FOURTH DIVISION
November 27, 2013

Nos. 1-10-1027 & 1-10-2603 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 99 CR 9658, 99 CR 9659 &
	)	99 CR 9660
	)	
JAMES DOLIS,	)	The Honorable
	)	Mary Margaret Brosnahan
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justice Epstein concurred in the judgment.
Justice Pucinski concurred in part and dissented in part.

ORDER

¶ *1* *Held*: (1) The invalidation of Public Act 88-680 did not render the judgment void; (2) Errors with respect to the entry of the order of protection did not render that order void; (3) The no-contact order entered with defendant's prison term lacked statutory authority and thus, was void; (4) Defendant forfeited his right to have guilty plea proceedings held in the courtroom, rather than in chambers; (5) Defendant was not entitled to relief pursuant to *People v. Whitfield*, 217 Ill. 2d 177, 185, 189-91 (2005); (6) The dismissal of defendant's petition was reversed and remanded for an evidentiary hearing where defendant made a substantial showing that counsel was ineffective for providing erroneous advice and abandoning defendant's direct appeal.

¶ 2 Defendant James Dolis pled guilty to three counts of communicating with a witness, for which he was sentenced to five-year prison terms, and three counts of violating an order of protection, for which he was sentenced to three-year prison terms. All sentences were to be served concurrently with each other but consecutively to a sentence entered in another case. Defendant's direct appeal was subsequently dismissed for want of prosecution. He then filed a petition for relief, under both the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2004)) and section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2004)), which the trial court dismissed without an evidentiary hearing. Thereafter, defendant filed another petition under section 2-1401, which was also dismissed. On appeal from the dismissal of both petitions, defendant asserts that the invalidation of Public Act 88-680 rendered the underlying judgment void, and that the order of protection and no-contact order entered by the trial court were also void. Defendant further asserts the trial court erred in denying him postconviction relief without an evidentiary hearing because his right to public guilty plea proceedings was violated, the trial court failed to admonish him of his mandatory supervised release (MSR) term, and his appointed counsel was ineffective where he erroneously advised defendant that he had an absolute right to withdraw his guilty plea and later abandoned his appeal. We address each contention in turn.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to resolve the issues raised on appeal. In April 1999, defendant was charged in three cases (Nos. 99 CR 9658, 99 CR 9659 & 99 CR 9660)

with several offenses pertaining to victim Ellen Stefanitis.[1] Defendant was charged in each case with one count of communicating with Stefanitis, who was a witness in another pending circuit court case (99 CR 5180) (720 ILCS 5/32-4(b) (West 1998)), and with violating an order of protection (97 JA 3271) (720 ILCS 5/12-30 (West 1998)). In case number 99 CR 9659, defendant was charged with an additional count of intimidation (720 ILCS 5/12-6(a)(1) (West 1998)). The offenses alleged in the charges occurred between February and March 1999, by which time Public Act 88-680 (Pub. Act 88-680, eff. Jan. 1, 1995) had raised communicating with a witness (720 ILCS 5/32-4 (West 1998)) from a Class 4 to a Class 3 felony. After the offenses were committed, however, the supreme court held that Public Act 88-680 was unconstitutional because it violated the single subject rule. *People v. Cervantes*, 189 Ill. 2d 80, 82 (December 2, 1999). In response, Public Act 91-616 (Pub. Act 91-616, eff. Apr. 13, 2000) re-enacted communicating with a witness as a Class 3 felony.

¶ 5 A jury trial was scheduled to begin in the three aforementioned cases, as well as least one other case against defendant, on September 10, 2003. On that day, Michael Greco, a private attorney who had been appointed to represent defendant, answered not ready for trial due to difficulty finding witnesses and the need to obtain access to the juvenile file in case number 97 JA 3271. Greco stated that the protection order entered in the juvenile case was to remain in effect "until further order" and as a result, counsel wanted a week's

[1]We note that the record refers to the victim as both "Stefanitis" and "Stephanitis." In addition, it appears that the victim changed her surname to "Rogala" over the course of proceedings. We refer to the victim solely as Stefanitis for consistency.

continuance to investigate what additional orders had been entered. In addition, Greco asked the trial court to issue a subpoena for the juvenile court to turn over the complete records in the juvenile case because Greco experienced difficulty obtaining those records through his own inquiry. Greco argued that the question of whether the protection order was vacated prior to 1999 was germane to the present charges of violating that protection order. Furthermore, Greco stated that defendant had believed the order of protection in case number 97 JA 3271 had been vacated in 1997. The State objected to the motion for a continuance, arguing, in part, that this issue had been raised and resolved in another case against defendant. After the court denied the motion, the assistant State's Attorney (ASA) stated that it would nol-pros the intimidation count in case number 99 CR 9659 as well as the charges filed in a fourth case.

¶ 6 The remaining trial court proceedings occurred in chambers but on the record, without objection from either party. A conference ensued pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), during which the ASA alleged certain details concerning the facts leading to the charges, defendant's relationship with Stefanitis, with whom he had a daughter, and information pertinent to sentencing. In addition, the ASA explained that it had withdrawn its prior offer of three concurrent two-year prison terms, to be served consecutively to defendant's prior sentence for home invasion, because that sentence would be woefully inadequate. The ASA stated that communicating with a witness was a Class 3 offense, that the sentence was "extendible," and that defendant could be sentenced to a maximum of 10 years' imprisonment. As a result, the ASA asked that defendant "be

sentenced to the maximum extension which would be ten years on each of those and ask that they be consecutive to each other which would be 30 years." In exchange, the State would dismiss defendant's remaining five cases, which were also subject to extended-term sentences. Greco responded that while communicating with a witness was a Class 3 offense, defendant would not agree to a cumulative 30-year sentence.

¶ 7 Following arguments, the court stated, "I would be willing to offer five years consecutive to Judge Kazmierski and take care of all cases." When the ASA sought clarification as to whether the sentences in the present cases would be consecutive to each other as well, the court answered, "[n]o, just Class 3, five years total." The case was passed for defendant to discuss the court's offer with Greco. When the proceedings continued, Greco again questioned the validity of the protection order in 97 JA 3271, stating as follows:

> "I don't believe that it was brought out at the trial of the home invasion and aggravated battery that he was told by the judge sitting in Branch 50 on the 9th of September 1998 that the order of protection that's case 98-M1-10386301 he was told by the judge on that date Edward O'Brien that the record showed that the 97-JA-3271 order of protection had been vacated which is not demonstrated by the transcript unfortunately."

The trial court found it difficult to believe defendant's suggestion that Judge O'Brien had made the statement off the record.

¶ 8 After another brief break, defendant pled guilty to all counts of communicating with a witness and violating an order of protection in case numbers 99 CR 9658, 99 CR 9659

and 99 CR 9660. The court admonished defendant as follows:

> "The charge of communicating with a witness that is a Class 3 offense. Holding a penalty not less than two years not greater than five years in the state penitentiary.
>
> You could also be subject to extended term which is not less than five years, not greater than ten years in the state penitentiary."

The court further admonished defendant regarding the sentencing range for the Class 4 offense of violating an order of protection and asked, "[k]nowing what the possible penalties are is it still your wish to plead guilty to this charge [*sic*]?" Defendant answered in the affirmative. Defendant also stated that he was pleading guilty of his own free will but was basically forced to plead guilty "[b]ecause it would be a sham to go to trial with the witnesses and evidence that exists [*sic*]." The court ultimately accepted defendant's guilty pleas and proceeded to sentencing.

¶ 9 The ASA disagreed with the court's proposed sentence, asked that an order of protection be entered under the Illinois Domestic Violence Act of 1986 (the Domestic Act) (750 ILCS 60/101 *et seq*. (West 2004)), and asked that defendant be prohibited from contacting Stefanitis, her daughter, and her son, as well as Albert Zaucha and Nick Karentakis, two individuals who apparently neither resided with nor were related to Stefanitis but whom defendant was alleged to have threatened. Greco objected to the inclusion of Zaucha and Karentakis in the order of protection.

¶ 10 When the court asked if defendant wished to say anything further, he said that he had "lied" when he pled guilty but could not go to trial. Defendant nonetheless confirmed that

he was exercising his right to plead guilty. In addition, defendant told the court that a judge had previously told him that protection order 97 JA 3271 no longer existed. The court stated, "if you do not wish to plead guilty[,] [t]his is the time. We've got the jury out there. They've been waiting for two hours." Defendant replied, "I already did it."

¶ 11 The court then sentenced defendant to three five-year prison terms for communicating with a witness, and three three-year prison terms for violating the protection order, all to be served concurrently with each other but consecutively to his sentence for home invasion in case number 99 CR 05180.[2] We note with respect to the five-year prison terms imposed in this case, that the trial court did not explicitly state whether it was sentencing defendant to an extended or non-extended Class 3 sentence, both of which authorize a five-year prison term. See 730 ILCS 5/5-8-2(a)(5) (West 1998) (the extended term for a Class 3 felony "shall not be less than 5 years and not more than 10 years"); 730 ILCS 5/5-8-1(a)(6) (West 1998)) (the non-extended term for a Class 3 felony "shall be not less than 2 years and not more than 5 years"). In addition, the mittimus did not specify that an extended-term sentence had been imposed. The court also entered an order of protection, which forbade defendant from, among other things, contacting Stefanitis and her children. Furthermore, the court entered a no-contact order which prohibited defendant from contacting Stefanitis, her children, Zaucha and Karentakis.

---

[2]The Illinois Department of Corrections (IDOC) website indicates defendant was sentenced to 30 years in prison for the latter offense, as well as 5 years in prison for aggravated battery and 1 year in prison for violating an order of protection. See *People v. Vaughn*, 2013 IL App (1st) 092834, ¶ 47 (the appellate court may take judicial notice of records appearing on the IDOC website).

¶ 12 On October 9, 2003, defendant filed a *pro se* motion to withdraw his guilty plea and have new competent counsel appointed. Defendant alleged that he was "coerced" into pleading guilty by the threat of a 30-year sentence and that counsel abandoned his case. On October 23, 2003, Greco filed another motion to withdraw defendant's guilty plea because no preliminary hearing had been held with respect to the charges.

¶ 13 At a hearing on January 16, 2004, the trial court denied defendant's motion. When the court asked Greco if he was "going to stay on and file the appeal," Greco responded, "I can do that." The following colloquy subsequently ensued:

> "DEFENDANT: I also want it down I'm withdrawing my plea because my attorney wasn't prepared at that time. I'm not guilty and I filed my own withdrawal. If you want to put this as part of the record I think maybe you should read this."
>
> MR. GRECO: I don't agree with that, your Honor. I submit that I was ready to proceed to trial on the date that the guilty plea was entered. Mr. Dolis was given the opportunity to discuss -
>
> DEFENDANT: I'm innocent of them charges so I'm going to appeal it, that's all."

On the same day, Greco filed a certificate (ILCS S. Ct. 604(d), eff. Nov. 1, 2000) stating that he had discussed with defendant his motion to withdraw the guilty plea. Greco alleged that although defendant said he would claim he pled guilty because Greco was unprepared for trial, Greco told defendant the assertion was untrue. On February 13, 2004, Greco filed a notice of

appeal on defendant's behalf. The appeal was dismissed for want of prosecution, however, on November 18, 2004. *People v. Dolis*, No. 1-04-0980 (November 18, 2004) (dispositional order).

¶ 14 On October 20, 2005, defendant filed a petition for relief under the Act as well as section 2-1401(f) of the Code, again alleging that trial counsel was ineffective. Defendant alleged for the first time that before he pled guilty, Greco spoke with him in the "bull pen." According to the petition, Greco said, "we can't get a continuance, and I am unprepared for trial." Greco also said, "if you plead guilty you can always withdraw your Plea within 30 days, which you will do." (Emphasis in original.) Meanwhile, Greco would procure additional evidence. Because of the threat of a 30-year sentence and the overwhelming emotional duress and anxiety, defendant accepted the trial court's offer of five years' imprisonment. Defendant asserted that as a result, his plea was not knowingly or intelligently entered. In addition, defendant asserted he was innocent and alleged that in a hearing before Judge O'Brien, the judge identified an order rescinding the protection order in 97 JA 3271, although the transcript of that hearing had been tampered with. Moreover, defendant alleged that the present guilty plea proceedings were improperly held in chambers.

¶ 15 The petition further alleged that Greco abandoned defendant's appeal. Specifically, defendant alleged that for several months after Greco was appointed as counsel on appeal, defendant asked him for the transcript. Greco said he had it and repeatedly told defendant that Greco would give him a copy. Defendant also alleged he had repeatedly asked Greco whether he filed the record in the appellate court. Greco said he had done so but

defendant was skeptical given his past experience. As a result, defendant wrote to the appellate court. Attached to defendant's petition was the response from the clerk's office of the appellate court, dated July 6, 2004. The response informed defendant that Greco had not filed an appearance in the appellate court and that to the clerk's knowledge, the circuit court had not assigned an attorney to his case. The clerk's office suggested that defendant consult Greco regarding his representation. The clerk's office further advised defendant that if he determined he was not being represented, he could file a motion asking the appellate court to appoint an attorney. Apparently around the same time, defendant contacted the clerk of the trial court and learned that Greco had not ordered the transcripts. As a result, defendant requested the transcripts and common law record from the trial court in order to file it with the appellate court but the motion was denied on June 9, 2004. The letter notifying defendant that his motion was denied was attached to the petition. Furthermore, on December 9, 2004, the appellate court clerk's office sent defendant a letter, attached to his petition, which responded to a second inquiry from defendant. The clerk's office informed defendant that the record was never filed in his appeal and that the appeal had been dismissed for want of prosecution on November 18, 2004.[3]

¶ 16 On August 29, 2007, the assistant public defender (APD) filed a supplemental petition on

[3]Defendant also alleged he had sued Greco in the court of claims. We note that the Cook County Clerk of the Circuit Court's website indicates defendant filed a *pro se* complaint against Greco on October 15, 2003, but the complaint was dismissed for want of prosecution on January 22, 2004 (*James Patrick Dolis v. Michael J. Greco*, 2003 L 012290).

defendant's behalf, adding that the trial court failed to admonish defendant that a one-year MSR term applied to each of his sentences. In addition, the APD argued that defendant's appeal should be reinstated because it was dismissed as a result of appellate counsel's neglect.[4] The State moved to dismiss defendant's *pro se* and supplemental petitions, arguing, in pertinent part, that defendant had not demonstrated the trial court's failure to admonish him of his MSR term constituted a due process violation under *People v. Whitfield*, 217 Ill. 2d 177 (2005), and that the record showed his guilty plea was knowing and voluntary. The State further argued that the postconviction court lacked authority to reinstate defendant's direct appeal.

¶ 17 On May 28, 2008, defendant filed a *pro se* motion to represent himself in the postconviction proceedings, which the trial court granted. Defendant subsequently filed a supplemental addendum to his petition, reiterating several of his prior assertions. Attached to the addendum was an "order on motion to close proceedings" entered in case number 97 JA 3271 on August 20, 1998, prior to the offenses committed in the present cases. The order stated, among other things, that "[t]he 405/2-25 Order of Protection is terminated." The order further stated that "[t]he 405/2-24 Order of Protective Supervision is terminated." Defendant also attached his own affidavit, repeating his allegation that he had been told the protection order no longer existed, that Greco told him he had an

[4]After the APD was appointed, defendant also filed a *pro se* "petition to vacate void judgments and sentences" under section 2-1401(f) of the Code in October 2006. In October 2007, defendant filed a *pro se* "supplemental addendum to original post-conviction petition." In November 2007, the State filed a motion to strike the aforementioned *pro se* pleadings. The trial court granted the State's motion on November 14, 2007.

absolute right to withdraw his plea, and that "it was really only a continuance. That [counsel] would get the record evidence to exhonorate [*sic*] Petitioner, then they would withdraw the plea and have the charges dismissed." In addition, defendant alleged that he was innocent of all charges. At some point, the State filed a second-amended motion to dismiss defendant's petitions, attaching several form orders of protection entered in case number 97 JA 3271.[5] At a hearing on December 22, 2009, the trial court found defendant failed to make a substantial showing that his constitutional rights were violated and granted the State's motion to dismiss the petition. Defendant appealed (No. 1-10-1027).

¶ 18 On May 13, 2010, defendant filed a *pro se* petition to vacate void judgments and sentences pursuant to section 2-1401(f) of the Code, arguing, in pertinent part, that the order of protection was void because it did not comply with statutory requirements. The trial court denied defendant's motion on July 29, 2010, and defendant filed a notice of appeal (No. 1-10-2603), which we consolidated with the appeal from the denial of his combined petition.

¶ 19 II. PUBLIC ACT 88-680

¶ 20 On appeal, defendant first asserts that contrary to the understanding of Greco, the ASA and the trial court, communicating with a witness was a Class 4 offense, rather than a Class 3 offense. Defendant failed to raise this issue in his petitions but nonetheless

[5] The State's motion responded only to defendant's *pro se* claims, relying on a letter sent by defendant to the ASA. In this letter, defendant stated that, "[a]nything filed by the Public defenders office is stricken." We note, however, that neither the State's motion nor the briefs on appeal have directed us to any motion to strike filed by defendant or any trial court order granting such a motion.

contends he is entitled to relief because the judgment is void. Compare 725 ILCS 5/122-3 (West 2004) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived"); and *People v. Gray*, 2013 IL App (1st) 112572, ¶ 12 (a defendant may forfeit an issue on appeal by failing to raise the issue in his section 2-1401 petition); with *People v. Mathis*, 357 Ill. App. 3d 45, 50 (2005) (a defendant may attack a void judgment at any time). Nonetheless, defendant has not shown the judgment was void.

¶ 21 A judgment is void only where the court entering the judgment lacked jurisdiction or exceeded its statutory authority. *People v. Smith*, 406 Ill. App. 3d 879, 887 (2010). In addition, a court will not lose jurisdiction merely because it has made a mistake of law or fact. *People v. Ramirez*, 361 Ill. App. 3d 450, 454 (2005).[6] Furthermore, it is well settled that the trial court's failure to correctly apply a sentencing statute does not automatically render a sentence entirely invalid. *People v. Brown*, 225 Ill. 2d 188, 205 (2007).

¶ 22 Defendant does not dispute that at all relevant times, communicating with a witness was a cognizable offense. In addition, defendant has cited no authority for the suggestion that

---

[6] The term "void" is frequently misused. *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 16. Improper admonishments do not render a judgment void. *People ex rel. Alverez v. Skryd*, 241 Ill. 2d 34, 42 (2011); *People v. Santana*, 401 Ill. App. 3d 663, 666 (2010); see also *People v. Donaldson*, 2011 IL App (1st) 092594, ¶ 15, n. 1 (confirming the validity of this rule notwithstanding the supreme court's subsequent misstatement that improper admonishments render the plea "void" in *People v. White*, 2011 IL 109616), affirmed by *People v. Donaldson*, 2013 IL 113603. Similarly, the involuntariness of a plea does not render a judgment void. *Hubbard*, 2012 IL App (2d) 101158, ¶ 12. Moreover, constitutional violations do not necessarily render a judgment void. *People v. Smith*, 406 Ill. App. 3d 879, 887-888 (2010).

an offense's classification constitutes an element of the offense itself. Instead, defendant asserts that when he committed the offense, its increased classification from a Class 4 to a Class 3 felony pursuant to Public Act 88-680 was invalid because *Cervantes* held that public act to be void *ab initio*. Notwithstanding *Cervantes*, the State responds that the Class 3 classification was valid under Public Act 91-616, which had re-enacted communicating with a witness as a Class 3 felony by the time defendant pled guilty and was sentenced. Even assuming defendant was required to receive a Class 4 sentence, we find defendant's sentence was authorized.

¶ 23 As stated, *Cervantes* held that Public Act 88-680 was unconstitutional, as violative of the single-subject clause. *Cervantes*, 189 Ill. 2d at 82, 98. In addition, "a statute which violates the single-subject clause is void in its entirety." *Brown*, 225 Ill. 2d at 198. As a result, when *Cervantes* held Public Act 88-680 to be void *ab initio*, the public act's amendment raising the communicating with a witness offense from a Class 4 to a Class 3 felony was also rendered void *ab initio*. See *Brown*, 225 Ill. 2d at 203. It does not follow, however, that the judgment in this case is necessarily void.

¶ 24 When an amendment to a statute is determined to be unconstitutional, the law in force before the amendment was adopted remains in effect. *People v. Cundiff*, 322 Ill. App. 3d 426, 439 (2001). Addressing the effect of *Cervantes*, the supreme court in *Brown* clarified that "[w]hen a defendant's sentence complies with the mandatory sentencing guidelines in effect when the sentence was imposed, the defendant is not entitled to a new sentencing hearing merely because some aspect of the sentencing law was subsequently

determined to be void on the grounds that it violated the single-subject clause of the Illinois Constitution of 1970." *Brown*, 225 Ill. 2d at 204. As a result, the court found that because the defendant's sentence was proper under the version of the statute in effect prior to the now invalidated public act, the defendant was not entitled to a new sentencing hearing. See *Id*. at 203-04. Even after *Cervantes*, so long as a defendant's sentence falls within the permissible sentencing range, the judgment is not void. *Ramirez*, 361 Ill. App. 3d at 454.

¶ 25 Prior to the enactment of Public Act 88-680, communicating with a witness was a Class 4 felony (720 ILCS 5/32-4(b) (West 1994)), with a non-extended sentencing range of between one and three years' imprisonment and an extended range of between three and six years' imprisonment (730 ILCS 5/5-8-1(a)(7) (West 1994); 730 ILCS 5/5-8-1(a)(7) (West 1998)). Section 5-8-2(a) provides that "[a] judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present. Where the judge finds that such factors were present, he may sentence an offender to the following: *** for a Class 4 felony, a term shall be not less than 3 years and not more than 6 years." 730 ILCS 5/5-8-2(a) (West 1998)). In addition, section 5-8-2(b) states that "[i]f the conviction was by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that a sentence under this Section was a possibility. If it does not so appear on the record, the defendant shall not be subject to

such a sentence unless he is first given an opportunity to withdraw his plea without prejudice." 730 ILCS 5/5-8-2(b) (West 1998)).

¶ 26 Here, defendant has not disputed the State's assertion on appeal and before the trial court that he was subject to an extended-term sentence because his criminal background was a qualifying factor under section 5-5-3.2(b). 730 ILCS 5/5-5-3.2(b)(1) (West 1998)).[7] The State discussed defendant's prior convictions, noting that his current offenses were "all extendible." The trial court subsequently found that he was extendable:

"The charge of communicating with a witness that is a Class 3 offense. *** You could also be subject to extended term which is not less than 5 years, not greater than ten years in the state penitentiary.

And the violation of order of protection that's a Class 4 offense, penalty not less than one not greater than three years in the state penitentiary and that could also be extended based on your background to a period of not less than three not greater than six years in the state penitentiary."

Although the trial court's finding and admonishment could have been clearer, these deficiencies

[7]Generally, facts that increase a crime's penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). However, extended-term sentences based on prior conviction are not subject to the strictures of *Apprendi*. *Id.*; see also *People v. Askew*, 341 Ill. App. 3d 548, 554-55 (2003) (triers of fact need not find prior convictions beyond a reasonable doubt under 730 ILCS 5/5-5-3.2). In any event, defendant has not raised an *Apprendi* issue on appeal and an *Apprendi* error, which is constitutional in nature, would not render the judgment void. *People v. Kelly*, 366 Ill. App. 3d 676, 679 (2006) (observing that the requirements of *Apprendi* pertain to due process and jury trial guarantees); *Smith*, 406 Ill. App. 3d at 887-888 (constitutional violations do not automatically render a judgment void).

did not render defendant's sentence void. See *People v. Taylor*, 368 Ill. App. 3d 703, 707 (2006) (section 5-8-2(b) does not explicitly require the trial court to admonish the defendant that he may receive an extended-term sentence); *People v. Cavins*, 288 Ill. App. 3d 173, 179 (1997) ("a defendant is not entitled to vacate the extended-term portion of his sentence of imprisonment solely based upon the claim that the court did not use the words 'extended term' or recite the section number of the extended-term statute***"); *People v. Bell*, 217 Ill. App. 3d 985, 1013-14 (1991) (finding that defendant had been convicted before—among other references to extended sentencing factors—was sufficient); *People v. Brown*, 327 Ill. App. 3d 816, 827 (2002) ("While the trial court did not precisely articulate 'I am sentencing defendant to an extended term of 6 ½ years based on defendant's prior felony convictions,' as defendant suggests was required, neither the Unified Code nor case law requires such a strict pronouncement of sentence.").

¶ 27 Here, the record clearly shows that defendant knew he could be subjected to an extended-term sentence in light of the State's arguments and the trial court's finding and admonishments. *Cf. Taylor*, 368 Ill. App. 3d at 709 (the record did not show the defendant knew he was subject to an extended term where the court admonished him of the permissible range "if" an extended term applied and the attorneys had been uncertain regarding defendant's qualifying prior convictions). Although the trial court admonished defendant that communicating with a witness was a Class 3 offense subject to an extended prison term of between 5 and 10 years, rather than a Class 4 offense with an extended term of between 3 and 6 years, 5-8-2(b) was nonetheless satisfied because the sentence imposed fell within the range that defendant was advised of. See *People v.*

Torres, 228 Ill. 2d 382, 396-402 (2008) (where the defendant was improperly admonished of the applicable sentencing range but was sentenced within both the applicable range and the range he was admonished of, the record did not show the defendant had a non-frivolous claim to be raised on direct appeal). In addition, while defendant contends the trial court did not actually state that it was imposing an extended-term sentence in the transcript or on the mittimus, the trial court's admonishments indicate that this is precisely what the court intended to do, notwithstanding the lack of clarity in the record. In any event, the question before us is whether the trial court had the authority to sentence defendant to five years in prison, not the trial court's reason for doing so. Because defendant's five-year sentence properly falls within the extended Class 4 sentencing range in place before Public Act 88-680 was enacted, his sentence is not void and he is not entitled to relief. See *Brown*, 225 Ill. 2d at 204.

¶ 28 III. ORDER OF PROTECTION & NO CONTACT ORDER

¶ 29 Defendant next asserts that the order of protection and the no-contact order should be vacated as void. As to the order of protection, defendant asserts that the State failed to file the requisite written petition alleging that defendant violated the Domestic Act through his actions against a household member and failed to name the alleged victim as the petitioner. See 750 ILCS 60/202(a)(3) (West 1998); 750 ILCS 60/203(a) (West 1998). In addition, he argues that the court failed to make the requisite findings in "an official record or in writing." 750 ILCS 60/214(c)(3) (West 1998).

¶ 30 As stated, a judgment is void only where the court entering the judgment lacked

jurisdiction or exceeded its statutory authority (*Smith*, 406 Ill. App. 3d at 887), and a court will not lose jurisdiction merely because it has made a mistake of law or fact (*Ramirez*, 361 Ill. App. 3d at 454). Here, defendant does not dispute that the trial court's jurisdiction was invoked when criminal charges were brought. In addition, while an action for a protection order is a "distinct cause of action" with its own requirements for brining the action to the court's attention (750 ILCS 60/210(a) (West 2002)), non-compliance with these requirements did not oust the court of jurisdiction. In addition, defendant does not dispute that the trial court could properly enter the order of protection had the State and trial court followed the correct procedures.

¶ 31 Despite defendant's characterization of this issue, defendant essentially challenges the manner of the proceedings, not the court's authority to enter such an order under the Domestic Act. *Cf. People v. Hughes*, 2012 IL 112817, ¶ 28 (holding that a defective indictment does not divest a court of jurisdiction). It is undisputed that protection orders under the Domestic Act are within the general class of cases that the trial court has the power to hear and determine. See *Id.* ¶ 21. Moreover, we are unpersuaded by defendant's reliance on *People v. Cuevas*, 371 Ill. App. 3d 192 (2007). Although the *Cuevas* court found errors occurred under similar facts, the errors occurred on direct appeal and the reviewing court did not expressly find the errors rendered the protection order void. *Id.* at 195, 197.

¶ 32 Notwithstanding our determination that the errors alleged did not render the protection order void, we find that defendant has shown the no-contact order was void. Defendant

asserts that the no-contact order lacked any statutory authority whatsoever. *Cf.* 730 ILCS 5/5-7-1(f) (West 2004) ("The court may issue an order of protection pursuant to the Illinois Domestic Violence Act of 1986 as a condition of a sentence of periodic imprisonment.") The State responds that the reviewing court in *Cuevas* found a no-contact order was appropriate. In *Cuevas*, however, the defendant was sentenced, in part, to 30 months' probation and the reviewing court relied on a provision in the Unified Code of Corrections which permits the imposition of a no-contact order as a condition of probation or conditional discharge. *Id.* at 194-95; 730 ILCS 5/5-6-3(b)(15) (West 2004); see also 725 ILCS 5/112A-4 (West 1998) (defining persons protected by the Domestic Violence Act of 1986). In contrast, here, defendant was sentenced to a term of imprisonment. Moreover, the State cites no alternative statutory authority for the imposition of a no-contact order in conjunction with defendant's prison term. Absent any apparent authority, there is no manner of proceedings in which the trial court had the authority to enter a no-contact order as part of defendant's sentence in this case. Accordingly, we now vacate that order.

¶ 33 IV. PUBLIC TRIAL

¶ 34 Defendant further asserts the trial court erred in dismissing his petition under the Act because his right to a public trial was violated. Specifically, defendant argues that the trial court improperly held his guilty proceedings in chambers, albeit on the record. Section 122-1(a)(1) of the Act provides that "[a]ny person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that *** in the

proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2004). At the second stage of proceedings, appointed counsel may file an amended postconviction petition and the State may file an answer or a motion to dismiss. *People v. Domagala*, 2013 IL App 113688, ¶ 33. In addition, our inquiry at this stage is whether the defendant's liberally construed allegations are sufficient to invoke relief. *People v. Stewart*, 381 Ill. App. 3d 200, 203 (2008). A defendant is entitled to an evidentiary hearing on his postconviction petition where his allegations, supported by the record or affidavits where appropriate, make a substantial showing that one of his constitutional rights was violated. *People v. Young*, 355 Ill. App. 3d 317, 321 (2005). We review the denial of a petition without an evidentiary hearing *de novo*. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 35 Pursuant to the Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, as well as the Illinois Constitution (Ill. Const. 1970, art. I, § 8), a defendant has the right to a public trial. *People v. Webb*, 267 Ill. App. 3d 954, 957 (1994). This right extends to all criminal proceedings. *Id.*; see also *People v. Hancasky*, 410 Ill. 148 (1951) (applying this right to guilty plea proceedings). Nonetheless, a defendant's sixth amendment right to a public trial may be waived where the accused failed to object to the court's exclusion of the public. *People v. Hayden*, 338 Ill. App. 3d 298, 306 (2003); *People v. Lane*, 256 Ill. App. 3d 38, 55 (1993) (citing *Levine v. United States*, 362 U.S. 610, 619 (1960)); but see *Walton v. Briley*, 361 F.3d 431, 434

(2004) (indicating that the right to public trial cannot be waived through acquiescence).

¶ 36 Here, the State asserts, and defendant does not dispute, that he failed to contemporaneously object to the trial court's decision to hold the guilty plea proceedings in chambers. See *People v. Foster*, 391 Ill. App. 3d 487, 491 (2009) (Claims that a defendant could have raised in an earlier proceeding are forfeited); see also *People v. Dominguez*, 366 Ill. App. 3d 468, 470 (2007) (forfeiture is a valid basis for summary dismissal). Defendant argues, however, that express waiver was required, relying on *Walton*. Notwithstanding defendant's contention, federal decisions are not binding on Illinois state courts. *People v. Nash*, 409 Ill. App. 3d 342, 352 (2011). Accordingly, we adhere to this court's precedent providing that defendant's acquiescence in this case was sufficient to forfeit his right to public guilty plea proceedings.

¶ 37 V. MSR ADMONISHMENTS

¶ 38 Moreover, defendant asserts the trial court erred in dismissing his petition under the Act because the trial court failed to admonish him of his MSR term when he pled guilty. Defendant asserts that his sentence should be reduced, relying on *People v. Whitfield*, 217 Ill. 2d 177 (2005). Defendant's assertion relies on his misguided contention that he entered into a fully negotiated guilty plea. See ILCS 605(b) (eff. Oct. 1, 2001) ("[A] negotiated plea 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 (emphasis added)"). Even assuming defendant was correct, however, he would not be entitled to relief. In *Whitfield*, the supreme court held

that a defendant has a contractual due process right to enforce the terms of a plea agreement with the State and thus, a unilateral modification to add an MSR term breaches the agreement and violates fundamental fairness. *Whitfield*, 217 Ill. 2d at 185, 189-91 (citing *Santobello v. New York*, 404 U.S. 257 (1971)). In contrast, where a defendant enters an open guilty plea, the failure to admonish a defendant of his MSR term does not violate his right to due process so long as the sentence plus the MSR term is less than the maximum sentence the defendant was told could be imposed. *Whitfield*, 217 Ill. 2d at 193.

¶ 39 Defendant acknowledges the supreme court subsequently found that *Whitfield* created a new rule that would only be applied to cases where the conviction was not final before December 20, 2005, the date of the *Whitfield* decision. *People v. Morris*, 236 Ill. 2d 345, 360, 366 (2010); see also *People v. Hildenstein*, 2012 IL App (5th) 100056, ¶¶ 18-19 (rejecting the defendant's argument that the State could waive the non-retroactivity of *Whitfield* and that an independent basis for relief existed under *Santobello*); *People v. Demitrio*, 406 Ill. App. 3d 954, 957 (2010) (same). Thus, pursuant to *Morris*, defendant is not be entitled to relief under *Whitfield* because his conviction was final prior to that decision.

¶ 40 VI. INEFFECTIVE ASSISTANCE OF COUNSEL

¶ 41 Finally, defendant asserts the court erred in dismissing his petition under the Act because he made a substantial showing that counsel was ineffective. Specifically, defendant asserts, as he did in his petition, that Greco erroneously advised him before his scheduled

trial that if he pled guilty, he would have an absolute right to withdraw his plea. Thus, Greco advised defendant to plead guilty and withdraw the plea within 30 days. During that time, Greco would continue to investigate and procure evidence not obtained by the date set for trial.

¶ 42 In deciding whether defendant has made the requisite showing of a substantial constitutional violation, the trial court must accept all well-pleaded facts as true. *Young*, 355 Ill. App. 3d at 321. Accordingly, credibility determinations are inappropriate at the second stage of proceedings. *People v. Hall*, 217 Ill. 2d 324, 336 (2005). In addition, unless positively rebutted by the record, factual disputes cannot be resolved at this stage. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 30. Furthermore, although a defendant generally must support his allegations with records, affidavits or other evidence, the failure to attach independent corroborating documentation or otherwise explain its absence may be excused where the petition contains sufficient facts from which to infer that the only affidavit the defendant could have attached, aside from his own, would be his attorney's affidavit. *Hall*, 217 Ill. 2d at 332-33.

¶ 43 An ineffective assistance of counsel claim involving a challenge to a guilty plea is governed by *Strickland v. Washington*, 466 U.S. 668 (1984). *Rissley*, 206 Ill. 2d at 457. Under *Strickland*, the defendant must show that (1) his counsel's performance was deficient and (2) counsel's deficient performance resulted in prejudice. *People v. Pena-Romero*, 2012 IL App (4th) 110780, ¶ 13. Counsel's conduct is deficient where he fails to ensure that the defendant's guilty plea was voluntarily and intelligently entered. *Rissley*,

206 Ill. 2d at 457. Furthermore, a misapprehension of law speaks to whether the plea was intelligently and voluntarily entered. *People v. Harris*, 392 Ill. App. 3d 503, 508 (2009);see also *People v. Stone*, 374 Ill. App. 3d 980, 984-85 (2007) (a voluntary guilty plea waives all nonjurisdictional errors or irregularities, including constitutional errors, but a defendant may nonetheless attack the voluntary and intelligent nature of his guilty plea by showing that counsel provided incompetent advice).

¶ 44 To establish prejudice, a defendant must show a reasonable probability exists that he would not have pled guilty but for counsel's deficiency; however, a defendant's bare allegation in that regard is insufficient. *People v. Presley*, 2012 IL App (2d) 100617, ¶ 36. The question of whether counsel's deficiency caused the defendant to plead guilty depends in part on predicting whether the defendant would have succeeded at trial. *Hall*, 217 Ill. 2d at 336. Thus, the defendant's claim must be accompanied by either a plausible defense to be presented at trial, or a claim of innocence. *Presley*, 2012 IL App (2d) 100617, ¶ 36.

¶ 45 Here, defendant's petition alleged that Greco advised him that he had an absolute right to withdraw his guilty plea within 30 days. At this stage of proceedings, we must take defendant's allegation as true. In addition, although defendant attached only his own affidavit in support of this allegation, the petition contains sufficient facts from which we can infer that only defendant and Greco participated in this conversation and, thus, the only other affidavit defendant could have supplied was his own. *Hall*, 217 Ill. 2d at 333. Furthermore, the State does not dispute that Greco's alleged advice was erroneous.

People v. Stone, 2013 IL App (1st) 111344, ¶ 11 (a defendant does not have an absolute right to withdraw his guilty plea).

¶ 46 We reject the State's contention that defendant forfeited his claim by failing to raise it when he moved to withdraw his guilty plea. At that time, defendant was represented by Greco. We cannot assume that Greco would bring his own failings to the trial court's attention. In addition, we reject the State's suggestion that defendant was required to bring this matter to the trial court's attention himself. Defendant was entitled to rely on his attorney to protect his interests. The fact that defendant chose to address the court on his own regarding some, but not all, of his concerns does not alter his entitlement, notwithstanding that his decision to not address this allegation could potentially impact his credibility at an evidentiary hearing.

¶ 47 Furthermore, we reject the State's suggestion that the trial court's admonishments cured any error. Before defendant entered his guilty plea, the court asked whether he understood he was giving up his right to plead not guilty and his right to force the State to prove his guilt. Defendant responded, "I didn't." This was not an unequivocal declaration that he understood what he was forgoing. When the court asked if defendant was giving up his right to a jury trial, defendant answered yes. With that said, defendant may have believed he was giving up his right to be tried by a jury on that particular day. On this record, at this stage of proceedings, we cannot say the record rebuts defendant's assertion that Greco's erroneous advice led him to believe he had an absolute right to withdraw his guilty plea within 30 days. See *Hall*, 217 Ill. 2d at 337-39 (the question of whether the

trial court's admonishments negated defense counsel's erroneous advice depends on whether such admonishments were sufficiently related to counsel's erroneous advice so as to overcome the resulting prejudice).

¶ 48 Moreover, defendant alleged that he would not have pled guilty but for counsel's erroneous advice. This allegation is corroborated by his insistence throughout proceedings that he is innocent. Defendant has also repeatedly stated in these proceedings that Judge O'Brien told him the protection order had been vacated. Although the State represented in the trial court that this issue had previously been raised and resolved in a different case, the record from the prior case is not part of our record on appeal. We cannot rely merely on one ASA's representation at defendant's guilty plea proceeding. In addition, the attachments to the parties' pleadings indicate that there were multiple orders of protection entered in case number 97 JA 3271 and that it is likely that a plenary order of protection was in effect when the offenses were committed. Nonetheless, Greco indicated that he wanted to determine whether the juvenile record in case number 97 JA 3271 contained any subsequent orders which effectively invalidated all protection orders in that case. The State has not disputed Greco's suggestion that the juvenile division would not give Greco the record absent a subpoena issued by the court. Moreover, it is not clear that this record would have been available to defendant's postconviction counsel. Under these circumstances, defendant has sufficiently alleged a plausible defense.

¶ 49 We conclude that defendant has made a substantial showing that trial counsel was

ineffective for erroneously advising defendant that he had an absolute right to withdraw his guilty plea. Accordingly, we reverse and remand for an evidentiary hearing, at which the trial court can assess the credibility of the evidence to determine whether Greco advised defendant as alleged and whether defendant would have proceeded to trial absent such advice. In furtherance of this hearing, we order the court to subpoena the record in case number 97 JA 3271. The trial court may inspect the record *in camera* to determine whether the protection orders entered in that case remained in effect at the time defendant was alleged to have violated said orders.

¶ 50 On remand, the trial court will also have the opportunity to consider defendant's assertion that Greco's ineffective assistance resulted in the dismissal of defendant's appeal. Pursuant to the Illinois Constitution, a defendant's right to a direct appeal is fundamental. *People v. Ross*, 229 Ill. 2d 255, 268 (2008) (citing Ill. Const. 1970, art. VI, § 6). When an attorney's constitutionally deficient performance results in the defendant's loss of an appeal he would have otherwise taken, the defendant has made a successful ineffective assistance of counsel claim. *People v. Brooks*, 233 Ill. 2d 146, 157 (2009). In addition, a "State cannot penalize a criminal defendant by dismissing his first appeal as of right when his counsel has failed to follow mandatory appellate rules." *People v. Moore*, 133 Ill. 2d 331, 336 (1990). Furthermore, Illinois courts have found the first prong of *Strickland* was satisfied where appellate counsel of record failed to file the trial record and appellate brief after filing the notice of appeal. See *Moore*, 133 Ill. 2d at 336 (where counsel filed a notice of direct appeal but did nothing further, the supreme court reinstated the

defendant's direct appeal through its supervisory authority); *People v. Mena*, 337 Ill. App. 3d 868, 872 (2003); *People v. Brandon*, 294 Ill. App. 3d 911 (1998) (the defendant was denied his right to the effective assistance of appellate counsel where counsel filed a notice of appeal but failed to file a brief, resulting in the dismissal of the appeal); *People v. Koch*, 266 Ill. App. 3d 688, 690-92 (1994) (dismissal of postconviction petition raising ineffective assistance of appellate counsel was reversed where the public defender filed a notice of appeal but the appeal was dismissed for want of prosecution); *People v. Baskin*, 213 Ill. App. 3d 477 (1991).

¶ 51 The State contends that Greco never agreed to represent defendant on appeal, but rather, only agreed to file the notice of appeal. While Greco's statements to the trial court did not clearly indicate that he intended to represent defendant after filing the notice of appeal, defendant's petition alleged that defendant remained in contact with Greco. Greco allegedly promised to give defendant a copy of the transcript and told defendant that he had filed the record in the appellate court, which would indicate that Greco had also filed an appearance in this court. Even assuming no further communications regarding defendant's appeal occurred between defendant and Greco, counsel has a constitutional duty to consult with a defendant regarding the possibility of an appeal where counsel has reason to think that (1) a rational defendant would wish to appeal; or (2) this particular defendant wanted to appeal. *Torres*, 228 Ill. 2d at 396; *Gutierrez*, 387 Ill. App. 3d at 5. The State does not dispute that defendant's desire to appeal, as well as Greco's understanding of that desire, is apparent from the record. Furthermore, an attorney's duty

to consult with a defendant regarding the possibility of appeal arguably includes consulting the defendant regarding whether that attorney will actually represent the defendant on appeal. Greco may have a reasonable explanation for his lack of participation in defendant's direct appeal, considering, among other things, defendant's lawsuit against him, but Greco's explanation does not appear in our record. See also *People v. Gutierrez*, 387 Ill. App. 3d 1, 6 (2008) (finding that the record did not explain appointed appellate counsel's apparent lack of diligence). Accordingly, defendant has made a substantial showing that Greco's performance was deficient.

Moreover, defendant need not demonstrate prejudice in this instance. Because a defendant must be afforded a direct appeal and an appellate advocate at some point, a court cannot deny the defendant an attorney-assisted appeal by determining from the record that an appeal would not have been successful. *Moore*, 133 Ill. 2d at 339. Thus, prejudice is presumed where counsel failed to perfect the defendant's appeal. *Id.* Nonetheless, the defendant must show that counsel's deficient performance actually caused the defendant to forgo a direct appeal. *People v. Rovito*, 327 Ill. App. 3d 164, 171 (2001).

¶ 52 As stated, there is no doubt that defendant wanted to appeal. The State observes, however, that on July 6, 2004, the clerk of the appellate court wrote to defendant to inform him that Greco had not filed an appearance and the trial court had not assigned an attorney to defendant's case. The clerk further suggested that defendant consult Greco to determine whether he was representing defendant and, if defendant determined he was not being represented, he could file a motion asking the appellate court to appoint an

attorney. It is unclear, however, how long it took the clerk's letter to travel through the prison mail system and actually reach defendant or whether defendant would have had sufficient time to act upon it. In addition, defendant wrote to the appellate court again but by the time the clerk's office received that letter, defendant's appeal had already been dismissed for want of prosecution on November 18, 2004. Thus, the record is silent as to whether defendant had a meaningful opportunity to remedy the lack of representation after receiving the clerk of the appellate court's first letter. Such determinations would likely involve credibility findings based on evidence outside the pleadings. At this stage, defendant has sufficiently shown that Greco's deficient performance actually caused the him to forgo his direct appeal. Accordingly, the trial court erred in dismissing defendant's petition asserting that Greco was ineffective for providing erroneous advice and for abandoning defendant's appeal. Whether defendant can prove his assertion following an evidentiary hearing remains to be seen. See *Young*, 355 Ill. App. 3d at 322.

¶ 53 VII. CONCLUSION

¶ 54 For the foregoing reasons, we vacate the no contact order, reverse and remand for an evidentiary hearing on defendant's ineffective assistance of counsel claims and affirm the judgment in all other respects.

¶ 55 Affirmed in part, vacated in part and reversed in part; cause remanded with directions.

¶ 56 JUSTICE PUCINSKI concurring in part and dissenting in part.

¶ 57 I. Void Sentence

¶ 58 Although I wholeheartedly agree with the majority's determination that defendant's

counsel was ineffective, we need not reach that issue and I dissent from the majority's reasoning and holding in this case because (1) defendant's sentence was void since it was more than the maximum allowed by statute; (2) the sentence cannot be "reformed" by relying on an additional extended term because the court did not make the findings required to impose an extended term. I note the majority quotes the wrong version of the extended term statute; (3) the court's faulty admonishment of minimum and maximum sentence results in defendant's plea being not "knowing and voluntary"; and (4) the order of protection was entered without the State first filing a petition which is required for the court to obtain subject matter jurisdiction.

¶ 59 The majority acknowledges that due to the void enactment upgrading communicating with a witness to a Class 3 offense, at the time defendant committed the offenses between February 1999 and March 1999 the crime had reverted to the prior classification as a Class 4 felony with a sentencing range of one to three years' imprisonment. See 720 ILCS 5/32-4(b) (West 1998); 730 ILCS 5/5-8-1(a)(West 1998). This being the case, defendant's sentence of five years for the offense, when the correct sentencing range maximum was three years, is void as to the excess two years. "[W]hile a sentence, or portion thereof, not authorized by statute is void ***, it is void only to the extent that it exceeds what the law permits. The legally authorized portion of the sentence remains valid." *Brown*, 225 Ill. 2d at 205. Defendant's sentence is void as to the excess two years.

¶ 60 The majority nevertheless holds that defendant's five-year sentence was within the

statutory sentencing range because defendant was "subject to" an extended term under section 5-8-2(a) because of his "criminal background" as a qualifying factor for an extended term under section 5-5-3.2(b),[8] but the majority's reasoning and conclusion are invalid for several reasons.

¶ 61 First, the majority quotes the wrong version of the extended-term statute. "A defendant is 'entitled to be sentenced under either the law in effect at the time of the offense or the law in effect at the time of sentencing.' " *People v. Calhoun*, 377 Ill. App. 3d 662, 664 (2007) (quoting *People v. Hollins*, 51 Ill. 2d 68, 71 (1972)). The version of section 5-8-2(a) quoted by the majority was in effect only from February 23, 2001, up until June 27, 2002. See 730 ILCS 5/5-8-2(a) (eff. Feb. 23, 2001); 730 ILCS 5/5-8-2(a) (eff. June 27, 2002). Defendant committed the offenses between February 1999 and March 1999, and was sentenced on September 10, 2003. The version of section 5-8-2(a) quoted by the majority was thus not in effect either at the time of the offenses or at the time of sentencing and is inapplicable to defendant.

The version of section 5-8-2(a) that was in effect at the time of the offenses is as

---

[8] Though the majority states defendant was subject to an extended-term sentence because his "criminal background" was "a qualifying factor under section 5-5-3.2(b)," a defendant's "history of prior delinquency or criminal activity" is a factor in aggravation for a more severe sentence within the classification for the offense under subsection 5-5-3.2(a), not a factor for an extended-term sentence under subsection 5-5-3.2(b). See 730 ILCS 5/5-5-3.2(a), (b) (West 2002). I will assume the majority meant prior felony convictions under section 5-5-3.2(b).

follows:

"(a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the *factors in aggravation set forth in paragraph (b) of Section 5-5-3.2* were *found* to be present. *Where the judge finds that such factors were present*, he *may* sentence an offender to the following:

* * *

(6) for a Class 4 felony, a term shall be not less than 3 years and not more than 6 years." (Emphasis added.) 730 ILCS 5/5-8-2(a) (West 1998).

¶ 62 A prior conviction of a same or similar class felony within 10 years is a factor in aggravation set forth in paragraph (b) of section 5-5-3.2. 730 ILCS 5/5-5-3.2(b)(1) (West 1998).

¶ 63 Section 5-8-2(a) was amended in 2000, effective February 23, 2001, to require that a trier of fact must find the existence of all section 5-5-3.2(b) factors beyond a reasonable doubt before an extended term sentence can be imposed, which is the language quoted by the majority. See 730 ILCS 5/5-8-2(a) (eff. Feb. 23, 2001).

¶ 64 However, the statute was amended again in 2002, over a year before defendant was sentenced, deleting this language and substituting the following: "If the pre-trial and trial proceedings were conducted in compliance with subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963." See 730 ILCS 5/5-8-2(a) (eff. June 27, 2002). At

the time defendant was sentenced, September 10, 2003, the extended-term statute provided as follows:

"(a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the *factors in aggravation set forth in paragraph (b) of Section 5-5-3.2* were *found* to be present. If the pre-trial and trial proceedings were conducted in compliance with subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963, [footnote omitted] the judge *may* sentence an offender to the following:

* * *

(6) for a Class 4 felony, a term shall be not less than 3 years and not more than 6 years."[9] (Emphasis added.) 730 ILCS 5/5-8-2(a) (West 2003) (eff. June 27, 2002).

¶ 65 The version of section 5-8-2(a) at the time of the offenses and the version in effect at the time of sentencing are the same in requiring a finding and *barred* a court from imposing an extended term unless it found the extended-term factors in sentencing, which include prior convictions. See 730 ILCS 5/5-5-3.2(b(1) (West 1998).

---

[9] At the time of defendant's sentencing, section 111-3(c-5) provided that an aggravating factor for extended-term sentencing beyond the statutory maximum for the offense must be included in the charging instrument, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt, but specifically excepted prior convictions from these requirements. 725 ILCS 5/111-3(c-5) (West 2002) ("other than the fact of a prior conviction").

¶ 66 The amendments to section 5-8-2(a) were a reaction by our legislature to the United States Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the court held that extended-term factors had to be found beyond a reasonable doubt by the trier of fact. However, the court in *Apprendi* specifically excepted and continued to endorse the long-standing and continued procedure of the sentencing judge finding prior convictions by a preponderance of the evidence to impose extended-term sentencing without submitting this enhancement fact for trial by a jury for proof beyond a reasonable doubt. *Apprendi*, 530 U.S. 466, 490. The Supreme Court's prior holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), recognized the exception for judicial fact-finding regarding a defendant's prior convictions to support extended-term sentences, known as the "recidivism exception." A year after *Almendarez-Torres*, the Supreme Court explained that the recidivism exception was permitted because "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999). The majority in *Apprendi* also distinguished judicial findings of prior convictions for extended terms as appropriate: "There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt[] and allowing the judge to find the required fact under a lesser standard of proof." *Apprend*i, 530 U.S. at 496. *Apprendi* clarified that, although prior convictions carry a lesser burden than proof beyond a reasonable doubt to impose an extended term, a

judge must still make a finding regarding prior convictions.

¶ 67 Our supreme court recognized the holding of *Apprendi* in *People v. Swift*, 202 Ill. 2d 378, 389 (2002), *cert denied*, *Illinois v. Swift*, 538 U.S. 979 (2003). The holdings of *Apprendi* and *Swift* apply to any extended term issue this case because defendant was sentenced in 2003, after these decisions. See *People v. De La Paz*, 204 Ill. 2d 426, 438-39 (2003) (holding that *Apprendi* does not apply retroactively). *Apprendi* did not change the long-standing recognition of findings by the court by a preponderance of the evidence of prior convictions to support an extended term, and our legislature's 2002 amendment to section 5-8-2(a) after *Apprendi* did not remove the requirement of a court finding of a prior conviction.[10] Our legislature's June 27, 2002 amendment reduced the finding requirement for prior convictions back to a finding by the court.[11] The requirement of a finding by the court of prior convictions remained and still remains part of our statute today. See 730 ILCS 5/5-8-2(a) (West 2012). This evinces our legislature's intent that our courts adhere

---

[10] There is no *Apprendi*-based challenge in this case, as no extended term was imposed and in any event the only basis for an extended term relied upon by the State was defendant's prior convictions, which do not require proof beyond a reasonable doubt. My discussion of *Apprendi* is limited to explaining the recognized parameters of an authorized sentencing range.

[11] The majority's reliance of the version of section 5-8-2(a) that required a trier of fact to find the extended-term factors beyond a reasonable doubt is actually worse for its own analysis, because the version of the statute they are relying on requires the heightened burden of proof found beyond a reasonable doubt by a trier of fact.

to the long-standing recidivism exception recognized in *Apprendi* where a judge makes a finding of a prior conviction in order to support an extended term. See *De La Paz*, 204 Ill. 2d at 433 (" ' "[w]here statutes are enacted after judicial opinions are published, it must be presumed that the legislature acted with knowledge of the prevailing case law" ' "). See also *People v. Washington*, 343 Ill. App. 3d 889, 903-04 (2003) (explaining that the legislature's amendment of section 5-8-2 after *Apprendi* did not change extended-term sentencing based on prior convictions).

¶ 68 The majority holds that defendant's sentence is not void and is within statutory authority because the authorized sentencing range includes a discretionary extended term which may apply, regardless of required findings, but this argument has been roundly rejected by the United States Supreme Court and the Illinois Supreme Court. In *Swift*, the State had similarly argued that all possible sentencing provisions which were authorized and possibly applicable to defendant for first degree murder were part of the sentencing range, but the Illinois Supreme Court rejected this argument:

"In essence, the State contends that Illinois has a 'unitary' sentencing scheme for first degree murder. The State urges us to read all of the statutes as a whole and conclude that any sentence the legislature has authorized to be imposed on a defendant convicted of first degree murder is part of the sentencing range.

"We reject this argument. *** [A]ccording to the plain language of the statutes, 20 to 60 years' imprisonment is the sentencing range for first degree murder. This is the only range of sentence authorized for the basic elements of the crime." *Swift*, 202 Ill. 2d

at 388.

¶ 69 The Illinois Supreme Court held that the "argument that the *Apprendi* 'sentencing range' for a crime is any penalty authorized by statute to be imposed for that crime – regardless of what factual findings the legislature might require before higher ranges of sentence could be imposed – has recently been rejected by the Supreme Court." *Swift*, 202 Ill. 2d at 389 (citing *Ring v. Arizona*, 536 U.S. 584 (2002)). Our supreme court in *Swift* made clear that the authorized sentencing range is the range under statute for the offense itself, as any further enhanced sentence requires findings, including under section 5-8-2(a) for an extended term:

"We conclude that for purposes of *Apprendi* analysis, the 'sentencing range' for first degree murder in Illinois is 20 to 60 years' imprisonment. This is the only range of sentence permissible based on an ordinary jury verdict of guilt. *Although there is statutory authorization for higher sentences* to be imposed for this crime, any sentence longer than 60 years *requires additional factual findings*. See 730 ILCS 5/5-8-2(a) (West 1998) (*extended-term sentence*); 730 ILCS 5/5-8-1(a)(1)(b), (a)(1)(c) (West 1998) (life imprisonment); 720 ILCS 5/9-1(g), (h) (West 1998) (death penalty)." (Emphasis added.) *Swift*, 202 Ill. 2d at 392.

¶ 70 The sentencing range is determined by what sentence the statute authorized, based solely on the basic elements of the offense. *Swift*, 202 Ill. 2d at 388. A defendant's prior conviction is not an essential element of the underlying offense and is unrelated to the commission of the offense. *Landrum*, 323 Ill. App. 3d at 667. This court has previously

explained that, "[i]In other words, to apply *Apprendi*, a court must first determine what was the maximum sentence the defendant could have received, *based solely on the facts determined by a jury*. (Emphasis added.) *People v. Rockman*, 2012 IL App (1st) 102729, ¶ 23 (citing *Swift*, 202 Ill. 2d at 385). Even before *Apprendi*, the authorized sentencing range was the range for the offense itself, and did not include any possible extended term. See, *e.g.*, *People v. Kunze*, 193 Ill. App. 3d 708, 727 (1990) (upholding a sentence because the sentence imposed "was well within the range of *unextended-term sentences* which the trial court could have imposed on [the defendant] for a Class 1 felony") (emphasis added). After *Apprendi* and *Swift*, there is no question that the sentencing range does not include any penalty authorized, regardless of necessary factual findings for an extended term. The maximum sentence that was statutorily authorized that defendant could have received in this case based solely on a determination by a jury of the elements of the offense of communication with a witness, a Class 4 felony, was three years.

¶ 71 The authorized sentence for an offense includes mandatory sentencing enhancements, but not discretionary extended terms where no finding was made. Where an automatic mandatory sentencing enhancement applies and the court has no discretion, the authorized sentencing range is the range for the offense itself plus the mandatory enhancement. See, *e.g.*, *People v. White*, 2011 IL 109616, ¶ 29 (28-year sentence imposed by the trial court on the defendant's plea was void because the defendant pled guilty to first degree murder and the factual basis in support of the plea made it clear that a firearm was used in the commission of the offense, which triggered a mandatory

15-year enhancement); *People v. Smith*, 2013 IL App (3d) 110738 (sentence was void because the trial court was required to add 25 years under the firearm mandatory enhancement statute). Yet even in the case of mandatory enhancements, where the factual basis of the plea itself does not provide facts which automatically trigger mandatory enhancement, the authorized sentencing range is merely the range for the offense itself. See *People v. Keller*, 353 Ill. App. 3d 830, 831 (2004) (pursuant to a fully negotiated plea agreement, the State amended the indictment to allege that the defendant committed armed robbery with only a "dangerous weapon," not a "firearm," the defendant pleaded guilty to that factual basis, and so the 12-year sentence without the firearm enhancement of 15 years was affirmed as within the statutory range); *White*, 2011 IL 109616 at ¶¶ 40, 41 (Theis, J., specially concurring). Unlike mandatory sentencing enhancements, extended terms are discretionary and are not automatically part of the sentence for an offense. Compare 730 ILCS 5/5-8-1(d)(i) (West 1998) ("if the person committed the offense while armed with a firearm, 15 years *shall* be added to the term of imprisonment imposed by the court"), with 730 ILCS 5/5-8-2(a) (West 1998) ("the judge *may* sentence an offender to an extended term as provided") (emphasis added).

¶ 72 The majority relies on *Brown*, but in *Brown* the Illinois Supreme Court held that the sentence could be upheld because it was within the statutory range for the offense itself, not including any extended term. In *Brown*, the defendant pled guilty to one count of attempted first degree murder of a peace officer, a Class X felony, in exchange for a sentence of 28 years' imprisonment, and the court imposed this sentence of 28 years.

Brown, 225 Ill. 2d at 193-94. Then the sentencing law was declared unconstitutional and void *ab initio* by in *Cervantes*, which meant that the proper sentencing range for the offense reverted back to 15-60 years. *Brown*, 225 Ill. 2d at 203. The Illinois Supreme Court found that the defendant's sentence of 28 years pursuant to his plea was not void because "the 28-year term imposed under [the defendant's] plea agreement was squarely within the old 15- to 60-year sentencing range which should have governed these proceedings." *Brown*, 225 Ill. 2d at 205. The proper "sentencing range" was the sentencing range for the offense itself: "In this case, however, defendant's 28-year sentence was well within the old 15- to 60-year sentencing range which governed defendant's case. Accordingly, it did not exceed the governing *statutory maximum for the offense*." (Emphasis added.) *Brown*, 225 Ill. 2d at 204.

¶ 73 The majority also relies on *Cavins*, but *Cavins* is distinguishable and cannot apply here because the court in *Cavins* made the required finding to support an extended sentence at the defendant's sentencing hearing. The issue was merely a different sentencing range of 7 to 14 years' imprisonment because of the court's reliance on and finding of a prior conviction in Iowa, rather than the sentencing range of 6 to 30 years' imprisonment due to prior Illinois convictions originally contemplated during the plea. The *Cavins* court reviewed the record and found that the circuit court made the required finding of a prior conviction to support extended-term sentencing:

"At the sentencing hearing, the State presented evidence that defendant had a prior Iowa conviction, which defendant did not deny, and *the court determined that because of the*

Iowa conviction defendant could be sentenced to an extended term of 7 to 14 years' imprisonment pursuant to section 5-5-3.2(b)(1)." (Emphasis added.) *Cavins*, 288 Ill. App. 3d at 179.

¶ 74 The circuit court in *Cavins* thus made the finding regarding a prior conviction required by section 5-8-2(a), and so the actual sentence imposed was within statutory authority.

¶ 75 There are numerous cases discussing how a trial court may find the fact of a prior conviction in order to be able to impose an extended-term sentence. See, *e.g.*, *People v. Bolton*, 382 Ill. App. 3d 714, 723-24 (2008) (discussing what material the fact finder can use to legally establish the existence of prior convictions and discussing the Supreme Court's guidance regarding such materials in *Shepard v. United States*, 544 U. S. 13 (2005), *Taylor v. United States*, 495 U.S. 575 (1990)); *People v. Matthews*, 362 Ill. App. 3d 953 (2005) (reliance on a pre-sentence investigation report in making a finding of a prior conviction during sentencing); *People v. Hay*, 362 Ill. App. 3d 459, 468 (2005) (certified copy of the defendant's prior conviction introduced at sentencing sufficient). "The only true factual inquiry involved in section 5-5-3.2(b)(1) is whether the defendant has a prior conviction." *People v. Landrum*, 323 Ill. App. 3d 664, 667 (2001). A judge need only make this finding of a prior conviction to support an extended term by a preponderance of the evidence. *Swift*, 202 Ill. 2d at 384 (citing *People v. Jackson*, 199 Ill. 2d 286, 293 (2002) (judge need only find extended-term sentencing factor by a preponderance of the evidence).

¶ 76 In *People v. Sterling*, 357 Ill. App. 3d 235 (2005), a case exemplifying perhaps the lowest

threshold satisfaction of the finding requirement of prior convictions for an extended term, this court held that the finding requirement was satisfied where the prior conviction was placed before the court immediately before sentencing, and the court acknowledged that it was imposing an extended term. The testimony of a prior conviction was given immediately before sentencing and "[d]uring sentencing, the State asked the trial court if the murder sentence was based on an extended term, and the court responded that it was." *Sterling*, 357 Ill. App. 3d at 254-55. We could "ascertain from the comments of the court that it did find an extended term sentence appropriate for defendant." *Sterling*, 357 Ill. App. 3d at 255. See also *People v. Bell*, 217 Ill. App. 3d 985, 1013-14 (1991) (although the trial court did not specifically state which factor or factors it based its extended sentences upon, the court made several comments which could correspond to the extended-term factors, including noting defendant's prior convictions); *People v. Lenninger*, 88 Ill. App. 3d 801, 807 (1980) (where the judge stated in reviewing the evidence, "it is a very serious case," found the defendant had a history of criminal activity, and imposed an extended term of six years' imprisonment the court held it could not ascertain from the comments of the court whether the extended term factors were met by the evidence and vacated the sentence and remanded for a new sentencing hearing).

¶ 77 Defendant's case, however, does not meet even the minimum threshold satisfaction of the finding requirement for imposing an extended term based on prior convictions. In this case, however, during sentencing the court made no finding regarding his prior convictions to support any extended term. The court's sentence was simply as follows:

"*** Mr. Dolis, I will sentence you as to the counts of communicating with the witnesses in the three indictments before me to five years Illinois Department of Corrections. The violation of bail bond being a class – violation of order of protection being a Class 4 I'll sentence you to three years Illinois Department of Corrections. That will run concurrent and all to run concurrently together. So that means you have a five year sentence between all three cases ***."

¶ 78 Further, the *mittimus* does not reflect any extended term. Defendant was not in fact sentenced to an extended term, which is why there were no findings.

¶ 79 Instead, the facts in this case are clear that the court was simply mistaken as to the correct maximum term for the offense and imposed the wrong maximum term, which rendered the sentence void as to the excess two years. When the court told defendant, prior to his plea, that his recommended sentence if defendant pled guilty would be five years' imprisonment, the Assistant State's attorney asked whether the sentences in defendant's three cases would also be consecutive, the court replied, "No, *just Class 3*, five years total." (Emphasis added.) The court believed communicating with a witness was a Class 3 felony and five years was the maximum term for Class 3 felonies. After defendant pled guilty, the court then indeed sentenced defendant to five years' imprisonment.

¶ 80 The majority attempts to bolster its position by stating that "[d]efendant has not disputed the State's assertion on appeal and before the trial court that he was subject to an extended-term sentence because his criminal background [*sic*] was a qualifying factor under section 5-5-3.2(b)." The fact that defendant was "subject to" and *eligible* for an

extended term based on his prior convictions is a vast difference from the court actually making the finding in sentencing that was required by section 5-8-2(a). Defendant directly disputes any assertion that the court made any finding or actually imposed an extended-term sentence in this case.

¶ 81 The majority also states "the record clearly shows defendant knew he could be subjected to an extended-term sentence in light of the State's arguments and the trial court's admonishments." A State's argument in aggravation does not equate with a court's finding under section 5-8-2(a), and admonishing a defendant during his plea before sentencing of the possibility of an extended term does not somehow cure a failure to make the extended-term finding in sentencing required under section 5-8-2(a).

¶ 82 Had the court simply stated during sentencing that defendant had a prior conviction and that it was imposing an extended term, or that it found an extended term appropriate and mentioned defendant's prior felony conviction, then I would have found as the majority does. But here there is *no* finding by the court in sentencing regarding any prior convictions as a basis for an extended term.

¶ 83 Even if the court *had* imposed an extended term in this case, the extended-term portion would be void because imposing an extended term without any finding is unauthorized by statute and, therefore, void. See 730 ILCS 5/5-8-2(a) (West 1998) (requiring a finding to impose an extended term); *Swift*, 202 Ill. 2d at 392 (the "sentencing range" is "the range of sentence permissible based on an ordinary jury verdict of guilt," and although "there is statutory authorization for higher sentences," any longer sentence requires additional

factual findings); *People v. Arna*, 168 Ill. 2d 107, 113 (1995) ("A sentence which does not conform to a statutory requirement is void."). The majority does not recognize this outcome of its own reasoning.

¶ 84 Either way, under the facts of this case any sentence above the maximum for the offense here, three years, was void. If the five-year sentence was only for the offense (which it was), then it is void as to the excess of two years. If the five-year sentence was partially an extended term for the two-year excess above the three- year maximum for a Class 4 felony, then the two-year extended sentence is void because it was entered without statutory authority due to the lack of the required finding under section 5-8-2(a). There is no way to avoid the conclusion that defendant's sentence was void as to the excess of two years above the three-year maximum of Class 4 felonies. As such, I therefore dissent from the majority's holding that the sentence was not void. Defendant's sentence of five years for the offense, when the correct maximum was three years, is void as to the excess two years.

¶ 85 I also dissent because the majority completely ignores the faulty admonishment in this case and the fact that defendant's plea was therefore not knowing and voluntary and requires that he be allowed to withdraw his plea. Normally, where a sentence is void modifying a defendant's aggregate sentence in a fully-negotiated plea agreement to approximate the "bargain" struck in a fully negotiated plea agreement regarding the sentence term can be appropriate if the defendant's aggregate sentence could be reconfigured to be within statutory mandates. See *People v. Donelson*, 2013 IL 113603.

People v. Stone, 2013 IL App (1st) 111344. Where a sentence is void as to the excess over the appropriate maximum term, the sentence can be reduced. See *People v. Didier*, 306 Ill. App. 3d 803 (1999).

¶ 86 However, where a defendant is not admonished correctly as part of the plea agreement and the ultimate sentence is void, the defendant is given the opportunity to withdraw his or her plea. *People v. Snyder*, 2011 IL 111382, ¶ 31. Illinois Supreme Court Rule 402 requires that the trial court admonish defendants of "the minimum and maximum sentence prescribed by law" before it may accept a guilty plea Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997). "The necessary admonitions – which are mandated by Supreme Court Rule 402(a)(2) (177 Ill. 2d R. 402 (a)(2)) – are designed 'to insure that [the defendant's] guilty plea is intelligently and understandingly made, as required by *Boykin* [*v. Alabama*, 395 U.S. 238 *** (1969)].' " *People v. Seyferlich*, 398 Ill. App. 3d 989, 991 (2010) (quoting Ill. S. Ct. R. 402 (eff. July 1, 1997), Committee Comments). In *Boykin*, the Supreme Court held that a guilty plea that is not knowing and voluntary of the law in relation to the facts is a violation of the Due Process Clause and is void. *Boykin*, 395 U.S. at 243-44. See also *Snyder*, 2011 IL 111382 at ¶ 31 (adopting the court's holding in *Seyferlich*). In *Snyder*, the Illinois Supreme Court reiterated that "Rule 402 requires that the trial court give a defendant certain admonishments before accepting a guilty plea, including 'the minimum and maximum sentence prescribed by law.' " *Snyder*, 2011 IL 111382 at ¶ 19 (quoting Ill. S. Ct. R. 402 (eff. July 1, 1997)). In partially negotiated plea cases, as here, where the defendant is not admonished correctly as part of the plea agreement and the

ultimate sentence is void, the defendant is given the opportunity to withdraw his or her plea. See *Snyder*, 2011 IL 111382 at

¶ 31. The Illinois Supreme Court has held "for the clarification of all" that while in fully negotiated plea cases a defendant has the option of seeking the benefit of his bargain or being given the opportunity to withdraw his plea, where the defendant's plea was not knowing and voluntary the remedy "is limited to allowing defendant leave to file a motion to withdraw his plea." *People v. Guerrero*, 2012 IL 112020, ¶ 23.

¶ 87 The majority focuses on the court's admonishment of the possibility of an extended term sentence, and notes no admonishment of mandatory supervised release (MSR) was required, but completely ignores the faulty admonishment of the correct minimum and maximum term for the offense. In this case, the court accepted defendant's guilty plea and sentenced defendant to a void sentence after it had incorrectly admonished defendant that the minimum and maximum terms for the offense of communicating with a witness were for a Class 3 felony, with a minimum of five years and a maximum of ten years, when the actual range was for a Class 4 felony, with a minimum of one year and a maximum of three years' imprisonment. Also, there is no indication that, despite the faulty admonishment, defendant otherwise knew the correct minimum and maximum terms. *Cf. People v. Coleman*, 129 Ill. 2d 321, 340 (1989) (holding the court substantially complied with admonishment requirements where the record revealed that the defendant knew that the minimum sentence was natural life imprisonment, despite the court's faulty admonishment that the minimum was 20 years).

¶ 88 The majority maintains that, despite the faulty admonishment of the sentencing range, "[section] 5-8-2(b) was nonetheless satisfied because the sentence imposed fell within the range that defendant was advised of," and cites to *Torres*. However, *Torres* does not stand for the blanket proposition that faulty admonishments can be ignored so long as a defendant is sentenced to within that wrongly admonished range. The defendant in *Torres* was not only sentenced to within the range he was admonished of; his sentence of 45 years actually complied with statutory guidelines because it was the minimum required for first degree murder (20 years) plus the mandatory firearm enhancement (25 years), and thus was within the statutorily required range. *Torres* involved a mandatory sentencing enhancement based on the factual basis of the plea, not a discretionary extended-term range based on prior convictions requiring a finding by the court. The factual basis recited during the defendant's plea included the use of a firearm, which triggered the mandatory firearm enhancement. *Torres*, 228 Ill. 2d at 388. The court's holding affirming the sentence was supported by the fact that the actual sentence received in *Torres*, 45 years, complied with the statutory sentencing range for the crime with which the defendant was charged, first-degree murder of a minimum of 20 years, plus the mandatory firearm enhancement of 25 years. *Torres*, 228 Ill. 2d at 386, 388. A sentence cannot be upheld based on compliance with the range stated during faulty admonishment where the actual sentence received did not comply with the statutory sentencing range.

¶ 89 Admonishment of the correct minimum and maximum terms of an offense before pleading guilty is a due process right. Because of the faulty admonishment in this case,

defendant's plea was not knowing and voluntary and the judgment entered on the conviction on his plea must be vacated and defendant must be allowed to withdraw his plea, thereby rendering his claims regarding ineffective assistance of counsel, lack of public trial, and failure to admonish of mandatory supervised release term moot. I therefore cannot join in those portions of the majority's holding. The only appropriate remedy is to vacate defendant's sentence and conviction and allow him to withdraw his guilty plea.

¶ 90 II. Order of Protection

¶ 91 Finally, I concur in the result of reversing the order of protection, but I do not agree with the majority's holding that the plenary order of protection was merely voidable and not void. While our courts often repeat the well-known rule regarding subject matter jurisdiction, which the majority does here, the order of protection in this case implicates the invocation of that subject matter jurisdiction or general jurisdiction of this cause of action for an order of protection. The distinction here is between subject matter jurisdiction, which relates to the general class of cases, and a court's jurisdiction of a particular cause of action within that broad general class of cases. The Illinois Supreme Court "defines 'subject matter jurisdiction' as a court's power '" to hear and determine cases of the general class to which the proceeding in question belongs." ' [Citation.]" *In re Luis R.*, 239 Ill. 2d 295, 300 (2010). See also *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002) (a court's subject matter jurisdiction relates to "the power of a court to hear and determine cases of the general class to which the

proceeding in question belongs."). "Subject matter jurisdiction 'does not *** mean jurisdiction of the particular case before it, but the class of cases to which that case belongs.' " *Health Cost Controls v. Sevilla*, 307 Ill. App. 3d 582, 587 (1999) (quoting *Kemling v. Country Mutual Insurance Co.*, 107 Ill. App. 3d 516, 519–20 (1982)).

¶ 92 In application to any particular case, the subject matter jurisdiction of the court is the power to hear and determine *that* controversy. (Emphasis added.) *City of Chicago v. Chicago Board of Education*, 277 Ill. App. 3d 250, 261 (1995) (citing *In re Marriage of Fox*, 191 Ill. App. 3d 514 (1989)). " 'The court's authority to exercise its jurisdiction and resolve a justiciable question is invoked by the filing of a complaint or petition.' " *City of Chicago*, 277 Ill. App. 3d at 261 (quoting *Ligon v. Williams*, 264 Ill. App. 3d 701, 707 (1994)).

¶ 93 For a particular cause of action, jurisdiction is invoked in the trial court when an action is filed and a summons is issued and served upon the defendant according to law. *Nelson v. Keene Corp*., 283 Ill. App. 3d 7, 11 (1996) (citing *Ryan v. Miller*, 58 Ill. App. 3d 283 (1978), 735 ILCS 5/2-201(a) (West 1994)). Then, if that complaint or petition alleges the existence of a justiciable matter, the court's subject matter jurisdiction is properly invoked. As explained by the Illinois Supreme Court in *In re Luis R.*:

"To *invoke* a circuit court's subject matter jurisdiction, *a petition or complaint* need only 'alleg[e] the existence of a justiciable matter.' [*In re*] *M.W.*, 232 Ill. 2d [408,] 426 [2009]. Indeed, even a defectively stated claim is sufficient to invoke the court's subject matter jurisdiction, as '[s]ubject matter jurisdiction does not depend upon the legal sufficiency of

the pleadings.' *Belleville Toyota*, 199 Ill. 2d at 340." (Emphasis added.) *In re Luis R.*, 239 Ill. 2d at 300.

See, *e.g.*, *People v. Fiorini*, 143 Ill. 2d 318, 338 (1991) ("In the instant case, the trial court had jurisdiction over the original action when the Attorney General filed the complaint in the circuit court."); *Adams v. Klink*, 210 Ill. App. 3d 630, 637-38 (1991) ("When the plaintiffs here filed their complaint ***, they invoked the circuit court's jurisdiction over the subject matter *** [of] their amended complaint[]"); *Walker v. State Board of Elections*, 65 Ill. 2d 543, 551 (1976) ("When the Better Government Association filed its complaint against the plaintiffs, the State Board of Elections obtained jurisdiction to hear the charges ***.")

¶ 94 A circuit court's subject matter jurisdiction powers "may only be exercised in the context of adjudicating a justiciable matter presented to the court by the parties to the cause." *City of Chicago*, 277 Ill. App. 3d at 261. "The pleadings of the parties frame the issues in controversy and circumscribe the relief that the court is empowered to order." *City of Chicago*, 277 Ill. App. 3d at 261 (citing *Ligon*, 264 Ill. App. 3d at 707). " '[O]nce a justiciable matter is properly submitted, a court has the power to decide rightly or wrongly the issues properly before it.' " *People v. Carroll*, 375 Ill. App. 3d 162, 164 (2007) (quoting *People ex rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541, 554 (2003)). See also *Downtown Disposal Services v. City of Chicago*, 2012 IL 112040, ¶ 29 (quoting *Wood v. First National Bank of Woodlawn*, 383 Ill. 515, 522 (1943) (" 'Jurisdiction of the subject matter is the power to adjudge concerning the general question involved, and if a complaint states a case belonging to a general class over which the authority of the court

extends, the jurisdiction attaches and no error committed by the court can render the judgment void.' "). "Orders entered in the absence of a justiciable question properly presented to the court by the parties are void since they result from court action exceeding its jurisdiction." *Ligon*, 264 Ill. App. 3d at 707.

¶ 95 An order of protection is a separate cause of action and requires filing a petition to invoke the court's jurisdiction. The Illinois Domestic Violence Act of 1986 specifically provides: "Any action for an order of protection, whether commenced alone or in conjunction with another proceeding, is a *distinct cause of action* ***." (Emphasis added.) 750 ILCS 60/210(a) (West 2002).

¶ 96 Proceedings to obtain an order of protection are civil proceedings. *In re Marriage of Young*, 2013 IL App (2d) 121196, ¶ 22 (citing *Best v. Best*, 223 Ill. 2d 342, 348 (2006)).

¶ 97 Section 202(a)(3) of the Illinois Domestic Violence Act of 1986 provides for only the following three ways to commence an action for an order of protection:

"§ 202. *Commencement of action*; filing fees; dismissal. (a) How to commence action. Actions for orders of protection are commenced:

(1) Independently: By filing a petition for an order of protection in any civil court, unless specific courts are designated by local rule or order.

(2) In conjunction with another civil proceeding ***.

(3) In conjunction with a delinquency petition or *a criminal prosecution: By filing a petition for an order of protection, under the same case number* as the delinquency petition or *criminal prosecution*, to be granted during pre-trial release of a

defendant, with any dispositional order issued under Section 5-710 of the Juvenile Court Act of 1987 [705 ILCS 405/5-710] or as a condition of release, supervision, conditional discharge, probation, periodic imprisonment, parole or mandatory supervised release, or *in conjunction with imprisonment* or a bond forfeiture warrant; *provided that*:

(i) *the violation is alleged in an information, complaint, indictment* or delinquency petition on file, and the alleged offender and victim are family or household members or persons protected by this Act; *and*

(ii) *the petition, which is filed by the State's Attorney, names a victim of the alleged crime as a petitioner*." (Emphasis added.) 750 ILCS 60/202(a) (West 2002).

¶ 98 In conjunction with a criminal prosecution, as here in defendant's case, the action must be commenced by "*filing a petition* for an order of protection, under the same case number." (Emphasis added.) 750 ILCS 60/202(a)(3) (West 2002).

¶ 99 Commencement of an action for an order of protection is also set forth in separate provisions in the Illinois Code of Criminal Procedure of 1963. Section 112A-2 of the Code of Criminal Procedure of 1963 requires that an action for an order of protection must be commenced by filing a petition and must present the justiciable question as follows:

"§ 112A-2. *Commencement of Actions*.

(a) *Actions for orders of protection* are *commenced in conjunction with* a delinquency petition or a *criminal prosecution* by *filing a petition* for an order of

protection, under the same case number as the delinquency petition or the criminal prosecution, to be granted during pre-trial release of a defendant, with any dispositional order issued under Section 5-23 of the Juvenile Court Act of 1987, [footnote omitted] or as a condition of release, supervision, conditional discharge, probation, periodic imprisonment, parole or mandatory supervised release, or in conjunction with imprisonment or a bond forfeiture warrant, provided that:

(i) the violation is alleged in an information, complaint, indictment or delinquency petition on file, and the alleged offender and victim are family or household members; *and*

(ii) the *petition*, which is *filed by the State's Attorney*, names a victim of the alleged crime as a petitioner." (Emphasis added.) 725 ILCS 5/112A-2(a) (West 2002).

Section 111-8 of the Code of Criminal Procedure of 1963 also requires that a cause of action for an order of protection be commenced by a separate petition:

§ 111-8. Orders of protection to prohibit domestic violence.

(a) Whenever a violation *** is alleged in an information, complaint or indictment on file, and the alleged offender and victim are family or household members, as defined in the Illinois Domestic Violence Act, as now or hereafter amended, [footnote omitted] the People through the respective State's Attorneys may *by separate petition* and upon notice to the defendant, except as provided in subsection (c) herein, request the court to issue an order of protection." (Emphasis added.) 725 ILCS 5/111-8 (West 2002).

¶ 100 Under the majority's reasoning, courts simply have general jurisdiction of every particular cause of action, without a party ever filing a complaint or petition or motion, due to its subject matter jurisdiction. The court of course had subject matter jurisdiction to hear causes of action for orders of protection generally. However, while our courts have the authority to hear and determine orders of protection generally, that authority must still be invoked for each cause of action. The failure to file a petition is not merely a procedural irregularity. Our legislature specifically provided that a proceeding for an order of protection is a separate cause of action in itself, and has set forth the requirement of a written petition to commence an action for an order of protection in not one, not two, but three separate provisions. In this case, jurisdiction of the order of protection was never invoked in the court in this particular case because no petition was ever filed. I find that entry of the order of protection was therefore void. I therefore only concur in the result of vacating the order of protection.

¶ 101 As to the no-contact order, I concur in both the majority's reasoning and result.