No. 116572

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, Third Judicial District
Plaintiff-Appellant,	)	No. 3-11-0738
	)	
	)	There on Appeal from the
v.	)	Circuit Court of the Twelfth
	)	Judicial Circuit, Will County, Illinois
	)	No. 10-CF-1345
	)	
MICKEY D. SMITH,	)	The Honorable
	)	Amy Bertani-Tomczak,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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ARGUMENT

The appellate court erred in holding that the rule of *People v. White*, 2011 IL 109616 — that the defendant's negotiated plea agreement and sentence were void because they did not include a mandatory firearm sentencing enhancement — applied to this case. As demonstrated in the People's opening brief, *White* does not apply here because (1) it did not establish a constitutional rule of criminal procedure and thus does not apply to cases on postconviction review, and (2) it was new for purposes of the *Teague v. Lane*, 489 U.S. 288 (1989), retroactivity analysis and did not meet either *Teague* exception. The People further demonstrated that even if this Court were to determine that *White* applies to cases that were final when it was decided, principles of judicial estoppel counsel against its application here. Finally, the People demonstrated that even assuming the applicability of *White*, the proper remedy is a remand to the trial court to permit the People to amend the factual basis for the plea and enforce the plea bargain.

Defendant counters that (1) his plea agreement and sentence were void under *White* and thus can be attacked at anytime, Def. Br. 5-9; (2) the appellate court correctly determined that *White* did not establish a new rule, Def. Br. 10-21; (3) estoppel does not apply here, Def. Br. 22; and (4) the proper remedy is to allow him to withdraw his guilty plea and proceed to trial, Def. Br. 27-28. Defendant also argues that the People forfeited their arguments that (1) *White* does not apply retroactively because it did not establish a constitutional rule of criminal procedure; and (2) defendant is estopped from raising *White*. Def. Br. 5, 22. Each of these counter-arguments lacks merit.

I. Defendant's Plea Agreement and Sentence Were Merely Voidable, Not Void, and Thus Cannot Be Challenged in This Collateral Attack.

The People's opening brief established that this Court need not resort to *Teague* analysis because *White* did not establish a constitutional rule of criminal procedure and, therefore, does not apply in postconviction proceedings like this one. Peo. Br. 7. In response, defendant argues that *White* applies and that *White* error renders the sentence void. Def. Br. 3-7. But despite *White*'s use of the term "void" to describe the plea agreement and sentence in that case, *White* error renders a plea agreement and sentence merely voidable, not void, and thus it cannot be raised in this collateral attack. Indeed, even if *White*'s rule were dictated by existing precedent, such as *People v. Arna*, 168 Ill. 2d 107 (1995), because defendant's judgment was not void under *White* or *Arna*, he cannot attack it collaterally.

White held that the trial court in that case made two distinct, independent errors: (1) it did not apply a mandatory firearm enhancement where the charging instrument and factual basis for the plea indicated that a firearm had been used in the commission of the murder; and (2) it did not properly admonish the defendant about the enhancement. *White*, 2011 IL 109616, ¶ 21. Explaining the consequences of these errors, this Court said that (1) defendant's "sentence" was "void" because it "did not conform to the statutory requirements"; and (2) "because defendant was not properly admonished, the entire plea agreement is void as well." *Id*. But although this Court used the term "void," the trial court in *White* did not act in excess of its jurisdiction and, consequently, this Court should clarify that *White* error renders a plea agreement and sentence merely voidable, not void.

Examining the distinction between "void" and "voidable," this Court has cautioned that "void" has been so "frequently employed interchangeably with the term 'voidable' as to have lost its primary significance." *People v. Davis*, 156 Ill. 2d 149, 155 (1993). "Therefore, when the term 'void' is used in a judicial opinion it is necessary to resort to the context in which the term is used to determine precisely the term's meaning." *Id*. In determining the meaning of "void" in the case before it, *Davis* observed that whether "a judgment is void or voidable presents a question of jurisdiction." *Id*. A judgment entered by a court without jurisdiction to do so "is void and may be attacked either directly or indirectly at any time," while "a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack." *Id*. at 155-56 (internal citations omitted).

Except in the context of administrative review trial courts have subject matter jurisdiction "as a matter of law over all 'justiciable matters'" brought before them. *In re Luis R.*, 239 Ill. 2d 295, 301 (2010) (quoting *In re M.W.*, 232 Ill. 2d 408, 424 (2009)). To invoke a circuit court's jurisdiction, the charging instrument "need only 'alleg[e] the existence of a justiciable matter.'" *Id*. (quoting *M.W.*, 232 Ill.2d at 426). That said, however, "jurisdiction or power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered, for the power to decide carries with it the power to decide wrong as well as to decide right." *Davis*, 156 Ill. 2d at 156. Although a judgment may be erroneous, "a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law or both." *Id*.; *see People v. Hughes*, 2012 IL 112817,

¶ 84 ("A judgment is void, and hence subject to attack at any time, only when a court either exceeds its jurisdiction or has simply not acquired jurisdiction.").

Under these principles, plea agreements and sentences that run afoul of *White* are voidable, not void. Neither error in *White* — the failure to admonish the defendant or impose the firearm enhancement — implicated the court's jurisdiction.

A. The trial court's deficient admonishments rendered the plea agreement voidable, not void.

This Court has already held that a trial court's failure to properly admonish a defendant during a plea hearing renders the plea voidable, not void. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 42 (2011) ("While the absence of admonishments is erroneous, the error does not render the judgment of a circuit court void, so that a defendant can raise the issue at any time."); *In re J.T.*, 221 Ill. 2d 338, 346 (2006) (improper admonishments were error, but did not render judgment void); *People v. Jones*, 213 Ill. 2d 498, 509 (2004) ("While improper admonishments are error, the error does not serve to divest the circuit court of its jurisdiction such that the conviction and sentence are now void."). Thus, any collateral attack on the plea agreement under *White* necessarily fails. *Davis*, 156 Ill. 2d at 155-56 ("a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack").

White's use of the term "void" to describe the plea agreement, despite the substantial authority from this Court establishing that a failure to properly admonish renders a judgment voidable, is therefore notable. 2011 IL 109616, ¶ 21. As one appellate opinion posited in light of this apparent tension, "[i]t appears [*White*] was referring to the particular fact

scenario before it; there is no indication that the supreme court intended to overrule or set aside its clear and repeated statements that improper admonishments do not render a plea agreement or the resulting judgment void." *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 15 n.1 (citing *White*, 2011 IL 109616, ¶ 21), aff'd, 2013 IL 113603, ¶ 26 (characterizing *White*'s holding without using term "void": "inadequate admonishment led to a sentence that could not stand as it was inconsistent with statutory requirements"). No "voidness" finding was necessary in *White*, for the issue arose on direct appeal. Accordingly, although *White* appears to have determined that the plea agreement before it was "void" in the sense that it was ineffectual in light of the trial court's failure to admonish the defendant, *White* did not, sub silentio, alter this Court's long-standing rule that a failure to properly admonish a defendant renders a judgment merely voidable. *White*'s use of the term "void" in this context — where settled authority indicates that the plea agreement was voidable and not void — suggests that "void" in that opinion should be read narrowly to mean erroneous, and not that the judgment was void such that it could be attacked at any time. *See Davis*, 156 Ill. 2d at 155 (context should be examined to determine meaning of"void" in an opinion).

B. A trial court's erroneous determination that an enhancement does not apply renders the judgment voidable, not void.

Similarly, a trial court's erroneous finding that a sentencing enhancement does not apply renders that sentence voidable, not void, for a trial court's determination as to whether an enhancement applies is not a question of jurisdiction. The punishment fixed by the court for the offenses to which White pleaded guilty was unauthorized by law, because the trial court should have included the firearm enhancement in his sentence. But determining that

the enhancement did not apply — even if erroneously — was the type of decision the trial court had jurisdiction to make. *See Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002) (court has jurisdiction over any justiciable matter, meaning "controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests"); *Davis*, 156 Ill. 2d at 156 (jurisdiction includes "power to decide wrong as well as to decide right"); *see generally People v. Medrano*, 2014 IL App (1st) 102440, ¶¶ 80-83 (Pucinski, J., dissenting) (unauthorized sentences should be considered voidable, not void). Therefore, the trial court in *White* did not "lose jurisdiction because it [made] a mistake in determining either the facts, the law or both," *Davis*, 156 Ill. 2d at 156, and the error resulted in a voidable judgment that may not be attacked collaterally.

The cases cited by *White* for the proposition that White's sentence was "void," *see White*, 2011 IL 109616, ¶ 20 (citing *Arna*, 168 Ill. 2d at 113; *People v. Harris*, 203 Ill. 2d 111, 119–21 (2003); *People v. Pullen*, 192 Ill. 2d 36, 40 (2000); *City of Chicago v. Roman*, 184 Ill. 2d 504, 510 (1998); *People v. Williams*, 179 Ill. 2d 331, 336 (1997)), like *White* itself were all direct appeals and so did not have occasion to address directly whether an unauthorized sentence was void or merely voidable. *Arna*'s "voidness" finding, for example, was not necessary because, like *White*, the issue arose on direct appeal where merely voidable judgments can be attacked. *See Arna*, 168 Ill. 2d at 113; *see also Pullen*, 192 Ill. 2d at 40; *Roman*, 184 Ill. 2d at 510; *Williams*, 179 Ill. 2d at 336. And in *Harris*, also a direct appeal, the word "void" does not even appear in the opinion. Instead, *Harris* characterizes *Arna*'s holding as "the order imposing concurrent sentences violated the statute's mandate,"

203 Ill. 2d at 118, *see also id*. ("order imposing concurrent terms was invalid because the sentence did not conform to the statutory requirement"). Therefore, these decisions did not establish that an unauthorized sentence is "void," such that it can be attacked collaterally. Accordingly, although this Court has used "void" in this sentencing context, it should clarify here that *White* error renders the sentence merely voidable, not void. *See People v. Blair*, 215 Ill. 2d 427, 443-444 (2005) (clarifying that although Illinois courts, including this Court, had"often use[d] the terms 'forfeit,' 'waive,' and 'procedural default' interchangeably in criminal cases," the terms were distinct and this Court would adhere to their definitions).

In other cases, this Court has relied on outdated concepts of jurisdiction to find a sentence void. *People v. Thompson*, 209 Ill. 2d 19 (2004), held that the lesser of Thompson's two extended-term sentences was void because it violated a statute providing "that when a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may be imposed only on the conviction within the most serious class." *Id*. at 23. *Thompson* rejected the People's argument that the statutory violation rendered the sentence merely voidable, instead of void, explaining that "[t]he principle has often been stated that a sentence, or portion thereof, that is not authorized by statute is void." *Id*.

But that principle — that a sentence is "void" if not authorized by statute — is rooted in authorities dating from a time when circuit court jurisdiction was conferred by statute. *See Smith v. Smith*, 334 Ill. 370, 379 (1929) (courts are permitted to "exercise their powers within the limits of jurisdiction conferred by statute"). For this reason, at that time, a judgment in excess of a court's limited statutory jurisdiction was void. *Thayer v. Vill. of Downers Grove*,

369 Ill. 334, 339 (1939). But a 1964 constitutional amendment granted circuit courts "original jurisdiction over all justiciable matters," *see* Ill. Const. 1970, art. VI, §9, and thus, since then, the circuit court derives its jurisdiction from the constitution, not the legislature. It follows that a mere statutory violation cannot deprive the court of jurisdiction.

The rule relied on in *Thompson* — that a sentence not authorized by statute is void — traces back to pre-amendment authorities. Although *Thompson* cites post-amendment cases, an examination of each reveals that the voidness rule for unauthorized sentences developed when the circuit court's jurisdiction was statutory, not constitutional, in nature. *See Thompson*, 209 Ill. 2d at 23 (citing *People ex rel. Waller v. McKoski*, 195 Ill. 2d 393, 401 (2001); *People v. Williams*, 179 Ill. 2d 331, 336 (1997); *Arna*, 168 Ill. 2d at 113; *People v. Wade*, 116 Ill. 2d 1, 5-6 (1987); *In re T.E.*, 85 Ill. 2d 326, 333 (1981); *People v. Simmons*, 256 Ill. App. 3d 651, 652 (1st Dist. 1993)). *T.E.*, for instance, cites as authority for the voidness rule two of this Court's cases dating from well before the 1964 amendment. 85 Ill. 2d at 333 (citing *People ex rel. Barrett v. Sbarbaro*, 386 Ill. 581, 590-91 (1944); *People v. Hamlett*, 408 Ill. 171, 178 (1951)). *Wade* likewise reaches back to pre-amendment authority for the proposition that "a court exceeds its authority if it orders a lesser sentence than is mandated by statute." 116 Ill. 2d at 6 (citing *People ex rel. Ward v. Salter*, 28 Ill. 2d 612, 615 (1963)). *Wade* also cites three post-amendment decisions from this Court, none of which discusses voidness or jurisdiction, let alone the effect of the 1964 constitutional amendment on the circuit courts' source of jurisdiction. *See* 116 Ill. 2d at 6 ("A trial court, upon determination of guilt, has no authority to assess a fine or impose a sentence other than that provided by statute") (citing *People ex rel. Daley v. Suria*, 112 Ill. 2d 26, 38 (1986);

People ex rel. Carey v. Bentivenga, 83 Ill. 2d 537, 542 (1981); *People ex rel. Ward v. Moran*, 54 Ill. 2d 552, 556 (1973)). *Arna*, too, is grounded in pre-amendment authority: *Arna* relied on two appellate court decisions for the voidness rule, *People v. Mapps*, 198 Ill. App. 3d 521 (5th Dist. 1990), and *Simmons*, 256 Ill. App. 3d 651. But *Mapps*, like *Thompson*, cited *T.E.* for the voidness rule, and thus is based on pre-amendment cases. And *Simmons*, also cited by *Thompson*, relied on *Wade*, and thus, like *Wade*, was based on authority that either pre-dated or failed to acknowledge the constitutional amendment establishing the circuit court's jurisdiction as constitutional, not statutory, in nature. Accordingly, while the voidness rule cited in *Thompson* has been re-stated by this Court several times since the 1964 amendment, it rests on pre-1964 authority.

That voidness rule can no longer stand now that "a circuit court's subject matter jurisdiction is conferred entirely by our state constitution." *Luis R.*, 239 Ill. 2d at 300 (quoting *M.W.*, 232 Ill. 2d at 424 (quoting *Belleville Toyota*, 199 Ill. 2d at 334)); *see id.* (1964 constitutional amendment is source of circuit courts' subject matter jurisdiction). This Court has stressed that in determining whether a circuit court has subject matter jurisdiction, "the *only* consideration is whether the alleged claim falls within the general class of cases that the court has the inherent power to hear and determine." *Id.* (emphasis in original). In short, whereas the voidness principle relied upon by *Thompson* was indeed often-stated, it did not survive the constitutional amendment and this Court's recent admonitions in *Belleville Toyota*, *M.W.*, and *Luis R.*, that jurisdiction is no longer statutory, but is "entirely" constitutional in nature. *Luis R.*, 239 Ill. 2d at 300; *Belleville Toyota*, 199 Ill. 2d at 337-38 (precedential value of case law examining jurisdiction under pre-1964 judicial system

"necessarily limited to the constitutional context in which those cases arose"); *see id*. at 341 (identifying statutory requirements as jurisdictional "would permit an unwarranted and dangerous expansion of the situations where a final judgment may be set aside on a collateral attack," and thus an order should be deemed void only when there is no alternative). And because jurisdiction is conferred entirely by the constitution, a court cannot lose jurisdiction because of a statutory error. *See id*. at 341; *Davis*, 156 Ill. 2d at 156. Accordingly, although the trial court in *White* erred by failing to impose an enhancement required by statute, that error did not strip the court of its jurisdiction, and the error rendered the sentence merely voidable, not void.

C. The People did not forfeit their argument that *White* does not apply retroactively because it did not establish a constitutional rule of criminal procedure.

Contrary to defendant's argument, Def. Br. 4, the People have not forfeited their argument that *White* does not apply retroactively because it did not establish a constitutional rule of criminal procedure. Whether the rule is one of constitutional dimension is part of the retroactivity question that was argued in the appellate court and is the issue on which leave to appeal was granted. *See Smith*, 2013 IL App (3d) 110738; *see generally People v. Sanders*, 238 Ill. 2d 391, 400 (2010) (issue under *Teague* is whether case announced "a new constitutional rule of criminal procedure"). In any event, as the People were appellee in the appellate court, even if this argument were new, it could be raised for the first time here. *Dillon v. Evanston Hosp*., 199 Ill. 2d 483, 491 (2002) ("An appellee in the appellate court may raise a ground in this court which was not presented to the appellate court in order to sustain the judgment of the trial court, as long as there is a factual basis for it"). And even

if the argument were not adequately presented here, this Court should address it. *Mich. Ave. Nat. Bank v. Cnty. of Cook*, 191 Ill. 2d 493, 518 (2000) (forfeiture limits the parties, not this Court).

II. In the Alternative, *White* Also Does Not Apply Retroactively Because It Did Not Establish a New Rule.

The appellate court decided the retroactivity question after employing the traditional *Teague* retroactivity analysis adopted by this Court in *People v. Flowers*, 138 Ill. 2d 218 (1989). *See Smith*, 2013 IL App (3d) 110738, ¶ 12. But, as discussed in Part I, *supra*, the parties appear to agree that *White* did not establish a constitutional rule. Therefore, this Court need not resort to the traditional retroactivity analysis. *See Hickey*, 204 Ill. 2d at 628. And as demonstrated, error under *White* renders a judgment merely voidable, not void; thus it cannot be raised in a collateral attack. *See Davis*, 156 Ill. 2d at 155-56; *Hughes*, 2012 IL 112817, ¶ 84; *Beacham v. Walker*, 231 Ill. 2d 51, 60 (2008).

Nevertheless, defendant alternatively argues that even if *Teague* applies here, *White* should apply retroactively because it did not establish a "new" rule. Def. Br. 8. As defendant explains, under *Teague*, a "constitutional rule of criminal procedure applies retroactively" if the rule (1) was not new or (2) was new but fits within one of *Teague*'s two exceptions. Def. Br. 7. Defendant acknowledges that the United States Supreme Court has defined a new rule as one "'not dictated by precedent existing at the time the defendant's conviction became final,'" Def. Br. 8 (quoting *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013)), and explains that a rule is "not dictated by precedent unless it would have been 'apparent to all reasonable jurists,'" Def. Br. 8 (quoting *Chaidez*, 133 S. Ct. at 1107). Yet

defendant maintains that the Supreme Court's language in *Chaidez* "is not to be taken literally," Def. Br. 8. Defendant contends that *White*'s rule was not new because "it did not break new ground or impose a new obligation on the government." Def. Br. 11. He argues that *White* was grounded in the plain language of the firearm enhancement statute and the long-standing rule against unauthorized sentences, and that there was no confusion prior to *White* about the applicability of the general rule against unauthorized sentences to negotiated pleas. Def. Br. 13-15.

Defendant's argument fails because it understates *White*'s holding. It is undisputed that the rule prohibiting unauthorized sentences was established long before *White*. *White*, 2011 IL 109616, ¶ 20 (citing *Arna*, 168 Ill. 2d at 113). But *White* did not concern merely whether a court may impose an unauthorized sentence, but whether the prosecutor's charging discretion permitted the State to negotiate away the sentencing enhancement. None of the cases cited by *White* for the rule against unauthorized sentences covered this ground. *See White*, 2011 IL 109616, ¶ 20 (citing *Arna*, 168 Ill. 2d at 113; *Harris*, 203 Ill. 2d 111, 119–21 (2003); *Pullen*, 192 Ill. 2d at 40; *Roman*, 184 Ill. 2d at 510; *Williams*, 179 Ill. 2d at 336). The defendant in *Arna*, for example, was convicted and sentenced to concurrent terms after a bench trial; this Court held that the applicable sentencing statute required him to serve the terms consecutively and thus affirmed the appellate court's decision remanding the case with instructions to run the sentences consecutively. *Arna*, 168 Ill. 2d at 113. Similarly, *Harris* involved a defendant convicted of multiple offenses after a jury trial and erroneously sentenced to concurrent terms. *Harris*, 203 Ill. 2d at 116-117. *Pullen* concerned whether a defendant should have been allowed to withdraw his guilty plea because his sentence

exceeded the statutory maximum. *Pullen*, 192 Ill. 2d at 40-46; *see also Roman*, 184 Ill. 2d at 510 (defendant convicted after a bench trial; sentence was invalid because it was below the statutory minimum); *Williams*, 179 Ill. 2d at 336 (consecutive sentences were invalid because statute did not authorize consecutive terms for a single offense).

As demonstrated in the People's opening brief, before *White*, there was confusion regarding whether the factual basis could trigger imposition of a firearm enhancement where the parties agreed that defendant's negotiated plea and sentence would not include the enhancement. Peo. Br. 16-18. Accordingly, in holding that *White* did not apply retroactively because it established a new rule, the appellate court in *People v. Avery*, 2012 IL App (1st) 110298, ¶ 39, and *People v. Young*, 2013 IL App (1st) 111733, ¶¶ 29-30, observed that the conduct of the parties and the courts in those cases demonstrated that confusion existed prior to *White* as to whether a trial court was required to apply an enhancement under those circumstances. *See also* Peo. Br. 18 (citing *People v. Deng*, 2013 IL App (2d) 111089 (parties stipulated to factual basis indicating victim was shot but sentence did not include firearm enhancement); *People v. McRae*, 2011 IL App (2d) 090798 (same)).

Defendant dismisses such cases as "simply examples of trial courts unreasonably ignoring existing precedent." Def. Br. 21. But *Teague*'s "new rule" inquiry requires this Court to determine whether *White*'s rule was "apparent to all reasonable jurists." *Chaidez*, 133 S. Ct. at 1107. That the jurists in this case, *Avery*, *Young*, *Deng*, and *McRae* reached a different conclusion than *White* does not render them unreasonable; instead, it demonstrates that *White* announced a new rule.

Despite defendant's repeated assertion that *White* merely applied settled law that the court cannot impose a sentence that violates statutory requirements, Def. Br. 11-21, that authority, alone, would not have answered the question before this Court in *White* because it was not clear based on existing precedent that the sentence was unauthorized. In holding that the enhancement was mandatory despite the intent of the parties not to include it, *White* relied primarily on extra-jurisdictional authority, citing nine cases from federal courts and courts of other states, and adding one Illinois case, introduced with a "[*s*]*ee also*" signal. *White*, 2011 IL 109616, ¶ 23. This reliance on extra-jurisdictional authority demonstrates that *White* was "break[ing] new ground" on this question. *Chaidez*, 133 S. Ct. at 1107.

Additionally, it would not have been unreasonable prior to *White* for jurists to question whether the trial court was required to find that an enhancement applied to a sentence negotiated by the parties as part of a plea agreement simply because the factual basis supported it. The factual basis need not prove each element of an offense beyond a reasonable doubt, but must provide a sufficient "'basis from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent (if any) required to constitute the offense to which the defendant is pleading guilty.'" *People v. Jackson*, 199 Ill. 2d 286, 298-99 (2002) (quoting *People v. Barker*, 83 Ill. 2d 319, 327-28 (1980)); *see* Ill. Sup. Ct. R. 402(c) ("The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.") But Rule 402(c) does not suggest that the court must examine the factual basis to determine whether it proves further offenses or enhancements in addition to those to which the defendant is pleading guilty. Thus, prior to *White*, courts, like the trial court here, reasonably could have

determined that the factual basis, alone, was insufficient to mandate imposition of an enhancement where the parties intended that it not apply.

In short, the *White* rule was new for purposes of *Teague* because it was not apparent to all reasonable jurists before it was decided. Prior to *White*, the law was settled that a trial court could not impose an unauthorized sentence, but it was not clear whether a prosecutor could negotiate away the enhancement or a trial court's decision not to impose a sentencing enhancement rendered the sentence illegal because the enhancement was supported by the factual basis. Moreover, defendant does not contend that either of the *Teague* exceptions applies in this case. Therefore, if the Court reaches the *Teague* question, it should hold that *Teague* bars retroactive application of *White*.

III. Defendant Should Be Estopped from Withdrawing His Guilty Plea.

In response to the People's argument that principles of estoppel should bar defendant from withdrawing his guilty plea, defendant argues that (1) the People forfeited the estoppel argument by omitting it from the petition for leave to appeal; (2) estoppel does not apply where a sentence does not conform to statutory requirements; and (3) estoppel does not apply because defendant has taken legally — not factually — inconsistent positions. Def. Br. 22-26. These arguments do not preclude estoppel.

The single case cited by defendant in support of his argument that estoppel does not apply to an unauthorized sentence, *People ex rel Ryan v. Roe*, 201 Ill. 2d 552 (2002), is distinguishable. *Ryan* held, in part, that estoppel did not prevent the People from arguing that the defendant's negotiated sentence was void because it did not conform to Illinois's truth-in-sentencing law. *See id*. at 554. But unlike this case, in *Ryan* there was no alternative

to enforcing the truth-in-sentencing provisions because those provisions necessarily applied to the defendant's sexual assault conviction. *Id*. Thus, the Court could not hold the People to their end of the original plea agreement. But here the parties agreed that defendant would receive a thirty-year prison term and, as defendant acknowledges in his appellee's brief, the parties could have lawfully negotiated around the enhancement if defendant's use of a firearm had not been included in the factual basis. Def. Br. 20 ("there was no question" that parties in *White* could have negotiated away enhancement). Thus the obstacle to enforcing the plea agreement in this case, as in *White*, was a question of execution. *See* Def. Br. 17-18 (plea agreement in *White* failed because the People "had the defendant plead guilty to facts that triggered the enhancement"). Accordingly, unlike *Ryan*, where there was no lawful way for defendant to avoid serving his sentence according to the truth-in-sentencing provisions, applying estoppel here would merely involve holding the parties to their original agreement, which could be lawfully enforced by remanding the case with instructions to permit the People to amend the indictment and factual basis to omit reference to a firearm.

This Court should also reject defendant's argument that estoppel does not apply because he has taken inconsistent legal, rather than factual, positions. As the Supreme Court has explained, "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). It is an "equitable doctrine" intended to "prevent improper use of judicial machinery"; as such, it is "invoked by a court at its discretion." *Id*. (internal quotation marks and citations omitted). Accordingly, this Court should exercise its discretion to prevent an abuse of the judicial machinery in this case and others like it: a

defendant should not be permitted to bargain for a sentence that is too short and then use the fact that it is too short to secure the even greater benefit of going to trial at a later date on weaker evidence.

Defendant vainly attempts to distinguish this case from some of the several cases cited in the People's opening brief where courts in other jurisdictions have invoked the doctrine under these circumstances. *See* Peo. Br. 24-25. This and his related claim, that he did not actually receive that benefit because the sentence is void and therefore unenforceable, Def. Br. 25, fail: defendant's sentence is not void, and thus defendant will receive his bargained-for benefit. In any event, these out-of-state cases unambiguously find that the defendant cannot receive the benefit of a sentence that was too short and then use that error to vacate the judgment. *See 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); *see also State v. Moore*, 303 S.W. 3d 515, 522 (Mo. 2010); 31 C.J.S. Estoppel and Waiver § 172.

Finally, while the People generally forfeit a point relied upon for reversal by failing to include it in the petition for leave to appeal, that does not prevent this Court from invoking estoppel in this case to ensure the administration of justice. *Mich. Ave. Nat. Bank*, 191 Ill. 2d at 518 ("It is well settled that the waiver rule is a limitation on the parties and not the jurisdiction of this court, which has the responsibility of achieving a just result and maintaining a sound and uniform body of precedent").

IV. The Appropriate Remedy Is Enforcement of the Original Plea Agreement.

Because, prior to *White*, many attorneys and trial courts believed that plea agreements like the one at issue in this case were lawful, it is reasonable to assume that numerous defendants have been convicted and sentenced under such agreements. If all defendants imprisoned under these now too-lenient plea agreements are entitled to a new trial, they can lie in wait and raise their claims at an opportune moment, when witnesses die, or disappear, or memories have faded. To avoid this unjust result — one that could not have been intended by the General Assembly in enacting mandatory firearm enhancements — if this Court holds that defendant's sentence is void, then it should exercise its discretion, and supervisory authority if necessary, to order enforcement of the plea agreement.

There is precedent for crafting such an equitable remedy in cases where a sentence is void. As discussed, in *Ryan*, this Court held that the defendant's sentence was void because the trial court unlawfully exempted it from the mandatory truth-in-sentencing provision. *Ryan*, 201 Ill. 2d at 557. But rather than vacate the plea, this Court granted mandamus relief and ordered the circuit court to issue an amended sentencing order without language exempting it from truth-in-sentencing, and it reduced the defendant's sentence in light of his original belief regarding how much prison time he would actually serve if sentenced pursuant to the negotiated plea agreement "because neither party contemplated truth-in-sentencing requirements when negotiating toward a guilty plea." *Id*. at 557-58; *see generally People v. Whitfield*, 217 Ill. 2d 177, 204-205 (2005) (where statute required imposition of three-year mandatory supervised release term that was not part of negotiated

plea agreement, appropriate remedy was to reduce defendant's sentence by three years and impose mandatory term).

The same is true here. Because neither party contemplated *White*, the proper remedy is enforcement of the plea agreement. At heart, the error here occurred in mentioning defendant's use of a firearm in the recitation of the factual basis for the plea. Had the factual basis omitted mention of the firearm, the agreement — that both parties bargained for and intended to be enforced — would have been enforceable under *White*. *See White*, 2011 IL 109616, at ¶¶ 40-41 (Theis, J., specially concurring) (State should have "negotiated around" enhancement by referring to "dangerous weapon," as opposed to "firearm," in both indictment and factual basis); Def. Br. 17-18 (People had authority to negotiate away firearm enhancement but did not do so in this case because the factual basis triggered the enhancement). Thus, the most equitable remedy is a remand to the trial court with instructions to permit the People to correct that error and properly enforce the plea agreement by amending the indictment and factual basis to refer to a dangerous weapon, instead of a firearm. Such a remedy would ensure that both parties received the full benefit of their bargain, and prevent the unjust result that would obtain if defendant were allowed a belated trial because his sentence was too lenient.

CONCLUSION

The People of the State of Illinois respectfully request that this Court reverse the judgment of the Illinois Appellate Court, Third District, and remand for further proceedings.

May 7, 2014

Respectfully Submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

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

/s/ Stephen M. Soltanzadeh
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on May 7, 2014, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and three copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail an original and 12 copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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