IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- OCTAVIUS LORENZO JOHNSON Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-16-0920. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 13-CF-1447. Honorable Scott D. Drazewski, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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POINTS AND AUTHORITIES

A defendant who entered into a partially negotiated plea agreement may challenge his sentence on the basis the trial court relied on improper sentencing factors, without withdrawing his guilty plea.

A.
This Court's precedent supports the Fourth District's holding.

B.

The State is wrong to equate substantive excessive-sentence challenges with procedural improper-sentence challenges when interpreting Rule 604(d).

1.

The State ignores the need to maintain the integrity of the judicial process by protecting defendants' statutory and constitutional rights at sentencing.

2.

A plea bargain assumes proper sentencing procedures will be followed. Unlike an excessive-sentence challenge, an improper-sentence challenge does not breach the contract—it asks for specific performance by the court.

ISSUE PRESENTED FOR REVIEW

Whether a defendant who entered into a partially negotiated plea agreement may challenge his sentence on the basis the trial court relied on improper sentencing factors, without withdrawing his guilty plea.

STATUTES AND RULES INVOLVED

Illinois Supreme Court Rule 604(d) (eff. Nov. 1, 2000):

" * * * No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending."

STATEMENT OF FACTS

It is necessary to supplement the State's statement of facts with the following to allow full consideration of the issue presented.

Octavius Johnson pled guilty to two Class 1 counts of unlawful delivery of a controlled substance (less than a gram of a substance containing cocaine) within 1,000 feet of a church, in exchange for the dismissal of seven other charges and a cap on the total sentence to be imposed on the two convictions of 13 years in prison. (Vol. XII, R. 6, 10-16)

Before imposing the sentences in this case, the circuit court told Mr. Johnson: "[S]o long as any sentence that the [c]ourt imposes is [within the negotiated sentencing range of 4] and 13 years, *** the reviewing court, in all likelihood, unless I say something really stupid, such as a factor that is not allowed to be considered under the [s]tatute, will say that that was within the [c]ourt's discretion because it fell within the range of the sentence." (Vol. XIII, R. 25-26)

In crafting the sentences, the court then explicitly relied on two statutory factors in aggravation. First, when discussing "[f]actors in mitigation[,]" the court stated:

> "[Y]our harm could have threatened, could have caused serious physical harm to another[.] *** [T]he harm that we're referring to relates to *** preying, in essence, upon the addictions of others, and so when you are selling drugs, in essence, to individuals who are addicted, you know that you're not helping them. It's for profit; it's for gain. It could, or might, cause serious physical harm to them depending upon how they use or abuse those drugs, so that isn't a factor in mitigation." (Vol. XIII, R. 26-27)

The court then discussed "[t]he factors in aggravation[,]" stating: "I think the conduct threatened serious harm. You did receive compensation, that being for committing the offense, that being of selling drugs." (Vol. XIII, R. 30)

The court also discussed Mr. Johnson's criminal history and the need for deterrence. (Vol. XIII, R. 30) The court then imposed concurrent sentences of 11 years in prison, which it described as "giving [Mr. Johnson] two years' credit off the maximum" negotiated cap of 13 years. (Vol. XIII, R. 31-32)

In giving appellate admonishments, the court informed Mr. Johnson that he would first need to move to withdraw the guilty pleas. (Vol. XIII, R 33) The court explained that, if the motion were denied, Mr. Johnson would "then be limited on your right to appeal to those issues and claims of error" raised in the motion. (Vol. XIII, R. 34) The court did not discuss a motion to reconsider the sentences.

Mr. Johnson filed a *pro se* motion for reduction of sentence. (C. 79-83) The court entered a docket entry, stating: "Court receives correspondence from [defendant]. A timely filed [motion] to [r]econsider [s]entence has been filed, however, as this sentence was imposed pursuant to a plea agreement (the State agreed to a 'cap'), the defendant is required to move to withdraw his plea of guilty." (C. 6) (docket entry for February 10, 2015).

At a hearing, the court explained to Mr. Johnson that "because your sentence is pursuant to a plea agreement, *** you can't have the [c]ourt just reconsider your sentence" and "I can't reconsider your sentence." (Vol. XIV, R. 2, 12; C. 6) The court gave counsel leave to file an amended motion. (Vol. XIV, R. 13-14) Counsel stated that because there was "a partially negotiated [guilty] plea[,] *** the only proper motion we believe would be a motion to withdraw guilty plea." (Vol. XVI, R. 2) The court then denied a motion to withdraw the guilty pleas and the *pro se* motion to reconsider the sentences. (C. 98-99; Vol. XVI, R. 2, 18)

In the initial appeal, the Fourth District of the Appellate Court remanded for strict compliance with Supreme Court Rule 604(d). (C. 119) On remand, the circuit court again denied the motion to withdraw the guilty pleas and the *pro se* motion to reconsider the sentences. (Supp. Vol., R. 3)

Mr. Johnson argued in this appeal that the trial court committed prong-two plain error by relying on improper statutory aggravating factors at the sentencing hearing. *People v. Johnson*, 2017 IL App (4th) 160920, ¶ 1. (St. br. App., A2) The State did not contest that these procedural sentencing errors occurred, that they reasonably could have affected the sentences imposed, or that the errors qualified as prong-two plain error that undermined the fairness of the proceedings and the integrity of the judicial process. (St. br. App., A4)

Instead, the State asked the Fourth District to overrule its own longstanding interpretation that Supreme Court Rule 604(d) allows defendants who enter a negotiated guilty plea to challenge certain types of improper sentencing, such as reliance on improper aggravating factors, without needing to move to withdraw the plea. (St. br. App., A4) In a published opinion, the Fourth District declined the State's request and reversed Mr. Johnson's sentences and remanded for a new sentencing hearing. (St. br. App., A14) This Court granted the State's petition for leave to appeal.

ARGUMENT

A defendant who entered into a partially negotiated plea agreement may challenge his sentence on the basis the trial court relied on improper sentencing factors, without withdrawing his guilty plea.

Argument Summary

The State asks this Court to resolve a split among appellate court districts in interpreting Illinois Supreme Court Rule 604(d). (St. br. App., A3) The Fourth District has long held that Rule 604(d) allows defendants who enter a negotiated guilty plea to challenge certain improper sentencing procedures, but not excessive sentencing, in a motion to reconsider the sentence. *People v. Johnson*, 2017 IL App (4th) 160920, ¶¶ 17-42; *People v. Palmer-Smith*, 2015 IL App (4th) 130451, ¶¶ 24-28; *People v. Economy*, 291 Ill. App. 3d 212, 219 (4th Dist. 1997); *People v. Catron*, 285 Ill. App. 3d 36, 37 (4th Dist. 1996). The Second District has long agreed. *People v. Martell*, 2015 IL App (2d) 141202, ¶ 10; *People v. Dover*, 312 Ill. App. 3d 790, 797 (2000). Only the Third District has explicitly held otherwise, in the lone case of *People v. Rademacher*, 2016 IL App (3d) 130881, ¶¶ 58-60.

The State wishes to prevent defendants in this situation from challenging any procedural errors of improper sentencing that occur after they plead guilty. (St. br. at 9) The State's position has troubling implications: No matter how egregious the procedural sentencing error, no matter how badly a sentencing court violates a defendant's due process and substantial rights, defendants who entered a partially negotiated guilty plea could not challenge the errors, but rather could only move to withdraw their pleas.[1] This goes much too far.

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[1]The State now attempts to narrow the broader argument it made in the appellate court by adding a new limit: "Rule 604(d) prohibits defendants who enter negotiated guilty pleas from challenging any *statutorily authorized* sentence on appeal." (Emphasis added, capitalization altered.) (St. br. at 8) As discussed below, the State never explains this new concession, or why it believes such a defendant may challenge a sentence that is *substantively* not authorized by statute, but not a sentence created in manner that is *procedurally* not authorized-the point at the core of the Fourth District's holding here. See (St. br. App., A6, A10)

The State is wrong to assert this Court's precedent does not support the Fourth District's holding. (St. br. at 9) This Court already reversed a sentence resulting from a negotiated guilty plea for reliance on an improper aggravating factor in *People v. Heider*, 231 Ill. 2d 1, 5-6, 9-11, 24 (2008) (holding the sentencing court "improperly relied on mental retardation as an aggravating factor in sentencing" after the defendant entered a negotiated guilty plea with a sentencing recommendation). As discussed by the Fourth District, this Court's other precedent supports its holding here too. (St. br. App., A4-6, A8-10)

The State is also wrong to assert there is no difference between a substantive excessive-sentence challenge and a procedural challenge to an improper-sentence error that undermines the fairness of the sentencing hearing. (St. br. at 12-13) The State overlooks this Court's twin interests in upholding the integrity of our judicial system and protecting defendants' statutory and constitutional at sentencing. Defendants who plead guilty do not waive their rights to a fair sentencing hearing. And improper sentencing procedures are not bargained for in any plea deal, making this request for error-correction an issue of specific performance, rather than a breach of the agreement.

Also, the remedy the State proposes presents a Hobson's choice that punishes the defendant either way for an error he did not cause: Accept the sentencing errors you did not bargain for, or move to withdraw your plea. Of course, many defendants in this position—like Mr. Johnson—do not wish to withdraw their favorable pleas, but rather, want the obvious improper-sentence error corrected. The State would have this Court reject that reasonable request.

By contrast, the Fourth District's longstanding interpretation of Rule 604d allows defendants with negotiated guilty pleas to challenge a sentencing court's reliance on improper aggravating factors in a motion to reconsider the sentence.

(St. br. App., A6-7) Such defendants still may not attack the substantive correctness of the sentence itself, but they may directly address certain procedural violations that occur at sentencing, without being required to withdraw their pleas.

As the State notes, over 96% of Illinois felony convictions stem from guilty pleas. (St. br. at 15); see *Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting "the central role plea bargaining plays in securing convictions and determining sentences"). This staggering statistic means "ours is for the most part a system of pleas, not a system of trials[.] *** [P]lea bargaining *** is not some adjunct to the criminal justice system; it is the criminal justice system." (Internal quotation marks and citations omitted.) *Frye*, 566 U.S. at 143-44. Because our system relies almost exclusively on pleas to function, the impact of the State's request to deny justice for procedural sentencing violations would be widespread. On the other hand, the Fourth and Second Districts have already been following the opposite view for quite some time, with no dire results. This Court should reject the State's approach and instead affirm the Fourth District's holding.

Standard of Review

The State does not dispute that: (1) the sentencing court relied on improper aggravating factors here; (2) there is a reasonable probability the errors affected Mr. Johnson's sentences, impacting his fundamental right to libery; and (3) the errors qualify as prong-two plain error because they undermine the fairness and integrity of the judicial process. (St. br. App., A4) Rather, the State only asserts that Supreme Court Rule 604(d) bars Mr. Johnson from obtaining any relief from those errors because they followed a negotiated guilty plea. (St. br. at 8-9) "[T]he interpretation of a supreme court rule presents a question of law, which we review *de novo*." *People v. Tousignant*, 2014 IL 115329, ¶ 8.

Authorities on Interpreting Rule 604(d)

Supreme Court rules are reviewed based on the "same principles that govern the interpretation of statutes[,]" with a goal to "ascertain and give effect to the intention of the drafters of the rule." *People v. Tousignant*, 2014 IL 115329, ¶ 8. The language of the rule itself provides the most reliable indicator of that intent, and that language "must be given its plain and ordinary meaning." *Id.* "Words and phrases should not be considered in isolation; rather, they must be interpreted in light of other relevant provisions and the statute as a whole." *Id.*

But also, "[e]ach word, clause and sentence *** , if possible, must be given reasonable meaning and not rendered superfluous." *Brucker v. Mercola*, 227 Ill. 2d 502, 514 (2007); see *Fisher v. Waldrop*, 221 Ill. 2d 102, 112 (2006) ("Courts should *** avoid[] constructions which would render any term meaningless or superfluous."); *Arnold v. Bd. of Trustees*, 84 Ill. 2d 57, 62 (1981) (indicating a "strong presumption against finding *** language to be mere 'surplusage' ").

But in addition to the language itself, "the court may consider the purpose behind the law and the evils sought to be remedied, as well as the consequences that would result from construing the law one way or the other." *Tousignant*, 2014 IL 115329, ¶ 8.

Supreme Court Rule 604(d) states, in relevant part:

> "No appeal shall be taken upon a negotiated plea of guilty *challenging the sentence as excessive* unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Nov. 1, 2000). See (St. br. App., A4-5) (discussing history and development of Rule 604(d)).

As the Fourth District noted, although the italicized language above clearly forecloses excessive-sentence arguments, it "leaves open the question of whether an improper-sentence argument is similarly foreclosed by the failure to withdraw the negotiated guilty plea." (St. br. App., A5)

The purpose of Supreme Court Rule 604(d) is to promote finality in the convictions and sentences that result from guilty pleas, by limiting the types of arguments that may be made on appeal, and thereby reduce the number of appeals filed in those cases. See, *e.g., People v. Wilk*, 124 Ill. 2d 93, 106 (1988) ("The rule was designed to eliminate needless trips to the appellate court and to give the trial court an opportunity to consider the alleged errors and to make a record for the appellate court to consider on review in cases where defendant's claim is disallowed."). In other words, the rule is meant to conserve judicial resources, surely a worthwhile goal.

As explained by the Fourth District, the key language in Rule 604(d) for purposes of this appeal—including: "challenging the sentence as excessive"—was added to address concerns raised in *People v. Evans*, 174 Ill. 2d 320, 326-27 (1996), and *People v. Linder*, 186 Ill. 2d 67, 74 (1999). (St. br. App., A4-5) *Evans* barred an excessive-sentence argument in the context of a fully-negotiated plea, while *Linder* extended the reasoning of *Evans* to bar an excessive-sentence argument in the context of a partially-negotiated plea agreement with a sentencing concession. *Evans*, 174 Ill. 2d at 326-27; *Linder*, 186 Ill. 2d at 74 ("By agreeing to plead guilty in exchange for a recommended sentencing cap, a defendant is, in effect, agreeing not to challenge any sentence imposed below that cap *on the grounds that it is excessive.*" (Emphasis added.)).

A.

This Court's precedent supports the Fourth District's holding.

This Court's precedent supports the Fourth District's holding that this kind of improper-sentence error may be directly challenged, without moving to withdraw the plea. The sentencing judge in this case apparently thought the issue could be challenged, preemptively telling Mr. Johnson: "unless I say something really stupid, such as a factor that is not allowed to be considered under the [s]tatute," the reviewing courts will likely uphold the sentences imposed. (Vol. XIII, R. 25-26)

As noted above, this Court has already reversed a sentence that resulted from a negotiated guilty plea on the basis of an improper sentencing factor, in *People v. Heider*, 231 Ill. 2d 1, 5-6, 9-11, 24 (2008). In *Heider*, the parties entered a plea agreement that included the dismissal of other charges and a promise from the prosecution to recommend a minimum 6-year sentence at sentencing. *Id.* at 5-6. At the sentencing hearing, the court then imposed a sentence of 10 years in prison, while relying on the defendant's mental impairment as a factor in aggravation. *Id.* at 9-11. This Court reversed, holding the sentencing court erred in its reliance on that factor. *Id.* at 24. The State's argument would mean *Heider* is wrongly decided and such important issues could never be addressed in negotiated-guilty-plea cases. That must be incorrect.

And as the Fourth District explained in its opinion, its holding finds support in this Court's decisions in *People v. Williams*, 179 Ill. 2d 331, 333 (1997), and *People v. Wilson*, 181 Ill. 2d 409, 413 (1998). (St. br. App., A5-6) ("Notably, both *Williams* and *Wilson* limited the application of *Evans* to cases involving excessive-sentence arguments and allowed improper-sentence arguments to be raised without first withdrawing the negotiated guilty plea."); (St. br. App., A8-10).

In *Williams*, the negotiated guilty plea involved a sentence cap, like this case (Vol. XII, R. 6, 10-16), and the defendant challenged his resulting sentence on appeal as void, without moving to withdraw his guilty plea. *Williams*, 179 Ill. 2d at 332. This Court rejected the State's argument that the defendant was required to move to withdraw his plea, noting:

> "In the instant case, the defendant does not contend that his sentence was excessive; rather, he argues that the court imposed a sentence which, under the statute, it had no authority to impose. Thus, *Evans* is inapplicable and cannot bar defendant's claim that his sentence was void because it does not conform with the statute." *Id.* at 333.

So too, in *Wilson*, the defendant entered a negotiated plea with a sentencing cap, then challenged his sentence on appeal as not being statutorily authorized. *Wilson*, 181 Ill. 2d at 413-14. This Court again rejected the State's argument that the defendant was required to move to withdraw his plea:

> "[I]n the instant case, [the defendant] argues that the trial court imposed sentences which violated statutory requirements. According to our reasoning in *Williams*, [the defendant's] claim of improper sentencing by the trial court is not barred and can be considered regardless of whether [the defendant] complied with the requirements of *Evans*. [Citation]. We find that under *Williams*, a challenged to a trial court's statutory authority to impose a particular sentence is not waived when a defendant fails to withdraw his guilty plea and vacate the judgment." *Id.* at 413.

The Fourth District quoted the above passages from *Williams* and *Wilson* and relied heavily upon their logic in its holding, after noting that the plain language of Rule 604(d) and the holdings of *Evans* and *Linder* only specifically limit an excessive-sentence challenge, and do not speak to an improper-sentence challenge. (St. br. App., A6, A8-10) The Fourth District noted it was merely reaffirming its own

longstanding interpretation of this Court's precedent. (St. br. App., A9) (citing *Palmer-Smith*, 2015 IL App (4th) 130451, ¶¶ 26, 28, and *Catron*, 285 Ill. App. 3d at 37-38).

As the Fourth District explained, allowing a defendant to directly challenge a court's reliance on improper statutory aggravating factors without moving to withdraw his plea is "supported by the logic employed by the supreme court in *Williams* and *Wilson*, which stands for the proposition that where a sentence is void or otherwise not statutorily authorized, a defendant need not withdraw his negotiated guilty plea to challenge his sentence." (St. br. App., A10) The Fourth District then stated:

> "In the context of partially negotiated plea agreements, the effect of the trial court's act of imposing a void sentence or a sentence not authorized by statute is similar to the act of fashioning a sentence based on improper sentencing factors in that the court has imposed a sentence which does not comply with the law. In considering the policy of ensuring each party is held to their end of the plea bargain, the trial court's errors do not alter the State's or the defendant's adherence to the agreement, but it does unilaterally alter the terms of the agreement without the assent of either the State or the defendant. Thus, in this context, we see no difference between the effect of the trial court's imposition of a void sentence and the trial court's imposition of a sentence in reliance on improper sentencing factors. It would then logically follow a defendant need not withdraw his guilty plea to raise an unfair-sentence challenge when his sentence has been crafted in reliance on improper sentencing factors, as in the case when the court imposes a void sentence." (St. br. App., A10)

In other words, the Fourth District concluded that an improper-sentence challenge may be made in a motion to reconsider the sentence when either the substance of the sentence—or the procedure used to create it—clearly violates the law.

The State, however, never fully addresses this important analysis. As noted above, the State adds a new attempt to limit its argument by now asserting that only challenges to "statutorily authorized" sentences are barred by Rule 604(d), which implies that challenges to statutorily unauthorized sentences are allowed. (St. br. at 8) This concession is inconsistent with the State's broader argument, however, because Supreme Court Rule 605(c) would still not tell a defendant he had the right to challenge a sentence that is substantively unauthorized by statute, anymore than it tells a defendant he may challenge a sentence created by unauthorized procedures. (St. br. at 9, 20-21; St. br. App., A9-10)

But the State also attempts to both limit the holdings of *Williams* and *Wilson* and undermine their continuing legitimacy. First, the State describes those cases as creating a "far narrower exception to the *Evans* rule." (St. br. at 12) The State criticizes the language in *Wilson* as "loosely referr[ing] to the claim that a sentence was unauthorized as an 'improper sentenceing' claim[,]" then asserts that "nothing in *Williams* or *Wilson* suggests that the exception recognized in those cases was meant to include claims that a trial court erroneously considered an inapplicable aggravating factor in fashioning a statutorily authorized sentence." (St. br. at 13) This is unresponsive to the Fourth District's discussion of the similarity between a sentence that is substantively unauthorized by law and a sentence that is created by an unauthorized procedure—in either case, the sentencing court had no discretion and its actions were clearly contrary to the law. (St. br. App., A10)

The State then points to *People v. Diaz*, 192 Ill. 2d 211, 217 (2000), in which this Court held that a defendant who entered a partially negotiated guilty plea could not challenge the sentencing court's decision to admit certain evidence in aggravation during sentencing, without moving to withdraw his plea. (St. br. at 13)

The State believes the only difference between *Diaz*, and *Williams* and *Wilson*, is that in *Diaz* "there was no allegation that the defendant's sentence was 'statutorily void[.]' " (St. br. at 13) (quoting *Diaz*, 192 Ill. 2d at 226).

But in *Diaz*, this Court found that "both *Williams* and *Wilson* are *factually* inapposite to the matter at bar." (Emphasis added.) *Diaz*, 192 Ill. 2d at 226. This Court noted that in *Williams*, it agreed with the defendant's argument that "the circuit court lacked statutory authority to impose consecutive prison and probation terms for a single offense[,]" and held that "*Evans* does not bar a sentence challenge where a defendant claims that his sentence is void because it does not conform with the sentencing provisions of the Unified Code of Corrections." *Id.*

This Court went on to note it had reaffirmed *Williams* in *Wilson*, "stating that a 'challenge to a trial court's statutory authority to impose a particular sentence is not waived when a defendant fails to withdraw his guilty plea and vacate the judgment.' " *Diaz*, 192 Ill. 2d at 226 (quoting *Wilson*, 181 Ill. 2d at 413). This Court explained:

> "We concluded in *Wilson* that, under the specific circumstances where the circuit court imposed sentences which violated the statutory requirements found in the Unified Code of Corrections, a court may review a challenge to a statutorily improper sentence without requiring the defendant to first move to withdraw his guilty plea." *Diaz*, 192 Ill. 2d at 226.

This Court then concluded with the line the State partly quotes here (St. br. at 13): "We find defendant's reliance upon *Williams* and *Wilson* to be misplaced, as no allegation has been made in this case that defendant's sentence is statutorily void." *Diaz*, 192 Ill. 2d at 226.

But *Diaz* is *factually* unlike *Williams* and *Wilson* because it revolved around a question of a sentencing court's discretion (to admit evidence at

sentencing)—which makes it like an excessive-sentence argument—rather than a clear violation of statutory authority. *Id.* This case, on the other hand, looks much more like *Williams* and *Wilson* because it involves a clear violation of a court's authority to rely on proper statutory aggravating factors in fashioning a sentence. (St. br. App., A10); *Williams*, 179 Ill. 2d at 333; *Wilson*, 181 Ill. 2d at 413-14. The fact that this error is procedural in nature, rather than substantive, should not matter in interpreting Rule 604(d). In both cases, the sentencing court has no discretion and has clearly violated the law.

The State then simultaneously attempts to undermine the legitimacy of these holdings, asserting in a footnote that "[i]t is unclear whether the exception recognized in *Williams* and *Wilson* survived the abolition of the void sentencing doctrine." (St. br. at 13 n.4) (quoting *People v. Castleberry*, 2015 IL 116916, ¶ 17). But the State overlooks that the abolition of the void sentencing rule as a separate vehicle to raise claims does not change the fact that *Williams* and *Wilson* interpreted Rule 604(d) as allowing defendants to raise those claims directly. *Williams*, 179 Ill. 2d at 333; *Wilson*, 181 Ill. 2d at 413-14.

In other words, *Williams* and *Wilson* did not say that the void sentencing rule allows defendants to raise improper-sentence claims *despite* the meaning of Rule 604(d); it interpreted Rule 604(d) as allowing those claims, some of which also happened to be void. Although the scaffolding of the void sentencing rule was removed from around it, Rule 604(d) remains standing.

Three other important points in the Fourth District's analysis of this Court's precedent require separate discussion below, in part because the State fails to address them. Each of these three points relates to and refutes the State's assertion that there is no meaningful difference between an excessive-sentence challenge and an improper-sentence challenge under Rule 604(d). (St. br. at 15, 18-19)

B.

The State is wrong to equate substantive excessive-sentence challenges with procedural improper-sentence challenges when interpreting Rule 604(d).

The State asserts that, under Rule 604(d), there really is no difference between an excessive-sentence challenge and an improper-sentence challenge like the one at issue here. (St. br. at 15, 18-19) This argument must fail, in part based on three important points the Fourth District made that the State fails to address. These points are that: (1) a defendant's right to a fair sentencing hearing must be protected; (2) the contract theory at the heart of this Court's *Evans-Linder* rule, which in turn animates Rule 604(d), breaks down and requires a different outcome in this context; and (3) the State's proposed remedy of requiring defendants to move to withdraw their pleas unfairly saddles defendants with the cost of improper-sentence errors they did not cause. (St. br. App., A8-10)

1.

The State ignores the need to maintain the integrity of the judicial process by protecting defendants' statutory and constitutional rights at sentencing.

The Fourth District succinctly explained the "important practical difference" between improper-sentence and excessive-sentence claims:

> "When a defendant challenges his sentence based upon the trial court's reliance on an improper sentencing factor, he is asserting his constitutional right to a fair sentencing hearing was violated. The mere fact a defendant agrees to a negotiated plea does not mean he has agreed to give up his right to be fairly sentenced in accordance with the laws of the State of Illinois." (St. br. App., A8)

The State's silence on this critical point is telling. The State believes defendants like Mr. Johnson who point out a sentencing court's clear procedural error in crafting

a sentence—and that this undermined the fairness and integrity of the proceedings—are engaging in "gamesmanship[.]" (St. br. at 9) This is not just wrong, it betrays a troubling view of the rules of sentencing: that they do not truly matter, that they are a fiction. So long as the sentence falls within the bargained-for range, it matters not how the judge fashioned that sentence, the State seems to say. But that cannot be correct; these rules ensure the integrity of the judicial process.

Multiple constitutional protections guarantee the right to a fair sentencing hearing, including the sixth amendment right to a fair trial, the eighth amendment right to be free of cruel and unusual punishment, and the fourteenth amendment right to due process. U.S. Const. amends. VI, VIII, XIV; see, *e.g.*, *People v. Shaw*, 186 Ill. 2d 301, 339-40 (1998). A variety of statutory protections, including the statutory list of aggravating factors at issue here, then undergird and enforce those constitutional rights. See *People v. Martin*, 119 Ill. 2d 453, 458 (1988) (noting the "judge's consideration of [an improper] factor in aggravation in sentencing clearly affected the defendant's fundamental right to liberty [citation,] and impinged on her right not to be sentenced based on improper factors").

For instance, where a statute affords a defendant the right to a jury at sentencing, he then " 'has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [citation], and that liberty interest is one that the [f]ourteenth [a]mendment preserves against arbitrary deprivation by the State.' " *Shaw*, 186 Ill. 2d at 342 (quoting *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)).

The Supreme Court recently noted that, although "a valid guilty plea forgoes" both "a fair trial" and "other accompanying constitutional guarantees[,] *** those simultaneously relinquished rights *** do not include a waiver of the privileges which exist beyond the confines of the trial." (Internal quotation marks and citations omitted.) *Class v. United States*, ___ U.S. ___, 138 S. Ct. 798, 805 (2018). The Court

held that a defendant's "statutory right directly to appeal his conviction 'cannot in any way be characterized as part of the trial[,]' " and therefore is not waived by pleading guilty. *Class*, 138 S. Ct. at 805 (quoting *Lafler v. Cooper*, 566 U.S. 156, 165 (2012)). Here too, Mr. Johnson has not waived the various constitutional and statutory protections that together comprise the right to a fair sentencing hearing—similarly not part of the trial—by simply pleading guilty.

Unlike a jury's deliberations before delivering a trial verdict, a sentencing judge's deliberations are done in open court. And although a great deal of discretion is afforded to the judge in rendering a sentence, clear constitutional and statutory requirements constrain and guide the judge's decision making. These rules matter. But adopting the State's position would betray our fidelity to those rules.

By analogy, the Supreme Court also recently held an unpreserved error in calculating the applicable federal sentencing guidelines range must implicate the fairness and integrity of the sentencing proceedings, where the error implicated the defendant's substantive right to liberty by possibly increasing his prison sentence. *Rosales-Mireles v. United States*, ___ U.S. ___, 138 S. Ct. 1897, 1910 (2018). Prior to each federal sentencing hearing, an advisory sentencing guidelines range is calculated on behalf of the sentencing court. In *Rosales-Mireles*, the defendant received a sentence towards the bottom of an erroneously calculated range, that would have been in the middle of the lower, correct range. *Id.* at 1900-01.

As the Court explained:

> "In broad strokes, the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.' [Citation]. In considering claims like [the defendant's], then, 'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?' " *Id.* at 1908.

The Court concluded that "regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings[,]" and thus must be reviewed as plain error. *Id.* at 1910. The Court also noted a procedural sentencing error of this type "can be remedied through a relatively inexpensive resentencing proceeding[,]" which "is far less burdensome than a retrial, or other jury proceedings, and thus does not demand such a high degree of caution." *Id.* at 1909.

So too here. The obvious procedural sentencing errors that occurred here both undermine the public legitimacy of our justice system and would be relatively inexpensive to correct at a resentencing proceeding, unlike a withdrawal of the plea and the possibility of a new trial. This Court should reject the State's request to require courts to nonetheless bar relief when such errors occur to a defendant who has entered a negotiated guilty plea.

2.

A plea bargain assumes proper sentencing procedures will be followed. Unlike an excessive-sentence challenge, an improper-sentence challenge does not breach the contract—it asks for specific performance by the court.

The Fourth District also engaged in an extended discussion of the contract principles that undergird the *Evans-Linder* rule behind Rule 604(d). (St. br. App., A9-10) As with the above point, the State simply fails to respond.

This Court explained in *Evans* that plea agreements "are governed to some extent by contract law principles." *People v. Evans*, 174 Ill. 2d 320, 326 (1996). But the application of those principles in this context has limits:

> "Courts must keep in mind that the defendant's underlying 'contract' right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. [Citation]. As a result, the application of contract law

> principles to plea agreements may require tempering in some instances." (Some internal quotation marks omitted.) *Id.* at 326-27.

This Court then explained that the two cases at issue in *Evans* were "appropriate for the application of contract law principles" because each defendant had agreed to a specific sentence with the prosecution in a fully negotiated plea agreement, but then had "sought to reduce his sentence by filing a motion for sentence reconsideration." *Id.* at 327. This meant the defendants were "seeking to hold the State to its part of the bargain while unilaterally modifying the sentences to which they had earlier agreed." *Id.* This Court explained that behavior contradicted both contract-law principles and constitutional concerns of fundamental fairness. *Id.*

By contrast, in the context of a partially-negotiated plea agreement, the prosecution offers a sentencing recommendation or cap in exchange for the defendant's guilty plea. (St. br. App., A9) But, as the Fourth District explained, "after the State and the defendant have performed their duties under the agreement, the trial court still must fashion an appropriate sentence based upon counsels' recommendations and the statutory sentencing factors." (St. br. App., A9) The Fourth District noted the plea agreement depends on an implicit, "basic assumption" that "the trial court will conduct a proper sentencing hearing and consider only proper sentencing factors." (St. br. App., A9)

For this reason, the Fourth District explained that improper-sentence errors like those at issue here trigger the "frustration of purpose doctrine" under contract law because the actions of a third party have undermined a basic assumption of the parties, without their fault. (St. br. App., A9) (citing Restatement (Second) of Contracts § 265 (1981); and *People v. Shinaul*, 2017 IL 120162, ¶¶ 35-38 (Theis, J., dissenting)). Citing Justice Theis's dissent in *Shinaul*, the Fourth

District noted the remedy for this situation could either be to (1) require specific performance of the agreement, or (2) allow withdrawal of the guilty plea. (St. br. App., A9) Here, requiring specific performance makes more sense "[i]n the interest of judicial economy" because only a fair sentencing hearing is being sought, and doing otherwise would both contravene the wishes of the parties and waste judicial resources. (St. br. App., A9-10)

3.

The State's proposed remedy unfairly makes defendants pay the price for sentencing courts' mistakes of law.

Finally, the Fourth District noted that requiring a defendant to withdraw his guilty plea in this situation unfairly "places the onus of the trial court's sentencing error—not to mention the burden of proof accompanying a motion to withdraw a guilty plea—on the defendant." (St. br. App., A10) Yet again, the State has no response.

The Fourth District explained it is "good policy to allow a defendant to raise an unfair-sentence argument in a motion to reconsider the sentence without requiring him to withdraw the negotiated guilty plea." (St. br. App., A10) Because a defendant does not have the absolute right to withdraw a guilty plea, adopting the State's position may create an "untenable situation where the defendant may be unfairly bound to an agreement containing a term to which he did not agree, *i.e.*, the surrender of his constitutional right to a fair sentencing hearing. Just as we would not unfairly bind the State to a negotiated plea agreement, we likewise should not unfairly bind a defendant to such an agreement." (St. br. App., A10)

Requiring defendants like Mr. Johnson to withdraw their pleas to attack a court's own improper-sentence error presents a Hobson's choice that punishes

the defendant either way for an error he did not cause: Accept the sentencing errors you did not bargain for, or move to withdraw your plea. But if the plea is allowed to be withdrawn, the sentence no longer exists, meaning the improper-sentencing error is not corrected; it simply becomes irrelevant that it ever occurred. And many defendants in this position, like Mr. Johnson, do not wish to withdraw their favorable please, but instead only wish for a fair sentencing hearing.

C.

Concerns of fairness and judicial integrity and the strong presumption against construing language as surplusage outweigh the interest in judicial economy and a potential conflict with Supreme Court Rule 605(c).

Plea bargaining offers advantages to prosecutors, defendants, and the courts alike; but those "advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." *Blackledge v. Allison*, 431 U.S. 63, 71-72 (1977). And yet, our courts have recognized countervailing interests that sometimes outweigh the finality interest, such as an interest in "safeguard[ing] a person's freedom from detention in violation of constitutional guarantees." *Id.* (reversing the summary dismissal of a collateral *habeas* attack on the validity of a guilty plea for that reason).

As Mr. Johnson argued before the appellate court, "[c]onsideration of an improper factor in aggravation clearly affects the defendant's fundamental right to liberty, and a court of review must remand such a cause for resentencing, except in circumstances where the factor is an insignificant element of the defendant's sentence." *People v. Reed*, 376 Ill. App. 3d 121, 128 (3d Dist. 2007); see *People v. Martin*, 119 Ill. 2d 453, 458 (1988). The State has never contested that such errors occurred here or that the improper factors were significant elements of Mr. Johnson's sentences.

The State takes the finality interest to extreme lengths in this case, asking this Court to hold that obvious errors of improper sentencing cannot be addressed and fixed by a trial court or court of review, when the sentencing error follows a partially-negotiated guilty plea with a sentencing concession. This goes too far; the interest in finality and judicial economy that prompted the creation of Rule 604(d), see, *e.g., People v. Wilk*, 124 Ill. 2d 93, 106 (1988), should yield here to protect defendants' rights at sentencing and the integrity of our judicial process.

The Fourth District's longstanding approach, which it reaffirmed once again in this case, provides necessary protections for defendants' rights at sentencing. This reasonable approach allows a defendant who has entered a plea with a sentencing concession to challenge certain improper sentencing procedures, but not the substantive correctness of the sentence itself, in a motion to reconsider the sentence. See *Rosales-Mireles v. United States*, ___ U.S. ___, 138 S. Ct. 1897, 1910 (2018) ("[R]egardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings.").

Also, the language of Rule 604(d) itself provides the most reliable indicator of its intent and "[e]ach word, clause and sentence *** , if possible, must be given reasonable meaning and not rendered superfluous." *Brucker v. Mercola*, 227 Ill. 2d 502, 514 (2007); see *Fisher v. Waldrop*, 221 Ill. 2d 102, 112 (2006). The key language of Rule 604(d) at issue here is its limitation on any appeal "taken upon a negotiated plea of guilty *challenging the sentence as excessive* ***." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Nov. 1, 2000). The State's interpretation—that Rule 604(d) bars *any* challenge to the sentence, following a negotiated plea, renders the "as excessive" language of Rule 604(d) superfluous. (St. br. at 8) This would contravene the "strong presumption" this Court has recognized "against finding *** language to be mere 'surplusage.' " *Arnold v. Bd. of Trustees*, 84 Ill. 2d 57, 62 (1981).

On the other hand, the Fourth District acknowledged, and the State now emphasizes, that Supreme Court Rule 605(c) does not inform a defendant who enters a negotiated guilty plea that he has the right to file a motion to reconsider the sentence. (St. br. App., A10-11; St. br. at 20-21) Yet, this inconsistency would apply just as fully to the State's implied concession that Rule 604(d) allows a statutorily unauthorized sentence to be challenged in a motion to reconsider the sentence. (St. br. at 8) ("When, as here, a defendant pleads guilty pursuant to a negotiated plea agreement in which the State makes a sentencing concession, Rule 604(d) prohibits him from appealing *a statutorily authorized sentence* imposed within the terms of the plea agreement." (Emphasis added.)). It is important to note that this makes the State's argument internally inconsistent.

Yet, in the end, this Court should agree with the Fourth District that this single argument should not be conclusive in light of the above discussions of the countervailing interests of fairness and judicial integrity and the application of contract principles in this unique context (St. br. at A11), as well as the need to avoid interpreting part of Rule 604(d) as mere surplusage. For all of these reasons, this Court should reject the State's approach and adopt the Fourth District's holding.

CONCLUSION

For the foregoing reasons, Octavius Lorenz Johnson, defendant-appellee, respectfully requests that this Court affirm the appellate court's reversal of his sentences and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Daaron V. Kimmel, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding 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-six pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- OCTAVIUS LORENZO JOHNSON Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-16-0920. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 13-CF-1447. Honorable Scott D. Drazewski, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 25, 2018, 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 Springfield, 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.

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