural life sentence that had

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been imposed on a minor because it violated the holding of *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455 (2012). 2016 IL 119271, ¶¶ 7-10. Although the offense at issue took place on December 20, 2009, this Court nevertheless agreed with the parties that the defendant was "entitled, on remand, to be resentenced under the sentencing scheme found in section 5-4.5-105." *Id.*, at ¶ 12. Thus, despite the State's contention to the contrary, it is clear that Section 5-4.5-105 is ***not*** limited to juveniles who commit an offense after January 1, 2016.

The State next claims that subsection (b) expressly indicates that it applies prospectively. In so arguing, the State does not – because it cannot – point to any portion of subsection (b) that supports this conclusion. Instead, the State baselessly contends that "the legislature's expression of temporal reach in subsection (a) applies to the entire scheme[,]" (St. Br. 11), notwithstanding the glaring omission of such language in any other section of the statute. In other words, the State's argument disregards the well-established rule of statutory construction that "where the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded[.]" *In re J.L.*, 236 Ill. 2d 329, 341 (2010) (citing 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 46:5, at 228-29 (7th ed. 2007)). And here, since the "effective date" language of subsection (a) was clearly excluded from the other sections of the statute, the legislature's intent must be given effect, and that temporal restriction cannot be indiscriminately injected into subsection (b). *See, e.g., Kelley v. Astor Inv'rs, Inc.*, 123 Ill. App. 3d 593, 599 (2nd Dist. 1984); *see also In re Ben S.*, 331 Ill. App. 3d 471, 473 (3d Dist. 2002) ("[C]ourts cannot use construction as a guise for supplying [textual]

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omissions.")

Nevertheless, in an attempt to sidestep the plain language and overall structure of Section 5-4.5-105, the State claims that "the legislature stated the enactment's temporal reach in the ***first sentence***, ***then*** set forth in subsection (a) the new procedures that govern juvenile sentencing hearings. Subsections (b) and (c) provide the applicable sentencing ranges." (St. Br. 11) (emphasis added). But this characterization disingenuously implies that the "effective date" statement was set forth in an introductory paragraph above all three subsections when, in fact, it is contained solely within subsection (a).

Moreover, the State's assessment grossly overstates the reach of subsections (b) and (c). Indeed, while subsection (a) applies to ***all*** juvenile offenders who are under the age of 18 at the time of the commission of an offense, subsections (b) and (c) only apply to a small and specific subset of those juveniles who are subject to the firearm sentencing enhancement. And even under those circumstances, subsections (b) and (c) do not set a mandatory minimum or maximum penalty but simply provide the court with discretion over whether to impose the sentence enhancement. Thus, the State's suggestion that subsections (b) and (c) provide the "applicable sentencing ranges" for all juvenile offenders is clearly incorrect.

Next, although the State recognizes that "the Court considers 'real-world results'" when construing statutes, (St. Br. 6, 24), it disregards the logic behind applying (b) retroactively while applying (a) prospectively. Indeed, subsection (a) merely codifies the sentencing factors embodied in such cases as *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455 (2012), *Graham v. Florida,* 560 U.S. 48, 130

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S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551, 569-73 (2005), in which the United States Supreme Court clarified that states may not sentence juveniles in the same manner as adults without considering the juveniles' age and the attendant characteristics of youth. And while courts were not statutorily required to contemplate such mitigating factors as peer pressure and level of maturity prior to the enactment of Section 5-4.5-105, Illinois courts nevertheless consistently considered a defendant's youth to be a significant factor in mitigation. *See, e.g.*, *People v. Clark*, 374 Ill. App. 3d 70, 75 (1st Dist. 2007) (reducing 18-year-old defendant's sentence by ten years "in light of defendant's age and lack of any significant criminal background"); *People v. Margentina*, 261 Ill. App. 3d 247, 250 (3d Dist. 1994) (finding an 18-year-old defendant's 50-year sentence for first degree murder excessive); *People v. Steffens*, 131 Ill. App. 3d 141, 152-53 (1st Dist. 1985) (reducing 30-year murder sentence to 20 years based in part on the fact that defendant was only 16). In other words, subsection (a) merely mandated the consideration of mitigating factors that were already frequently taken into account by sentencing courts and, as such, may have been considered during a juvenile's original sentencing hearing. Thus, it makes sense that the legislature would intend for subsection (a) to apply prospectively so as to avoid a duplicative hearing.

Subsection (b), on the other hand, creates an entirely new procedure for imposing a firearm enhancement. Prior to January 1, 2016, firearm add-ons were mandatory for juveniles under 18 years of age at the time of the offense. Following the enactment of Section 5-4.5-105, sentencing courts now have the discretion to refuse their imposition. Thus, it is indisputable that a juvenile sentenced before

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January 1, 2016, was before a judge who did not have the discretionary authority that has since been granted. And since the reforms of Section 5-4.5-105 were enacted as a legislative response to unconstitutionally lengthy sentences for juveniles, it is rational to apply the brand new procedure set forth in subsection (b) to those very persons whom the reforms were designed to help: defendants under the age of 18 at the time of their offense, who received a mandatory firearm add-on, and who have a proceeding pending as of January 1, 2016.

For these reasons, when considering the statute as a whole, it is clear that the "effective date" statement contained within subsection (a) applies solely to that subsection. Although subsection (a) operates alongside subsection (b), it is nonetheless distinct in its wording, scope, and purpose. And there is simply no justification for extending its temporal language to subsection (b) when such language was purposefully excluded from that section. Indeed, the "legislature's use of certain language in some sections of a statute, but differing language in others, indicates that different results were intended." *Peoria Savings & Loan Association v. Jefferson Trust & Savings Bank*, 81 Ill. 2d 461, 469-70 (1980). *See also Chicago Teachers Union, Local No. 1 v. Board of Ed. of the City of Chicago*, 2012 IL 112566, ¶ 24 (noting that "[w]hen the legislature includes particular language in one section of a statute but omits it in another section of the same statute, courts presume that the legislature acted intentionally and purposely in the inclusion or exclusion . . . and that the legislature intended different meanings and results[.]"). Here, the legislature's omission of the "on or after the effective date" language from subsection (b) indicates that it intended for that particular

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subsection to operate retroactively.

Even if this Court finds the legislative intent to be unclear, subsection (b) is nevertheless retroactive due to Section 4 of the Statute on Statutes, 5 ILCS 70/4 (West 2016), which applies by default where the legislature has not expressly provided the temporal reach of a new statute. *Caveney v. Bower*, 207 Ill. 2d 82, 92 (2003). As explained in the opening brief, "Section 4 is a general savings clause, which this court has interpreted as meaning that procedural changes to statutes will be applied retroactively, while substantive changes are prospective only." *People v. Howard*, 2016 IL 120729, ¶ 20. Therefore, as long as Section 4 is in effect, procedural statutory amendments can apply to cases pending on direct appeal. And here, Kevin and Drashun maintain that section 5-4.5-105(b) is a procedural law because it creates a new process through which courts may now decline to impose previously-mandatory firearm enhancements upon a juvenile offender. (Defs. Br. 29-32.)

Although the State recognizes that "procedural changes may apply retroactively" under Section 4, (St. Br. 13), it claims that subsection (b) represents a substantive change because it "redefin[es] the mandatory minimum penalties that attach to certain offenses committed by juveniles[.]" (St. Br. 14.) But subsection (b) does not *prohibit* juvenile offenders from receiving the firearm sentence enhancement. Rather, subsection (b) simply provides that a judge *may* decline to impose "the otherwise applicable sentencing enhancement." 730 ILCS 5/5-4.5-105(b). The State consistently ignores this critical distinction, treating automatic mitigation of punishment as if it is identical to the mere possibility of a lesser

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sentence. Simply put, it is not. Unlike a substantive change that categorically reduces an applicable sentence, subsection (b) merely relinquishes the legislature's decision-making authority for juveniles at sentencing and reallocates that authority to the trial courts. *See People v. Johnson*, 23 Ill. 2d 465, 470-71 (1962) (requirement that a judge instead of a jury is to decide factors in aggravation on re-sentencing is a procedural change); *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (rules that allocate decision-making authority from judge to jury to determine the factors in aggravation for purposes of the death penalty are prototypical procedural rules). And despite the State's analysis to the contrary, that represents a ***procedural*** change in how sentencing judges determine juvenile dispositions. *See Rivard v. Chicago Fire Fighters Union, Local No. 2*, 122 Ill. 2d 303, 310-11 (1988).

The State relies upon *People v. Smith*, 2014 IL App (1st) 103436, to support its conclusion that subsection (b) is substantive. (St. Br. 20.) Specifically, the State contends that, "*Smith* held that the reenactment of a mandatory firearm enhancement is a substantive change that applies prospectively. [. . .] Likewise, the removal of a mandatory firearm enhancement is also a substantive change that must apply prospectively." (St. Br. 20.) But this argument gives a false impression of subsection (b), which does not constitute the outright removal of a mandatory firearm enhancement but merely a shift to a discretionary firearm enhancement.

Moreover, the State's argument is refuted by the very case it cites. The State conspicuously ignores the *Smith* court's holding that the revival of the sentence enhancement at issue was substantive because it "d[id] not alter any of the methods

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by which a defendant is sentenced, only the punishment for an offense." 2014 IL App (1st) 103436, ¶ 98 (further noting that "the amendment thus changes substantive law rather than procedural rules."). Thus, the fact that the *automatic imposition* of a sentence enhancement was deemed substantive has no bearing on subsection (b), which merely bestows courts the authority over whether to impose the sentence enhancement, and does not necessarily equate to a lower sentence. In other words, as explained in *Smith*, since subsection (b) simply alters the *method* by which a defendant is sentenced, it is, in fact, procedural.

The procedural nature of subsection (b) is further supported by *Montgomery v. Louisiana*, 136 S. Ct. 718, 729-30 (2016), in which the United States Supreme Court clarified that:

> Substantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating "the *manner of determining* the defendant's culpability." Those rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise."

(emphasis in original) (internal citations omitted). Thus, it is clear that subsection (b) is a procedural rule, as it does not place the firearm enhancement "altogether beyond the State's power to impose[,]" but, rather, amends "the manner of determining" whether a firearm enhancement should be imposed and "merely raise[s] the possibility" that a court will decline its imposition.

The State next posits that because subsection (b) grants the sentencing court the discretion to forgo the firearm enhancement, it "lessens the minimum

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penalty for the offense" and, thus, defendants who were sentenced "before the effective date" are "'not eligible to elect to be sentenced under it.'" (St. Br. 15-17.) The State's position, however, stands on flawed ground. The portion of Section 4 upon which the State relies for its analysis – that is, the second sentence of Section 4 of the Statute on Statutes – describes a sentencing election, which arises when a new law that lowers the punishment for the charged offense is passed during the pendency of the defendant's case and prior to sentencing. *People v. Gancarz*, 228 Ill.2d 312, 317 (2008); 5 ILCS 70/4 ("If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."). Significantly, that provision has been applied to instances where a punishment is *categorically* reduced, such as in *People v. Hansen*, 28 Ill. 2d 322, 340-41 (1963), cited by the State. (St. Br. 8, 13, 15, 17.) But there, the maximum penalty for the defendant's crimes was definitively reduced from five years' imprisonment to one year. *Hansen*, 28 Ill. 2d at 340-41. And since the new law in *Hansen* was necessarily mitigating, Section 4 barred it from applying to the defendant's case. *Id*. Here, however, the maximum sentence does not change; subsection (b) merely grants the court the freedom to forgo the firearm enhancement if circumstances so warrant. And unlike *Hansen*, Kevin and Drashun ask only for a new sentencing hearing, not an automatically lower sentence.

Simply put, despite the State's characterizations to the contrary, (St. Br. 12-21), subsection (b) does not involve a sentencing election or a mitigated penalty because it does not have the effect of automatically lowering the punishment for

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a crime. Rather, as discussed above, it merely alters the procedure by which courts formulate an appropriate sentence for minor defendants like Kevin and Drashun. *United City of Yorkville v. Vill. of Sugar Grove*, 376 Ill. App. 3d 9, 21 (2d Dist. 2007) (procedure encompasses pleadings, evidence and the legal rules which direct the course of court proceedings, while "substantive law" involves "the rights underlying the lawsuit"). As such, subsection (b) applies retroactively under Section 4 to all pending cases, *Howard*, 2016 IL 120729, ¶ 20, including those currently on direct appeal. *See, e.g.*, *People v. Patterson*, 2016 IL App (1st) 101573-B, ¶ 17 (procedural amendments apply retroactively, including to "all cases pending on direct appeal."); *People v. Ortiz*, 2016 IL App (1st) 133294, ¶¶ 35-36 (same); *People v. Scott*, 2016 IL App (1st) 141456, ¶¶ 45-46 (same).

The State, however, claims that even if Section 4 mandates retroactive application of subsection (b), "if a procedural change is to apply to a particular case, there must be 'proceedings thereafter' that are capable of 'conform[ing]' to the change" in the law. (St. Br. 21.) From this premise, the State posits that, since Kevin's and Drashun's trial court proceedings were completed by the time the new law took effect, there are no "proceedings thereafter" that can conform to the statutory amendment. (St. Br. 21-24.) But this reading flies directly in the face of *Howard*, which sets forth this Court's well-established, straightforward reading of Section 4: that it "is a general savings clause, which this court has interpreted as meaning that procedural changes to statutes will be applied retroactively, while substantive changes are prospective only." *Howard*, 2016 IL 120729, ¶ 20 (citing *People v. Glisson*, 202 Ill.2d 499, 506-07 (2002)). And the State

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cites no authority to support the notion that this does not apply to cases, such as Kevin's and Drashun's, that are pending on direct appeal.

In fact, in *Glisson* – the very authority upon which *Howard* relies for its foundational premise – this Court applied Section 4 to a statutory repeal that took effect while the defendant's case was pending on direct appeal. *Glisson*, 202 Ill. 2d at 503. Ultimately, because the new law at issue in *Glisson* decriminalized the conduct for which the defendant had been convicted, the legislative change was found to be substantive in nature, and thus applied prospectively only. *Id*. at 507-08. However, nowhere in *Glisson* did this Court state, or even suggest, that Section 4 barred retroactive application of the new law merely because the trial court proceedings had come to a close. Put differently, the *Glisson* court applied Section 4 to the question of a statutory change that took effect during the pendency of the defendant's direct appeal, without regard for the fact that the only "proceedings thereafter" would occur in the appellate court. *Id*. at 509. The dispositive issue in *Glisson*, as here, was the nature of the statutory change, *i.e.* substantive versus procedural, not the posture of the case.

Like *Glisson*, *Howard* demonstrates that, when applying Section 4 to statutory amendments that take effect while the defendant's case is pending on direct appeal, the sole issue is whether the amendment affects a substantive change or a procedural one. *Howard*, 2016 IL 120729, ¶ 20. *See also Scott*, 2016 IL App (1st) 141456, ¶ 46 ("[T]he fact that defendant's case was pending on direct appeal when Public Act 99-258 was passed does not change the controlling effect of *Howard*."). If the change is substantive, it applies prospectively only; if the change is procedural,

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it applies retroactively. *Id*. at ¶¶ 20, 28. And neither *Glisson* nor *Howard*, nor indeed any other case from this Court, supports the State's novel reading of Section 4. Rather, a direct appeal is, indeed, a "proceeding" capable of conforming to a change in the law. *See* Argument A, *supra.*

Finally, the State claims that granting a remand under Section 4 would result in "absurdity and inconvenience." (St. Br. 24.) However, while procedural changes are applied retroactively only "so far as is practicable," 5 ILCS 70/4, as this Court admonished in *Howard*, practicable "is not synonymous with 'convenient.' Rather, it means 'possible to practice or perform : capable of being put into practice, done, or accomplished: FEASIBLE.'" *Id.*, at ¶ 32 (citing Webster's Third New International Dictionary 1780 (1993); Black's Law Dictionary 1291 (9th ed. 2009)) (defining "practicable" as "reasonably capable of being accomplished; feasible"). And clearly, remanding a case for a new sentencing hearing "is something that is feasible." *See, e.g., Howard*, 2016 IL 120729, ¶ 32 (holding that "[c]learly, transferring this case to juvenile court for a transfer hearing is something that is feasible.").

In sum, Section 5-4.5-105(b) simply constitutes a change to the sentencing process, as courts now have discretion over whether to impose a firearm enhancement on juveniles who were less than 18 years old at the time of their offense. And by omitting the temporal restriction of subsection (a) from subsection (b), the legislature clearly evinced its intent for subsection (b) to have a retroactive application. Moreover, since subsection (b) is a procedural change, rather than a substantive amendment or a categorical mitigation of a penalty, it likewise apples

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retroactively under Section 4 of the Statute on Statutes. For these reasons, Drashun and Kevin respectfully request that this Court find that Section 5-4.5-105(b) applies to cases pending on direct appeal as of January 1, 2016, reverse their sentences, and remand for new sentencing hearings, at which the court will have discretion as to whether to impose a firearm enhancement.

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CONCLUSION

For the foregoing reasons, Kevin Hunter and Drashun Wilson, defendants-appellants, respectfully request that this Court:

1. Remand Kevin Hunter's case back to juvenile court, so that the State may have the opportunity to file a petition to transfer his case to adult court if it so chooses; and

2. Remand Kevin Hunter's and Drashun Wilson's cases for new sentencing hearings pursuant to 730 ILCS 5/5-4.5-105(b), at which the courts will have discretion in determining whether to impose the firearm enhancements.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Katie Anderson, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 6720 words.

/s/Katie Anderson
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No. 121306 & 121345 (Consolidated)

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- KEVIN HUNTER & DRASHUN WILSON Defendants-Appellants	)))))))))))	Appeal from the Appellate Court of Illinois, Nos. 1-14-1904 and 1-14-1500. There on appeal from the Circuit Court of Cook County, Illinois, Nos. 11 CR 9381 and 12 CR 19490. Honorable Evelyn B. Clay and Honorable Thaddeus L. Wilson, Judges Presiding.

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;
Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602;
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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 August 3, 2017, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendants-appellants in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Joseph Tucker
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