No. 121365

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- BYRON BOYKINS Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-2542. There on appeal from the Circuit Court of Cook County, Illinois , No. 07 CR 7163. Honorable Clayton J. Crane, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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REPLY BRIEF FOR PETITIONER-APPELLANT

Byron Boykins stated an arguable claim that he was denied the benefit of his bargain by the addition of mandatory supervised release ("MSR") to his negotiated sentence, as the trial judge mentioned MSR only once during guilty plea admonishments when explaining the possible penalties.

The State argues that the judge substantially complied with Rule 402 and due process, resting its entire case on the fact that, after mentioning the possible sentencing range in his guilty plea admonishments to Byron Boykins, the judge said, "Upon your release from the penitentiary, there is a period of three years mandatory supervised release, sometimes referred to as parole." (St. Br. 6-12, Supp. R. 4-5) An ordinary person in Boykins's circumstances would not have understood that single reference to mandatory supervised release ("MSR") to mean that MSR definitely applied to his agreed-upon sentence, both because the reference itself was vague and because the judge surrounded that reference with a discussion of possible penalties. Moreover, every time the parties discussed the negotiated agreement, no one mentioned MSR. Boykins thus made an arguable claim that

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the addition of the MSR term to his 22-year negotiated sentence violated his due process rights. Accordingly, this Court should reverse the summary dismissal of Boykins's post-conviction petition and remand for second-stage post-conviction proceedings.

At the outset, the State agrees that under *People v. Whitfield*, 217 Ill. 2d 177, 195 (2005), there is no substantial compliance with Rule 402, and due process is violated, when a judge does not advise a defendant before accepting his negotiated guilty plea that MSR will be added to his agreed-upon sentence. (St. Br. 4) The State also agrees that an admonishment must put MSR in a relevant context so that an ordinary person understands what the admonishment is conveying. *People v. Morris*, 236 Ill. 2d 345, 366-67 (2010). (St. Br. 5)

Nonetheless, the State argues that Boykins received "the notice and process to which he was entitled," citing the judge's admonishment that included the only mention of MSR in this case. (St. Br. 2, 6) That admonishment told Boykins that the sentencing range was 20 to 60 years' imprisonment, possibly extendable to life imprisonment. (Supp. R. 4) Immediately after mentioning those possible sentences, the judge said, "Upon your release from the penitentiary, there is a period of three years mandatory supervised release, sometimes referred to as parole." (Supp. R. 4-5) The State contends that this single reference to MSR sufficed because Boykins knew he was receiving a prison sentence. (St. Br. 6-7) This claim simply ignores the context of those admonishments.

First, the phrase, "Upon your release from the penitentiary, there is a period of three years mandatory supervised release, sometimes referred to as parole,"

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is by itself unclear. (Supp. R. 4-5) That language did not make clear that the MSR term would definitely be added to the 22-year sentence that Boykins and the State had negotiated in exchange for his guilty plea. Instead, an ordinary person in Boykins's circumstances could easily have interpreted that phrasing to mean that MSR applied when a defendant did not have a negotiated plea deal with the State.

Second, that admonishment came in the context of possible penalties for the offense. The judge began his guilty plea admonishments by addressing the applicable sentencing range for first-degree murder, including the possibility of an enhanced sentence if an individual has a prior murder conviction. (Supp. R. 4) At this point, an ordinary person would view the judge's discussion of the sentencing range as presenting the possible penalties – not the 22-year term that Boykins had negotiated. And, immediately after mentioning MSR, the judge again cast the penalties as mere possibilities, stating, "Understanding the nature of the offense and its *possible* penalties, how do you plead to this offense, guilty or not guilty?" (Supp. R. 5) (emphasis added) This phrasing would lead an ordinary person to believe that the phrase "its possible penalties" meant everything that preceded it: the range of up to 60 years' imprisonment, the possible enhancement to natural life imprisonment, and MSR. An ordinary person would thus understand that single reference to MSR to be simply a possible penalty that did not apply to his negotiated sentence.

That inference is supported by the judge's later statement to Boykins that "in this particular situation," the parties had agreed on a 22-year term. (Supp. R. 7) Although Boykins discussed the significance of that later statement in his

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brief, the State never addresses it, even though the State repeatedly argues that the judge's single reference to MSR, "read within the context of the entire hearing," demonstrates substantial compliance with Rule 402. (Def. Br. 10-12, St. Br. 2, 7) The context of the entire hearing actually demonstrates that a reasonable person in his circumstances would have believed that MSR was merely a possibility because the judge couched MSR as a possible penalty and reinforced that impression by later explaining that in Boykins's "particular situation," the parties had agreed on a 22-year term. *See People v. Daniels*, 388 Ill.App.3d 952, 954 (2d Dist. 2009) (judge linked MSR only to maximum sentences authorized, making it unclear that MSR followed a minimum term); *People v. Smith*, 386 Ill.App.3d 473, 479-84 (5th Dist. 2008) (admonishments did not make clear that MSR would definitely apply but instead suggested that MSR was possible); *People v. Burns*, 405 Ill.App.3d 40, 43 (2d Dist 2010) (admonishment "related solely to the penalties that the defendant might receive, and did not mention at all the sentences that the defendant would in fact receive under the plea agreement"); *People v. Dorsey*, 404 Ill.App.3d 829, 836-37 (4th Dist. 2010) (while denying relief, noting that a mention of MSR "only during the minimum and maximum penalties requires an ordinary person to make a significant analytical jump that MSR, which the court had just informed him applied to any prison term under the statutory sentencing range, also applied to the agreed-upon sentence").

The State nonetheless argues that an ordinary person would have understood MSR to apply because the phrase "mandatory supervised release" demonstrates that MSR is not only a "possible penalty." (St. Br. 6-7) But this argument ignores

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the fact that the judge himself categorized MSR as a possible penalty: as addressed above, immediately after mentioning MSR, the judge asked Boykins, "Understanding the nature of the offense and *its possible penalties*, how do you plead to this matter, guilty or not guilty?" (Supp. R. 4-5) (emphasis added) The State's argument also assumes a level of legal sophistication that Boykins did not have – he was 16 years old at the time of the offense and 17 at the time of his plea, with no prior adult convictions. (Supp. R. 12, C. 9, 24) An ordinary person in Boykins's circumstances simply would not have understood that MSR applied to his agreed-upon sentence.

In arguing that the judge substantially complied with Rule 402, the State cites *People v. Berrios*, 387 Ill.App.3d 1061 (3d Dist. 2009); *People v. Marshall*, 381 Ill.App.3d 724 (1st Dist. 2008); *People v. Holt*, 372 Ill.App.3d 650 (4th Dist. 2007); *People v. Borst*, 372 Ill.App.3d 331; *People v. Jarrett*, 372 Ill.App.3d 344 (4th Dist. 2007); *People v. Lee*, 2012 IL App (4th) 110403; *People v. Hunter*, 2011 IL App (1st) 093023; *People v. Andrews*, 403 Ill.App.3d 654 (4th Dist. 2010); *People v. Dorsey*, 404 Ill.App.3d 829 (4th Dist. 2010); and *People v. Davis*, 403 Ill.App.3d 461 (1st Dist. 2010). (St. Br. 7-9) As explained in Boykins's brief, this Court should reject those cases' approach to Rule 402 compliance. (Def. Br. 18-19)

First, the State incorrectly equates the judge's MSR admonishment here with an admonishment telling a defendant that *any* prison sentence would be followed by MSR. (St. Br. 6-7, Supp. R. 4-5) As explained above, however, the judge's vague admonishment to Boykins couched MSR as a possible penalty. In contrast, in both *Marshall* and *Berrios*, the judge definitively made clear that MSR would follow any prison sentence. *Marshall*, 381 Ill.App.3d at 726-27 (judge told defendant

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that for the sentencing range for his Class X felony was six to 30 years' imprisonment, and that "[y]ou could be fined or you could get a penitentiary sentence and have to serve a period of three years[']mandatory supervised release, which is like parole, when you get out of the penitentiary"); *Berrios*, 387 Ill.App.3d at 1062 (judge told defendant about the sentencing range and added that "any sentence to the Department of Corrections [would be] followed by three years mandatory supervised release"). Since Boykins was not apprised that MSR followed any prison sentence, but instead received a vague admonishment about MSR that was presented in the context of possible penalties, *Marshall* and *Berrios* are factually distinguishable.

Further, *Jarrett*, *Borst*, *Andrews*, and *Dorsey* illustrate that the Fourth District Appellate Court disagrees with *Whitfield* in principle. *Jarrett*, 372 Ill.App.3d at 351; *Borst*, 372 Ill.App.3d at 334; *Andrews*, 403 Ill.App.3d at 663-66; *Dorsey*, 404 Ill.App.3d at 836-38. (Def. Br. 18-19) The State concedes that the *Jarrett* and *Borst* courts incorrectly limited *Whitfield* to cases in which MSR was never mentioned, but argues that those cases were still correctly decided because the defendants were told that MSR would follow their prison sentences. (St. Br. 8) But in each case, the court relied heavily on its disagreement with *Whitfield* in reaching its decision. *Jarrett*, 372 Ill.App.3d at 352; *Borst*, 372 Ill.App.3d at 334. In fact, *Borst* simply noted that the court "ha[d] concerns about the supreme court's opinion," then stated briefly that the defendant was told about MSR. 372 Ill.App.3d at 334. As a result, the State's attempt to minimize the Fourth District's hostility to *Whitfield* fails, and the reasoning of those cases thus carries little persuasive

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weight.

The State's remaining cases are also of limited help. *Berrios* and *Marshall* are not only factually distinguishable, but each adopted the reasoning in *Jarrett* and *Borst*. In turn, *Hunter* and *Davis* followed *Marshall*'s adoption of *Jarrett* and *Borst* and thus rest on the same faulty foundation as *Jarrett* and *Borst*: a general hostility to *Whitfield*, rather than a reasoned, persuasive distinction of *Whitfield*. (Def. Br. 20) More importantly, as those cases do not meaningfully consider whether a defendant would reasonably understand that MSR *will* be added to his sentence, their analyses do not fulfill due process and the purpose of Rule 402: ensuring that the defendant understands the terms of his plea bargain and the consequences of his plea. *Whitfield*, 217 Ill. 2d at 195; *Morris*, 236 Ill. 2d at 366.

The State disputes that the Fourth District's resistance to *Whitfield* involves any misapprehension of *Whitfield*. (St. Br. 8-9, Def. Br. 19-20) In *Andrews*, the court considered whether *Whitfield* and Rule 402(b) required the trial judge to mention MSR when addressing the terms of the plea agreement. 403 Ill. App. 3d at 663-64. The appellate court answered in the negative, holding that MSR could not be bargained for because MSR is statutorily-required, and finding that *Whitfield* only involved Rule 402(a)(2), which requires the trial judge to advise a defendant of the maximum and minimum available sentences. *Id.* The State makes the same point here. (St. Br. 8-9)

In fact, *Whitfield* did consider Rule 402(b) in its analysis. There, the State argued that the defendant should have to prove his lack of knowledge about MSR at an evidentiary hearing. 217 Ill. 2d at 200. This Court rejected that argument,

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stating that any evidence presented to show that MSR was discussed in plea negotiations ". . .would not establish what defendant reasonably understood the terms of his plea agreement to be at the time he pled guilty. . . [and] most importantly, due process requires that it be evident from the record that a defendant's plea of guilty is entered with full knowledge of the consequences." *Id.*; *see also id.* at 208 (Thomas, J., concurring) (explaining that the State's analysis "would be sound if not for the requirement of Supreme Court Rule 402(b), which requires that the terms of a plea agreement be stated in open court"). Thus, contrary to the *Andrews* court's reasoning and the State's suggestion here, *Whitfield* did consider both subdivisions (a)(2) and (b) of Rule 402. Such a result is consistent with the purpose behind the Rule 402 admonishments as a whole: to "ensure that the plea was entered intelligently and with full knowledge of its consequences" as well as to "advise the defendant of the actual terms of the bargain he has made with the State." *Morris*, 236 Ill. 2d at 366.

The State professes confusion about what rule Boykins seeks, claiming that Boykins seeks "two standards [that] cannot coexist." (St. Br. 9-10) Specifically, the State suggests that Boykins seeks both the objective test that *Morris* addressed and that some appellate court decisions have adopted, as well as a finding that Rule 402 compliance requires trial judges to explicitly link MSR to the agreed-upon sentence. (St. Br. 9-10) The State presents these as two separate, unrelated ideas, when in fact the two concepts are entirely consistent.

In *Whitfield*, this Court held that substantial compliance with Rule 402 requires the trial judge to "advise the defendant, prior to accepting his plea, that

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a mandatory supervised release term *will be added to that sentence*." 217 Ill. 2d at 195 (emphasis added). Further, in *Morris*, this Court explained that a reference to MSR, "without putting it in some relevant context[,] cannot serve to advise the defendant of the consequences of his guilty plea and cannot aid the defendant in making an informed decision about his case." *Morris*, 234 Ill. 2d at 366. Accordingly, this Court stated that an admonishment about MSR suffices only where an ordinary person in the defendant's circumstances would understand the warning that admonishment conveys. *Id.* This approach is what *Daniels*, 388 Ill.App.3d at 959; *Burns*, 405 Ill.App.3d at 43-44; *Smith*, 386 Ill.App.3d at 481-82; and *Company*, 376 Ill.App.3d at 850-51, employed: whether an ordinary person in the defendant's circumstances would understand that MSR *did* apply, not just *might* apply, to his sentence. While the State attempts to treat those cases as "not so clear," those cases found no substantial compliance with Rule 402, and held that explicitly linking MSR to the agreed-upon sentence most easily fulfills the purpose of *Whitfield* and *Morris*. (St. Br. 11-12)

Linking MSR to the defendant's agreed-upon sentence makes the terms of the bargain and the consequences of his plea clear so that the defendant understands the sentence that he will actually serve. *Whitfield*, 217 Ill. 2d at 195; *Morris*, 236 Ill. 2d at 366-68. That this Court did not require an explicit link in *Morris* does not mean, as the State suggests, that this Court rejected that result. (St. Br. 10) Instead, once this Court concluded that *Whitfield* did not apply retroactively, this Court did not reach the full merits of whether Morris's and Holborow's admonishments sufficed under Rule 402. *Morris*, 236 Ill. 2d at 353-66.

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The State next reasons that requiring trial judges to link MSR to the actual negotiated sentence would effectively result in a strict compliance standard because a precise formula would be required. (St. Br. 10-11) This is not correct. The judge would need to make it clear to the defendant, before accepting the guilty plea, that MSR applied to the agreed-upon sentence. But no precise wording would be required, and therefore, such a requirement would not be a "formulaic approach," though trial judges could certainly use a formulaic approach and might prefer to do so for ease of compliance. (St. Br. 10) As long as the judge ensured that the defendant understood that MSR was *in addition to* the agreed-upon sentence, the judge could make that admonishment at any point before accepting the plea. Reviewing courts would still consider whether a reasonable person in the defendant's circumstances would understand that MSR applied to his agreed-upon sentence. Reviewing courts would still look to the context of the plea proceedings, and would still consider if the defendant was ultimately serving a longer sentence than he had bargained for. Thus, nothing in this approach would undermine *Whitfield* and *Morris*. (St. Br. 10) Instead, this result would ensure that a defendant's due process rights were fulfilled by linking MSR to the agreed-upon sentence in some way so that the defendant understood that MSR applied to him, and thereby understood the terms of his bargain and the consequences of his plea. It would also reduce prolonged litigation by clarifying the required admonishments for trial judges and reviewing courts. *Morris*, 234 Ill. 2d at 368.

Finally, the State notes that Boykins's petition was untimely. (St. Br. 13) But, as the State itself admits, his petition was dismissed at the first stage of post-

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conviction proceedings. (St. Br. 3) The State fails to acknowledge that this Court held, in *People v. Boclair*, 202 Ill. 2d 89, 87-102 (2002), that a first-stage post-conviction petition cannot be dismissed on timeliness grounds. Under *Boclair*, the proper time to address timeliness is at the second and third stages of post-conviction proceedings, when Boykins, with the assistance of counsel, would have the opportunity to prove that he was not culpably negligent. The State's request for this Court to "address the timeliness question" at the first stage is thus contrary to authority. (St. Br. 13)

In sum, an ordinary person in Boykins's position would not have reasonably understood that MSR would be added to his sentence where the judge mentioned MSR only in the context of *possible* penalties instead of putting MSR in a relevant context that advised Boykins of the terms of his bargain and the consequences of his plea. This Court should therefore hold that Boykins made an arguable claim that he was denied the benefit of the bargain by the addition of MSR to his agreed-upon sentence, and should remand for second-stage post-conviction proceedings.

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CONCLUSION

For the foregoing reasons, Byron Boykins, petitioner-appellant, respectfully requests that this Court reverse and remand for second-stage post-conviction proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Aliza R. Kaliski, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance, is 12 pages.

/s/Aliza R. Kaliski
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NOTICE AND PROOF OF SERVICE

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

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. An electronic copy of the Reply Brief in the above-entitled cause was submitted to the Clerk of the above Court for filing on April 7, 2017. On that same date, we personally delivered three copies to the Attorney General of Illinois, personally delivered three copies to opposing counsel, and mailed one copy to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. The original and twelve copies of the Reply Brief will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

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