No. 122598

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee, v. NELSON A. YOUNG, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, Fourth Judicial District No. 4-15-0575 There on Appeal from the Circuit Court of the Seventh Judicial Circuit, Morgan County, Illinois, No. 12 CF 479 The Honorable David R. Cherry, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

A Morgan County jury found defendant guilty of first degree murder, and the court sentenced him to forty years in prison, with 215 days of credit for time spent in presentence custody. A21.[1] Defendant then challenged his conviction in a section 2-1401 petition that the circuit court dismissed. C297, 322. On appeal, defendant argued for the first time that he was entitled to additional presentence custody credit. The Illinois Appellate Court, Fourth District, vacated the circuit court's judgment and remanded for admonishments under *People v. Pearson*, 216 Ill. 2d 58 (2005), and further held that defendant could not raise a presentence custody credit claim for the first time on collateral appeal. A18. No issue is raised on the pleadings.

ISSUE PRESENTED

Whether a defendant may challenge the amount of presentence custody credit in his sentence for the first time on collateral appeal.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On November 22, 2017, this Court granted defendant's petition for leave to appeal. *People v. Young*, No. 122598 (Ill. 2017).

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[1] Citations to the consecutively paginated volumes of the common law record appear as "C__." Citations to the presentence investigation report contained in an envelope at page C170 of the record appear as "PSI__." Citations to the reports of proceedings appear as "R[Vol] __." Citations to defendant's brief and appendix appear as "Def. Br. __" and "A__," respectively.

The appellate court held that it "lack[ed] jurisdiction" to entertain the presentence custody credit issue, applying Fourth District precedent holding that the appellate court lacks jurisdiction over those claims in postconviction appeals that are not cognizable under the Post-Conviction Hearing Act. *People v. Nelson*, 2016 IL App (4th) 140168, ¶ 29 (citing *People v. Ferree*, 40 Ill. 2d 483, 484 (1968)). But *People v. Castleberry*, 2015 IL 116916, abrogated that rationale. *Id.* ¶ 15 (statutory limits on causes of action not jurisdictional). And even if the jurisdictional rationale retained force after *Castleberry*, it did not apply to this case, an appeal from the denial of a section 2-1401 petition.

STATEMENT OF FACTS

On July 20, 2005, defendant Nelson Young was arrested for the stabbing death of his girlfriend, Eva Mae Davis, and the People charged him with first degree murder. C11, 13. The circuit court found defendant unfit to stand trial and ordered his transfer from the Morgan County jail to the Department of Human Services (DHS). *Id.* at 50-51. In January 2006, the court ordered defendant's return to the Morgan County jail for a hearing, and the record suggests that he remained there until he was again found fit. *Id.* at 55, 56, 65; RIV 86-88.

Shortly after he was found fit, defendant attempted suicide, and counsel moved for him to be hospitalized. C69-70. On April 6, 2006, the circuit court found that defendant needed medical treatment and ordered that he be transferred back to DHS custody. *Id.* at 73. Two weeks later, the

court canceled its order after learning that DHS would not treat defendant and that the jail could make accommodations. *Id.* at 84. The record does not reveal whether defendant was transferred in the two weeks before the court canceled its order.

In July 2006, a Morgan County jury found defendant guilty of first degree murder. The presentence investigation report correctly noted that defendant had been in continuous custody since his July 20, 2005 arrest but incorrectly computed this time as 215 days. PSI1.[2] On August 22, 2006, 398 days after his arrest, defendant was sentenced to forty years in prison with credit for 215 days of time served. A21; RX15. Defendant neither alerted the circuit court to the error during sentencing nor raised the issue in his post-trial motion. RX15 (no objection to "215 days"); C173 (challenging length of prison term but not presentence custody credit).

Defendant raised no challenge to his presentence custody credit in his direct appeal, and the appellate court affirmed. *People v. Young*, 381 Ill. App. 3d 595 (4th Dist. 2008). Similarly, defendant did not challenge his presentence custody credit in litigation on his postconviction petition. C233, 255; Rule 23 Order, *People v. Young*, No. 4-09-0486 (4th Dist. 2011).

In 2014, defendant filed a petition for relief from judgment under 735 ILCS 5/2-1401 that did not challenge his presentence custody credit. C281-

[2] The report almost certainly arrived at 215 days by counting only the time since defendant's return to jail in January 2006.

89. Using a form order that applied to postconviction petitions, the circuit court ordered the People to respond. C290-93. The circuit court dismissed the petition on the People's motion. C297, 322.

Defendant appealed, arguing for the first time that he was entitled to 183 additional days of presentence custody credit under 730 ILCS 5/5-8-7(b) (2006). A18.[3] The appellate court rejected that claim, holding that "a request for presentence custody credit . . . cannot be raised for the first time on appeal from postconviction proceedings." *Id.* But the appellate court reversed the circuit court's judgment on other grounds, finding that the circuit court had recharacterized defendant's petition as a successive postconviction petition without the admonishments required by *People v. Pearson*, 216 Ill. 2d 58 (2005). A16-18.

ARGUMENT

I. Introduction

Defendant failed to preserve the presentence custody credit error in the trial court and omitted it from his direct appeal, his postconviction proceedings, and his section 2-1401 petition (which was untimely to boot). As a result, the claim was defaulted, and the appellate court correctly refused to consider it for the first time on appeal from the denial of an untimely petition that did not even raise the claim.

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[3] When the circuit court sentenced defendant in 2006, 730 ILCS 5/5-8-7(b) (eff. Jan. 1, 2005 to May 31, 2008) governed presentence custody credit. The issues presented here are the same under the current statute, 730 ICLS 5/5-4.5-100(b) (eff. July 1, 2009). Def. Br. 9.

Defendant does not persuasively explain why this Court should immunize this type of challenge against well-established rules of procedural default. He chiefly argues that presentence custody credit under 730 ILCS 5/5-8-7 should be treated the same as per diem credit under 725 ILCS 5/110-14, for which defendants may apply at any time. Def. Br. 12, 14-17 (citing *People v. Caballero*, 228 Ill. 2d 79 (2008)). But per diem credit — unlike presentence custody credit — is awarded "upon application of defendant," which this Court construed to mean upon application in any court, at any time. *Caballero*, 228 Ill. 2d at 88. Section 5-8-7(b) contains no similar language. A defendant's appellate brief thus cannot serve as an "application" for presentence custody credit because there is no such thing. 730 ILCS 5/5-8-7(b) (2006). Defendant's argument that the claim can be treated as a motion to amend the mittimus is also meritless, for he in fact seeks to amend his sentence, which he cannot do for the first time on collateral appeal.

Finally, if this Court deems alternative relief appropriate here, it should exercise its supervisory authority to order a hearing in the circuit court, and not grant the credit outright. And the People reiterate the rule change proposal that this Court referred to the rules committee in *People ex rel. Berlin v. Bakalis*, 2018 IL 122435, ¶ 27, that a statutorily unauthorized sentence may be corrected at any time by motion in the circuit court.

II. Standard of Review

Whether a defendant's claim "is procedurally barred or forfeited because defendant failed to include that claim in his section 2-1401 petition

. . . presents a question of law that [this Court] review[s] de novo." *People v. Thompson*, 2015 IL 118151, ¶ 25. This Court also reviews questions of statutory interpretation de novo. *People v. Young*, 2011 IL 111886, ¶ 10.

III. The Appellate Court Correctly Held that It Could Not Consider Defendant's Presentence Custody Credit Claim.

A litany of procedural defaults prevented the appellate court from addressing defendant's claim for presentence custody credit.[4] First, defendants forfeit claims not raised at trial, including sentencing errors introduced through a defect in a presentence investigation report. *People v. Meeks*, 81 Ill. 2d 524, 533 (1980). Second, "[i]ssues that could have been presented on direct appeal, but were not, are [forfeited]" for purposes of collateral proceedings. *People v. Towns*, 182 Ill. 2d 491, 503 (1998) (citations omitted). Because it was "clear from the record" that defendant spent more than 215 days in pretrial custody, Def. Br. 16, defendant had to preserve the claim in the circuit court and raise it on direct appeal. As he did neither, he forfeited his claim to presentence custody credit.

Third, defendant's section 2-1401 petition was filed more than six years late. A21 (judgment entered in August 2006), C281 (petition filed in October 2014); 735 ILCS 5/2-1401(c) (petition must be filed within two years of challenged judgment); *Thompson*, 2015 IL 118151, ¶ 39 (sentencing challenges must comply with section 2-1401(c)'s two-year deadline). Nor

[4] Although the court below held that it lacked jurisdiction, the appellee may argue any issue in support of affirming the judgment. *In re Veronica C.*, 239 Ill. 2d 134, 151 (2010).

would construing the section 2-1401 petition as a successive postconviction petition save the claim: defendant waived it by failing to include it in his initial postconviction petition, and as a statutory claim, it was not cognizable. 725 ILCS 5/122-3 (claims not raised in initial petition waived); 725 ILCS 5/122-1(a) (only constitutional claims cognizable in postconviction petition).

Finally, because defendant did not mention presentence custody credit in his section 2-1401 petition, he forfeited the claim on appeal. "[A]ny issues to be reviewed" in a collateral appeal "must be presented in the petition filed in the circuit court." *People v. Jones*, 211 Ill. 2d 140, 148 (2004); *Thompson*, 2015 IL 118151, ¶ 39 (defendant may not raise issue on appeal that was not raised in section 2-1401 petition). As this Court has "repeatedly stressed, the appellate court does not possess the supervisory powers enjoyed by this [C]ourt and cannot, therefore, reach postconviction claims not raised in the initial petition[.]" *People v. Jones*, 213 Ill. 2d 498, 507 (2004) (citations omitted). The "appellate court is not free . . . to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." *Id.* at 508.

These procedural rules apply with equal force when a defendant alleges that his sentence does not conform to a statute. Although void judgments — those entered by a court lacking jurisdiction — can be attacked at any time, voidable judgments — erroneous judgments entered by a court with jurisdiction — are "not subject to collateral attack." *People v.*

Castleberry, 2015 IL 116916, ¶ 11 (citation omitted). Before *Castleberry*, the void sentence rule of *People v. Arna*, 168 Ill. 2d 107 (1995), held that "a sentence which [did] not conform to a statutory requirement [was] void" because, the reasoning went, circuit courts that "violate[d] a particular statutory requirement when imposing a sentence act[ed] without 'inherent authority[.]'" *Castleberry*, 2015 IL 116916, ¶¶ 1, 13. "[A]s to defendants, the void sentence rule functioned as a judicially created exception to the forfeiture doctrine," allowing them to attack illegally severe sentences as void in any court at any time. *People v. Price*, 2016 IL 118613, ¶ 16. *Castleberry* abolished that rule, acknowledging that under the Illinois Constitution of 1970, "[a] circuit court . . . is a court of general jurisdiction, which need not look to the statute for its jurisdictional authority." *Castleberry*, 2015 IL 116916, ¶ 15 (quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 31) (internal citations and quotation marks removed). Because a sentence that violates a statute is merely voidable, challenges to that sentence must comply with ordinary procedural rules. *Id.*; *see also Thompson*, 2015 IL 118151, ¶ 39 (challenge to sentence forfeited when raised for first time on appeal from untimely section 2-1401 petition).

IV. No Exception Permitted the Appellate Court to Excuse Defendant's Default of the Presentence Custody Credit Claim.

A. *Caballero* does not support raising presentence-custody credit claims for the first time on collateral appeal.

Defendant argues that presentence custody credit is exempt from established procedural rules because *People v. Caballero*, 228 Ill. 2d 79, 82

(2008), held that defendants may make an "application" for per diem credit under 725 ILCS 5/110-14 for the first time in a collateral appellate brief. If a defendant may apply for per diem credit in any court at any time, defendant posits, then he can also raise a claim for presentence custody credit in any court at any time. *See, e.g.*, Def. Br. 12.

But *Caballero* does not govern this case. *Caballero* interpreted 725 ILCS 5/110-14, which provides that "upon application of the defendant" courts must award a five-dollar-per-day credit against fines for time spent in certain pretrial custody. 725 ILCS 5/110-14. Caballero applied for the per diem credit for the first time on postconviction appeal, and the appellate court ordered the circuit clerk to award it. *Caballero*, 228 Ill. 2d at 82. This Court affirmed, concluding that because section 110-14 allows the credit "upon application of defendant" without limitation on when or where defendants must make the application, it could be "raised at any time and at any stage of court proceedings." *Id*. at 88. Although the claim was otherwise procedurally inappropriate, the defendant could apply for section 110-14 credit in his postconviction appellate brief because the plain language of the statute permitted him to do so. *Id.* at 87-88.

But *Caballero* does not extend to presentence custody credit. Unlike per diem credit, presentence custody credit is not obtained "upon application of the defendant." *Id.* at 83, 88. Thus, while a request for per diem credit in a postconviction appellate brief can double as an "application," *id.* at 88, there

is no such thing as an "application" for presentence custody credit. 730 ILCS 5/5-8-7(b) (2006). Rather, presentence custody credit is a mandatory sentencing rule that is subject to the ordinary rules of forfeiture. *Castleberry*, 2015 IL 116916, ¶¶ 15-16.

1. The presentence custody and per diem statutes are dissimilar.

Defendant suggests several reasons why *Caballero* should extend to this case, but none are persuasive. He argues that *Caballero* applies here because, like the per diem statute, the presentence custody statute is mandatory and imposes no time limit for claiming the credit. Def. Br. 17. But the lack of a time limit in section 110-14 mattered only because this Court had to determine when defendants could make an "application." *Caballero*, 228 Ill. 2d at 87-88 (quoting *People v. Woodard*, 175 Ill. 2d 435, 444 (1997)). Because section 5-8-7(b) does not authorize defendants to apply for the credit, it does not establish a time limit. 730 ILCS 5/5-8-7(b) (2006). Rather, section 5-8-7, like other mandatory sentencing provisions that do not mention time limits, is enforceable through a mandamus action, and not a freestanding "application" that transcends the rules of forfeiture. *See, e.g.*, *Castleberry*, 2015 IL 116916, ¶¶ 26-27 (People must file mandamus action to obtain mandatory fifteen-year sentence enhancement omitted from initial sentencing judgment).

2. Principles of judicial economy do not support extending *Caballero* to this case.

Defendant also argues that *Caballero* should govern because both the per diem and presentence custody credits are ministerial, and allowing the appellate court to grant them on collateral appeal would promote judicial economy. Def. Br. 17-18, 19-20. But this policy consideration was secondary to the question of statutory interpretation in *Caballero*. There, the Court held that the defendant's per diem credit claim was "a statutory claim and therefore not cognizable as a separate issue upon which to base relief under the Post-Conviction Hearing Act." *Caballero*, 228 Ill. 2d at 88. But because the defendant was not trying to raise a new constitutional issue for the first time on appeal (which would violate established procedural rules), but instead "simply applying for a different and purely statutory monetary credit" in his appellate brief, this Court "considered" the claim as "an 'application of the defendant' made under the statute[.]" *Id.* Only after finding a statutory means to consider the claim did this Court note that "if, as in this case, the basis for granting the application of the defendant is clear and available from the record, the appellate court may, in the 'interests of an orderly administration of justice,' grant the relief requested." *Id.* That was the correct sequence of analysis, for even easily fixed errors are still subject to the ordinary rules of forfeiture. *See, e.g.*, *Castleberry*, 2015 IL 116916, ¶¶ 21-27 (appellate court could not impose mandatory fifteen-year enhancement and People had to seek mandamus); *People v. Johnson*, 208 Ill. 2d 118, 140-41

(2003) (rejecting defendant's argument that appellate court should correct easy errors outside its jurisdiction to promote judicial economy).

Indeed, judicial economy is better served by enforcing procedural rules than excusing them. Defendant overlooks the systemic inefficiency of not raising errors until collateral appeal, easily fixed or not. Defendant could have notified the circuit court of the error at sentencing. *See* RX15 (circuit court stated "I think it's 215 days that you have served," without correction); *People v. Bryant*, 369 Ill. App. 3d 54, 60 (1st Dist. 2006) ("Public policy favors correcting errors at the trial level[.]"). Failing that, he could have argued plain error on appeal. Failing that, he could have argued in a postconviction petition that trial or appellate counsel were ineffective for missing the sentencing error. Had defendant followed any of these available procedures, the matter could have been readily resolved. Instead, this case has meandered through the state courts for nearly a decade. It would disserve judicial economy to instruct future litigants that they may chart the same course.

3. Per diem credit and presentence custody credit need not run together.

Finally, defendant argues that *Caballero* governs here because both per diem and presentence custody credit entail counting days in presentence custody and because courts often consider them together. Def. Br. 18. But the General Assembly has already distinguished the claims in multiple ways. Per diem credit is available only "upon application of the defendant," while

presentence custody credit must be calculated by the sentencing court. 725 ILCS 5/110-14(a); 730 ILCS 5/5-8-7(b) (2006). The legislature also placed the credits in different chapters of the Illinois Compiled Statutes: per diem credit is part of the Code of Criminal Procedure under Chapter 725, while presentence custody credit is part of the Unified Code of Corrections under Chapter 730. *See People v. Hill*, 199 Ill. 2d 440, 452 (2002) (using legislative categorization to determine legislative intent), *overruled on other grounds by People v. Sharpe*, 216 Ill. 2d 481 (2005). A legislative directive to treat the credits differently overrides any judicial preference to treat them the same.

In any event, this Court has never held that the claims must be treated similarly. Instead, this Court has looked to presentence custody credit cases when considering the per diem credit because of the dearth of cases discussing the per diem credit. In *Woodard*, this Court held that the "'normal rules' of waiver do not apply" to applications for per diem credit because "the statutory right to a per diem credit is conferred in mandatory terms while being subject to a defendant's application." 175 Ill. 2d at 457. After so holding, this Court noted that "the mandatory credit in section 5-8-7(b) . . . has been treated similarly," in that the appellate court had also allowed defendants to raise it for the first time on direct appeal. *Id.* (collecting cases). In *Caballero*, this Court explored appellate cases about presentence custody credit to assist in its reasoning. 228 Ill. 2d at 83-87 (collecting cases). The Court noted the district split on whether to allow

defendants to seek presentence custody credit on collateral appeal and did not disavow the cases on either side. *See id.* at 87 (citing *People v. Bates*, 179 Ill. App. 3d 705 (4th Dist. 1989), *People v. Uran*, 196 Ill. App. 3d 293 (3d Dist. 1990), and *People v. Reed*, 335 Ill. App. 3d 1038 (4th Dist. 2003)). But neither *Woodard* nor *Caballero* "tacit[ly] approv[ed]" appellate cases endorsing defendant's position here. Def. Br. 18.

Defendant also insists that *Caballero* applies because presentence custody credit presents a weightier concern than per diem credit. Def. Br. 18-19 (arguing that failure to award presentence custody credit violates Double Jeopardy Clause). But procedural rules do not turn on the importance of the right. *See, e.g.*, *Thompson*, 2015 IL 118151, ¶ 39 (Eighth Amendment challenge forfeited for failure to raise in timely section 2-1401 petition). Regardless, defendant's presentence custody does not implicate the Double Jeopardy Clause. *See North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969) (holding that Double Jeopardy Clause requires credit for *prison* time already served under vacated conviction); *cf. Faye v. Gray*, 541 F.2d 665, 667 (7th Cir. 1976) ("Where the pre-sentence time and the sentence imposed together are less than the statutory maximum penalty, no grounds exist for finding 'double punishment[.]'"). Finally, the statutory differences mean that presentence custody credit is favored over per diem credit in the mine run of cases. Courts award per diem credit only on application but must award presentence custody credit without request.

B. Construing defendant's request as a motion to amend mittimus would not have made it procedurally appropriate.

Defendant also contends that presentence custody credit claims are, in effect, motions to amend the mittimus, which he argues he can raise at any time. But defendant seeks to modify the judgment, not the mittimus. A sentencing judgment authorizes the Illinois Department of Corrections to imprison someone; a mittimus is a copy of that judgment for the Department's reference. 735 ILCS 5/2-1801(a). Because the mittimus is only a reference, if it inaccurately describes the sentencing judgment, the circuit court can modify it at any time. *People v. Latona*, 184 Ill. 2d 260, 278 (1998) (citations omitted). The judgment itself, however, cannot be modified after the sentencing court loses jurisdiction. *Id.* In *Latona*, as part of a plea agreement, the circuit court awarded defendant Williams presentence custody credit that the Department did not honor. *Id.* at 274. The circuit court then amended the mittimus to convey unambiguously to the Department how much credit the court had included in the sentencing judgment. *Id.* at 278-79. Holding that "[t]he circuit court had the authority to enter an order amending the mittimus," this Court denied the Department's request for mandamus to vacate those orders. *Id.* Unlike *Latona*, defendant argues not that the circuit court awarded 398 days of credit and the mittimus incorrectly said 215, but that the court gave him 215 days of credit and should have given him more. A21. Defendant's quarrel

here is not with the mittimus but with the sentencing judgment itself, which he cannot challenge for the first time on collateral appeal.

In any event, the appellate court lacks the authority to amend a sentence on collateral appeal by claiming to amend the mittimus. In the middle of the last century, this Court explained several times that "the mittimus is not part of the common-law record and any error therein affords no basis for the assignment of error in this [C]ourt." *People v. Cox*, 401 Ill. 432, 434 (1948) (citing *People v. Wells*, 393 Ill. 626 (1946)); *People v. Anderson*, 407 Ill. 503, 505 (1950). This Court assured defendants that they could obtain a corrected mittimus from the circuit court, where "a correct mittimus may be issued at any time." *Cox*, 401 Ill. at 434.

But like a game of telephone, courts have since misinterpreted this language to mean that the *appellate court* can modify a *sentence* by calling it an amendment of the mittimus. For instance, *People v. Wren*, 223 Ill. App. 3d 722 (5th Dist. 1992), held that although "[a] sentencing credit issue . . . is not appropriately considered in an appeal from the dismissal of a post-conviction petition [that] did not raise the issue," the court could award the credit by treating it as a motion to amend the mittimus. *Id.* at 731. The Fifth District found that power in *People v. Miles*, 117 Ill. App. 3d 257, 259 (4th Dist. 1983), which in turn relied on *Anderson*, which rejected the defendant's "insistence that the judgments be reversed for the issuance of proper mittimi," because "correct mittimi may be issued at any time." 407 Ill. at 505.

Other courts to hold that defendants may raise presentence custody claims on collateral appeal as motions to amend the mittimus similarly misapplied this Court's precedents. In *People v. Andrews*, 365 Ill. App. 3d 696 (3d Dist. 2006), the Third District relied on *Wren*, 223 Ill. App. 3d at 731 and its own precedent, *People v. White*, 357 Ill. App. 3d 1070 (3d Dist. 2005), to grant extra presentence custody credit on collateral appeal as an amendment to the mittimus. *Andrews*, 365 Ill. App. 3d at 699-700. *White* concerned whether the circuit court had authority to amend the mittimus. 357 Ill. App. 3d at 1072-73 (citing *Baker v. Dep't of Corr.*, 106 Ill. 2d 100, 106 (1985) (holding that habeas corpus and mandamus to correct mittimus unwarranted because circuit court retained jurisdiction to correct mittimus)).

In *People v. Flores*, the Second District held that by exercising its supervisory power to allow a presentence custody claim, this Court had invited the appellate court to entertain such claims on collateral appeal. *People v. Flores*, 378 Ill. App. 3d 493, 496 (2d Dist. 2008) (citing *People v. Brown*, 222 Ill. 2d 579 (2006) (supervisory order)). The appellate court inappropriately found this Court's "approach . . . instructive," *id.* at 496, failing to acknowledge that only this Court has supervisory authority. *Jones*, 213 Ill. 2d at 507 (citations omitted) ("[T]he appellate court does not possess the supervisory powers enjoyed by this [C]ourt[.]").

Because the appellate court lacks the authority to change a defendant's sentence on collateral appeal by treating the claim as a motion to amend the mittimus, defendant's presentence custody credit claim is defaulted.

V. The People Do Not Oppose Alternative Relief, but Not as Defendant Proposes.

A. The People do not oppose additional presentence custody credit, but this Court should not grant the credit outright.

The People do not oppose additional presentence custody credit, but the circuit court should hear defendant's claim in the first instance. "As a general rule, [this Court] will not issue a supervisory order unless the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice or intervention is necessary to keep an inferior tribunal from acting beyond the scope of its authority." *People ex rel. Birkett v. Bakalis*, 196 Ill. 2d 510, 513 (2001). The record is clear that defendant spent more than 215 days in presentence custody and, therefore, defendant's sentence did not comply with 735 ILCS 5/5-8-7(b) (2006). Although defendant has available remedies, he likely could not obtain relief without intervention from this Court. For example, he could file a successive postconviction petition (alleging that counsel was ineffective for failing to bring the claim) but would need to show cause and prejudice for his failure to raise the claim in his initial petition, which he likely could not do. 725 ILCS 5/122-1(f). He could also seek leave to file a mandamus complaint

in this Court, but because that request would merely duplicate the briefing here, the People do not oppose supervisory relief.

But this Court should exercise its supervisory authority to direct the circuit court to hold an evidentiary hearing rather than grant the requested credit outright, because the record does not clearly establish that defendant is entitled to all of the credit he requests. Although the record shows that defendant was not released between arrest and sentencing, it does not reveal whether defendant spent that entire period in creditable custody. The circuit court must give credit for both "time spent in custody as a result of the offense for which the sentence was imposed," 730 ILCS 5/5-8-7(b) (2006), and "a commitment to the Department of Human Services following a finding of unfitness." 725 ILCS 5/104-24 (2006). But credit is discretionary for psychiatric treatment and available only if the circuit court finds that the confinement was custodial. 730 ILCS 5/5-8-7(b) (2006) ("[T]he trial court may give credit to the defendant . . . when the defendant has been confined for psychiatric . . . treatment prior to judgment, if the court finds that the detention or confinement was custodial."). Here, on April 6, 2006, the circuit court ordered defendant to be transferred to a DHS facility after he attempted suicide but canceled that order on April 20, 2006. C73, 84. The record does not establish whether defendant was ever transferred and, if so, for how long. Thus, this Court should not exercise its supervisory authority to award 183 days of credit outright, but instead direct the circuit court to

determine the appropriate amount of credit and amend defendant's sentence accordingly.

Moreover, remand makes sense here because the appellate court has already remanded the case to the circuit court for *Pearson* admonishments, and the circuit court can address both outstanding issues on remand.

B. This Court should amend its rules to allow parties to move to correct illegal sentences in the circuit courts at any time.

In *People ex rel. Berlin v. Bakalis* and *People v. Vara*, the People proposed a new rule "to allow statutorily unauthorized sentences to be corrected at any time by motion in the circuit court." *Bakalis*, 2018 IL 122435, ¶ 24 & n.2. This Court referred the proposal to the rules committee. *Id.* ¶ 27. The People briefly reiterate the proposal here and note that it would address the issue in this case.

Since the demise of the void sentence doctrine, mandamus is the preferred remedy for parties seeking to correct illegal sentences. Thus, parties must petition this Court to correct broad classes of statutorily unauthorized sentences: those above or below a mandatory maximum or minimum, those omitting mandatory supervised release (MSR) terms or including incorrect MSR terms, and those containing fines other than as statutorily mandated, to name a few. A rule change to allow circuit courts to correct statutorily unauthorized sentences at any time would move the forum of first resort to correct statutorily unauthorized sentences from this Court to the circuit courts.

This proposal would encompass defendant's case, as presentence custody credit is a mandatory statutory sentencing rule. It thus addresses defendant's concerns about error correction, while avoiding the inefficiency in his proposed rule that would allow defendants to seek presentence custody credit in any court at any time. "Public policy favors correcting errors at the trial level[.]" *Bryant*, 369 Ill. App. 3d at 60. And for good reason. Circuit courts can receive new evidence to resolve disputes in the amount of credit owed; appellate courts cannot. And allowing defendants to raise claims in the appellate court that do not pertain to the judgment below would detract from the appellate court's (and appellate advocates') primary function.

CONCLUSION

This Court should affirm the judgment of the Illinois Appellate Court, Fourth District; order the circuit court to conduct a hearing to determine the amount of presentence custody credit to which defendant is entitled; and amend its rules to provide that a statutorily unauthorized sentence may be corrected at any time by motion in the circuit court.

March 27, 2018

Respectfully submitted,

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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 containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-two pages.

/s/ Daniel B. Lewin
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 27, 2018 the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was electronically filed with the Clerk of the Supreme Court of Illinois and served upon the following by e-mail:

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

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