IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 3-11-0738.
Respondent–Appellant,	)	
	)	There on appeal from the Circuit Court of the Twelfth Judicial
-vs-	)	Circuit, Will County, Illinois, No. 10-CF-1345.
	)	
MICKEY D. SMITH,	)	Honorable Amy Bertani-Tomczak,
Petitioner–Appellee.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER–APPELLEE

MICHAEL J. PELLETIER
State Appellate Defender

PETER A. CARUSONA
Deputy Defender

MARIO KLADIS
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER–APPELLEE

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I. The appellate court correctly found that *White* applied in postconviction proceedings, it did not establish a new rule, and Smith's plea agreement and sentence were void.

A. Regardless of whether White established a constitutional rule of criminal procedure, it applies in collateral proceedings where the defendant claims that his sentence violates statutory requirements.

ISSUES PRESENTED FOR REVIEW

I. Whether the appellate court correctly found that *White* applied in postconviction proceedings, it did not establish a new rule, and Smith's plea agreement and sentence were void.

A. Whether White applies in collateral proceedings where the defendant claims that his sentence violates statutory requirements, regardless of whether White established a constitutional rule of criminal procedure.

B. Whether the appellate court correctly applied Teague and interpreted White when it determined that White did not announce a new rule and Smith's plea agreement and sentence were void.

II. Whether Smith is not judicially estopped from challenging his plea agreement and sentence because estoppel may not apply to validate judgments that violate the legislature's authority to set penalties for crimes, Smith has not taken factually inconsistent positions in this case, and he did not benefit from pleading guilty because his plea agreement and sentence are void and can be challenged anytime.

III. Whether Smith should be allowed to withdraw his plea and proceed to trial if he so chooses if this Court affirms the appellate court's judgment.

STATEMENT OF FACTS

The State set out the facts in its brief (State's brief at 2–5). Additional facts are included, along with references to the record, in the argument section of Smith's brief.

ARGUMENT

The appellate court correctly found that Smith's plea agreement and sentence were void and that *People v. White*, 2011 IL 109616, did not create a new rule. *White* did not break new ground or impose new obligations on the government. Even without *White*, Smith's plea and sentence were void under numerous decisions holding that trial courts may not impose sentences that violate statutory requirements. Furthermore, Smith was not estopped from challenging his plea agreement and sentence because courts may not apply estoppel to validate judgments that violate the legislature's exclusive authority to set penalties for crimes; Smith did not take factually inconsistent positions in plea and postconviction proceedings; and he did not benefit from pleading guilty because his plea and agreement and sentence are void and can be challenged anytime. This Court should affirm the appellate court's judgment and allow Smith to withdraw his plea and proceed to trial if he so chooses, which is the same remedy granted in *White*.

I. The appellate court correctly found that *White* applied in postconviction proceedings, that *White* did not establish a new rule, and that Smith's plea agreement and sentence were void.

The State essentially argues that the appellate court misinterpreted *White* and misapplied *Teague v. Lane*, 489 U.S. 288 (1989) (see State's brief at 6–21). First, the State claims *White* is "not cognizable" in postconviction proceedings because it did not establish a constitutional rule of criminal procedure (State's brief at 5, 7–9). Second, the State argues that even if *White* established a constitutional rule, it does not apply retroactively in collateral proceedings because it is new and does not fit either of *Teague*'s exceptions (State's brief at 6, 9–21). Respectfully, the State is mistaken on both points: Whether *White* announced

a constitutional rule is not relevant to Smith's claim, and the appellate court neither misunderstood *White* nor misapplied *Teague* when it determined that *White* did not create a new rule and that Smith's plea agreement and sentence were void.

A. *Regardless of whether White established a constitutional rule of criminal procedure, it applies in collateral proceedings where the defendant claims that his sentence violates statutory requirements.*

The State argues that *White* is not cognizable in postconviction proceedings because the issue it addressed does not affect defendants' constitutional rights (State's brief at 5, 7–9). The State forfeited this argument because it did not include the issue when it petitioned for leave to appeal in this Court (see State's petition for leave to appeal at 3–6). See *Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 320–21 (2008). Moreover, the appellate court's decision in *People v. Avery*, on which the State relied heavily in its petition, did not address whether *White* created a constitutional rule. See *People v. Avery*, 2012 IL App (1st) 110298. *Avery* simply assumed *Teague* applied and determined that *White* announced a new rule that did not fit either of *Teague*'s exceptions. See *Avery*, 2012 IL App (1st) 110298, ¶¶ 35–40. The parties here did not address this issue below. See *People v. Smith*, 2013 IL App (3d) 110738, ¶¶ 4, 9–11 (discussing parties' arguments).

Even if the State did not forfeit this argument, *White* applies in postconviction proceedings whether or not it established a constitutional rule. Generally, postconviction relief is available only to defendants whose constitutional rights were violated in the proceedings that led to their convictions or sentences. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). However, sentences that vary from statutory requirements are void, and defendants may attack void orders anytime, directly or collaterally. *People v. Thompson*, 209 Ill. 2d 19, 24–25 (2004). Defendants may

attack void orders in postconviction proceedings without raising constitutional claims. *Thompson*, 209 Ill. 2d at 27.

Furthermore, when the defendant alleges that his sentence violates a statute, a court may resolve the issue by applying cases that interpret the statute even if the defendant's conviction became final before the cases were decided. For example, in *People v. Kizer*, the defendant was sentenced to consecutive terms for one count of murder and three counts of attempt murder. 318 Ill. App. 3d 238, 240 (1st Dist. 2000). His convictions became final in 1997. *Id.* at 239–40, 247. On appeal from the dismissal of his 1998 postconviction petition, he argued that the consecutive terms for two of the attempt murder counts violated section 5-8-4(a) of the Unified Code of Corrections as construed in *People v. Whitney*, 188 Ill. 2d 91 (1999). *Id.* at 240–241. The State conceded this point, and the appellate court ruled that under *Whitney*, one of the defendant's consecutive sentences for attempt murder was void—even though his conviction became final before *Whitney* was decided. *Id.* at 240–41, 252; see also *People v. Perruquet*, 181 Ill. App. 3d 660, 662–63 (5th Dist. 1989); *cf. People v. Granados*, 172 Ill. 2d 358, 361–62, 365–66 (1996) (defendant subject to extended terms for June 1992 offenses under *People v. Hicks*, 164 Ill. 2d 218 (1995) (construing 730 ILCS 5/5-5-3.2(b)(1) (West 1992)), even though that case reached supreme court though postconviction proceeding).

In Smith's case, his postconviction petition alleged that his plea agreement and sentence were void because the trial court did not properly admonish him about the mandatory firearm enhancement and his sentence did not include it (C363). *People v. Smith*, 2013 IL App (3d) 110738, ¶ 4. Smith's claim was cognizable in a postconviction proceeding, and *White*—which construed the firearm

enhancement statute—applied to his case even though his conviction was final two weeks before *White* was decided.

None of the cases cited by the State says otherwise (see State's brief at 7–9 and authorities cited therein). The State notes that *White* relied on *People v. Arna*, 168 Ill. 2d 107 (1995), for the general rule that unauthorized sentences are void (State's brief at 8). *Arna* further demonstrates not only that attacks on unauthorized sentences do not have to allege violations of the defendant's constitutional rights, such attacks do not even have to come from the defendant. See *Arna*, 168 Ill. 2d at 112–13; see also *People v. Wade*, 116 Ill. 2d 1, 4–6 (1987) (cited in State's brief at 8) (trial court vacated nine-month-old probation order—and let defendant withdraw guilty plea—after court learned defendant was statutorily ineligible for probation).

The State also relies on *People v. Hickey*, 204 Ill. 2d 585 (2001) (State's brief at 7–9), but *Hickey* simply demonstrates the general rule that postconviction proceedings must usually involve constitutional claims. In *Hickey*, the dissenting justices—but not the defendant—argued that the defendant should benefit from new court rules for capital cases. See *Hickey*, 204 Ill. 2d at 594, 624–25. The majority disagreed because the new rules were "broader than the constitutional rights they protect[ed]," and violations of procedures "designed to secure constitutional rights should not be equated with a denial of those constitutional rights." *Hickey*, 204 Ill. 2d at 628 (citing *People v. Hangsleben*, 43 Ill. 2d 236, 238 (1969) (no postconviction relief for defendant who alleged grand jury foreperson did not sign indictment)).

Furthermore, the court rules at issue were unquestionably new. The rules

became effective in 2001, but the defendant's conviction became final in 1998. *Hickey*, 204 Ill. 2d at 594, 627. And there was no doubt the rules broke new ground and imposed new obligations on the government. *Id.* at 635–36 (Harrison, C.J., dissenting) ("[The new rules] represent a basic and unprecedented shift in our conception of what we must do to afford defendants a fair trial in death penalty cases and to assure that the results of such trials are consistently reliable. A new, irreducible standard has been set.").

This points to the second issue the State raised in its brief—and the only issue the State raised in its petition for leave to appeal—whether the appellate court correctly applied *Teague* and interpreted *White* when the court determined that *White* did not announce a new rule and Smith's plea agreement and sentence were void.

B. The appellate court correctly applied Teague and interpreted White when it determined that White did not announce a new rule and Smith's plea agreement and sentence were void.

Under *Teague* and its progeny, courts follow a three-step process to determine whether a constitutional rule of criminal procedure applies retroactively in a collateral proceeding. *Beard v. Banks*, 542 U.S. 406, 411 (2004) (citing *Teague* and *Lambrix v. Singletary*, 520 U.S. 518 (1997)). First, the court pinpoints when the defendant's conviction became final. *Beard*, 542 U.S. at 411. Then the court evaluates the "legal landscape" when his conviction became final to determine whether the rule announced in a later case was actually new. *Beard*, 542 U.S. at 411 (quoting *Graham v. Collins*, 506 U.S. 461, 468 (1993)) (internal quotation marks omitted). If the rule was new, the court determines whether it fits one of *Teague*'s exceptions. *Beard*, 542 U.S. at 411. But if the rule was not new, it applies

retroactively in collateral proceedings. E.g., *People v. Moore*, 177 Ill. 2d 421, 429–35 (1997).

A case creates a new rule when its holding breaks new legal ground or imposes new obligations on the government. *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013). A case does not create a new rule when it merely applies principles that governed prior decisions to a different set of facts. *Chaidez*, 133 S. Ct. at 1107; see also *Moore*, 238 Ill. at 431 ("[A] decision clearly does not announce a new rule if it merely applies existing precedent to an analogous set of facts."). "[W]hen all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes." *Chaidez*, 133 S. Ct. at 1107.

As the State notes (State's brief at 11), the Supreme Court indicated that a case announces a new rule when the result "was not dictated by precedent existing at the time the defendant's conviction became final." *Chaidez*, 133 S. Ct. 1107 (quoting *Teague*, 489 U.S. at 301) (internal quotation marks omitted). A holding is not dictated by precedent unless it would have been "apparent to all reasonable jurists." *Chaidez*, 133 S. Ct. at 1107 (quoting *Lambrix*, 520 U.S. at 527–28) (internal quotation marks omitted). This is not to be taken literally. As the Supreme Court explained, even conflicting authority in state or federal lower courts does not by itself establish that a rule is new. *Chaidez*, 133 S. Ct. at 1110 n.11; see also *Moore*, 177 Ill. 2d at 435 (rejecting argument that conflicting decisions in appellate court showed rule was not dictated by precedent).

Smith questions whether *Teague* applies here. *Teague* arose in the context of federal habeas proceedings, where the Supreme Court was concerned about

comity and respecting the finality of state criminal convictions. *Teague*, 489 U.S. at 308–09. But comity is not an issue in Smith's case. See *Schoberlein v. Purdue University*, 129 Ill. 2d 372, 378 (1989) (defining *comity*). *Teague* limits federal courts' authority to overturn state convictions but not state courts' authority to grant relief when reviewing state convictions. See *Danforth v. Minnesota*, 552 U.S. 264, 280–81 (2008). And although finality plays an important role in our criminal justice system, sometimes that role "take[s] a backseat to other fundamental considerations." *People v. Bailey*, 2014 IL 115459, ¶ 12. In Smith's case, the State's interest in finality is less fundamental: he is challenging an order that can be attacked anytime, "regardless of the length of time that has passed since its entry," *Bailey*, 2014 IL 115459, ¶ 12, because it violates the legislature's "exclusive authority" to set penalties for crimes, *People v. Caban*, 318 Ill. App. 3d 1082, 1090 (1st Dist. 2001).

It is also not clear that *Teague* applies when the issue does not involve a constitutional rule of criminal procedure. The State's brief suggests this where it argues that *White* is not retroactive because it is not a constitutional rule (see State's brief at 7–9, citing *People v. Hickey*, 204 Ill. 2d 585 (2001)). In *Hickey*, the majority explained that *Teague* applied to constitutional rules. *Hickey*, 204 Ill. 2d at 628. The majority there refused to apply *Teague* because the court rules at issue were not constitutional rules—they protected defendants' constitutional rights but were "not of constitutional dimension in and of themselves." *Hickey*, 204 Ill. 2d at 628–29. This Court originally adopted *Teague* in a case that involved the defendant's constitutional rights. *People v. Flowers*, 138 Ill. 2d 218, 235–39 (1990). Smith has not discovered any cases in which this Court applied the full

Teague analysis in a situation that did not involve the defendant's constitutional rights. In Smith's case, the appellate court did not consider whether *Teague* did not apply. See *People v. Smith*, 2013 IL App (3d) 110738, ¶¶ 12–14; see also *People v. Avery*, 2012 IL App (1st) 110298, ¶¶ 30–47 (applying *Teague*); *People v. Young*, 2013 IL App (1st) 111733, ¶ 21 (adopting *Avery*'s *Teague* analysis).

In contrast, as Smith argued in Part A, courts have not hesitated to forgo *Teague* and retroactively apply this Court's interpretation of statutes where the defendant alleges that his sentence violates statutory requirements. See *People v. Kizer*, 318 Ill. App. 3d 238, 240–41, 252 (1st Dist. 2000); *People v. Perruquet*, 181 Ill. App. 3d 660, 662–63 (5th Dist. 1989) (cited approvingly in *People v. Thompson*, 209 Ill. 2d 19, 25–26 (2004)). This makes sense because a "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994); see also *Fiore v. White*, 531 U.S. 225, 228–29 (2001) (no retroactivity issue where decision simply clarified statute); *People v. Brit-El*, 206 Ill. 2d 331, 346 (2002) (Harrison, C.J., dissenting) (stating "judicial interpretation of a statute [that] involves a commonsense construction based on the clear wording of the law as enacted by the General Assembly" should apply retroactively in postconviction proceedings); *Perruquet*, 181 Ill. App. 3d at 662–63 (this Court's interpretation of statute simply declared "what the statute in question had meant from the date of its effectiveness onward").

Assuming that *Teague* applies here, the appellate court correctly applied it when the court determined that *White* did not announce a new rule. There was

no issue as to whether Smith's conviction was final before *White*, so the appellate court started its analysis with the firearm enhancement statute. See *Smith*, 2013 IL App (3d) 110738, ¶ 8 (construing 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)). The appellate court interpreted the plain terms of the statute, under which 25 years are added to the defendant's prison sentence when he personally discharged a firearm that proximately caused another person's death. *Id.* The court noted that in Smith's case, the indictment and factual basis stated that he shot and killed the victim with a firearm. *Id.*

Next, after summarizing the parties' arguments, the court examined *White* and the legal landscape that existed when Smith's conviction became final. See *Smith*, 2013 IL App (3d) 110738, ¶¶ 9–12. Relying on several cases (all decided before Smith's conviction became final) that set out the long-standing rule that unauthorized sentences are void, the appellate court found that *White* did not establish a new rule because it did not break new ground or impose a new obligation on the government. *Smith*, 2013 IL App (3d) 110738, ¶ 12 (citing *People v. Whitfield*, 228 Ill. 2d 502 (2007); *People v. Harris*, 203 Ill. 2d 111 (2003); *People v. Pullen*, 192 Ill. 2d 36 (2000); *People v. Arna*, 168 Ill. 2d 107 (1995); and *People v. Wade*, 116 Ill. 2d 1 (1987)). The court concluded that "even without *White*," Smith's sentence was void because it fell below the mandatory minimum under the law that existed when his conviction became final. *Id.* (citing *People v. Torres*, 228 Ill. 2d 382 (2008); *People v. Thompson*, 209 Ill. 2d 19 (2004); *People ex rel. Ryan v. Roe*, 201 Ill. 2d 552 (2002)).

The Third District's analysis here was consistent with the First District's in *People v. Cortez*, 2012 IL App (1st) 102184. As *Cortez* explained, *White* did not

announce a new rule because it was based on well-established principles of voidness:

> The central holding in *White* was that a sentence not authorized by statute is void. This rule of law has been consistently applied since *People v. Arna*. Contrary to the State's argument, the supreme court's holding in *White* did not create a new rule by eliminating the prosecution's discretion in seeking to include the firearm enhancement. Rather, in *White* the supreme court explained that when the facts underlying a plea agreement trigger the firearm enhancement statute, the minimum permissible sentence must include the term of the add-on despite any negotiations to the contrary. The prosecution still retains discretion whether to seek the enhancement when it decides how to charge the defendant and what facts to submit to support the plea agreement.

Cortez, 2012 IL App (1st) 102184 at ¶ 16 (citations omitted). *Cortez* was correct: this Court has consistently held since *Arna* that when a sentence violates statutory requirements, the sentence is void and can be vacated anytime and in any court. *See, e.g., People v. Hauschild*, 226 Ill. 2d 63, 80 (2007); *People v. Bishop*, 218 Ill. 2d 232, 254 (2006); *People v. Roberson*, 212 Ill. 2d 430, 440 (2004); *Thompson*, 209 Ill. 2d at 24–25; *People v. Pinkonsly*, 207 Ill. 2d 555, 569 (2003); *People v. Williams*, 179 Ill. 2d 331, 336 (1997).

The State complains that the appellate court in Smith's case ignored not only *White*'s analysis but also its statement of the issue (State's brief at 14). The State claims the court read *White* "too broadly" as "reiterating only that a sentence is void if it does not conform to statutory guidelines" (State's brief at 14, 18–19). According to the State, *White* "actually decided that this general rule prevailed over the prosecutor's well-established discretion to make charging decisions and to negotiate plea agreements where a plea's factual basis indicates that an enhancement applies" (State's brief at 19). Furthermore, the State argues, the appellate court misapplied *Teague* when it examined the legal landscape and found that existing precedent rendered Smith's plea agreement and sentence void (see

State's brief at 19). Specifically, the State says *White* changed the law because it held that the State's authority to "make charging decisions and negotiate pleas does not extend to negotiating away mandatory enhancements" (State's brief at 13).

The appellate court did not misunderstand *White*. As the State notes (State's brief at 11–12), the issue in *White* was:

> When the factual basis entered for a guilty plea makes it clear that a defendant is subject to a mandatory sentencing enhancement, may the trial court enter judgment imposing a sentence that does not include the enhancement on the basis that the enhancement was excluded by the parties from the plea agreement?

White, 2011 IL 109616, ¶ 1. The controlling authority of the case—that is, the law that compelled *White*'s holding, see *Lambrix v. Singletary*, 520 U.S. 518, 528 n.3 (1997)—had two components: (1) the plain terms of the firearm enhancement statute; and (2) the general rule that courts have no authority to impose sentences that violate statutory requirements. See *White*, 2011 IL 109616, ¶¶ 18, 20–21 (and authorities cited therein).

There was no question that the general rule against unauthorized sentences applied to negotiated sentences. See *White*, 2011 IL 109616, ¶ 20 (citing *Whitfield*, 228 Ill. 2d 502; *Wade*, 116 Ill. 2d 1; *Pullen*, 192 Ill. 2d 36; and *Williams*, 179 Ill. 2d 331); see also *People v. Woolsey*, 278 Ill. App. 3d 708, 709–10 (2d Dist. 1996) (sentence void where plea agreement gave defendant supervision for domestic battery but statute prohibited supervision for that offense); *People ex rel. Ryan*, 201 Ill. 2d at 557 (trial court has no authority to order unauthorized sentence, and State has no authority to agree to one); *People v. Brown*, 225 Ill.2d 188, 203–204 (2007) (sentence that exceeds statutory maximum or violates constitution is void

from inception and subject to challenge anytime, "even where, as here, the sentence is imposed as part of a negotiated plea"); *People v. Gregory*, 379 Ill. App. 3d 414, 418–22 (4th Dist. 2008); *People v. Johnson*, 338 Ill. App. 3d 213, 215–16 (1st Dist. 2003); *Caban*, 318 Ill. App. 3d at 1087–89; *People v. Hare*, 315 Ill. App. 3d 606, 609–11 (2d Dist. 2000).

Therefore, applying the plain terms of the firearm enhancement statute and the general rule against unauthorized sentences, *White* held that the trial court could not impose a sentence that excluded the firearm enhancement when the defendant pled guilty to facts that triggered it. *White*, 2011 IL 109616, ¶¶ 17, 19, 21. In other words, *White* applied the general standard to the kind of factual circumstances the standard was meant to address. Under *Teague*, this application of a general standard does not create a new rule. *Chaidez*, 133 S. Ct. at 1107; see also *Moore*, 177 Ill. 2d at 433 (no new rule where case "merely applied existing precedent and statutory law to the facts"). Consequently, the appellate court did not misinterpret *White* or the authorities it relied on. See *Smith*, 2013 IL App (3d) 110738, ¶¶ 12, 14.

The State seems to concede that this part of *White* was "unremarkable" (see State's brief 13). It nevertheless argues that *White* announced a new rule because "it had to establish new law before it could determine that the defendant's sentence was void" (State's brief at 15). According to the State, before *White*, there was "tension" between the general rule against unauthorized sentences and the State's power to negotiate pleas, and it was unclear which rule trumped the other (State's brief at 15). The Court in *White* "had to determine whether the general prohibition against sentences that did not conform to statutory requirements applied

to sentences that were negotiated and implemented by consent of the parties" (State's brief at 15). Contrary to the State's description of the legal landscape before *White*, there was no tension in the law or, for *Teague* purposes, confusion in the courts about whether the general rule against unauthorized sentences applied to negotiated sentences.

To support its argument, the State compares *White* to *Padilla v. Kentucky*, 559 U.S. 356 (2010) (State's brief at 14–15). But *Chaidez*'s analysis of *Padilla* demonstrates the fundamental difference between *Padilla* and *White*. Before *Padilla*, the Supreme Court considered, but "explicitly left open," the question whether advice concerning collateral consequences of a criminal conviction must satisfy *Strickland v. Washington*. *Chaidez*, 133 S. Ct. at 1108 (discussing *Hill v. Lockhart*, 474 U.S. 52 (1985)). Consequently, in *Padilla*, before the Court could determine *how* the *Strickland* test applied to an attorney's failure to advise a client about the immigration consequences of a criminal conviction, it had to first determine *if* the *Strickland* test applied. *Chaidez*, 133 S. Ct. at 1108 (citing *Padilla*, 130 S. Ct. at 1482). *Padilla*'s affirmative answer to the preliminary *if* question required a new rule because every federal appellate court that had considered the question, as well as appellate courts in 30 states, had found that *Strickland* did *not* apply to such failures to advise. *Chaidez*, 133 S. Ct. at 1109 & nn.7–8. Only two state courts had found otherwise. *Chaidez*, 133 S. Ct. at 1109 & n.9.

Padilla's analysis contrasts starkly with *White*'s. As explained above, before *White* there was no question that the general rule against unauthorized sentences applied to negotiated sentences. See *White*, 2011 IL 109616, ¶ 20. Unlike the Supreme Court in *Padilla*, in *White* this Court did not have to determine whether

the general rule applied to the defendant's case. *White* did not start by asking *if* the general rule applied—rather, it stated the relevant facts, set out the terms of the firearm enhancement statute, and immediately found that the defendant's plea agreement and sentence were void under the general rule because they violated the statute. *White*, 2011 IL 109616, ¶¶ 17, 18, 20–21. When the starting point of the analysis is a rule of general application, the court "will rarely state a new rule for *Teague* purposes." *Chaidez*, 133 S. Ct. at 1107. Moreover, in contrast to *Padilla*, which went against "almost unanimous[]" precedent in state and federal courts, *Chaidez*, 133 S. Ct. at 1109, *White* overruled no precedent—it was completely in line with decades of published decisions.

People v. Morris, 236 Ill. 2d 345 (2010), and *People v. Whitfield*, 217 Ill. 2d 177 (2005), likewise demonstrate that *White* did not announce a new rule. As *Morris* explained, before *Whitfield*, Illinois courts "routinely" held that defendants' due process rights were not violated by faulty MSR admonishments as long as their pleas were knowing and voluntary, as required by *Boykin v. Alabama*, 395 U.S. 238 (1969). *Morris*, 236 Ill. 2d at 360 (citing *People v. Wills*, 61 Ill. 2d 105, 110 (1975)). *Whitfield* changed this when it relied on *Santobello v. New York*, 404 U.S. 257 (1971), to find that a faulty MSR admonishment violated due process because it deprived the defendant of the benefit of his bargain with the State. *Morris*, 236 Ill. 2d at 361. Furthermore, the remedy in *Whitfield*—remanding the case so that the trial court could modify the sentence—was "novel and not based on" this Court's precedent. *Morris*, 236 Ill. 2d at 361. *Whitfield* therefore created a new rule. *Id.*

In contrast, before Smith's conviction became final, no existing precedent

suggested that Illinois courts "routinely" approved of negotiated sentences that violated the plain terms of statutes. Unlike *Whitfield*, *White* did not switch its rationale to the long-standing rule that unauthorized sentences are void, even when the parties agreed to the sentences. *White* simply applied this rule in a context the court had applied it before: a guilty plea. E.g., *Pullen*, 192 Ill. 2d 36. Furthermore, while the remedy *Whitfield* fashioned may have been novel and not based on this Court's precedent, the remedy in *White* was previously granted where the defendant's negotiated sentence violated a statute. See *Pullen*, 192 Ill. 2d at 43, 46 (defendant entitled to withdraw guilty plea where negotiated sentence exceeded statutory maximum).

The State further argues that *White* was new because it held that the State's "authority to make charging decisions and negotiate pleas does not extend to negotiating away mandatory enhancements" (see State's brief at 13). Respectfully, this is not quite right. There was no dispute that the State had exclusive discretion to negotiate away firearm elements when it reached plea agreements with defendants. *White*, 2011 IL 109616, ¶ 25. The problem in *White*—and Smith's case—was that the State did not exercise this discretion. See *id.*, ¶¶ 25–27; *id.*, ¶¶ 40–41 (Theis, J., concurring); see also *People v. Deng*, 2013 IL App (2d) 111089, ¶ 17 ("While it is possible that the State intended to remove the enhancement when it was negotiating the plea . . . it did nothing to remove the enhancement from the factual basis for the plea."). Although the State intended to negotiate away the enhancement in *White*, it failed to do so because it had the defendant

plead guilty to facts that triggered the enhancement. *Id.* at ¶ 27.[1]

Essentially, then, in *White* the State asked the Court to hold that the parties' bare intent to avoid the mandatory enhancement could trump the legislature's clear intent when it enacted the statute. See *White*, 2011 IL 109616, ¶¶ 22, 29. The Court refused to do this. The State cites no precedent existing when Smith's conviction became final that suggested the Court would do otherwise (see State's brief at 12–13).

The State argues also that the appellate court erred where it found that *White* did not create a new rule because the appellate court "placed undue emphasis on the fact that *White* 'specifically relied upon existing precedent'" (State's brief at 15, quoting Smith, 2013 IL App (3d) 110738, ¶ 5). Respectfully, the State places far too little emphasis on the fact that *White* relied on precedent existing before Smith's conviction became final. This is clear from the State's reliance on (1) appellate court decisions that purported to find "confusion" in the law before *White*, but which really just ignored existing precedent; and (2) the fact that some trial courts in some cases have overlooked the plain terms of the firearm enhancement statute when approving plea agreements (see State's brief at 15–19).

The State relies primarily on the appellate court's decision in *Avery*, 2012

---

[1] In *White* the Court did say, "If we were to hold that the State could *negotiate a sentence without the mandatory enhancement*, it would render section 5-8-1(a)(1)(d)(i) and the legislature's clear intent in enacting the provision meaningless." *White*, 2011 IL 109616, ¶ 29 (emphasis added). However, the Court's analysis made clear that "mandatory enhancement" was not a general descriptor of the statutory penalty but referred to situations where the enhancement was mandatory because the defendant pled guilty to facts that triggered it. As Justice Theis explained, before and after *White*, the parties remained free to negotiate such facts out of the indictment and factual basis during plea bargaining. See *White*, 2011 IL 109616, ¶¶ 37–41 (Theis, J., concurring) (discussing *People v. Keller*, 353 Ill. App. 3d 830 (2d Dist. 2004)).

IL App (1st) 110298. But *Avery*, unlike the appellate court in Smith's case, clearly misapplied *Teague*. Specifically, in determining that *White* "changed the law," *Avery* failed to examine the legal landscape to determine whether existing precedent compelled the result in *White*. See *Avery*, 2012 IL App (1st) 110298, ¶¶ 37–40. In this part of its analysis, the court did not even mention the general rule against unauthorized sentences or its application in the guilty-plea context; nor did it seriously examine the relevant precedents. Compare *id.* with *Smith*, 2013 IL App (3d) 110738, ¶ 12 (and authorities cited therein), and *Cortez*, 2012 IL App (1st) 102184, ¶ 16 (and authorities cited therein).

Instead, *Avery* ignored long-standing principles and concluded that "there was confusion" in the law before *White* as to whether the State could negotiate a guilty plea that did not include a mandatory sentencing provision. *Avery*, 2012 IL App (1st) 110298, ¶ 39. The only published case the court cited here was *People v. Jamison*, 197 Ill. 2d 135 (2001), which stated, "It has long been recognized by this court that the State's Attorney is endowed with the exclusive discretion to decide which of several charges shall be brought, or whether to prosecute at all." *Avery*, 2012 IL App (1st) 110298, ¶ 39 (quoting *Jamison*, 197 Ill. 2d at 161) (internal quotation marks omitted). *Jamison*, however, did not address whether this discretion allowed the State to agree to a sentence that did not include a mandatory sentencing enhancement—it addressed whether the State was permitted to charge a defendant with both aggravated vehicular hijacking as to the theft of a car and with armed robbery as to the theft of the contents of the car. *Jamison*, 197 Ill. 2d at 160–61. Moreover, although it was well-established that the State had discretion to choose "which of several charges shall be brought," *Jamison*, 197 Ill. 2d at 161, it was

equally well-established before *White* that this discretion did not permit the State and the trial court to agree to an unauthorized sentence, e.g., *People ex rel Ryan*, 201 Ill. 2d at 557.

Avery examined no other precedent existing when the defendant's conviction became final before the court concluded that *White* announced a new rule. See *Avery*, 2012 IL App (1st) 110298, ¶¶ 39–40 (citing only *Teague* and *Flowers* for statements of the retroactivity rule). Instead, the court found further support for "confusion" before *White* in its own unpublished decision in the same case on direct appeal. *Avery*, 2012 IL App (1st) 110298, ¶ 39 (citing *People v. Avery*, No. 1-07-3360 (Nov. 6, 2009) (unpublished order pursuant to Supreme Court Rule 23)). This single unpublished decision does not establish that *White*'s result was not dictated by existing precedent. See *Moore*, 177 Ill. 2d at 435 (rejecting argument that conflicting decisions in appellate court showed rule was not dictated by precedent); see also *Chaidez*, 133 S. Ct. at 1110 n.11 (even conflicting authority in lower courts does not by itself establish that rule is new (emphasis added)).

People v. Young, 2013 IL App (1st) 111733, adds nothing to the State's argument (see State's brief at 17). *Young* simply adopted *Avery*'s incomplete application of *Teague* in determining that *White* created a new rule. See *Young*, 2013 IL App (1st) 111733, ¶¶ 21–24, ¶ 29. Also like *Avery*, *Young* mistakenly framed the issue presented as whether the parties "can negotiate around the statutory firearm enhancement requirements during plea proceedings." *Young*, 2013 IL App (1st) 111733, ¶ 28 (citing *Avery*, 2012 IL App (1st) 110298). As explained earlier, there was no question in *White* that the parties could do this. The problem was that they did not do it.

Finally, as further evidence of the alleged "confusion" before *White*, the State points to the trial court record in Smith's case and two other cases where trial courts failed to impose the mandatory firearm enhancement when the defendant pled guilty to facts that triggered it (State's brief at 17–18, citing *Deng*, 2013 IL App (2d) 111089, and *People v. McRae*, 2011 IL App (2d) 090798). But the fact that some trial courts in some cases approved unauthorized negotiated sentences does not establish that *White* was new. For these trial court decisions to establish that *White* created a new rule, the decisions would have to represent "reasonable interpretations of existing precedent." See *Moore*, 177 Ill. 2d at 435. Instead, cases like Smith's are simply examples of trial courts unreasonably ignoring existing precedent that clearly applies to negotiated sentences.[2]

In sum, the appellate court did not err where it found that *White* did not establish a new rule and Smith's plea agreement and sentence were void. The appellate court properly applied *Teague* where it found that precedent existing when Smith's conviction became final dictated the result in *White*. Nor did the appellate court misinterpret *White* or the case law that preceded it. As the appellate court found, Smith's conviction would have been void even without *White* under the long-standing rule that trial courts do not have authority to impose sentences that violate statutory requirements. Smith respectfully asks this Court to affirm the appellate court's judgment.

---

[2] For example, in Smith's case, when the trial court was confronted with *White*, the court ignored *White*'s analysis of the firearm enhancement statute and the general rule against unauthorized sentences, and it dismissed Smith's postconviction petition because he "received the benefit of his plea agreement," even though *White* held a similar agreement void under the same circumstances (see C361).

II. Smith is not judicially estopped from challenging his plea agreement and sentence because estoppel may not apply to validate judgments that violate the legislature's authority to set penalties for crimes, Smith has not taken factually inconsistent positions in this case, and he did not benefit from pleading guilty because his plea agreement and sentence are void and can be challenged anytime.

The State argues that Smith is estopped from withdrawing his guilty plea (State's brief at 21). The State forfeited this argument because it did not raise the issue in its petition for leave to appeal (see State's petition for leave to appeal at 3–6). *People v. Robinson*, 223 Ill. 2d 165, 173–74 (2006). But even if the State did not forfeit it, Smith is not estopped from challenging his plea agreement and sentence. First, estoppel may not apply to validate a trial court order that violates statutory requirements. Second, even if estoppel applied, it would not prevent Smith from challenging his plea agreement and sentence because he has not taken factually inconsistent positions in this case. Moreover, he has not benefited from his plea agreement because it is void and can be challenged anytime.

Judicial estoppel may not apply to validate sentences that violate statutory requirements. The State relies on *People v. Young*, which found that the defendant was judicially estopped from challenging his plea agreement and sentence (State's brief at 21–22, 24, citing 2013 IL App (1st) 111733, ¶¶ 36–50). In *Young*, the appellate court correctly stated that a void agreement "cannot be rendered enforceable by estoppel." *Young*, 2013 IL App (1st) 111733, ¶ 41. The appellate court was "not aware of any Illinois case applying the doctrine of judicial estoppel or estoppel by contract to criminal defendants who are challenging sentences that are too lenient many years after they have entered into fully negotiated plea agreements." *Young*, 2013 IL App (1st) 111733, ¶ 42. But this Court has rejected a judicial estoppel argument from a defendant who wanted his unauthorized

sentence upheld when the State challenged it a few years after the parties entered into a fully negotiated plea agreement. *People ex rel Ryan v. Roe*, 201 Ill. 2d 552, 556–57 (2002).

In *People ex rel Ryan*, the defendant pled guilty to predatory criminal sexual assault and received eight years in prison per an agreement with the State. *Id.* at 554. Neither the parties nor the court believed that the truth-in-sentencing statute applied, even though it clearly did. *Id.* at 554–56, 558. Three years later, the State filed a mandamus complaint to amend the sentencing order to reflect that the defendant could not receive day-for-day credit and would have to serve 85 percent of his sentence. See *id.* at 555. The defendant conceded that he could not get day-for-day credit under the statute, but he argued that the State was estopped from challenging the sentencing order because it was part of his plea agreement. *Id.* at 556–57. The Court rejected the defendant's estoppel argument, explaining, "This case . . . is not about a promise made and broken by the State; it is about a sentence agreed to by the parties, and imposed by the trial court, in violation of a statute." *Id.* at 557. Because the sentencing order violated the statute, it was void and could not be rendered enforceable through judicial estoppel. See *id.* at 557 (citing *People v. Arna*, 168 Ill. 2d 107 (1995)).

Under Illinois law, then, judicial estoppel may not be applied to validate sentences that violate statutory requirements. It is also worth noting that in Smith's case, the State's argument that judicial estoppel may apply to validate an unauthorized sentence is just a different way of framing its argument that the bare intent of the parties can trump the clear intent of the legislature (see State's brief at 22, arguing that Smith is estopped because he "intended the court to accept

the validity of the plea agreement"). This Court already rejected the intent-of-the-parties argument in *White*. See *White*, 2011 IL 109616, ¶¶ 22–23, 29. There is no reason to accept it here under a different name.[3]

Even if judicial estoppel applied in this context, it would not prevent Smith from challenging his plea agreement and sentence. Judicial estoppel applies only when the party to be estopped takes *factually* inconsistent positions, not *legally* inconsistent positions. *People v. Jones*, 223 Ill. 2d 569, 598 (2006); see also *People v. Runge*, 234 Ill. 2d 68, 132 (2009); *People v. Caballero*, 206 Ill. 2d 65, 80 (2002); *McNamee v. Sandore*, 373 Ill. App. 3d 636, 649 (2d Dist. 2007); *Holzer v. Motorola Lighting, Inc.*, 295 Ill. App. 3d 963, 977 (1st Dist. 1998). *Young* glided right past this point, omitting the word *factually* from its statement of the judicial-estoppel requirements. See *Young*, 2013 IL App (1st) 111733, ¶ 40 (citing *Caballero*, 206 Ill. 2d at 80). In its brief, the State correctly quotes *Caballero*, but proceeds to argue that Smith took "inconsistent"—but not "factually inconsistent"—positions during his plea and postconviction proceedings because he "intended" that the court would accept the plea agreement's validity (State's brief at 22).

Smith did not take factually inconsistent positions in the plea and postconviction proceedings. At the plea hearing, the court informed Smith that the State was not seeking the firearm enhancement, and Smith said this was his understanding of the agreement (R204, 216). In his postconviction petition, he

---

[3] Worth mentioning too is that the State argued the defendant in *White* was estopped from challenging his plea agreement and sentence. Brief and Argument for Plaintiff–Appellant at 17, *White*, 2011 IL 109616, 2010 WL 9496629. Later, the State clarified that it "did not argue that [estoppel or invited error] could bar application of the '*Arna* voidness rule.'" Reply Brief and Argument for Plaintiff–Appellant at 7, *White*, 2011 IL 109616, 2011 WL 10702385.

alleged that his plea agreement and sentence were void because the firearm enhancement was not included even though the statute required it (C363). These were not factually inconsistent positions—at most they were legally inconsistent—and therefore judicial estoppel would not prevent Smith from challenging his plea agreement and sentence.

Additionally, judicial estoppel would not prevent Smith from challenging his plea agreement and sentence because he did not benefit from the plea agreement. Judicial estoppel applies only if the party to be estopped benefits from the earlier proceeding. *Jones*, 223 Ill. 2d at 598. The State argues that Smith benefited when the trial court accepted the plea agreement and sentenced him to 30 years when the statute mandated 45 (State's brief at 22). The State claims too that Smith "received the full benefit of his bargain" (State's brief at 24).

The State overlooks the fact that the trial court's sentencing order, which is void because it violated statutory requirements, is "subject to either direct or collateral attack at any time, regardless of the length of time that has passed since its entry." See *People v. Bailey*, 2014 IL 115459, ¶ 12. In other words, in exchange for pleading guilty, Smith received an unenforceable promise for a sentence that can be vacated anytime. *Cf. People v. Cortez*, 2012 IL App (1st) 102184, ¶ 17 (State's estoppel argument was "disingenuous where . . . Illinois law prohibits fulfillment of the sentencing condition"). Smith did not benefit from pleading guilty, and therefore judicial estoppel would not prevent him from challenging his plea agreement and sentence.

With little support in Illinois law for its judicial-estoppel argument, the State asks this Court to consider cases from other states (State's brief at 24–25,

citing *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004); *Rhodes v. State*, 240 S.W.3d 882, 889 (Tex. Crim. App. 2007); *Punta v. State*, 806 So.2d 569, 571 (Fla. Dist. Ct. App. 2002); *Graves v. State*, 822 So.2d 1089, 1092 (Miss. Ct. App. 2002); *People v. Hester*, 992 P.2d 569, 572 (Cal. 2000); *State v. Moore*, 303 S.W. 3d 515, 522 (Mo. 2010)). But these cases are distinguishable from Smith's.

For example, the defendants in *Lee*, *Punta*, and *Moore* all challenged their sentences after they received the full benefits of their bargains. See *Lee*, 816 N.E.2d at 37 (defendant challenged prior conviction on void-sentence grounds only after he fully served sentence); *Punta*, 806 So.2d at 570 (defendant challenged void probation order after violating probation terms); *Moore*, 303 S.W.3d at 517–18, 522 (jailed defendant challenged court-granted furlough after he was arrested for violating furlough terms). In *Graves* too it appeared that the defendant fully served his sentence before challenging it; in any event, the court added that it would also refuse to let the State challenge an unauthorized sentence. *Graves*, 822 So.2d at 1091–92. In *Rhodes* it was not even clear that there was a plea agreement. *Rhodes*, 240 S.W.3d at 887. Respectfully, these cases are not enough to overcome Illinois law.

In conclusion, Smith is not judicially estopped from challenging his plea agreement and sentence. Under Illinois law, judicial estoppel may not apply to validate judgments that violate the legislature's authority to set penalties for crimes. Even if judicial estoppel applied, Smith has not taken factually inconsistent positions in plea and postconviction proceedings, and he did not benefit from pleading guilty because his plea agreement and sentence are void and can be challenged anytime.

III. If this Court affirms the appellate court's judgment, Smith should be allowed to withdraw his plea and proceed to trial if he so chooses, which is the same remedy this Court ordered in *White*.

Finally, the State argues that if this Court affirms the appellate court's judgment, it should remand the case to the trial court so that the State may amend the indictment and factual basis to omit the references to the firearm because this would be consistent with the principles of *White* (State's brief at 26). Smith questions whether this would really be consistent with *White*'s principles. It would definitely not be consistent with *White*'s result, as this Court remanded that case to the trial court and directed it to allow the defendant to withdraw his plea and proceed to trial if he so chose. *People v. White*, 2011 IL 109616, ¶ 31. Moreover, the State adopted this "remedy" from Justice Theis's concurrence in *White,* but she clearly explained that the parties should do this during plea bargaining, not later. *White*, 2011 IL 109616, ¶¶ 40–41 (Theis, J., concurring) (discussing *People v. Keller*, 353 Ill. App. 3d 830 (2d Dist. 2005)).

The State also invokes Justice Schmidt's hypothetical "mischief lurking in the bushes" to argue that if the Court follows *White* here, defendants like Smith might wait to raise their claims until key witnesses disappear, thus prejudicing the State (State's brief at 26–27, citing *Smith*, 2013 IL App (3d) 110738, ¶ 15). Neither Justice Carter nor Justice Wright joined this part of the decision, *Smith*, 2013 IL App (3d) 110738, ¶¶ 20–22 (Carter, J., and Wright, J., concurring), and it is not clear how well Justice Schmidt's dicta describes reality. Defendants have strong incentives not to wait. See, e.g., *Barker v. Wingo*, 407 U.S. 514, 532 (1972). Smith himself filed his postconviction petition just two months after his conviction became final. In fact, even less time has passed since Smith pled guilty than passed

between the *White* defendant's guilty plea and this Court's decision in *White*. There is no reason to believe that the State would be prejudiced if Smith's case went to trial now, and the State does not actually claim that it would be (see State's brief at 26). Under the circumstances, Smith respectfully asks this Court to follow *White* and allow him to withdraw his plea and proceed to trial if he so chooses.

CONCLUSION

For the foregoing reasons, Mickey D. Smith, petitioner–appellee, respectfully asks this Court to affirm the appellate court's judgment and remand his case so that he may withdraw his guilty plea and proceed to trial if he so chooses.

Respectfully submitted,

PETER A. CARUSONA
Deputy Defender

MARIO KLADIS
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER–APPELLEE

CERTIFICATE OF COMPLIANCE

I, Mario Kladis, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 29 pages.

/s/Mario Kladis
MARIO KLADIS
Assistant Appellate Defender

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 3-11-0738.
Respondent–Appellant,	)	
	)	There on appeal from the Circuit Court of the Twelfth Judicial
-vs-	)	Circuit, Will County, Illinois, No. 10-CF-1345.
	)	
MICKEY D. SMITH,	)	Honorable Amy Bertani-Tomczak,
Petitioner–Appellee.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601;

Mr. Stephen M. Soltanzadeh, Assistant Attorney General, 100 W. Randolph Street, 12th Floor Chicago, IL 60601-3218;

Mr. James Glasgow, Will County State's Attorney, 121 N. Chicago St., Joliet, IL 60432;

Mr. Mickey D. Smith, Register No. N94725, Stateville Correctional Center, Box 112, Joliet, IL 60434.

The undersigned certifies that an electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on April 10, 2014. On that same date I caused to be delivered three copies to the State's Attorneys Appellate Prosecutor, and mailed three copies to the Attorney General of Illinois, and one copy to appellee in an envelope deposited in a U.S. mailbox in Ottawa, Illinois, with sufficient postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk upon receipt of the electronically submitted filed stamped Brief and Argument.

/s/Mario Kladis
MARIO KLADIS
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
Service via email will be accepted at
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER–APPELLEE