

as counsel on appeal and affirm the judgment of the circuit court of Jefferson County.

¶ 3

BACKGROUND

¶ 4 On May 24, 2002, the defendant was charged with 10 counts of first-degree murder pursuant to section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2002)) for a murder that was committed on May 5, 1988. The indictment included an aggravating sentencing factor charging that "the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty" pursuant to section 5-8-1(a)(1)(b) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(b) (West 2002)). The State later amended the indictment to reflect the date on which the offense was committed both for the murder charge and for the aggravated sentencing factor. Following a jury trial, the defendant was found guilty of first-degree murder pursuant to Ill. Rev. Stat. 1987, ch. 38, ¶ 9-1(a)(1). The jury also found, beyond a reasonable doubt, that the offense was accompanied by brutal or heinous behavior for purposes of sentencing pursuant to Ill. Rev. Stat. 1987, ch. 38, ¶ 1005-8-1(a)(1)(b). On June 23, 2006, the defendant was sentenced to natural life imprisonment pursuant to the extended-term provision of Ill. Rev. Stat. 1987, ch. 38, ¶ 1005-8-1(a)(1)(b).

¶ 5 The defendant's conviction and sentence were affirmed on direct appeal. *People v. Tucker*, No. 5-06-0484 (May 11, 2011) (unpublished order pursuant to Supreme Court Rule 23). On January 6, 2010, the defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2010)). On April 6, 2010, the circuit court *sua sponte* denied the defendant's section 2-1401 petition. The defendant filed a timely notice of appeal on April 30, 2010, and the State Appellate Defender was subsequently appointed to represent him.

¶ 6

ANALYSIS

¶ 7 The purpose of a section 2-1401 petition is to correct all errors of fact occurring in

the prosecution of a case, unknown to the petitioner or court at the time of judgment, that if known then, would have prevented the judgment's rendition. *People v. Harris*, 391 Ill. App. 3d 246, 249 (2009). We find no such error here. However, where a section 2-1401 petition alleges that the final judgment is void, we must determine whether the petitioner's contentions have any merit. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001). A judgment is void where the sentencing court did not have jurisdiction to render the judgment. *People v. Raczkowski*, 359 Ill. App. 3d 494, 496-97 (2005). The defendant, here, argues that his sentence is void. We thus address his contentions.

¶ 8 The defendant first argues that the State's pretrial revisions to the statutory citations used in the indictment were not formal corrections, changed the offense charged, and were thereby, incorrect. Section 111-5 of the Code of Criminal Procedure of 1963 (Code) allows for an amendment to an indictment to correct a formal defect. 725 ILCS 5/111-5 (West 2002). Such a change is permissible if the change is not material or does not alter the nature of the charged offense. *People v. Flores*, 250 Ill. App. 3d 399, 401 (1993). A formal amendment is permissible when there is no surprise or prejudice to the defendant, or where the record clearly indicates that he was aware of the actual charge or charges against him. *Id.*

¶ 9 Here, the count under which the defendant was convicted, count VI, provided that the defendant committed murder pursuant to 720 ILCS 5/9-1(a)(1) (West 2002) and that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, according to 730 ILCS 5/5-8-1(a)(1)(b) (West 2002). The State moved to amend the indictment to reflect the year in which the defendant committed the offense, which was 1988. With leave of the court, the State amended the statutory citations to Ill. Rev. Stat. 1987, ch. 38, ¶ 9-1(a)(1) and Ill. Rev. Stat. 1987, ch. 38, ¶ 1005-8-1(a)(1)(b), respectively. The language contained in both the original and the amended count did not change. The

only information that changed was the statutory citation. The defendant was still charged with exactly the same crime as the initial indictment charged. The amendment did not materially alter the indictment nor could the defendant have been surprised, as nothing changed other than the citations. Therefore, the defendant's first argument is without merit.

¶ 10 The defendant's second argument is that the "brutal or heinous" aggravating factor was improperly contained in the charge as if it were an element of the offense. Section 111-3(c-5) of the Code provides that the State must notify a defendant either through the charging instrument or by written notification that the State intends to prove an alleged fact that will be used to increase the range of penalties for the offense beyond the statutory maximum. 735 ILCS 5/111-3(c-5) (West 2002). Section 111-3(c-5) was added to the Code in order to comply with the Supreme Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *People v. Crutchfield*, 353 Ill. App. 3d 1014, 1024 (2004), we found that the State's notice to the defendant that it intended to prove the brutal-and-heinous enhancement factor at trial did not convert that sentencing factor into an element of the charge. There, the facts were similar to this case because the crime was committed in 1999, prior to the amendment to section 111-3 of the Code. When the State charged the defendant for a second time, it was after 2000, when section 111-3 had been amended to include subsection (c-5). We found that the State's compliance with section 111-3(c-5) was appropriate and the aggravating factor was properly included in the indictment.

¶ 11 Here, the State's compliance with section 111-3(c-5) did not add an element to the offense charged. Per section 111-3(c-5), the jury was to find the aggravating factor beyond a reasonable doubt, which it did in this case. A jury's failure to find the aggravating factor does not bar a conviction but is a bar to increasing the range of penalties beyond the statutory maximum. The addition of the "brutal or heinous" factor did not add an element to the offense but notified the defendant that the State would seek an increase in the

potential penalty. Therefore, this argument, too, fails.

¶ 12 The defendant's final argument is that he was deprived of the right to be sentenced under the law in effect at the time of the offense. This argument is based on his previous argument regarding the inclusion of the "brutal or heinous" aggravating factor being included in the indictment. Arguing that the factor was brought as an element of the offense, the defendant contends that he was wrongly sentenced post-*Apprendi* when the crime occurred before *Apprendi* was decided. As we stated above, the defendant's argument fails because the aggravating factor was not included as an element of the offense. The defendant was appropriately sentenced according to Ill. Rev. Stat. 1987, ch. 38, ¶ 1005-8-1(a)(1)(b), which allows for a sentencing court to sentence a defendant to natural life imprisonment if the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. This was the law at the time of the offense. Therefore, the defendant's argument is frivolous.

¶ 13

CONCLUSION

¶ 14 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is granted, and the judgment of the circuit court of Jefferson County is affirmed.

¶ 15 Motion granted; judgment affirmed.