No. 126116

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF OF APPELLEE.
CROSS-RELIEF REQUESTED.

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

GINGER LEIGH ODOM
Director of Expungement
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

E-FILED
11/24/2021 9:25 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

I. In the trial court, the State used a 2013 residential burglary offense committed when Denzal was 17 years old, as the basis for his Class X sentence. That offense, if committed in 2017, would no longer be tried in adult court. Under 730 ILCS 5/5-4.5-95(b), which says "now" classified, was Denzal ineligible to be sentenced as a Class X offender?

II. Denzal was under 21 at the time of **all** offenses used to impose a mandatory Class X sentence. Section 5-4.5-95(b) of the Code of Corrections bases its applicability on date of conviction and not date of offense. Where a defendant can "age into" a mandatory sentence, does §95(b) violate the proportionate penalties clause of the Illinois constitution, as well as the *ex post facto*, due process, and equal protection clauses of the Illinois and United States Constitutions? (Cross-relief requested)

STATUTES INVOLVED

730 ILCS 5/5-4.5-95, General Recidivism Provisions (in effect in 2017)

***

(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having 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 and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:

(1) the first felony was committed after February 1, 1978 * * *;

(2) the second felony was committed after conviction on the first; and

(3) the third felony was committed after conviction on the second. * * *

730 ILCS 5/5-4.5-95, General Recidivism Provisions (effective July 1, 2021)

***

(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 forcible felony after having 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 forcible felony was committed) classified in Illinois as a Class 2 or greater Class forcible felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:

(1) the first forcible felony was committed after February 1, 1978 * * *;

(2) the second forcible felony was committed after conviction on the first;

(3) the third forcible felony was committed after conviction on the second; and

(4) the first offense was committed when the person was 21 years of age or older.

705 ILCS 405/5-120, Exclusive jurisdiction. (2017)

Proceedings may be instituted under the provisions of this Article concerning any minor who prior to his or her 18th birthday has violated or attempted to violate, regardless of where the act occurred, any federal, State, county or municipal law or ordinance. Except as provided in Sections 5-125, 5-130, 5-805, and 5-810 of this Article, no minor who was under 18 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State.

705 ILCS 405/5-130, Excluded jurisdiction. (Eff. January 1, 2016)

(1)(a) The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 16 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, or (iii) aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05 where the minor personally discharged a firearm as defined in Section 2-15.5 of the Criminal Code of 1961 or the Criminal Code of 2012.

***

705 ILCS 405/5-805, Transfer of jurisdiction. (Eff. January 1, 2016)

(2) Presumptive transfer.

(a) If the State's Attorney files a petition, at any time prior to commencement of the minor's trial, to permit prosecution under the criminal laws and the petition alleges a minor 15 years of age or older of an act that constitutes a forcible felony under the laws of this State, and if a motion by the State's Attorney to prosecute the minor under the criminal laws of Illinois for the alleged forcible felony alleges that (i) the minor has previously been adjudicated delinquent or found guilty for commission of an act that constitutes a forcible felony under the laws of this State or any other state and (ii) the act that constitutes the offense was committed in furtherance of criminal activity by an organized gang, and, if the juvenile judge assigned to hear and determine motions to transfer a case for prosecution in the criminal court determines that there is probable cause to believe that the allegations in the petition and motion are true, there is a rebuttable presumption that the minor is not a fit and proper subject to be dealt with under the Juvenile Justice Reform Provisions of 1998 (Public Act 90-590), and that, except as provided in paragraph (b), the case should be transferred to the criminal court.

***

(3) Discretionary transfer.

(a) If a petition alleges commission by a minor 13 years of age or over of an act that constitutes a crime under the laws of this State and, on motion of the State's Attorney to permit prosecution of the minor under the criminal laws, a Juvenile Judge assigned by the Chief Judge of the Circuit to hear and determine those motions, after hearing but before commencement of the trial, finds that there is probable cause to believe that the allegations in the motion are true and that it is not in the best interests of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.

(b) In making its determination on the motion to permit prosecution under the criminal laws, the court shall consider among other matters:

(i) the age of the minor;

(ii) the history of the minor, including:

(A) any previous delinquent or criminal history of the minor,

(B) any previous abuse or neglect history of the minor, and

(C) any mental health, physical, or educational history of the minor or combination of these factors;

(iii) the circumstances of the offense, including:

(A) the seriousness of the offense,

(B) whether the minor is charged through accountability,

(C) whether there is evidence the offense was committed in an aggressive and premeditated manner,

(D) whether there is evidence the offense caused serious bodily harm,

(E) whether there is evidence the minor possessed a deadly weapon;

(iv) the advantages of treatment within the juvenile justice system including whether there are facilities or

programs, or both, particularly available in the juvenile system;

(v) whether the security of the public requires sentencing under Chapter V of the Unified Code of Corrections:

(A) the minor's history of services, including the minor's willingness to participate meaningfully in available services;

(B) whether there is a reasonable likelihood that the minor can be rehabilitated before the expiration of the juvenile court's jurisdiction;

(C) the adequacy of the punishment or services.

In considering these factors, the court shall give greater weight to the seriousness of the alleged offense, the minor's prior record of delinquency than to the other factors listed in this subsection.

***

705 ILCS 405/5-810, Extended jurisdiction juvenile prosecutions.

(1)(a) If the State's Attorney files a petition, at any time prior to commencement of the minor's trial, to designate the proceeding as an extended jurisdiction juvenile prosecution and the petition alleges the commission by a minor 13 years of age or older of any offense which would be a felony if committed by an adult, and, if the juvenile judge assigned to hear and determine petitions to designate the proceeding as an extended jurisdiction juvenile prosecution determines that there is probable cause to believe that the allegations in the petition and motion are true, there is a rebuttable presumption that the proceeding shall be designated as an extended jurisdiction juvenile proceeding.

***

STATEMENT OF FACTS

Summary of relevant facts and issues before this Court

In July 2013, when Denzal Stewart was a minor of 17 years old, he was arrested and charged with residential burglary, a Class 2 felony. (S. C. 46) In October 2013, Denzal, still 17, entered a guilty plea to that offense. (S. C. 46) In December 2014, at the age of 18, he entered a plea of guilty to possession of a stolen motor vehicle (PSMV). (S. C. 46) In August 2016, Denzal, then 20 years old, was charged with the instant offense, one count of PSMV. (R. 14, 15) Denzal turned 21 years old during the pendency of the pre-trial proceedings. He was convicted by a jury. (R. 347; S.C. 43) Based on the two prior offenses, the trial court sentenced him to a Class X term of six years in prison, to be followed by a three-year term of mandatory supervised release (MSR). (R. 371-72; C. 103) [1]

On appeal, the appellate court vacated Denzal's Class X sentence and remanded for resentencing to a Class 2 term, finding that Denzal's 2013 residential burglary, committed when he was 17 years old, "had it been committed under the laws in effect on August 13, 2016, would have been resolved through delinquency proceedings," so that the burglary was "not 'an offense now * * * classified in Illinois as a Class 2 or greater Class felony.' " *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 32, citing *People v. Miles*, 2020 IL App (1st) 180736, ¶ 11; 730 ILCS 5/5-4.5-9.5(b).

---

[1] During the proceedings on the instant PSMV charge, Denzal was released on electronic monitoring. He was injured and missed a court date, and was then charged with escape under case no. 16 CR 1601401. (R. 9-11, 14, 23-24)

The State filed a petition for leave to appeal (PLA) with this Court. In its PLA, the State argued *inter alia* that the appellate court's ruling conflicts with *Fitzsimmons v. Norgle*, 104 Ill.2d 369 (1984). Furthermore, in a reversal of its position in the appellate court, the State claimed for the first time in its opening brief in this Court, that the appellate court's reliance on this Court's decision in *People v. Taylor*, 221 Ill. 2d 157 (2006), is misplaced.

Denzal responds that the appellate court decision was correct, and that in 2017, Stewart's residential burglary offense from when he was 17 would have been resolved through delinquency proceedings, and was therefore not a qualifying prior conviction for purposes of the Class X sentencing statute. The trial facts from are set forth below.

Pre-trial proceedings

Through counsel, Denzal sought to resolve his case through a disposition other than a prison term.

In October 2016, Assistant Public Defender (APD) Debra Gassman stated that the 20-year old Denzal was "on medication," [2] and asked that he be evaluated for boot camp, which the court allowed. (R. 20, 27, 30); 730 ILCS 5/5-8-1.1. In December 2016, APD Gassman announced that Denzal was not accepted to boot camp because of his mental health status. (R. 39)

Also in December 2016, APD Gassman explained to the court that Denzal wanted to resolve the case with a disposition of probation, but

---

[2] The PSI reflects that Denzal has Attention Deficit Hyperactivity Disorder (ADHD) and bipolar disorder, and that he was taking Depakote. (S.C. 47, 49, 50)

because he had prior Class 1 and Class 2 convictions in his background, he was "not eligible for any type of probation." (R. 33-34) Denzal had previously been given TASC probation, which he had not successfully completed. (R. 34); 20 ILCS 301/40-5. The court explained to Denzal that he was not eligible for probation. (R. 35); 730 ILCS 5/5-5-3(c)(2)(C). APD Gassman then sought to have Denzal evaluated for mental health probation. (R. 39); 730 ILCS 168/1 *et seq*.

On February 2, 2017, while Denzal was still 20 years old, the State tendered a plea offer of three years in prison, and held it open until the following court date. (R. 42) At the next court date, on February 27, 2017, APD Michael Biel appeared for Denzal. (R. 45) The State stated that it had previously extended a plea offer for "less than a Class X"and that Denzal had rejected it. (R. 45) APD Biel requested evaluations both for TASC and drug court, noting that Denzal did not qualify for mental health probation. (R. 45)

In March 2017, APD Biel reported that TASC found Denzal acceptable. (R. 48) The State responded that Denzal was not eligible for TASC because he had received TASC in the past, and that he was not probationable. (R. 48) APD Biel agreed that a defendant may only get TASC once, and that as charged, Denzal did not qualify for Adult Re-Deploy, drug court, or mental health probation. (R. 48-49) APD Biel then stated:

> When my client was arrested and charged with the possession of stolen motor vehicle, he was 20 years old. Because he was only 20 years old, Judge, he is not X mandatory. 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. I just wanted to make that record. (R. 49-50)

Counsel then asserted that Denzal sought a 402 conference, but because the State had offered the minimum term, counsel opined that a conference was not "worthwhile." (R. 51) Nonetheless, the court admonished Denzal about the 402 conference, and Denzal agreed that the court should participate. (R. 51-52) The State again offered the minimum prison sentence on both charges: three years in prison on the PSMV and two years on the escape, to be served consecutively. The court agreed to go along with the State's recommendation. The court recognized that Denzal's drug addiction was driving his criminality, and advised him that his birthday in June would "significantly change" the mandatory minimum. The matter was continued for Denzal to consider the offer. (R. 53)

On April 17, 2017, APD Biel was not in court. Denzal asked for and was granted a continuance to speak with Biel about the court-approved March 2017 offer of a five-year aggregate prison sentence. (R. 56) On May 3, 2017, APD Biel told the court that he was wrong about his position on Class X sentencing. Biel specifically stated:

> it was my belief that based on the law, as of June 1st, when he turned 21 years of age, he would then be X mandatory, Judge. **I do not believe that is the case**. I believe that the X mandatory – the age of when someone is X mandatory is when they are – when the crime is charged. (R. 60)(emphasis added)

Neither the court nor the State responded. Denzal rejected the March 2017 offer of three years' imprisonment. (R. 60)

On the following court date, June 6, 2017, APD Biel asked for a BCX. (R. 64) After the interviews, on August 7, 2017, APD Biel stated there was no reason to conduct a fitness hearing, then asked the court to re-open the 402

conference, to ask for TASC probation once more. (R. 71-72)

The court noted that Denzal had been convicted of residential burglary, and that he had another pending case for the escape charge; both of these rendered Denzal ineligible for TASC probation. (R. 72-73)

The prosecutor stated that Denzal was Class X mandatory at that point, which would mean that the March 2017 offer of three years in prison on the PSMV followed by two years on the escape was invalid; therefore the offer would have to be six years imprisonment plus two years, instead. (R. 74) The State explained that the "recidivist statute" [3] requires the defendant to be 21 years old at the time of the conviction, which Denzal then was. (R. 75)

APD Biel disagreed that Denzal was Class X mandatory. Biel argued that the defendant's age at the time of the alleged commission of the offense triggered the recidivist statute, and because Denzal was only 20 years old at the time he was alleged to have committed PSMV, "in my reading of recent case law, Judge, he will never be Class X mandatory." (R. 75-76)

The court asked the parties to tender the cases in support of their respective interpretations of §95(b). (R. 75-76) APD Biel tendered *People v. Brown*, 2015 IL App (1st) 140508 (2015); the State tendered *People v. Smith*, 2016 IL 119659 (2016). (R. 76, 79) The court followed the *Smith* holding, that the defendant's age at the time of conviction is the deciding factor in determining whether §95(b) applies, making Denzal Class X mandatory. (R. 80) The court held that because Denzal was then 21 years old, the prior offer

[3] 730 ILCS 5/5-4.5-95.

of three years in prison plus two years was no longer valid, and that the minimum was now a six-year prison sentence plus two more years. (R. 82-83)

APD Biel asserted that *Smith* came down in March of 2017,[4] five months earlier, and argued that prior to *Smith*, the date of the offense or charge was the determining factor. (R. 80) Nonetheless, APD Biel agreed that because Denzal was 21 years old, he had become Class X mandatory. (R. 81) The matter was set for trial. (R. 83)

Jury trial and sentencing

At the jury trial, Frankie Tyler testified that on August 11, 2016, he owned a 1997 Chrysler Sebring convertible that was parked in his driveway. (R. 256) The following morning, the car was gone and he reported it stolen. (R. 256-57, 260) A few days later the police located the car and asked him to come look at it. Wires from the steering column were hanging down loose; the car did not look like that when Tyler last saw it. (R. 258) Tyler did not know Denzal and had not given him or anyone permission to take the Chrysler. (R. 258)

Chicago Police Officer Ronald Cavanaugh testified that he was working with his partner Officer Ramirez in full uniform in a marked "squadrol." (R. 274-75) The officers were on routine patrol around 8:45 PM on August 13, 2016, near 113th and Michigan when they spotted a 1997 Chrysler Sebring parked in a no-parking zone. (R. 275) Cavanaugh ran the plates through the on-board system and the system indicated that the car

[4] *Smith* came down in December 2016. 2016 IL 119659 (2016).

was stolen. (R. 275)

Just as the officers received the information, the car started driving away. (R. 276) The officers followed the Chrysler for a few blocks until it came to a stop. (R. 276) Cavanaugh confirmed via car radio that the car was stolen, then the officers pulled up behind the Chrysler and activated the emergency lights. (R. 276) The officers got out and approached the driver's side. (R. 277)

Cavanaugh identified Denzal as the driver of the car, and the only person inside. (R. 277) Cavanaugh could see the steering column as he approached. (R. 278) The plastic housing behind the steering wheel was cracked and damaged, with wires hanging out of the column. (R. 278)

The police ordered Denzal out of the car. He complied and was handcuffed. (R. 278-79) According to Cavanaugh, "[a]s he was being handcuffed, [Denzal] freely admitted that this is my uncle's vehicle. This is my uncle's car. It was stolen earlier. And I just got it back." (R. 279) Neither Cavanaugh nor his partner asked Denzal to write down his statement and sign it, nor did they write it down for him and have him sign it. (R. 293-94) There was no video or tape recording of the statement, only what Cavanaugh put in his report. (R. 293)

After the State rested, the court denied the defense motion for a directed verdict. (R. 300-01) Denzal elected not to testify and the defense rested without presenting evidence. (R. 302-03)

The jury returned a guilty verdict of PSMV. (R. 347); (S. C. 43) The court denied the motion for new trial. (R. 359-62, 363)

Sentencing

Defense counsel and the State agreed that Denzal was Class X mandatory due to prior offenses. (R. 364-65) One of the offenses, residential burglary, occurred in 2013, when Denzal was 17 years old. (S. C. 44, 46) The court sentenced Denzal to the six-year minimum term of imprisonment, recognizing that "except for the change in the law" Denzal could have gotten less than a six-year term. (R. 371) The court also made a boot camp recommendation, stating it was unlikely the camp would accept him because of the medicine he was taking and the escape charge. (R. 370-71) The court ordered a three-year term of mandatory supervised release, and 433 days credit for time served. (C. 103)

Immediately after, Denzal entered a guilty plea to escape in exchange for the minimum two-year prison sentence, to be served consecutively to the PSMV sentence. (R. 373-76)

Direct appeal

Denzal contended on direct appeal that the trial court erred when it found him eligible for Class X sentencing, because the first predicate offense, which he committed in 2013 at the age of 17, would have been adjudicated in juvenile court at the time of the present offense and should not count as a "conviction" for the purposes of the Class X statute. *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 26. The appellate court agreed:

> [Denzal]'s 2013 burglary is not "an offense now *** classified in Illinois as a Class 2 or greater Class felony." Rather, [his] prior 2013 burglary conviction, had it been committed under the laws in effect on August 13, 2016, would have been resolved through delinquency proceedings. ... The offense would have led to a

> juvenile adjudication rather than a felony conviction. As such, [Denzal]'s 2013 conviction is not a qualifying prior offense for Class X sentencing.

Stewart, 2020 IL App (1st) 180014-U, ¶ 32. The appellate court vacated Denzal's Class X sentence and remanded for resentencing as a Class 2 offense. *Id*. ¶ 39.

The State filed a petition for leave to appeal (PLA) on June 24, 2020. This Court allowed the State's PLA on January 27, 2021.

ARGUMENT

I. 720 ILCS 5/5-4.5-95(b) only considers whether the prior offenses would "now" be classified as Class 2 or greater felonies. Denzal's 2013 conviction in adult court for residential burglary from when he was a minor would now be under the exclusive jurisdiction of the juvenile court, and is thus not a qualifying offense. Consistent with the appellate court's decision, remand for a new sentencing hearing as a Class 2 offender, is therefore appropriate.

On November 29, 2017, the trial court sentenced Denzal Stewart as a Class X offender to six years in prison for possession of a stolen motor vehicle (PSMV), a Class 2 felony. (R. 371; C. 103); 730 ILCS 5/5-4.5-95(b)(2017) (§95(b)); 625 ILCS 5/4-103(A)(1)(2017). Denzal's Class X sentence was predicated in part on a 2013 residential burglary, committed when he was 17 years old. (S. C. 44, 46) However, in 2017, Denzal's 2013 residential burglary could not trigger a mandatory Class X term because he was only 17 years old at the time of that offense. Mandatory Class X sentencing applies *only* if the defendant was previously convicted of two offenses "now" classified (2017, on the date of the trial and sentence on the current charge) as Class 1 or Class 2 felonies. §95(b). In 2017, because of recent changes in the Juvenile Court Act (JCA), supported by scientific advances in the understanding of adolescents' brain development, the 2013 offense would be resolved through delinquency proceedings rather than in the criminal court, and thus it is not an offense *now* (at the time of Denzal's 2017 conviction) classified as a Class 2 or greater felony. §95(b); 705 ILCS 405/5-120 (2017); 705 ILCS 405/5-130 (2017).

Consistent with the appellate court decision below, this Court should affirm the appellate court's holding and remand for a new sentencing

hearing, where Denzal will be sentenced as a Class 2 offender. *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 32 ("[Denzal]'s 2013 burglary is not 'an offense now *** classified in Illinois as a Class 2 or greater Class felony.' Rather, [Denzal]'s prior 2013 burglary, had it been committed under the laws in effect on August 13, 2016, would have been resolved through delinquency proceedings."), citing *People v. Miles*, 2020 IL App (1st) 180736, ¶ 11 (holding that a defendant's 2006 conviction, had it been committed in 2016, would have been resolved with delinquency proceedings and therefore is not a qualifying offense for Class X sentencing.); *People v. Ruiz*, 2021 IL App (1st) 182553, ¶ ¶ 53-63 (following *Miles* and finding that defendant's 2006 prior robbery conviction from when he was 17 years old is not an offense now classified in Illinois as a Class 2 or greater Class felony, and therefore cannot serve as a predicate offense for Class X sentencing).

Standard of Review

Whether Denzal's conviction in adult criminal court for an offense he committed at age 17 could be a qualifying prior offense for purposes of mandatory Class X sentencing involves a question of statutory construction. As such, it is a question of law subject to *de novo* review. *People v. Baskerville*, 2012 IL 111056, ¶ 18.

Use of Date of Conviction for the 2017 PSMV

Throughout Argument I, Denzal uses 2017, the date he was convicted of the instant PSMV offense, pursuant to *People v. Smith*, 2016 IL 119659, ¶31, in which this Court held that "the plain language of [§95(b)], provides that a defendant must be 21 years old when he is convicted in order to be

eligible for Class X sentencing." In *Smith*, this Court was not asked, nor did it consider, the constitutional ramifications of the plain language of §95(b), which permits a defendant who is **under** 21 years-old on the date of the alleged commission of an offense, and therefore **not** eligible under §95(b), to "age into" a Class X term of years, based on the length of his court proceedings, and other factors beyond his control. The constitutionality of the statute, as applied to Denzal and other similarly-situated defendants, is addressed in Argument II, *infra*.

A. Under the plain language of §95(b), Denzal was not subject to mandatory Class X sentencing. In 2017, Denzal's 2013 residential burglary offense as a 17-year old would not be classified as a Class 2 felony conviction in 2017, because residential burglary by a 17-year old in 2017 was under the exclusive jurisdiction of the Juvenile Court.

This Court has held that when interpreting a statute, the court's "primary objective is to ascertain and give effect to the intent of the legislature." *People v. Molnar*, 222 Ill. 2d 495, 518 (2006); *Baskerville*, 2012 IL 111056, ¶ 18. The language of the statute is the best indicator of intent. *People v. Taylor*, 221 Ill. 2d 157, 162 (2006). A clear and unambiguous statute will be applied without the use of aids of statutory construction. *Molnar*, 222 Ill. 2d at 518-19. Courts should not, under the guise of statutory interpretation, remedy an apparent legislative oversight by rewriting a statute in a way that is inconsistent with its clear and unambiguous language. *Taylor*, 221 Ill. 2d at 162-63. Furthermore, criminal and penal statutes should be "strictly construed in favor of the accused, [with] nothing *** taken by intendment or implication beyond the obvious or literal meaning

of the statute." *Id*. at 162 (internal quotation omitted).

The mandatory Class X sentencing statute in 2017 provided:

> (b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having 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 and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:
>
> (1) the first felony was committed after February 1, 1978 * * * ;
> (2) the second felony was committed after conviction on the first; and
> (3) the third felony was committed after conviction on the second. ***

§95(b) (2017) (emphasis added).

The plain language of the mandatory Class X statute in effect at the time that Denzal was convicted of PSMV explicitly and unambiguously states that courts must look to how an offense would be classified "now," at the time a defendant is convicted of the present offense. *See Baskerville*, 2012 IL 111056, ¶ 18 (discussing principles of statutory interpretation). For purposes of this argument, "now" in §95(b) means **2017**, when Denzal was convicted of the PSMV. *Smith*, 2016 IL 119659, ¶31. In 2017, when Denzal was convicted (C. 103), residential burglary by a 17-year-old would have been heard in juvenile court, and would have resulted in an adjudication rather than a conviction. (*See* Sec. B., *infra*).

The trial court, in imposing what it believed was a mandatory Class X sentence, did not, however, consider how Denzal's prior 2013 offense would

now be classified. Rather, the court simply found that because Denzal had been convicted of a 2013 residential burglary, in addition to a 2014 PSMV, the sentencing range for the 2017 Class 2 PSMV must be elevated to a Class X sentence range of between six to 30 years instead of the Class 2 sentencing range of three to seven years in prison. 730 ILCS 5/5-4.5-95(b) (2017); 730 ILCS 5/5-4.5-35 (2017). The court did not consider the fact that the 2013 residential burglary occurred when Denzal was 17 years old, which in 2017 would mean that he would be subject to a juvenile adjudication and not a felony conviction in adult criminal court.

Therefore, as the appellate court recognized, under the plain language of the statute, Denzal did not qualify for a mandatory Class X term under §95(b). *Stewart*, 2020 IL App (1st) 180014-U ¶ 32.

B. Under the law in 2017 Denzal's 2013 residential burglary offense would not be classified as a Class 1 or 2 felony conviction but as a juvenile adjudication.

Recent changes to the Juvenile Court Act (JCA) show that Denzal's 2013 offense would now be entirely resolved in juvenile court, and would not be transferred to adult criminal court under any transfer provision, contrary to the State's assertions otherwise. *See* (St. Br. 10-11)

To begin, the residential burglary case would start out in juvenile court. In 2013, the legislature revised the JCA to raise the maximum age for which a teenager would remain under juvenile court jurisdiction for an offense that was not subject to automatic transfer. *See* Pub. Act 98-61 (eff. Jan. 1, 2014); 705 ILCS 405/5-120 (2017). This change from under 17 to under 18 years would have *directly* affected Denzal because he was 17 years

old at the time of his 2013 offense, residential burglary. (S. C. 44, showing Denzal's date of birth as June 1, 1996, and the date that Denzal pled guilty to the offense as November 11, 2013). Thus, the 2013 residential burglary, if committed in 2017 (the date he was convicted on the current offense), would have fallen under the jurisdiction of the Juvenile Court, and not the adult criminal court, as posited by the State. (St. Br. 10-11)

The 2013 residential burglary case would remain in juvenile court and not be transferred under the automatic, presumptive, or discretionary transfer provisions. The 2013 residential burglary offense, under the 2017 JCA scheme, would not qualify as one that would subject Denzal to *automatic transfer* to adult criminal court. (St. Br. 10) On January 2016, another amendment to the JCA went into effect that raised the age of automatic transfer to adult court from 15 years old to 16 years old for first degree murder, aggravated criminal sexual assault, and aggravated battery with a firearm. 705 ILCS 405/5-130; Pub. Act 99-258. The 2016 change provides that: "These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this state." 705 ILCS 405/5-130(1)(a). Denzal's offense, residential burglary, is not included among those offenses. Thus, were the 2013 residential burglary case to have been heard in 2017, it would not have been automatically transferred to adult criminal court. 705 ILCS 405/5-130(1)(a); *see* (St. Br. p. 10, "certain offenses *must* be adjudicated in adult court.") (emphasis in original).

Nor would Denzal be subject to *presumptive transfer* had the residential burglary been committed in 2017, because the 2016 amendments

to the JCA changed the Transfer of Jurisdiction provision. 705 ILCS 405/5-805 (2016). Prior to 2016, any defendant who was at least 15 years old and accused of a wide variety of offenses, including, other than armed violence, any other Class X felony, would be *presumed* to be subject to transfer. 705 ILCS 405/5-805(2)(a) (2015). With the 2016 amendments, the legislature further restricted presumptive transfer to only those 15-years-or-older defendants accused of committing a forcible felony in furtherance of illegal gang activity and who also had a prior adjudication or conviction for a forcible felony. 705 ILCS 405/5-805(2)(a) (2017); Pub. Act 99-258. The record demonstrates that, in 2013, Denzal had no prior adjudications or convictions for forcible felonies, and there is no indication that the residential burglary offense had anything to do with gang activity. (S. C. 45-49, 50 ("denies gang involvement")) Thus, Denzal's 2013 residential burglary offense is not one that would have been subject to presumptive transfer in 2017. *See* (St. Br. p. 10, "other juvenile cases are presumptively transferred to adult court.").

Finally, there is no reason to conclude Denzal would have been subject to *discretionary transfer* under the laws in effect in 2017 for the residential burglary offense. The discretionary transfer provision in effect in 2017 explicitly requires the court to consider a wide variety of factors about the juvenile offender's social history, rehabilitative potential and circumstances of offense. 705 ILCS 405/5-805(3)(b) (2017) (§5-805 transfer). The discretionary transfer statute provides, "In considering these factors, the court shall give greater weight to the seriousness of the alleged offense, the minor's prior record of delinquency than to the other factors listed in this

subsection." 705 ILCS 405/5-805(3)(b). Here, where the State did not present any prior record of delinquency, the issue of discretionary transfer would not have arisen. *See* (St. Br. pp. 10-11, "still other offenses are subject to discretionary transfer to adult court, on the People's motion.").

Moreover, Denzal was the type of adolescent that the 2017 laws are meant to protect from adult criminal court. Denzal's presentence investigation report indicates that his biological father is "unknown." (S. C. 47) Denzal was raised by his mother and step-father, who passed away suddenly in 2011 from a blood clot when Denzal was 14 years old. (S. C. 47) Denzal admitted that he only began getting into trouble when his step-father - "the only father figure he ever had" - passed away. (S. C. 47); *See* Institute of Medicine (US) Committee for the Study of Health Consequences of the Stress of Bereavement; Osterweis M, Solomon F, Green M, editors. Bereavement: Reactions, Consequences, and Care. Washington (DC): National Academies Press (US); 1984. CHAPTER 5, *Bereavement During Childhood and Adolescence*, (citing studies in which "[d]elinquency has been found to correlate with parental bereavement," and that parental loss in boys generates an increased likeliness to "engage in petty theft, car-stealing, fights, drug-taking, or testing authority systems.") Available from: https://www.ncbi.nlm.nih.gov/books/NBK217849/*; see Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (Observing the greater vulnerability to "negative influences and outside pressures" to which young people are subject).

In addition, Denzal admitted that he had substance abuse problems, such as "drink[ing] his problems away." (Sup C. 49) Denzal began smoking

marijuana at age 11, and turned to ecstasy three years later. (Sup. C. 49) He used Xanax and other drugs whenever he could get them, and reported being "high all the time." (Sup. C. 49) In fact, the trial court recognized during the pre-trial proceedings that Denzal's offenses were "fueled by drug addiction." (R. 53) In other words, the trial court understood that such self-medication had negative effects on Denzal's psychological state. "[A]ddiction diminishes the addict's capacity to evaluate and control his or her behaviors." *United States v. Walker*, 252 F. Supp.3d 1269, 1292 (D. Utah 2017). Additionally, "drugs of abuse are characterized as 'hijacking' the neuro-biological mechanisms by which the brain responds to reward ... addiction biologically robs drug users of their judgment, causing them to act impulsively and ignore the future consequences of their actions." *United States v. Hendrickson*, 25 F.Supp.3d 1166, 1172-73 (N.D. Ia. 2014).

Unlike in 2013, courts now more routinely recognize that "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be evidence of 'irretreivabl[e] deprav[ity],'" and that juveniles thus have "greater prospects for reform." *Miller*, 567 U.S. at 470. Thus scientific advances in the understanding of adolescent brain development, and a corresponding shift in attitude towards what constitutes fair and just proceedings for young offenders, would have made a discretionary transfer of Denzal's 2013 property-based offense inappropriate, especially because he had no prior record of delinquency. Notably, the State does not suggest any basis for such a transfer. (St. Br. 10-11)

This conclusion is furthered supported by statistical data gathered by

the Illinois Juvenile Justice Commission. *See,* Trial and Sentencing of Youth as Adults in the Illinois Justice System: Transfer Data Report (IJJ Report), attached at Appendix.[5] The IJJ Report reflects that statewide, the charges most often discretionarily transferred from juvenile court to adult court via §5-805 motion were first degree murder and armed robbery. *See* IJJ Report, p. 16 (showing 18 §5-805 motion transfers for first degree murder, and 14 §5-805 transfers for armed robbery) In all of Illinois, only *one* juvenile residential burglary case was subject to §5-805 motion transfer to adult court in 2017, in Champaign County. IJJ Report, p. 16, 21. And in Cook County, where Denzal pleaded guilty to residential burglary, the *only* charges that were transferred in 2017 under §5-805 were for armed robbery and first degree murder. IJJ Report, p. 23. In fact, the *only* residential burglary case transferred to adult court in Cook County in 2017 was pursuant to §**5-815**, the habitual offender provision, *see* IJJ Report, p. 23, which Denzal would not have qualified for, as the residential burglary was his first offense. (S. C. 46) The State bears the burden of proving that Denzal would have been transferred to adult criminal court in 2017 on a residential burglary charge, and it failed to do so.

The State's assertion, that Denzal *may* have been discretionarily transferred to adult court pursuant to §5-805 motion, on a residential burglary charge, is not only pure conjecture but belied by the statistical data

[5] IJJ Report available online at http://ijjc.illinois.gov/publications/trial-and-sentencing-youth-adults-illinois-justice-system-2020-transfer-data-report.

gathered by the IJJ Report. This Court should not accept the State's imaginary scenario in lieu of empirical evidence to the contrary.

Further, the State forfeited its contention that the 2013 residential burglary "may" have been resolved in adult court by failing to raise the claim in the appellate court or in its petition for leave to appeal. Supreme Court Rule 315(c)(3) requires that petitions for leave to appeal contain a "statement of the points relied upon for reversal of the judgment of the Appellate Court." *MD Elec. Contractors, Inc. v. Abrams*, 228 Ill.2d 281, 299 (2008) (citing 210 Ill.2d R. 315(c)(3)). "If a party fails to raise an issue in its petition for leave to appeal, it may be deemed a forfeiture of the issue." *Id*. (citing *Central Illinois Light Co. v. Home Ins. Co.*, 213 Ill.2d 141, 152 (2004)). Additionally, under Supreme Court Rules 315 and 341, "a party is required to raise its arguments and provide citation to legal authority in its appellate brief and in its petition for leave to appeal to avoid waiver." *People v. Davis*, 213 Ill.2d 459, 470 (2004). The State failed to raise the argument that Denzal's 2013 residential burglary may have been subject to transfer to criminal court in its appellate court brief or PLA. Accordingly, this claim is forfeited and should not be considered by this Court. *See People v. Williams*, 235 Ill. 2d 286, 299 (2009) (finding claim twice forfeited where party failed to raise it in appellate court or in its PLA.).

Under the law in effect in 2017, a 17-year old accused of residential burglary would not be automatically transferred to criminal court due to the nature of the offense. Nor would a teenager with no prior adjudication for a forcible felony be presumptively transferred. And it would be extremely

unlikely, based on statistical data, that a 17-year old with no juvenile or criminal background charged with a property offense such as residential burglary would be discretionarily transferred. Thus, Denzal's charges in 13CR1512202 would, under the law in effect in 2017, begin in juvenile court and would have been resolved there.

Under the plain language of §95(b), the sentencing court must look to how the predicate offenses would "now" be classified. At the time he was convicted of the PSMV here, a 17 year-old with Denzal's background accused of residential burglary would be subject to juvenile jurisdiction. This means that Denzal's 2013 offense would not "now" result in a felony conviction. *Stewart*, 2020 IL App (1st) 180014-U, ¶ 32; *Miles*, 2020 IL App (1st) 180736, ¶ 22.

C. Section 95(b) does not apply to juvenile adjudications.

Section 5/5-4.5-95(b) looks to whether the defendant has twice been previously convicted of an offense **now classified** as a Class 1 or Class 2 felony. That section does not apply to juvenile adjudications because the language in the statutes governing delinquent minors provides: (1) that an offense that would be considered a felony if committed by an adult is not considered a felony when committed by a minor, and (2) that juvenile adjudications are not considered convictions. Because of this, prior felony convictions in adult court that now would be adjudications in juvenile court may not be used as predicates for mandatory Class X sentencing.

First, as this Court recognized in *Taylor*, it is well established that a juvenile adjudication is not a criminal "conviction." 221 Ill.2d at 166-67, 170

(prosecutions under the JCA are not criminal in nature, rehabilitation is a more important consideration under the Act than under the Criminal Code, and there are important differences between the two); *see also, In re Jonathon C.B.*, 2011 IL 107750, ¶ ¶ 190-97, *modified on denial of rehearing* (amendments to JCA that changed terminology used concerning delinquency proceedings did not render a delinquency adjudication the legal equivalent of a felony conviction.); *In re Rodney H.*, 223 Ill.2d 510, 520 (2006) (proceedings under the JCA are protective and not criminal in nature, and purpose is not to punish); *In re A. G.*, 195 Ill.2d 313, 317 (2001) (proceedings under the JCA are not criminal in nature and are to be administered in a spirit of humane concern for, and to promote welfare of, minor).

Moreover, Your Honors observed that "[i]t is readily apparent that the legislature understands the need for specifically defining a juvenile adjudication as a conviction when that is its intention." *Taylor*, 221 Ill. 2d at 178. Here, §95(b) does not explicitly include juvenile adjudications but requires that prior offenses "now" be classified as Class 1 or Class 2 convictions. Because the 2013 residential burglary would "now" be adjudicated in the juvenile court, it is not a qualifying conviction.

Second, the language of the delinquent minor statutes shows that an offense is classified as a felony only when the defendant was subject to criminal prosecution in an adult court, not when he was subject to juvenile adjudication. For instance, the Extended Jurisdiction statute indicates the State may petition for a criminal proceeding when it "alleges the commission by a minor 13 years of age or older of any offense which *would be* a felony if

committed by an adult." 705 ILCS 405/5-810 (2017) (emphasis added). The implication here is, of course, that the offense is *not* a felony when committed by a juvenile. The Illinois Supreme Court Rules make the same distinction: "These [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. S. Ct. Rule 411 (emphasis added); *see also, e.g.*, 730 ILCS 150/3-5(c), 730 ILCS 5/5-5-3.2(b), and 20 ILCS 2630/5 (2017) (discussing offenses that *would be* felonies if committed by adults but are not when committed by juveniles).

Section 95(b) is part of the Code of Corrections, which contains a section defining the words and terms used therein. See 730 ILCS 5/5-1-1 ("For the purposes of this Chapter, the words and phrases described in this Article have the meanings designated in this Article, except when a particular context clearly requires a different meaning.") The legislature defined the term "conviction" as it is used in the Corrections Act (under which § 95(b) falls), and that definition does not include adjudications of delinquent minors. 730 ILCS 5/5-1-5 (" 'Conviction' " means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.") That is, the legislature defined convictions in a way that excludes juvenile adjudications, for purposes of the Code of Corrections. Thus, juvenile adjudications are not qualifying offenses under §95(b). Where the legislature has provided

definitions of any terms within its enactment, such definitions for the purposes of its acts will be upheld. *Mack v. Seaman*, 113 Ill. App. 3d 151, 154 (1st Dist. 1983); *Chicago-Midwest Meat Association v. City of Evanston*, 96 Ill. App. 3d 966, 969 (1st Dist. 1981); accord, *People v. Harman*, 125 Ill. App. 3d 338, 345 (2d Dist. 1984) ("separate acts with separate purposes need not define similar terms in the same way, and the meaning of words within the statute is dependent upon the connection in which the word is used, the object or purpose of the statute and the consequences which probably will result from the proposed construction.")

Section 95(b) is limited by its plain language to criminal "convictions" and does not refer to juvenile adjudications at all. This is in marked contrast to similar statutes in the same Chapter that explicitly state that juvenile adjudications may be considered. *See e.g.*, 730 ILCS 5/5-5-3.2(b)(7) (authorizing consideration of prior adjudication of delinquency for "an act that if committed by an adult would be a Class X or Class 1 felony" as reason for imposing extended term sentence). *See also*, 730 ILCS 150/2(a)(5)(defining "sex offender" to include those adjudicated delinquent of acts that "if committed by an adult" would constitute one of a list of offenses); and 730 ILCS 150/3-5(c)(extending registration requirements to those "adjudicated delinquent for an offense which, if charged as an adult, would be a felony"). Reading §95(b) in context with those statutes, it becomes clear that the legislature excluded juvenile adjudications from being used as qualifying offenses for §95(b).

It is notable that the extended-term sentencing statute, which outlines

factors in aggravation and extended-term sentencing, is the exception that proves the rule. 730 ILCS 5/5-5-3.2. There, the plain language of the statute explicitly provides for the consideration of juvenile adjudications. 730 ILCS 5/5-5-3.2(b)(7) (2017) (discussing offenses that *would be* felonies if committed by adults but are not when committed by juveniles). This statute is under the same Sentencing Chapter as §95(b), Chapter 5 of the Code of Corrections. The explicit *inclusion* of juvenile adjudications in the extended-term statute demonstrates that those adjudications are excluded, unless the legislature provides explicitly otherwise in the statute. Plainly, the legislation knows how to include adjudications when it so desires.

In *People v. Jones*, 2016 IL 119391, this Court looked to the extended-term sentencing statute to determine whether a prior juvenile adjudication was the equivalent of a prior criminal conviction for purposes of extended-term sentencing under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The relevant language appeared in subsection (b)(7), which sets forth various factors to be considered as reasons to impose an extended-term sentence and provides as follows:

> When a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony and *has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X or Class 1 felony* when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody."

730 ILCS 5/5-5-3.2(b)(7) (emphasis added).

The statute at issue in *Jones* explicitly provides for the consideration of prior juvenile adjudications as a basis for imposing an extended-term

sentence, while §95(b) fails to include adjudications of delinquency. *Compare* 730 ILCS 5/5-5-3.2(b)(7), *with* 730 ILCS 5/5-4.5-95(b). This difference is dispositive. "When the legislature decides to authorize certain sentencing enhancement provisions in some cases, while declining to impose similar limits in other provisions within the same sentencing code, it indicates that different results were intended." *People v. Bailey*, 2015 IL App (3d) 130287, ¶ 13, *citing Condell Hospital v. Illinois Health Facilities Planning Board*, 124 Ill.2d 341, 366 (1988) (the mention of one thing implies the exclusion of the other).

Here, the legislature included adjudications of delinquency in certain statutes in the Sentencing Chapter of the Code, 730 ILCS 5, and omitted adjudications from §95(b), within the same chapter. According to this Court's precedent, this omission must be understood as an exclusion. *Id.*

This is not merely an exclusion by implication, either. "Under the doctrine of *in pari materia*, two statutes dealing with the same subject will be considered with reference to one another to give them harmonious effect." *People v. McCarty*, 223 Ill. 2d 109, 133 (2006). Within the same Chapter ("Sentencing"), the legislature explicitly included consideration of prior adjudications of delinquency for extended-term sentencing, 730 ILCS 5/5-5-3.2, showing its awareness of the different terms and ability to use where it specifically desired.

The legislature has explicitly included consideration of juvenile adjudications in other sections of the Corrections Code. In *In re J.W.*, 204 Ill. 2d 50, 64 (2003), this Court considered whether a person adjudicated as a

delinquent minor was required to register for life under the Sex Offender Registration Act ("SORA"). SORA provides that those "convicted" of aggravated criminal sexual assault are required to register. *Id.* at 63-64. This Court interpreted SORA to require those adjudicated delinquent for this offense to register, because the statute explicitly provides that, "[f]or purposes of this Section, 'convicted' shall have the same meaning as 'adjudicated.'" *Id.* at 63 (quoting 730 ILCS 150/2(A-5) (2000)). SORA's express provision that an adjudication be treated as a conviction was the basis for this Court's decision in *In re J.W.*, and strictly distinguishes it from statutes without such language. *Taylor*, 221 Ill. 2d at 178 (discussing *J.W.*). Unlike SORA, §95(b) does not treat adjudications as convictions. Similarly, the Murderer and Violent Offender Against Youth Registration Act (VOYRA) of the Corrections Code, presents another example of the legislature specifically including adjudications with adult convictions. Under VOYRA, the legislature defined "convicted" more broadly: "[f]or purposes of this Section, "convicted" shall have the same meaning as "adjudicated." 730 ILCS 154/5(a)(2). The VOYRA definition thus demonstrates that when the legislature wants to include adjudications in the term "conviction," it knows how to do so and will do so explicitly.

The statutory rule of construction *expressio unius est exclusion alterius* ("the expression of one thing is the exclusion of another") supports this conclusion. This rule of construction "expresses the learning of common experience that when people say one thing they do not mean something else." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 152 (1997) (citation

omitted). When a statute contains a list, the doctrine of *expressio unius est exclusion alterius* gives rise to an inference that "all omissions [from that list] should be understood as exclusions, despite the lack of any negative words of limitation." *In re C.C.*, 2011 IL 111795, ¶ 34 (citing *People v. O'Connell*, 227 Ill. 2d 31, 37 (2007)).

It is true that, 35 years ago and in a different context, this Court stated that "[n]o distinction is drawn between convictions rendered while the defendant was a juvenile and those which occur after the defendant is no longer subject to the authority of the juvenile court." *Fitzsimmons v. Norgle*, 104 Ill. 2d 369, 372-73 (1984); (St. Br. 7). However that case does not apply here for several different reasons.

Initially, it must be stressed that *Fitzsimmons* involved a different statute with very different language. At issue in *Fitzsimmons* was whether the defendant, who, as a minor, had been convicted in adult court of a Class 2 felony, was subject to a provision stating that probation shall not be imposed for a "Class 2 or greater offense if the offender had been convicted of a Class 2 or greater felony within ten years of the date on which he committed the offense for which he is being sentenced." Ill. Rev. St. 38 § 1005-5-3(c)(2)(F) (1981); *Fitzsimmons*, 104 Ill. 2d at 371.

Unlike §95(b), the statute at issue in *Fitzsimmons* had no temporal requirement. By using the term "now," §95(b) explicitly requires that the old offense be evaluated on the basis of the standards in effect at the time of conviction on the new offense. 730 ILCS 5/5-4.5-95(b) ("*** after having twice been convicted *** of an offense that contains the same elements an offense

now (the date the Class 1 or Class 2 felony was committed) classified") (emphasis added). The *Fitzsimmons* statute, on the other hand, had no such timing qualification, and asked only whether the defendant had been convicted of an offense that had ever been classified as Class 2 or greater, without regard to whether that prior offense would still be classified the same way at the time of conviction on the new offense.

Second, there is no indication that the classification of the defendant's prior offense in *Fitzsimmons* would have changed between the time of his prior conviction and the time he was sentenced on his current conviction. That defendant was convicted in adult court as a minor, and the legislature had not changed the applicable criminal statutes so that he would not, at the time of his later conviction, have been subject to the same adult proceedings for the prior offense. By contrast, the legislative statutes applicable to Denzal had changed radically between the 2013 offense and sentencing on the 2017 offense. Accordingly, even if the statute at issue in *Fitzsimmons* had, like the statute here, referred to the state of the laws at the time of the subsequent conviction, the outcome for the *Fitzsimmons* defendant would have been the same.

Moreover, it is essential to stress that the determination in *Fitzsimmons* that juvenile adjudications are "convictions" is in direct contravention to the more recent determination by this Court in *Taylor* that a juvenile adjudication is *not* a criminal conviction. *See, e.g.*, *Taylor*, 221 Ill. 2d at 177; *also, People v. Wallace*, 331 Ill. App. 3d 822, 837 (5th Dist. 2002); *People v. Rankin*, 297 Ill. App. 3d 818, 824 (4th Dist. 1998). Section 95(b) is

limited by its plain language to "convictions." Accordingly, contrary to the State's contention, the language in *Fitzsimmons* is inapplicable to this case.

In a footnote, the State cites two appellate court cases from more than two decades ago that rely on *Fitzsimmons* to hold that juvenile adjudications should be treated no differently than adult criminal convictions under §95(b). (St. Br. 8, fn. 4); *see People v. Bryant*, 278 Ill. App. 3d 578 (1st Dist. 1996); *People v. Banks*, 212 Ill. App. 3d 105 (5th Dist. 1991). Those cases are not applicable here for several reasons.

First, *Bryant* and *Banks* base their conclusions on *Fitzsimmons*, which, as discussed above, construed a different statute than the one at issue here. Unlike §95(b), the statute in *Fitzsimmons* did not explicitly look at the classification of the old offense at the time of the *new* offense. 730 ILCS 5/5-4.5-95(b). Rather, the statute at issue in *Fitzsimmons* asked only whether the defendant had been convicted of a Class 2 or greater felony, without regard to whether that prior would still be so classified, at the time of the new offense.

Second, in *Banks* and *Bryant*, the question before the court was different than that posed here. In those cases, the issue was whether the use of a juvenile adjudication as a qualifying offense under §95(b) constituted an improper double enhancement because the JCA had allowed the defendant to be tried as an adult and then that conviction was used to satisfy the requirement of a prior Class 2 or greater conviction under §95(b). *Banks*, 212 Ill. App. 3d at 107; *Bryant*, 278 Ill. App. 3d at 586. While the *Banks* and *Bryant* courts rejected the argument related to double enhancement, they did not consider the principles of §95(b) set forth here, and thus their holdings

are not relevant to this Court's analysis.

Third, *Banks* and *Bryant* were both decided more than 20 years ago, prior to the increased understanding of juvenile culpability by scientists and the courts. *Roper v. Simmons*, 543 U.S. 551 (2005), the case that began our legal system's recent reevaluation of juvenile culpability, was still about a decade in the future when *Banks* and *Bryant* were decided. Those cases were not decided in today's context, where the legislature and courts have become increasingly uncomfortable with lifelong repercussions for crimes committed as a juvenile.

Finally, like *Fitzsimmons*, *Bryant* and *Banks* predate this Court's decision in *Taylor*. Indeed, all three of the cases were decided many years before the amendments to the JCA which, as discussed above, demonstrate that the legislature intended that adult convictions of juveniles in criminal court should be treated differently than criminal convictions of an adult. *Miles*, 2020 IL App (1st) 180736, ¶ 21 (same); *see also Williams*, 2020 IL App (1st) 190414, ¶ 20 (same); *People v. Martinez*, 2021 IL App (1st) 182553, ¶ 63 (same); *People v. Gray*, 2021 IL App (1st) 191086, ¶ 16 (applying *Miles*, finding that defendant's prior conviction, at age 17, for delivery of a controlled substance was not a valid predicate for armed habitual criminal).

In its brief, the State, for the first time, argues that the appellate court's reliance on *Taylor* is "misplaced." (St. Br. 13) Notably, in the appellate court, the State citing to *Taylor*, agreed that a juvenile adjudication is not a conviction. *See* (App. Ct. St. Br. p. 24: "The People agree that "convicted" as used in [§95(b)] requires a finding of guilt and sentence in criminal court and

not simply an adjudication under the Juvenile Court Act. *See People v. Taylor*, 221 Ill. 2d, 157, 176-78 (2006).") The State, relying on *Taylor*, in its PLA, specifically said a juvenile adjudication "would *not* qualify [Stewart] for Class X sentencing," and that, "a juvenile adjudication is not a "conviction" as defined by section 2-5 of the Criminal Code or section 5-1-5 of the Code of Corrections.") (State PLA, p. 6) (emphasis in original). As such, the State should be estopped from taking a contrary position in this Court. *See People v. Wells*, 182 Ill. 2d 471, 490 (1998) (State estopped from making *laches* argument on appeal where State never asserted doctrine until case reached Supreme Court). In the alternative, the State has forfeited its change of position concerning *Taylor* by failing to raise it in the appellate court or in its PLA. *See People v. Williams*, 235 Ill. 2d 286, 299 (2009) (finding claim twice forfeited where party failed to raise it in appellate court or in petition for leave to appeal.); *see also, People v. Davis*, 213 Ill.2d 459, 470 (2004) (under Supreme Court Rules 315 and 341, "a party is required to raise its arguments and provide citation to legal authority in its appellate brief and in its petition for leave to appeal to avoid waiver.")

D. Because §95(b) looks to the state of the law at the time of the latest sentence, it does not matter that the amendments to the JCA are not retroactive.

The 2016 amendments to the Juvenile Court Act, which raised the age of automatic transfer to the adult criminal courts to age 16, and which limited presumptive transfers to teenagers accused of committing a forcible felony in furtherance of illegal gang activity and who also had a prior adjudication or conviction for a forcible felony, do not apply retroactively to

matters no longer pending in the trial court. *See People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶¶ 31-35; (St. Br. 9, citing *People v. Richardson,* 2015 IL 118255, ¶ 10). However, because §95(b) looks to the current state of the law, the prospective nature of the revisions to the JCA does not affect it. Section 95(b) looks to whether the defendant has been convicted of an "offense *now classified* as a Class 2 or greater felony," not whether the defendant was convicted of an offense that, at the time of that offense, was classified as a Class 2 or greater felony. Accordingly, the State's citation to *Richardson* is misplaced. (St. Br. 9) Contrary to the State's intimation, whether the amendments to the JCA are prospective has no impact on §95(b). (St. Br. 9-10)

Moreover, in *Richardson*, the sole issue before this Court was whether the saving clause in the exclusive jurisdiction provision of the JCA violated the defendant's equal protection rights because the 17-year-old defendant did not get the benefit of the amendment where he committed the offense before that change. 2015 IL 118255, ¶ 1. At the time of his alleged offenses, the JCA only applied to minors under 17 years of age. *Id*. ¶ 3. The exclusive jurisdiction provision was subsequently amended to apply to minors under the age of 18, but the change only applied prospectively. *Id*. This Court rejected the defendant's equal protection argument and maintained that the amendment did not apply to 17-year-old juveniles who committed offenses prior to the amendment. *Id*. ¶ 10.

Richardson is inapplicable to Denzal's case, because unlike in *Richardson*, the question here does not concern the application of the JCA to

Denzal at the time he committed his 2013 offense; rather, the question is whether the 2013 case qualified as a predicate offense in 2017. Contrary to the State's contention, Denzal is not asking that his 2013 residential burglary be reclassified as a juvenile adjudication, but explaining that it *would be* a juvenile adjudication if committed in 2017, at the time of the PSMV. Even under a prospective application of the JCA that is true. 705 ILCS 405/5-120.

E. *People v. Reed* is an outlier, and its analysis is unsupported.

Every court that has addressed §95(b) has held that the plain language of the statute, with its "focus on the elements of the prior offense," is "clear and unambiguous." *See, e.g., People v. Foreman*, 2019 IL App (3d) 160334, ¶ 46; *People v. Miles*, 2020 IL App (1st) 180736, ¶ 10 (quoting *Foreman*); *People v. Martinez*, 2021 IL App (1st) 182553, ¶ 62 (quoting *Foreman*); *People v. Reed*, 2020 IL App (4th) 180533, ¶ 26 (applying plain language analysis); *People v. O'Neal*, 2021 IL App (4th) 170682, ¶ ¶ 102-103 (applying plain language analysis). The First District has also issued several unpublished decisions, holding that the plain language of §95(b) is clear and unambiguous. *People v. Stewart*, 2020 IL App (1st) 180014-U, ¶ 30; *People v. Newton*, 2021 IL App (1st) 182044-U, ¶ 51 (applying *Miles*); *People v. Suggs*, 2020 IL App (1st) 161632-U, ¶ 43 (applying *Miles*); *People v. Binion*, 2020 IL App (1st) 182538-U, ¶ 38 (same); *People v. Ford*, 2020 IL App (1st) 172835-U,

¶ ¶ 34-35 (same). [6]

Despite this unanimous determination that §95(b) is "clear and unambiguous," the Fourth District of the appellate court came to the opposite conclusion from the First and Third Districts regarding that language. *Compare Stewart*, 2020 IL App (1st) 180014-U (plain language of §95(b) states conviction of juvenile in adult court is not a qualifying offense for §95(b)), with *People v. Reed*, 2020 IL App (4th) 180533 (plain language of §95(b) states juvenile convicted in adult court has a qualifying offense.)

Reed, cited by the State, was wrongly decided. (St. Br. 7) The *Reed* court opined that a juvenile convicted in adult court has a "conviction" for the purposes of §95(b) because nothing in the section suggested that a juvenile convicted in adult court should instead be considered as a juvenile adjudication. *Id.*, ¶ 25. The *Reed* court's reasoning runs afoul of the legislature's definition of "conviction" in the Code of Corrections, where the sentencing code does not include adjudications. 730 ILCS 5/5-1-5. ("'Conviction' means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.").

Moreover, the *Reed* court wrongly concluded that §95(b) only requires a sentencing court to look at the elements of the offense, and the elements of burglary remained unchanged between the predicate offense and the present

[6] See Supreme Court Rule 23 (eff. Jan. 2021) (unpublished decisions cited as persuasive authority). Unpublished cases appear in the Appendix.

one. *Reed*, 2020 IL App (4th) 180533, ¶¶ 26-28. Critically, there is only **one** criminal code, and it applies to anyone charged with a violation thereof, adults and minors. Minors are charged with committing violations of the criminal code, either felony violations or misdemeanor violations. Because there is only one criminal code, it necessarily means that a charge against a minor or an adult will have the same "elements;" Illinois has not created a separate listing of "juvenile offenses" but instead relies on the Criminal Code when describing offenses committed by minors. The *Reed* court reasoning seems to contemplate a separate, juvenile Code of Offenses, with separate, and maybe different elements. But there is only one Chapter of Criminal Offenses, Chapter 720, so that every Illinois residential burglary charged against a minor will always "contain the same elements" as an Illinois residential burglary charge against an adult -- the age of the charged person does not alter what the elements are. 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."

Further, the *Reed* court made no attempt to discuss the temporal limitation of the language of §95(b), which limits qualifying priors to "an offense *now* . . . classified in Illinois as a Class 2 or greater Class felony." *Id.* (emphasis added). The plain language §95(b) requires consideration of how a past offense would be considered under the laws in effect on the date of the

sentencing for the present offense. The "now" language mandates the following analysis: In 2017, when Denzal was being sentenced on this PSMV, a teenager charged as a first offender with residential burglary (Denzal's first offense) would have his case resolved in juvenile court, and not in adult court. The residential burglary case, thus, would not be a qualifying prior for §95(b).

In contrast to *Reed*, the *Stewart* court integrated the legislature's inclusion of the word "now" in its plain-language analysis of §95(b). *Stewart*, 2020 IL App (1st) 180014-U, ¶ 32 ("[Denzal]'s 2013 burglary is not an offense now *** classified in Illinois as a Class 2 or greater felony.") Thus, the State's reliance on *Reed* is misplaced.

F. The 2021 amendments to §95(b) make explicit that juveniles convicted in adult court were never meant to act as qualifying priors for Class X sentencing.

The State avers that the 2021 amendments to §95(b) "are not retroactive," and thus not applicable to this matter. (St. Br. 13-14) The 2021 amendments explicitly state that prior convictions are not qualifying convictions unless the offense was committed after the defendant turned 21 years of age. 730 ILCS 5/5-4.5-95(b). The amendments became effective on July 1, 2021, after the State filed its brief in this Court; Denzal has not sought retroactive application of those amendments to his case.

Non-retroactivity aside, these amendments make clear the intent of the legislature, apparent in the plain language by the temporal limitation of the "now" employed in the version of §95(b) in place in 2017, when Denzal was sentenced, to exclude convictions of juveniles in adult court from serving as predicate convictions for §95(b). Denzal maintains that the plain language

of §95(b) provides that only prior offenses that would be classified as adult convictions at the time of the trial and sentencing for the most current offense may act as qualifying priors for mandatory Class X sentencing.

Thus, *Reed* and *O'Neal*'s determination that juveniles convicted in adult court have qualifying convictions under §95(b), was contrary to the legislature's intent, as evidenced by the recent 2021 amendments.

To the extent that this is any ambiguity on this point, the amendments serve as an indication of the intent the legislature had all along, that only offenses that would be adult convictions at the time of the current offense may serve as qualifying priors.

Alternatively, if this Court finds the language of §95(b) ambiguous, this Court should apply the rule of lenity. When language within a penal statute is ambiguous, courts resort to rules of statutory construction such as the rule of lenity, which requires that in such situations the penal statute "be strictly construed to afford lenity to the accused." *People v. Brooks*, 158 Ill. 2d 260, 264 (1994); *see also*, *People v. Goldstein*, 204 Ill. App. 3d 1041, 1044 (5th Dist. 1990)("If a statute increasing a penalty or punishment is capable of two constructions, the one which operates in favor of the accused is to be adopted.").

If two different interpretations are possible, which Denzal does not concede – one of which operates in favor of the accused – this Court should adopt the reasoning in *Stewart* as it affords defendants the benefit of the rule of lenity. Therefore, should this Court find ambiguity in §95(b), this Court should apply the rule of lenity and conclude that Denzal's 2013 residential

burglary could not serve as a qualifying offense under §95(b) for Class X sentencing in 2017.

G. Although trial counsel failed to preserve this issue for review by failing to object to the Class X sentence, this Court should review the error under second-prong plain error or ineffective assistance of counsel.

Defense counsel did not preserve this error. (St. Br. 5) The failure to object to an alleged error at trial and raise the issue in a post-trial motion ordinarily results in forfeiture of the issue on appeal. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). However, Supreme Court Rule 615(a) provides that: "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a). Thus the plain error doctrine permits this Court to review unpreserved sentencing errors in two circumstances: when a "clear or obvious error occurred" and either (1) "the evidence at the sentencing hearing was closely balanced"; or (2) "the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); Ill. S. Ct. R. 615(a). Here, the improper imposition of Class X sentencing can be reviewed under the second prong of plain error.

This Court recently reaffirmed that sentencing a defendant contrary to statute affects substantial rights and is, thus, second prong plain error. *People v. Fort*, 2017 IL 118966, ¶ 19. Whenever the trial court relies on an improper factor or misstates the defendant's eligibility for enhanced

sentencing, the error affects substantial rights. *See People v. Lashley*, 2016 IL App (1st) 133401, ¶ 69; *People v. Myrieckes*, 315 Ill. App. 3d 478, 483 (3rd Dist. 2000) (applying second-prong plain error review where the trial court mistakenly found that the defendant was eligible for extended-term sentencing); *People v. Johnson*, 347 Ill. App. 3d 570, 574-76 (1st Dist. 2004) (applying second-prong plain error review where the trial court considered an improper factor at sentencing); *People v. Easley*, 2012 IL App (1st) 110023, ¶¶16, 30 (holding that "sentencing issues are excepted from the doctrine of waiver [*i.e.*, forfeiture] when they affect a defendant's substantial rights," including when a sentence is improperly enhanced to a higher classification) (reversed in part on other grounds by *People v. Easley*, 2014 IL 115581).

Here, the sentencing error was directly related to Denzal's eligibility for Class X sentencing under §95(b). Denzal was only subject to Class X sentencing if his criminal history included two prior offenses that are "now" (in 2017) classified as Class 1 or 2 felony convictions. 730 ILCS 5/5-4.5-95(b) (2017). Where Denzal's criminal history does not support sentencing under §95(b), this Court should find that the statute's improper application affected his substantial rights, and should address this error.

Alternatively, where counsel failed to object to the imposition of Class X sentencing, this Court should find that counsel was ineffective. *People v. Bunning*, 298 Ill. App. 3d 725, 732 (4th Dist. 1998) (finding ineffective assistance for failing to preserve meritorious issues); *People v. Moore*, 307 Ill. App. 3d 107, 114 (5th Dist. 1999). A criminal defendant has the right to the effective assistance of counsel. U.S. Const. amends. VI, XVI; Ill. Const. 1970,

art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). This includes counsel's performance at sentencing, since sentencing is a critical stage of any criminal proceeding. *People v. Reyes*, 102 Ill. App. 3d 820, 837 (1st. Dist. 1981); *People v. Johnson*, 250 Ill. App. 3d 887, 905 (4th Dist. 1993) (counsel must keep vigorously representing client after a guilty finding).

To succeed on a claim of ineffective assistance of counsel at sentencing, a defendant must show that "counsel's performance fell below minimal professional standards and a reasonable probability exists that the sentence was affected by the poor performance." *People v. Steidl*, 177 Ill. 2d 239, 257 (1997); *People v. Orange*, 168 Ill. 2d 138, 168 (1995). As detailed above, Denzal's criminal history should not have subjected him to mandatory Class X sentencing. (S. C 46); 730 ILCS 5/5-4.5-95(b) (2017). There was no strategic reason for failing to object to its erroneous imposition. Denzal was prejudiced by the improper application of Class X sentencing where his sentencing range jumped from three to seven years in prison, to six to 30 years in prison. Therefore, this Court can review the error as ineffective assistance of counsel.

Conclusion

In 2017, a case involving a 17-year-old charged with residential burglary would not be heard in adult criminal court but in juvenile court, and there, the minor would not be convicted of a felony, but adjudicated delinquent. Section 95(b) requires two offenses that would now qualify as Class 1 or 2 felony convictions; Denzal's prior residential burglary conviction does not now qualify. As such, Denzal was not eligible for mandatory Class X sentencing. Because Denzal should have been sentenced for PSMV as a Class

2, rather than a Class X felony, this Court should affirm the appellate court's decision, and remand to the circuit court with instructions to sentence Denzal anew within the range for a Class 2 felony sentence, with two years of mandatory supervised release, per 730 ILCS 5/5-4.5-35.

II. Basing the applicability of the mandatory Class X statute of Section 5-4.5-95(b) on a defendant's age on the date of the conviction rather than the date of the offense violates the proportionate penalties clause of the Illinois constitution, as applied?, and the *ex post facto*, due process, and equal protection clauses of the Illinois and United States Constitutions. (Cross-relief requested)

Applying Section 5-4.5-95(b) to defendants like Denzal Stewart who were *under 21* at the time of *all* the relevant offenses, renders the mandatory Class X sentencing statute unconstitutional when applied to those defendants. [7] Specifically, §95(b) violates the proportionate penalties clause of the Illinois constitution, as it increases punishment based on an arbitrary factor, the passage of time, over which a defendant has no control, rather than on a defendant's relative culpability. Ill. Const. 1970, art. I, § 11. Further, §95(b) violates the due process and *ex post facto* clauses of the Illinois and United States Constitutions because it changes the applicable sentencing range after the date of the offense and does not provide fair notice at the time of the offense of the specific sentencing range that would apply to a defendant's conduct. U.S. Const., art. I, §§ 9, 10, amend. XIV; Ill. Const. 1970, art. I, §16, §2. The statute also violates the equal protection clauses of both constitutions because it punishes two equally-situated defendants under the age of 21 differently based solely on the date on which they are convicted of their offenses. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. Here,

[7] Effective July 1, 2021, the legislature has amended Section 95(b), to require all qualifying offenses to have been committed *after* the defendant turned 21 years old. Unless otherwise noted, discussions of Section 95(b) in this argument refer to the version in effect when Denzal was sentenced in November 2017.

Denzal was 20 years old when he was charged with possession of a stolen motor vehicle ("PSMV"). Because proceedings dragged on, Denzal was found guilty by a jury after his 21st birthday, upon which time a greater class of sentence became mandatory. Thus, Denzal "aged into" a Class X sentence.

In *People v. Smith*, this Court held that the plain language of §95(b) meant that defendant's age on the date of conviction would determine whether he was Class X eligible. *Smith*, 2016 IL 119659, ¶ 28, 31.[8] However, the constitutional challenges created by the legislature in permitting a defendant to "age into" a higher class of offense raised in this case were not addressed in *Smith*. 2016 IL 119659. Addressing the constitutional issues now, this Court should find that §95(b) is unconstitutional, vacate Denzal's Class X sentence, and remand the matter for resentencing within the Class 2 range.

A statute is presumed to be constitutional, and "the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation." *People v. Greco*, 204 Ill. 2d 400, 406 (2003) (citations omitted). A criminal statute, such as the one at issue in this case, should be "strictly construed" in favor of the accused and "nothing should be taken by intendment or implication beyond the obvious or literal meaning of [the] statute." *People v. Woodard*, 175 Ill. 2d 435, 444 (1997) (citations omitted). Whether a statute is constitutional is a question of

[8] The *Smith* Court did not decide whether the operative date was being found guilty or sentenced, as the *Smith* defendant was over 21 at both times. *Smith*, 2016 IL 119659, ¶ 13, 31. Denzal was also 21 years-old at the time of his trial and sentence.

law that is reviewed *de novo*. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). Although the issues raised on cross-appeal were not raised below, the constitutionality of a statute may be challenged for the first time on appeal. *People v. Wagener*, 196 Ill. 2d 269 (2001).

A. Basing a defendant's eligibility for Class X sentencing on his age at the time of the conviction rather than at the time the offense was committed violates the proportionate penalties clause of the Illinois constitution.

Denzal was 20 years old in August 2016, when he was alleged to have committed PSMV. (R. 14, 15) PSMV is a Class 2 offense, carrying a sentencing range of three to seven years in prison. 625 ILCS 5/4-1.3(a)(1); 730 ILCS 5/5-4.5-35(a) (2017). On June 1 of the following year, during the pendency of the pre-trial proceedings, Denzal turned 21 years old. (Supp. C. 4) After he was convicted by a jury, the trial court sentenced him to a mandatory Class X term of six years in prison, to be followed by a three-year term of mandatory supervised release (MSR). (R. 371-72; C. 103); 730 ILCS 5/5-4.5-95(b) (2017) ("when a defendant, over the age of 21 years, is convicted of a Class 1 or 2 felony, [and has two prior qualifying convictions], the defendant shall be sentenced as a Class X offender.") Denzal's culpability for the PSMV offense did not increase with the passage of time, nor did his actions after the offense make him more culpable. Instead, it was his 21st birthday, ten months after the offense, which elevated Denzal from a Class 2 range of years, to a Class X term of years. Passage of time, over which a defendant has no control, is an arbitrary factor that can, as here, result in a more severe punishment. Increasing punishment on an arbitrary factor such

as the passage of time, rather than on culpability, violates the proportionate penalties clause of the Illinois constitution.

The Proportionate Penalties Clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The Illinois legislature expanded on these general principles in the Code of Corrections, providing that the general legislative purposes underlying all sentencing statutes are fourfold: (1) to impose sanctions that are both "proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders"; (2) to prohibit and prevent crime; (3) to "prevent arbitrary or oppressive treatment" of individuals subject to the Code; and (4) to "restore offenders to useful citizenship." 730 ILCS 5/1-1-2 (West 2017).

The notion that a criminal sentence should reflect an offender's culpability and be proportionate to the offense is grounded squarely in the defendant's actions and state of mind at the time of the offense – not at some future point in time. *See Roper v. Simmons*, 543 U.S. 51, 568-71 (2005) (culpability of youthful offender measured at the time of the offense when evaluating the constitutionality of the juvenile death penalty). In contrast, measuring the applicability of a sentence enhancement at the time of conviction or sentencing creates the opportunity for "arbitrary *** treatment" that the Code of Corrections seeks to prevent. 730 ILCS 5/1-1-2.

To succeed on a proportionate penalties claim, a defendant must

demonstrate that his criminal penalty is "so wholly disproportionate to the offense committed as to shock the moral sense of the community." *People v. Miller*, 202 Ill.2d 328, 339 (2002). This standard has been intentionally left undefined because "as our society evolves, so too do our concepts of elemental decency and fairness. . . ." *Id*. As this Court recognized in *Leon Miller*, "whether a punishment shocks the moral sense of the community is based upon an 'evolving standard of decency that mark[s] the progress of a maturing society.'" *Id.*, quoting, *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Therefore, when considering what is "wholly disproportionate" and what would "shock the moral sense of the community," courts should look to objective evidence but never ignore their "own judgment." *Miller*, 202 Ill.2d at 339-40.

Section 95(b), which measures eligibility for a higher class of offense on a date other than the date of commission, "shocks the moral sense of community" because it permits a defendant who is under 21 years-old on the date of the crime, to "age into" a longer prison term than he was eligible to receive on the date he allegedly committed the offense. That is, his eligibility for a higher class of punishment is governed by the passage of time alone, a factor over which he can exercise no control, rather than on his culpability for the offense or his behavior after its commission. Increasing the penalty based on the passage of time is "wholly disproportionate" to Denzal's conduct as to "shock the moral sense of the community." *Miller*, 202 Ill.2d at 339.

It is a violation of the proportionate penalties clause, where a defendant's sentence may be extended from a Class 1 or 2 range, to a Class X

range of six to 30 years, based on factors unrelated to the defendant's actual conduct. This is so because the length of delay is arbitrary. For example, the length of time between the commission of an offense and a conviction is affected by a wide variety of factors, most of which are controlled solely or partially by the government. The State's Attorney controls the filing of criminal charges against a defendant and generally has up to three years from the date of commission to do so. 720 ILCS 5/3-5(b) (2017). Once that charge is filed, a defendant who is in custody is not entitled to a trial any sooner than 120 days from the date of his arrest, and for a defendant not in custody, that period extends an additional 40 days. 725 ILCS 5/103-5(a),(b) (West 2017). The defendant also lacks control over the docketing power of the trial judge, another government actor. *Pulliam v. Allen*, 466 U.S. 522, 540 (1984) (for purposes of safeguarding a defendant's rights, trial judges are state actors).

In addition to these general delays that are outside every defendant's control, in certain cases the period between the charge, and trial and sentencing, may be further extended by either the State or circumstances beyond the defendant's control. For example, the State may delay the prosecution of a Class X-eligible case by electing to proceed against the defendant on a different pending charge or by satisfying the requirements for a continuance for DNA testing. 725 ILCS 5/103-5(c),(e) (2017).

In some cases, delays between the time of charging and conviction will jeopardize basic constitutional guarantees. For example, a defendant has a constitutional right to be tried while fit (*Pate v. Robinson*, 383 U.S. 375, 386

(1966)), but the price to be paid for the time it takes to regain fitness for some defendants may be a mandatory Class X sentence. At the pre-trial stage, the lack of certainty about how old a defendant will be by the time of trial and sentencing also will interfere with an attorney's ability to render competent legal advice. If the accused is represented by a public defender office with a large backlog of cases, a defendant who is rapidly approaching his 21st birthday may be left to choose between the effective assistance of counsel and the risk of Class X sentencing. *See People v. Bowman*, 138 Ill.2d 131, 143 (1990) (counsel's request for a continuance in order to provide effective representation will toll the speedy trial clock). It may also affect an under-21 year-old defendant's decision to exercise his right to a trial versus to enter a guilty plea.

When the plain language of §95(b) is applied to defendants who were not yet 21 at the time of the offense, it is entirely possible that two identically situated 18- to 20-year-old defendants who were born and arrested on the same day, and who have committed identical crimes, will be subject to two very different sentencing ranges based solely on the timing of their dates of trial and sentencing – based largely on factors outside their own control. The "aging into" scenario, which occurred with Denzal, creates an arbitrary outcome that shocks the moral sense of community, and as such, is an unconstitutional violation of Illinois's proportionate penalties clause. *See e.g., People ex rel. Carroll v. Frye*, 35 Ill.2d 604, 610 (1966)(statute granting prospective pretrial custody credit was invalid as creating an arbitrary discrimination based upon the fortuitous circumstance of conviction date).

The "aging into" impact of §95(b), which arbitrarily penalizes a defendant not for his culpability, but for the passage of time, over which he has no control, violates the proportionate penalties clause and fails to pass constitutional muster. Thus, this Court should vacate Denzal's Class X sentence and remand to the trial court for him to be sentenced anew to a Class 2 term of years.

B. Basing a defendant's eligibility for Class X sentencing on his age at the time of the finding of guilt and sentence rather than the age at the time of the commission of the offense violates constitutional due process protections.

Due process requires that criminal defendants have fair warning of the criminal penalties which will attach to their conduct – a right which is "fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191-92 (1977) (citations omitted); U. S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. In addition to this requirement of definiteness in criminal sentencing, due process prohibits the arbitrary or unreasonable exercise of the State's police power. *People v. Wilson*, 214 Ill.2d 394, 402 (2005). In order to satisfy due process, a statute must bear a rational relationship to the legitimate public health, safety, or general welfare concerns it was designed to address, and the means by which the statute serves those interests must be reasonable. *Wilson*, 214 Ill.2d at 402. Here, §95(b) violates the due process protections of both the Illinois and U.S. constitutions.

Section 95(b) fails to provide fair notice to defendants under the age of 21 that they could be subject to Class X sentencing, depending upon *when*

they are found guilty and sentenced. At the time an offense is committed, a defendant under the age of 21 will face multiple factors outside his control that will affect his conviction date, including:

- the timing of the prosecutor's charging decision;
- availability of witnesses;
- laboratory backlog;
- the defendant's rights under the speedy trial statute;
- how crowded the court's docket is; and
- the backlog of cases handled by his attorney or public defender.

Providing 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. See, *e.g., Fletcher v. Williams*, 179 Ill. 2d 225, 229 (1997) (prohibition against *ex post facto* laws "assures that statutes give fair warning of their effect and permit individuals to rely on their meaning.")

In addition, measuring a defendant's eligibility for Class X sentencing based on his age at the time of conviction and sentencing rather than at time of the offense violates the due process prohibition on arbitrary criminal laws, because there would be no rational relationship between the purpose of §95(b) and its delayed application to a defendant, such as Denzal, who "ages into" a greater sentence. The statutory mitigation of a sentence enhancement based on a defendant's youth reflects a recognition that young defendants are both less culpable and more amenable to rehabilitation than older offenders. See *People v. Mendoza*, 342 Ill. App. 3d 195, 198-99 (2nd Dist. 2003) (in

measuring culpability under Section 5-4.5-95(b), age 21 is a logical place to draw the line given the historic significance of that milestone); *People v. Storms*, 254 Ill. App. 3d 139, 142 (2nd Dist 1993) (provisions of Section 5-4.5-95(b) reflect the presumption that individuals under the age of 21 have greater rehabilitative potential than older defendants); see also, 730 ILCS 5/5-4.5-95(b) (eff. July 1, 2021) (amended to require that "the first offense was committed when the person was 21 years of age or older.")

The notion that a criminal sentence should reflect an offender's culpability and rehabilitative potential is grounded squarely in the defendant's actions and state of mind at the time of the offense – not at some future point in time. See *Roper v. Simmons*, 543 U.S. 551, 568-71 (2005) (culpability of youthful offender measured at the time of the offense when evaluating the constitutionality of the juvenile death penalty). Furthermore, measuring a youthful defendant's eligibility for Class X sentencing at the time of conviction and sentence would arbitrarily penalize defendants for the length of their trial proceedings based on factors outside their control. *People v. Brown*, 2017 IL App (1st) 140508-B, at ¶24. As a result, there is no rational basis for §95(b)'s reliance on a defendant's age at the time of conviction and sentencing. This Court should conclude that §95(b) violates due process when applied to those defendants who are under 21 at the time of the offense.

C. Basing eligibility for Class X sentencing on a defendant's age at the time of the conviction rather than age at time of the offense violates the constitutional prohibition on *ex post facto* laws.

The United States Constitution prohibits both Congress and the

individual states from passing any *ex post facto* law. U.S. Const., art. I, §§ 9, 10. The Illinois Constitution contains a similar *ex post facto* prohibition (Ill. Const. 1970, art. I, §16), which has been read in lockstep with the federal *ex post facto* clause. *Hadley v. Montes*, 379 Ill. App. 3d 405, 409 (4th Dist. 2008). An *ex post facto* law is one that retroactively makes criminal conduct that was not criminal when performed, increases the punishment for crimes already committed, or changes the rules of procedure in force at the time an alleged crime was committed in a way substantially disadvantageous to the accused. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990). The federal *ex post facto* clause has long prohibited statutes both that aggravate a crime to a greater offense than when it was committed and those which provide for a greater punishment than that which was applicable at the time of the offense. *Miller v. Florida*, 482 U.S. 423, 429 (1987), citing *Calder v. Bull*, 3 U.S. 386, 390 (1798). Here, §95(b) violates *ex post facto* because it increases the punishment for a crime after the crime was committed, in instances where the defendant was under 21-years old at the time of the offense.

Two fundamental concerns undergird the *ex post facto* clause: preventing arbitrary or vindictive legislative action, and providing fair notice of the punishment an individual may subject himself to by his actions. *Miller v. Florida*, 482 U.S. at 430. For a sentencing statute to violate the *ex post facto* clause, the law must disadvantage the defendant "by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (citations and internal quotation marks omitted). Critically, a violating penal statute must be retroactive

insofar as it "changes the legal consequences of an act completed before its effective date." *Miller v. Florida*, 482 U.S. at 430; *Mathis*, 519 U.S. at 441 (in order to violate *ex post facto*, statute "must apply to events occurring before its enactment").

The retroactive element of the *ex post facto* test is generally triggered when the statute criminalizes or increases the punishment for conduct which occurred prior to the enactment of the statute. *E.g.*, *Miller v. Florida*, 482 U.S. at 430. It is the effect, not the form, of the law that determines whether it is *ex post facto*, with the critical question being "whether the law changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981). "'The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised.'" *Weaver*, 450 U.S. at 31 fn. 15, quoting *Cummings v. Missouri*, 71 U.S. 277 (1867).

In the case of §95(b), the date the statute was enacted is not at issue. Instead, the relevant "effective date" is the date a defendant turns 21-years old and the statute becomes automatically applicable to a defendant. This "applicable date" can change after the date of the offense for defendants who have not yet turned 21-years old. Specifically, when defendants like Denzal commit a Class 1 or Class 2 offense while they are under the age of 21, they can not be subject to Class X sentencing under §95(b) at that moment, because they are not yet "over the age of 21 years." However, §95(b) contains

a second, "applicable" date that triggers Class X sentencing if such defendants turn 21 before they are convicted. *Smith,* 2016 IL 119659. It is this second, "applicable" date that increases the punishment for an offense after its occurrence, and therefore violates the prohibition against *ex post facto*.

The shifting effective date in §95(b) violates the principles that are the foundation for the *ex post facto* clause, in that it is both arbitrary and fails to provide fair notice of the applicable punishment at the time of the offense. *Miller v. Florida*, 482 U.S. at 430. As for notice, defendants such as Denzal have no way of knowing when the offense is committed that they will be subject to Class X sentencing at a future date, if the litigation drags on. The "notice" that §95(b) provides to defendants under the age of 21 is thus illusory.

Because the date of conviction will be affected by a wide variety of factors that are largely outside of a defendant's control, *see* Section B, *supra*., the potential for arbitrary application is substantial, and invites the very arbitrariness the *ex post facto* clause is designed to prevent. As a result of the *Smith* Court's interpretation of §95(b), it is entirely possible that two identically-situated defendants under the age of 21 who were born and arrested on the same day, and who have committed identical crimes, will be subject to two very different sentencing ranges based solely on the timing of their dates of conviction. That is, the later-convicted defendant will be punished more severely than his identical, but earlier-convicted counterpart. *People v. Brown*, 2017 IL App (1st) 140508-B, ¶ 37 (noting that "[s]uch

defendants are essentially punished for the passage of time, caused by factors outside their control that are unrelated to either their culpability or capacity for rehabilitation," but affirming Class X sentence based on Illinois Supreme Court precedent.)

"Subtle *ex post facto* violations are no more permissible than overt ones." *Collins v. Youngblood*, 497 U.S. 37, 46 (1990). As the United States Supreme Court observed in *Miller v. Florida*, 482 U.S. at 431, "[t]he constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed." The *Miller* Court went on to hold that the revised sentencing guidelines at issue, as applied to petitioner whose crimes occurred before the effective date, violated *ex post facto*. The notice in §95(b), that a defendant might or might not be subject to Class X sentencing based on a future event that may or may not occur, is largely outside the defendant's control and cannot be accurately predicted, fails to pass constitutional muster.

Thus §95(b), which allows a defendant to *age into* a higher class of offense, and a greater punishment, due to a second, internal effective date, violates the *ex post facto* clause. Denzal should have been sentenced for a Class 2, rather than Class X, felony. This Court should remand to the circuit court for resentencing within the range for a Class 2 felony sentence, with two years of mandatory supervised release, per 730 ILCS 5/5-4.5-35. It is well-established that "even if a sentence imposed under a wrong sentencing range fits within a correct sentencing range, the sentence must be vacated due to the trial court's reliance on the wrong sentencing range in imposing

the sentence." *People v. Brooks*, 202 Ill. App. 3d 164, 172 (1st Dist. 1990); *accord People v. Owens*, 377 Ill. App. 3d 302, 305–06 (1st Dist. 2007). Accordingly, even though Denzal's six-year sentence is within the range of a Class 2 felony, due to the court's incorrect application of the mandatory Class X sentencing provision, a remand for resentencing is required.

D. Basing a defendant's eligibility for Class X sentencing on his age at the time of the conviction and sentence rather than at the time of commission of the offense violates the constitutional right to equal protection.

Equal protection guarantees are implicated whenever "the law lays an unequal hand on those who have committed intrinsically the same quality of offense." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Under the equal protection clauses of both the United States and Illinois Constitutions, a statute may not discriminate between two classes of individuals when those classifications are unrelated to the legitimate purpose of the statute. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2; *e.g.*, *People v. Reed*, 148 Ill.2d 1, 7 (1992). While the legislature is relatively free to make distinctions between different classes of persons when enacting laws, "the guarantee of equal protection does *** prohibit the State from according unequal treatment to persons placed by statute into different classes for reasons wholly unrelated to the purpose of the legislation." *Reed*, 148 Ill.2d at 7, citing *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

Because defendants between that ages of 18 and 21 are not members of a protected class for purposes of equal protection analysis, see e.g., *People ex rel. Tucker v. Kotsos*, 68 Ill. 2d 88, 97 (1977) ("[w]hat is "suspect" about a

suspect classification is its long history of use to oppress individuals whose only misfortune is to have been born into the class"), the constitutionality of §95(b) is measured under the rational basis test, which requires that there be "a rational basis for distinguishing the class to which the law applies from that to which it does not." *Reed*, 148 Ill.2d at 8. Under the rational basis test, the classification chosen must bear a rational relationship to a legitimate State goal. *Reed*, 148 Ill.2d at 7-8. Statutory classifications ordinarily will be upheld if "any state of facts may be reasonably conceived to justify" the classification, but "if the power to classify has been exercised arbitrarily, the State cannot justify the legislation simply by labeling it a 'classification.'" *Reed*, 148 Ill.2d at 8. Here, there is no rational relationship between the legislative goal of §95(b) (punishing recidivists more severely) and permitting one to "age into" a mandatory higher class of offense based solely on the passage of time.

In *People v. Smith*, this Court examined §95(b). There, the defendant was convicted of aggravated battery of a corrections officer. 2016 IL 119659, ¶ 1. The *Smith* defendant was 19 years old at the time of the commission of the offense, 20 years old when he was indicted, and 21 years old at the time of trial and sentencing. *Id*. at 13. The question before this Court was whether defendant's age at the time of commission, at the time of the charge, or at time of conviction was the determining factor for Class X sentencing to apply. *Id*. at 8.[9] This Court held that the age at the date that he was found guilty

[9] The *Smith* Court did not address the Equal Protection or other constitutional claims presented here.

and sentenced was the operative date. *Id*. at 31.

As interpreted by this Court in *Smith,* §95(b) takes a class of identically-situated defendants – those under the age of 21 who have committed a Class 1 or 2 offense with two prior qualifying offenses under the statute – and imposes two different sentencing ranges based upon the date on which the defendant is found guilty and sentenced. Under the *Smith* interpretation of the statute, Denzal and another identically-situated 20-year-old defendant – a defendant who was born and arrested on the same day and committed an identical crime – would be subject to two very different sentencing ranges based solely on the timing of their dates of their trials and sentencings. See *People ex rel. Carroll v. Frye*, 35 Ill.2d 604, 610 (1966) (statute granting prospective pretrial custody credit was invalid as creating an arbitrary discrimination based upon the fortuitous circumstance of conviction date). Thus, a trial court may be mandated to impose two different sentencing ranges on identical defendants based on the dates of their convictions and sentences, rather than on their individual culpability.

The legislature's decision to make the Class X sentencing provisions of §95(b) inapplicable to defendants under the age of 21 reflects a recognition that youthful offenders are more amenable to rehabilitation than older defendants. See *Storms*, 254 Ill. App. 3d at 142 (Section 5-4.5-95(b) reflects the presumption that individuals under the age of 21 have greater rehabilitative potential than older defendants); see also, 730 ILCS 5/5-4.5-95(b) (eff. July 1, 2021) (amended to require that "the first offense was committed when the person was 21 years of age or older.")

Here, there is no rational relationship between a legislative intent to attribute lesser culpability and greater rehabilitative potential to younger offenders, but drawing the line between these younger and older offenders at the date of their trials and sentences rather than when the offense was committed. The notion that a criminal sentence should reflect an offender's culpability and rehabilitative potential is grounded squarely in the defendant's actions and state of mind *at the time of the offense*, and to draw that line at some calendar date in the future would arbitrarily penalize defendants for the length of their trial proceedings based on factors outside their control. By "lay[ing] an unequal hand on those who have committed intrinsically the same quality of offense" (*Skinner*, 316 U.S. at 541), §95(b) violates equal protection guarantees so long as its applicability is measured by the defendant's age at the time of trial and sentence rather than at the time of the offense. This Court should find that §95(b) violates equal protection and thus is unconstitutional.

E. This Court may address Denzal's constitutional challenges to §95(b).

While Denzal did not challenge the constitutionality of §95(b) on appeal, this Court may nonetheless address his arguments, for these reasons: constitutional challenges may be raised at any time, presentation of the argument in the lower court would have been futile under this Court's decision in *People v. Smith*, and the record on appeal warrants relief. These will be addressed in turn.

First, as this Court has noted in the past, a challenge to the

constitutionality of a statute may be raised at any time. *In re J.W.*, 204 Ill. 2d 50, 61–62 (2003); *People v. Wright*, 194 Ill.2d 1, 23–24 (2000) (allowing defendant to challenge constitutionality of statute for first time in petition for rehearing); *People v. Bryant*, 128 Ill.2d 448, 454 (1989); see also, *People v. McCarty*, 223 Ill. 2d 109, 122–23 (2006) (permitting proportionate penalties and due process challenges to the constitutionality of a statute, raised for the first time in separate *pro se* and counseled supplemental briefs). Therefore, Denzal has not forfeited his proportionate penalties, due process, *ex post facto*, or equal protection challenges to the constitutionality of §95(b). U.S. Const., art. I, §§ 9, 10, amends. XI, XIV; Ill. Const. 1970, art. I, §§ 2, 16.

Second, this Court determined in *People v. Smith* that defendant's age at the time of trial and sentence was the date for determining mandatory Class X sentencing under Section 95(b). Although the *Smith* Court did not address the constitutional issues presented here, the appellate court lacks authority to overrule decisions of this Court, which are binding on all lower courts. See *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546, 551–52 (1983). Thus, presentation of an argument by Denzal in the appellate court urging that the date of commission of the offense was controlling would have been futile. *See*, *e.g.*, *People v. Artis*, 232 Ill. 2d 156, 164 (2009) (finding that the State did not forfeit an argument seeking the abandonment of the one act, one crime doctrine by not raising it in the appellate court, where that doctrine was established by the Illinois Supreme Court in *People v. King*.)

Third, Supreme Court Rule 318 allows that upon review in this Court from the appellate court, an appellee may seek relief on any issue warranted

by the record on appeal. *People v. Hopkins*, 235 Ill. 2d 453, 467 (2009). Here, the question of whether Denzal qualified for mandatory Class X sentencing under §95(b), based on his age at the time of the offense, was the subject of dispute below, and indeed the trial court held a hearing on that question. (R. 49-50, 60, 75-76, 79-80) Accordingly, the record on appeal demonstrates that relief is warranted, and this Court may review the constitutional challenges.

Conclusion

Application of §95(b) to defendants like Denzal, who were under 21-years old at all relevant times, violates the proportionate penalties clause of the Illinois Constitution, because permitting a defendant who is under 21 years-old at the time of the offense, to "age into" a mandatory higher class of offense, and a greater punishment, based solely on the passage of time, "shocks the moral sense of the community." Ill. Const. 1970, art. I, § 11. Section 95(b) also violates the due process and *ex post facto* clauses of the Illinois and United States Constitutions because it changes the applicable sentencing range after the date of the offense and does not provide fair notice at the time of the offense of the specific sentencing range which will apply to a defendant's conduct. U.S. Const., art. I, §§ 9, 10, amend. XIV; Ill. Const. 1970, art. I, §16, §2. The statute also violates the equal protection clauses of both constitutions because it punishes two equally-situated defendants under the age of 21 differently based solely on the date on which they are tried and sentenced for their offenses. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. This Court should therefore conclude that §95(b) is unconstitutional as applied to Denzal, vacate Denzal's Class X sentence, and remand the matter

for resentencing within the Class 2 range.

CONCLUSION

For the foregoing reasons, Denzal Stewart, defendant-appellee, respectfully requests that this Court affirm the order of the appellate court vacating Denzal's Class X sentence and remanding to the circuit court for resentencing in the Class 2 range. Alternatively, this Court should find that the application of Section 5-4.5-95(b) to a defendant like Denzal, who was 20 at the time of offense but turned 21 before his conviction and sentence, violates the proportionate penalties clause of the Illinois constitution, and the *ex post facto*, due process and equal protection clauses of the Illinois and United States Constitutions.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

GINGER LEIGH ODOM
Director of Expungement
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in 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, is 69 pages.

/s/Ginger Leigh Odom
GINGER LEIGH ODOM
Director of Expungement

No. 126116

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, aagKatherineDoersch@gmail.com;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Denzal Stewart, Reg # 31395-509, MCC Chicago, Metropolitan Correctional Center, 71 West Van Buren Street, Chicago, IL 60605

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 November 24, 2021, the Brief and Argument 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 defendant-appellee 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 Brief and Argument to the Clerk of the above Court.

/s/Alicia Corona
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us