No. 123492

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MUHAMMAD S. ABDULLAH Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-15-0840. There on appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 04 CF 1069. Honorable George Bridges, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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POINTS AND AUTHORITIES Page

NATURE OF THE CASE

Muhammad S. Abdullah,[1] petitioner-appellant, appeals from a judgment dismissing his petition for relief from judgment pursuant to 735 ILCS 5/2-1401.

The appellate court affirmed, finding that Abdullah's firearm enhancements were not void because the trial court properly struck his notice of appeal before granting the State's motion to resentence him with the enhancements and because the firearm enhancement for attempt murder, though unconstitutional at the time of his offense, was not unconstitutional at the time of his resentencing. *People v. Abdullah*, 2018 IL App (2d) 150840, ¶¶9-21. On September 26, 2018, this Court allowed leave to appeal. *People v. Abdullah*, No. 123492.

No issue is raised concerning the charging instrument. However an issue is raised concerning the sufficiency of the petition for relief from judgment pleadings.

[1] While the indictment and mittimus list the petitioner's name as Abdullah S. Muhammad, the appellate court's decision captions the case as Muhammad S. Abdullah and petitioner himself represents his name in this manner. As advised by this Court's clerk's office, counsel employed the name used in the appellate court's opinion when drafting the petition for leave to appeal, after which this Court used the same in its order granting leave.

ISSUES PRESENTED FOR REVIEW

I. Illinois Supreme Court Rule 606(b) directs the circuit court to strike a notice of appeal and retain jurisdiction when a post-judgment motion has been filed "by counsel or by defendant, if not represented by counsel." Here, the circuit court struck Muhammad Abdullah's timely notice of appeal because the State filed a motion to increase the sentence. Did the appellate court err in concluding that the phrase "counsel or by defendant, if not represented by counsel," applies to the State as well as the defense?

II. In 2003, this Court held that firearm enhancements for attempt murder were unconstitutional and void *ab initio* in *People v. Morgan*, 203 Ill. 2d 470, 489–92 (2003). Subsequently, Muhammad Abdullah was charged with, found guilty of, and sentenced to a prison term without a firearm enhancement for an attempt first degree murder committed after *Morgan*.

On October 6, 2005, this Court overruled *Morgan* and revived the firearm enhancements for attempt murder in *People v. Sharpe*, 216 Ill. 2d 481, 519 (2005). The circuit court subsequently re-sentenced Abdullah to a prison term that included the firearm enhancement for attempt murder.

When this Court holds a criminal statute unconstitutional and void *ab initio* prior to a defendant's offense, and then overrules that decision after the defendant's offense, is a sentence pursuant to that statute, like Abdullah's, void?

SUPREME COURT RULE INVOLVED

Illinois Supreme Court Rule 606(b) (West 2005)

Except as provided in Rule 604(d), the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion. When a timely post-trial or post-sentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending post-judgment motions shall have no effect and shall be stricken by the trial court. Upon striking the notice of appeal, the trial court shall forward to the appellate court within 5 days a copy of the order striking the notice of appeal, showing by whom it was filed and the date on which it was filed. This rule applies whether the timely post-judgment motion was filed before or after the date on which the notice of appeal was filed. A new notice of appeal must be filed within 30 days following the entry of the order disposing of all timely post-judgment motions. Within 5 days of its being so filed a copy of the notice of appeal or an amendment of the notice of appeal shall be transmitted by the clerk of the circuit court to the clerk of the court to which the appeal is taken. Except as provided in paragraph (c) below, and in Rule 604(d), no appeal may be taken from a trial court to a reviewing court after the expiration of 30 days from the entry of the order or judgment from which the appeal is taken. The clerk of the appellate court shall notify any party whose appeal has been dismissed under this rule.

STATEMENT OF FACTS

Muhammad Abdullah filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401 arguing that his firearm enhancements, which the court added upon a State's motion requesting a sentence increase, were void because they were neither charged in the indictment nor submitted to the jury, and that his enhancement for attempt murder violated the *ex post facto* clause of the United States Constitution because this enhancement was unconstitutional at the time of his offense under *People v. Morgan*, 205 Ill. 2d 470 (2003). Following arguments, the circuit court granted the State's motion to dismiss Muhammad S. Abdullah's petition.

On appeal, the Second District of the appellate court affirmed in a published opinion. *People v. Abdullah*, 2018 IL App (2d) 150840. This Court granted leave to appeal on September 26, 2018.

Jury Trial Proceedings

In 2003, this Court held the statute creating firearm enhancements for attempt murder unconstitutional in violation of the Illinois proportionate penalty clause. *People v. Morgan*, 203 Ill. 2d 470, 489–92 (2003). In 2004, Abdullah was charged by indictment with, *inter alia*, first degree murder of Marco Wilson and attempt first degree murder of Luis Melendez in relation to a March 15, 2004, incident. (C. 8–14)[2] The indictment did not charge firearm enhancements for any offense. (C. 8–14)

[2] Counsel will cite the electronic page numbers digitally imposed on the top and bottom corners on the right side of each page of this electronic record, rather than to the numbers previously stamped on the paper pages.

At trial, Abdullah testified that he acted in self defense. His friend, Jamiel Amlet, had called him and said somebody was shooting at him. (R. 986-87) Abdullah was driven to the scene by a friend. (R. 987) From within the car, Abdullah saw Amlet surrounded by a "bunch of guys" kicking him. (R. 989) Abdullah saw Marco Wilson, whom he knew was a member of the Four Corner Hustlers street gang, get out of a parked car and stuff something into his pants. Abdullah became afraid when he saw Wilson walking toward the car he was in. Abdullah got out of the car with a gun he got from under the seat; the gun belonged to the friend who drove him. (R. 991–93)

Abdullah ran to the back of the car and ducked down, thinking Wilson was going to shoot. (R. 993) He saw Wilson holding a gun in his hand. (R. 993–94) Wilson then approached Amlet and Luis Melendez. Abdullah walked toward them and saw Wilson start to pull a gun out of his waistband. (R. 994) Abdullah told Wilson "Don't do it, man. Don't do it. Don't pull it," and offered that he and Wilson could fight, but Wilson did not want to fight and pulled his gun out. (R. 995-96) Abdullah was five feet away and thought Wilson was going to shoot him. (R. 995) Abdullah then pulled out his gun and fired at Wilson. At the time Abdullah fired, Melendez was on the ground. He never shot at Melendez. Wilson also fired his gun, and Abdullah believed it was Wilson who shot Melendez in the back. (R. 996) Wilson's gun was pointed to the ground toward Melendez and Amlet, when it went off. (R. 1000) After his arrest, Abdullah gave a written statement explaining that he acted in self-defense. (R. 1115-16; P.Ex. 60)

Melendez testified that on the day of the shooting, someone he did not

know started a fight with him in the middle of the street. (658–663) As they fought, Wilson and Abdullah approached. He heard Wilson say, "You all not going to do this," and heard Abdullah say something he could not remember; he then heard four or five gunshots. (R. 664–66, 672) Melendez was shot in the middle of his back. (R. 685) He did not know who shot him. (R. 704)

Wilson died from a single bullet wound. (R. 942-43)

Demetrious Linder and his brother Bashir were friends with Melendez and Wilson and testified that they were present and saw Melendez fighting with another person. (R. 723, 740, 756) After Wilson helped Melendez get up, they both saw Abdullah pull out a pistol and point it at Wilson. (R. 725, 733, 757) Demetrious heard Wilson say to Abdullah, "shoot," three or four times, and they both saw Abdullah then shoot Wilson. (R. 732, 735, 737) Demetrious heard more shots as he fled. (R. 735, 737) Bashir testified that Melendez had a gun in his pocket but Wilson had nothing in his hands. (R. 758, 761)

Police recovered a .357 revolver with spent shell casings from a nearby garbage can and found three 9 millimeter bullet casings on the street and a bullet fragment of a larger caliber. (R. 786–89, 807-809, 812, 816–18, 837–38, 843, 845)

The jury found Abdullah guilty of first degree murder of Wilson and attempt first degree murder and aggravated battery with a firearm of Melendez on June 9, 2005. (C. 240–42; R. 1263)

Sentencing

At the August 17, 2005, sentencing hearing, the State asked for consecutive sentences. (R. 1321, 1332–334) Observing that neither the

maximum nor minimum sentences were warranted, (R. 1348), the court said the appropriate sentence would be concurrent terms of 40 years for murder and 20 years for attempt murder. (R. 1348–49) The court said, "I do believe there is still some hope for you," and explained that this sentence "means that you're going to be a fairly old individual when you come out, but still, you will get out." (R. 1348–49)

When the State again urged that the sentences should be consecutive, the court responded by saying that it believes that 100% of a 40-year sentence is appropriate. (R. 1351) The court issued its written sentencing order that day, reflecting concurrent terms of 40 and 20 years. (C. 267)

On September 2, 2005, the prosecution filed a motion to impose mandatory minimum and consecutive sentences, arguing that due to the infliction of severe bodily injury, the law required consecutive sentences as well as an additional 25-year enhancement for murder due to the use of a firearm. The State urged a new range with a minimum of 45 years for murder consecutive to six years for attempt. (C. 273–74) Defense counsel stated he was going to file a notice of appeal regardless of the State's motion. (R. 1357)

On September 8, 2005, Abdullah filed a notice of appeal. (C. 276–78). The State then moved to dismiss the notice of appeal. (C. 284) On October 13, 2005, defense counsel argued that the circuit court lacked jurisdiction, which removed to the appellate court upon the filing of the notice of appeal. (R. 1363–71) The circuit court disagreed and struck the notice of appeal. (C. 306; R. 1373)

Meanwhile, on October 6, 2005, this Court issued *People v. Sharpe*, 216 Ill. 2d 481, 519 (2005), overruling *Morgan* and reviving the firearm enhancements for attempt first degree murder.

On November 17, 2005, the court re-sentenced Abdullah to consecutive terms of 50 years for murder and 31 years for attempt, including a 25-year firearm enhancement for both offenses. (C. 308); (Supp. R. 6–8).

On January 20, 2006, upon a Abdullah's motion to reconsider the new sentence, the court reduced the firearm enhancement for attempt murder to 20 years, resulting in a 26-year term for this offense consecutive to 50 years for murder, for an aggregate term of 76 years in prison. (C. 319; R. 1409) With this sentence, Abdullah is projected to be released from prison at the age of 98.

Direct appeal

The appellate court affirmed Abdullah's convictions and sentences on direct appeal, rejecting claims regarding jury selection, the sufficiency of the evidence, and whether the murder sentence should be reduced to the minimum of 45 years where the court originally stated that a 40-year term was appropriate. (C. 346–74); *People v. Muhammad*, No. 2-06-0086 (Apr. 16, 2008) (Rule 23 order).

Post-conviction petition

In 2009, Abdullah filed a post-conviction petition alleging various instances of ineffective assistance of trial counsel, additional trial errors, and that his firearm enhancement for attempt murder was improper because it was not submitted to the jury. (C. 380–410) The trial court summarily

dismissed his petition on May 29, 2009. (C. 418–20).

Petition for relief from judgment

On January 27, 2014, Abdullah filed the petition for relief from judgement that is the subject of this appeal. (C. 445–74) He argued, *inter alia*, that the enhancement for attempt murder violated the *ex post facto* clause because it was unconstitutional at the time of his offense under *People v. Morgan*, 205 Ill. 2d 470 (2003). (C. 452–57)

Trial counsel appeared on Abdullah's behalf and, after the State moved to dismiss the 2-1401 petition, counsel filed an amended motion to vacate both firearm enhancements. (C. 537–45, 592–94; R. 1460) On May 20, 2015, the court found that it had erred by imposing firearm enhancements without the State charging them or presenting them to the jury, but found this error harmless and denied the petition. (R. 1504–06) After the court denied Abdullah's motion to reconsider, Abdullah appealed. (C. 623; R. 1512)

Appellate court proceedings below

On appeal, Abdullah contended his increased sentences were void for two reasons. First, he argued that because he timely filed a notice of appeal, the circuit court lacked jurisdiction to resentence him on both counts to consecutive terms with firearm enhancements. While the State had filed a motion to increase the sentences, Illinois Supreme Court Rule 606(b) only contemplates that post-judgment motions by the defense vitiate a timely notice of appeal, which removes jurisdiction to the appellate court. Thus, his entire new sentence is void. Second, Abdullah argued that because *Morgan* was controlling law at the time of his offense (and his original sentencing),

the firearm enhancement for attempt murder was void *ab initio* and could not be applied to him even after *Sharpe* overruled *Morgan*.

In a published opinion issued on February 27, 2018, the appellate court affirmed Abdullah's sentences. *People v. Abdullah*, 20185 IL App (2d) 150840, ¶¶9–21. The court held that although Rule 606(b) directs the trial court to strike a notice of appeal when a timely post-judgment motion has been filed "by counsel or by defendant, if not represented by counsel," the term "counsel" is ambiguous, and the court construed it to include the prosecutor. *Id*. at ¶¶15–17. The court also held that, despite *Morgan*, "the firearm enhancement factor for attempted murder was not unconstitutional prior to *Sharpe*; it was erroneously held to be unconstitutional," and thus applied to Abdullah's 2004 offense. *Id*. at ¶20

On March 21, 2018, the appellate court denied Abdullah's petition for rehearing. This Court granted Abdullah leave to appeal on September 26, 2018.

ARGUMENT

I. Because Rule 606(b) only directs trial courts to strike notices of appeal when the defense files a timely post-judgment motion, Muhammad Abdullah's timely filed notice of appeal removed jurisdiction to the appellate court despite the State's pending motion seeking a sentence increase. Abdullah's subsequent sentencing order is therefore void.

The trial court correctly sentenced Muhammad Abdullah without firearm enhancements following his jury trial, where the enhancements were neither charged in the indictment nor submitted to the jury. (C. 267; R. 1348–49); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The court also ordered concurrent sentences. (C. 267; R. 1348–51) Abdullah subsequently filed a timely notice of appeal. (C. 276–78) This timely notice of appeal removed jurisdiction to the appellate court and left the trial court without jurisdiction to enter any further orders. *People v. Bounds*, 182 Ill. 2d 1, 3 (1998). However, because the State had filed a motion seeking to increase the sentence, the trial court struck the properly filed notice of appeal and re-sentenced Abdullah to consecutive terms with the erroneous firearm enhancements. (C. 273–74, 306) Yet the exception to the jurisdictional effect of a notice of appeal created by Illinois Supreme Court Rule 606(b), allowing a court to strike the notice, only applies when a post-judgment motion is filed "by counsel or by defendant, if not represented by counsel." Ill. S. Ct. R. 606(b). Because this exception only applies to defense motions, the trial court lacked jurisdiction to resentence Abdullah. Absent jurisdiction, his newer sentences are void. *People v. Price*, 2016 IL 118613, ¶31.

The appellate court below found the language of Rule 606(b) ambiguous and construed it against Abdullah, holding that "counsel" includes

the prosecutor and thus applied to the State's motion. *People v. Abdullah*, 2018 IL App (2d) 150840, ¶15–18. The plain language of the rule and comparison to language elsewhere in Rule 606, as well as to other statutes and rules, shows that this provision only includes defense motions, as does the legal context surrounding its adoption. Moreover, limiting the rule to defense motions would not leave the State without a remedy to correct an unlawful sentence, as *mandamus* remains available.

This Court reviews *de novo* the interpretation of Supreme Court Rules. *People v. Salem*, 2016 IL 118693, ¶11. The same principles applicable to the construction of statutes guides the analysis of Supreme Court Rules. *People v. Marker*, 233 Ill. 2d 158, 164–65 (2009). The primary objective of statutory construction is to give effect to the drafter's intent. *People v. Reese*, 2017 IL 120011, ¶30. The most reliable indicator of intent is the language employed, given its plain and ordinary meaning. *Id*. Courts also consider the purpose of the statute or rule, the problems to be remedied, and the consequences of interpreting the statute one way or another, as well as the circumstances existing at the time of enactment and the goals sought to be achieved. *Id*. Here, this statutory analysis firmly establishes that the notice of appeal provision in Rule 606(b) only applies to defense motions.

A. The plain language of Rule 606(b) applies only to defense motions.

Criminal defendants in Illinois have a right to appeal their convictions and sentences after a final judgment. *People v. Ross*, 229 Ill. 2d 255, 268; Ill. Const. 1970, Art. VI, Sec. 6. The final judgment in a criminal case is the order of sentence or an order resolving a timely defense motion to reduce the

sentence. *People v. Caballero*, 102 Ill. 2d 23, 51 (1984); 730 ILCS 5/5-4.5-50(d) (West 2018)[3]. To exercise this right to appeal, a defendant must file a notice of appeal within 30 days after the final judgment appealed from or within 30 days after the entry of the order disposing of a post-judgment motion. Ill. S. Ct. R. 606(b). The notice of appeal is the only jurisdictional step required to confer jurisdiction upon the appellate court. *People v. Lewis*, 234 Ill. 2d 32, 37 (2009); *Bounds*, 182 Ill. 2d at 3.

Rule 606(b) creates an exception to the jurisdictional effect of a notice of appeal. By its language, this provision only contemplates motions by the defense:

> Except as provided in Rule 604(d) [regarding guilty pleas], the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion. When a timely post-trial or post-sentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending post-judgment motions shall have no effect and shall be stricken by the trial court. Upon striking the notice of appeal, the trial court shall forward to the appellate court within 5 days a copy of the order striking the notice of appeal, showing by whom it was filed and the date on which it was filed. This rule applies whether the timely post-judgment motion was filed before or after the date on which the notice of appeal was filed. . .

Ill. S. Ct. R. 606(b) (emphasis added).

As the emphasized phrase shows, Rule 606(b) directs a judge to strike a notice of appeal if the defense has also filed a timely motion directed against the judgment. The term "counsel" in this rule is limited to defense counsel, where the rule refers to motions filed by counsel or the defendant,

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[3]Previously codified at 730 ILCS 5/5-8-1(c) (West 2005).

where the defendant lacks that counsel. Said another way, this passage includes motions by defendants with counsel and defendants without counsel. This Court recently described Rule 606(b) in precisely this manner, limiting the notice of appeal provision to motions by the defense: "Rule 606(b) provides that, if a defendant files a timely postjudgment motion after filing a notice of appeal, the notice of appeal shall have no effect." *People v. Johnson*, 2018 IL 122227, ¶7, n.1 (emphasis added).

"Under basic rules of statutory construction, where the same words appear in different parts of the same statute, they should be given the same meaning unless something in the context indicates that the legislature intended otherwise." *McMahan v. Industrial Com'n*, 183 Ill. 2d 499, 514 (1998). Similarly, the canon of construction *noscitur a sociis*, meaning "a word is known by the company it keeps," indicates a meaning that includes only defense counsel. *See Corbett v. County of Lake*, 2017 IL 121536, ¶31 (citations omitted). Said another way, "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008).

Rule 606(b)'s provision for striking a notice of appeal uses "counsel" twice in the same sentence. Both uses should be given the same meaning. *McMahan*, 183 Ill. 2d at 514. Because the second instance only includes defense attorneys ("by defendant, if not represented by counsel"), the first instance must be limited to defense counsel as well. The term "counsel" in this rule is not ambiguous and does not include prosecutors, contrary to the appellate court's holding below. *Abdullah*, 2018 IL App (2d) 150840, ¶15–18.

Based on the clear language of the rule, notices of appeal carry jurisdictional effect and cannot be stricken unless the defense files a timely motion attacking the verdict or sentence. *See Johnson*, 2018 IL 122227, ¶7, n.1.

B. The history of the adoption of this notice of appeal provision shows that only a motion by the defense can vitiate a defense notice of appeal.

That this provision in Rule 606(b) excludes State's motions is also discernable from the "legislative and jurisprudential background" surrounding its adoption. *People v. Simms*, 2018 IL 122378, ¶40. In the past, courts often held that a timely post-judgment motion served to vitiate a notice of appeal. Courts reasoned that Illinois Supreme Court Rule 309, a rule incorporated into criminal practice by Rule 612, allows a party to move to dismiss its own appeal before the record on appeal is filed in the reviewing court. When a defendant filed a post-judgment motion, courts held this to be an implicit motion to dismiss the appeal. *People v. Hook*, 248 Ill. App. 3d 16, 18 (2d Dist. 1993) (holding that defendant's "filing of the post-sentencing motion was an implicit motion to dismiss pursuant to Rule 309"); *accord People v. Richmond*, 278 Ill. App. 3d 1042, 1046–47 (3d Dist. 1996), *People v. Rowe*, 291 Ill. App. 3d 1018, 1020–21 (2d Dist. 1997) (collecting cases). This practice did not permit one party to dismiss an opposing party's appeal, as Rule 309 states that the trial court may "dismiss the appeal of any party (1) on motion of that party or (2) on stipulation of the parties." Ill. S. Ct. R. 309 (emphasis added).

People v. Bounds, 182 Ill. 2d 1, 3 (1998), ended this practice in 1998 by holding that a notice of appeal has immediate jurisdictional effect despite the

filing of a post-judgment motion. *Bounds*, 182 Ill. 2d at 3. In *Bounds*, a post-conviction petitioner filed both a motion to reconsider the court's dismissal of his petition and a notice of appeal on the same day. Two weeks later, the trial court denied the petitioner's motion to reconsider. *Bounds*, 182 Ill. 2d at 2. This Court held that the notice of appeal divested the trial court of jurisdiction to enter any further rulings despite the pending defense motion to reconsider. *Id*. at 3.

After *Bounds* but before the amendment to the rule, the Fourth District of the appellate court weighed in on this issue. *People v. Jenkins*, 303 Ill. App. 3d 854, 859 (4th Dist. 1999). Noting that it had previously rejected the implicit Rule 309 approach other courts had employed, the court was prepared to reconsider its own precedent and treat defense post-judgment motions as dismissals of defense notices of appeal, if not for *Bounds*. *Id*. Due to *Bounds*, it felt constrained to afford jurisdictional effect to notices of appeal despite a defense motion attacking the judgment. *Id*. The court expressed "hope that the supreme court will soon take the opportunity to revisit this issue." *Id*. at 860.

Later that year, and one year after *Bounds*, this Court answered that call by amending Rule 606(b). The amendment added the provision to strike a notice of appeal when a post-trial or post-sentencing motion is filed either before or after the notice of appeal, creating an exception to *Bounds*. Ill. S. Ct. R. 606(b) (eff. December 1, 1999). This amendment revived and codified the prior practice developed by the lower courts that allowed a timely post-judgment motion to serve as an implicit request to dismiss *the filing party's*

appeal under Rule 309. Again, this rule—and this revived practice—did not permit one party to vitiate the opposing party's appeal by filing a post-judgment motion. In light of this background, it is clear that Rule 606(b)'s provision to dismiss a notice of appeal likewise does not allow the State to file a post-judgment motion that results in the dismissal of a defendant's appeal.

C. Comparison to language in other rules and statutes, and an understanding of how Rule 606(b) fits within the legislative intent regarding post-trial motions—which may only be filed by the defense—shows that this provision only applies to defense motions.

That the term "counsel" excludes the State is further discernable from comparison to other language within Rule 606 and in other rules, as well as by examining how this rule fits with the legislative design regarding post-trial motions.

In a later subsection of Rule 606, this Court expressly refers to "the defendant" and "the State." Ill. S. Ct. R. 606(e) (emphasis added). Supreme Court Rule 604(e) likewise explicitly differentiates between both parties: "The defendant or the State may appeal to the Appellate Court from an order holding the defendant unfit to stand trial or be sentenced." Ill. S. Ct. R. 604(e) (emphasis added). Similarly, the civil rule regarding the timing of appeals explicitly includes both parties, stating, "The notice of appeal may be filed by any party," and, "When a timely postjudgment motion has been filed by any party . . ." Ill. S. Ct. R. 303(a) (emphasis added).

As these rules show, this Court knows how to refer to both parties individually or collectively when intended. If the provision in Rule 606(b) regarding the striking of a notice of appeal intended to include motions by the

State, the language would have explicitly included "the State" or "any party," as in these other rules. *See Gruszeczka v. Illinois Workers' Compensation Com'n*, 2013 IL 114212, ¶26 ("the legislature knows how to preclude application of the mailbox rule when it wants to"); *Chicago v. Roman*, 184 Ill. 2d 504, 517 (the legislature knows how to preempt home rule authority when it intends to); *In re County Treasurer and Ex Officio County Collector*, 2017 IL App (4th) 170003, ¶42 ("The legislature knows how to say 'refun'" when it intends to communicate the idea of a refund."). By choosing to use the language "counsel or by defendant, if not represented by counsel," this Court excluded the State.

Moreover, the provision to strike a notice of appeal cannot include State's motions because it only applies when there is a "post-trial or post-sentencing motion" filed. Ill. S. Ct. R. 606(b). The Code of Criminal Procedure (725 ILCS 5/100-1 *et seq*.), only allows for post-trial motions by the defense. Article 116, titled "Post-Trial Motions," includes defense motions seeking a new trial, 725 ILCS 5/116-1 ("the court may grant the defendant a new trial"; motion shall be "served upon the State"); defense motions in arrest of judgment, 725 ILCS 5/116-2 ("filed by the defendant"); defense motions seeking to vacate sex-crime convictions of sex-trafficking victims, 725 ILCS 5/116-3 (motion must be "served upon the State"); defense motions for forensic testing, 725 ILCS 5/116-4 ("A defendant may make a motion"); and defense motions for DNA database searches, 725 ILCS 5/116-6 ("Upon motion by a defendant").

Likewise, section 5-8-1(c) of the Code of Corrections, 730 ILCS 5/1-1-1

et seq., authorizes post-sentencing challenges only by defendants seeking sentence reductions: "A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed within 30 days following the imposition of sentence." 730 ILCS 5/5-4.5-50(d) (West 2018). This section only permits "A motion to *reduce* a sentence," or for the court to reduce a sentence without a motion, and provides that only these defense motions affect the finality of the judgment. *Id*. This statute also forbids courts from increasing the sentence: "However, the court may not increase a sentence once it is imposed." *Id*.

Rule 606(b) only allows a trial court to strike a notice of appeal when a "post-trial or post-sentencing" motion is filed. As demonstrated, the State cannot file this type of motion. Therefore, this provision cannot include the State.

Because this Court chose language that included only the defense rather than both parties, and because the State is not authorized to file the specific motions that trigger the striking of a notice of appeal, this rule only applies to defense motions. Absent such a motion, the judgment is final and a notice of appeal divests the trial court of jurisdiction. *Bounds*, 182 Ill. 2d at 3.

D. Excluding the State from Rule 606(b)'s provision for striking a notice of appeal also fits with the rules governing criminal appeals.

In a criminal case, the State may only appeal in the limited circumstances provided by rule. Ill. S. Ct. R. 604(a) (State may only appeal orders that result in dismissing a charge, arresting judgment due to a defective charging instrument, quashing an arrest or search warrant, or

suppressing evidence). In these narrow circumstances, the State may first file a motion to reconsider the judgment or order from which they may appeal, which tolls the deadline for the State to file its notice of appeal. *People v. Marker*, 233 Ill. 2d 158, 167 (2009).

Rule 604(a) does not permit the State to appeal criminal sentences and this Court has forbidden such appeals. *People v. Castleberry*, 2015 IL 116916, ¶21 (the State may not appeal a sentencing order). Only where the State has a right to appeal an order does it have a right to a circuit court ruling on a motion to reconsider that order. *Marker*, 233 Ill. 2d at 176–77 ("a party entitled to appeal from an order" can seek correction in the circuit court) (citing *People v. Heil*, 71 Ill. 2d 458, 461–62 (1978)). Because the State here sought relief that it had no right to pursue on appeal, from an order it had no right to appeal, its pleading did not vitiate Abdullah's timely notice of appeal.

Notably, discussing State motions to reconsider, this Court recognized that a trial court has the ability to reconsider appealable judgments "'as long as no notice of appeal has been filed.'" *Marker*, 233 Ill. 2d at 171 (quoting *People v. Williams*, 138 Ill. 2d 377, 394 (1990)). Naturally, then, if a notice of appeal is filed, jurisdiction removes to the appellate court and the notice of appeal provision of Rule 606(b) does not apply. Ill. S. Ct. R. 606(b).

The State may argue that, while the State never had the right in this case to request increased sentences via uncharged firearm enhancements, it it had the ability to request mandatory consecutive sentences after the court ordered concurrent terms, because *People v. Arna*, 168 Ill. 2d 107 (1995), was controlling at the time. In *Arna*, this Court held that concurrent sentences

where they were statutorily mandated to be consecutive were void and could be corrected on appeal. *Arna*, 168 Ill. 2d at 112–13; *but see Castleberry*, 2015 IL 116919, ¶19 (abolishing the *Arna* void sentence rule). However, even though a court has the duty to correct a void sentence, it must first have jurisdiction to enter that corrective order. *People v. Flowers*, 208 Ill. 2d 291, 308 (2003) (a court without jurisdiction cannot alter a void order). Abdullah's notice of appeal extinguished the trial court's jurisdiction.

E. The appellate court has previously held that unauthorized motions, including specifically a State's post-sentencing request for mandatory consecutive sentences, do not preclude the jurisdictional effect of a notice of appeal.

A timely filed notice of appeal prevents the State from seeking reconsideration of erroneous concurrent sentences. *People v. Mabry*, 398 Ill. App. 3d 745, 757 (1st Dist. 2010). In *Mabry*, the defendant was subject to mandatory consecutive sentencing but the court imposed concurrent terms. *Id*. at 757. After the defendant filed a notice of appeal, the State moved for mandatory consecutive sentences and the trial court resentenced him to consecutive terms. *Id*. at 750, 757. The appellate court found this was improper because the trial court had been divested of its jurisdiction by virtue of the defendant's notice of appeal. *Id*. at 757. The State even *agreed* with this jurisdiction analysis. *Id*.

Though the *Mabry* defendant filed a notice of appeal before the State's motion and Abdullah filed his notice of appeal after the State's motion, this distinction does not carry any meaning in light of Rule 606(b). Before *Bounds*, some appellate courts held that whether a notice of appeal was filed

before or after a post-judgment motion was a distinction that affected jurisdiction. *People v. Jenkins*, 303 Ill. App. 3d 854, 859 (4th Dist. 1999) (collecting cases). This Court eliminated that question in *Bounds* by holding that all notices of appeal immediately remove jurisdiction to the reviewing court. *Jenkins*, 303 Ill. App. 3d at 857–59 (citing *Bounds*, 182 Ill. 2d at 3). The December, 1999, amendment to Rule 606(b), adding an exception to the jurisdictional rule of *Bounds*, further explicitly stripped this timing distinction of any import: "This rule applies whether the timely post-judgment motion was filed before or after the date on which the notice of appeal was filed." Ill. S. Ct. R. 606(b) (eff. December 1, 1999). The filing sequence is irrelevant; the only consideration is whether the State's unauthorized motion invalidates the jurisdictional effect of a timely notice of appeal. It does not. *Mabry*, 298 Ill. App. 3d at 757.

Courts have found that other motions lacking statutory or rule-based authority likewise do not invalidate a notice of appeal. In *People v. Neal*, 286 Ill. App. 3d 353 (4th Dist. 1996), the defendant filed a *pro se* motion while he was represented by counsel, who filed a notice of appeal. Because defendants are not permitted to file *pro se* motions while represented by counsel, the notice of appeal removed jurisdiction to the appellate court despite the pending *pro se* motion attacking the judgment. *Neal*, 286 Ill. App. 3d at 355.

Similarly, in *People v. Miraglia*, 323 Ill. App. 3d 199, 205–06 (2d Dist. 2001), the court held that, while a defendant's post-sentencing motion directed against a final judgment vitiates a notice of appeal and tolls the time for filing a new notice, there is no authority for a motion to reconsider the

denial of that motion. Therefore, such successive post-judgment motions are "not authorize[d]" and therefore do not extend the trial court's jurisdiction. *Miraglia*, 323 Ill. App. 3d at 205–06 (collecting cases holding that "unauthorized" motions do not extend the circuit court's jurisdiction); *see also People v. Easley*, 199 Ill. App. 3d 179, 183–84 (4th Dist. 1990) (since there is no "provision authorizing" successive post-judgment motions, they do not affect jurisdictional considerations regarding notices of appeal). An unauthorized post-sentencing motion by the State therefore has no impact on the jurisdictional effect of a timely notice of appeal.

F. A harmonious reading of Rule 606(b)'s tolling provision and notice of appeal provision does not require allowing State's motions to invalidate a defense notice of appeal.

Rule 606(b) begins with a provision tolling the 30-day deadline for filing a notice of appeal. This tolling provision applies to both final and non-final judgments, and allows the State to delay filing a notice of appeal if it files a motion to reconsider an adverse ruling from which Rule 604(a) authorizes an appeal. *People v. Marker*, 233 Ill. 2d 158, 167–77 (2009). Rule 606(b) states:

> [T]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion. . .

Ill. S. Ct. R. 606(b).

The appellate court below relied on the fact that the tolling clause does not distinguish between motions filed by the defendant and those filed by the State to find that the subsequent provision regarding striking a notice of appeal when a motion is filed by "counsel or by defendant, if not represented

by counsel," also includes motions by the State. *People v. Abdullah*, 2018 IL App (2d) 150840, ¶13 (quoting Ill. S. Ct. R. 606(b)). However, as *Marker*'s treatment of the tolling provision shows, it does not affect the later provision regarding striking a notice of appeal.

In *Marker*, this Court held that the tolling provision applies to defense appeals from final judgments in criminal cases and also to all appeals from non-final interlocutory orders where authorized, and thus applies to motions seeking reconsideration of those orders. *Marker*, 233 Ill. 2d at 167–77. This interpretation corresponded with the State's limited right to appeal interlocutory orders provided by Rule 604(a), discussed above. *Id*. at 176–77. The tolling provision affords an opportunity for the party that wishes to appeal to first seek reconsideration of final and interlocutory orders in the trial court. *Id*. at 166, 172.

There is nothing incongruent to then hold that the notice of appeal provision applies only to defense motions. There are some orders the State can appeal; when it can do so, it can first move for reconsideration and does not need to file a notice of appeal until the circuit court rules on its motion. *Id*. at 167. When a criminal defendant receives a final judgment, though, the State cannot appeal and is not entitled to obtain reconsideration of that judgment in the trial court. Arguments I.C, I.D., *supra*. Thus, there is no reason to allow a State's motion to vitiate a defendant's notice of appeal.

This is a sensible outcome. When the State is permitted to appeal, it is best to allow the State to first seek reconsideration and a fully developed resolution in the trial court before doing so, just like any other party with the

ability and desire to appeal. *Marker*, 233 Ill. 2d at 171–72. In these circumstances, such as a circuit court's order granting a defense motion to suppress evidence, there is no risk that the defense will file a notice of appeal cutting off the State's motion to reconsider; the defendant cannot appeal that interlocutory ruling and would not want to. Both the moving party and the appealing party are the same, and the movant will wait for a ruling on the motion to reconsider before appealing.

In this case, the State was the movant and the defendant the appellant. The State should not be permitted to file motions seeking unauthorized relief from orders it cannot appeal, which may further be followed by continuances, all of which deprive the defendant of a timely appeal. Only defense post-judgment motions vitiate an otherwise timely notice of appeal, both by rendering the sentence non-final, 730 ILCS 5/5-4.5-50(d), and by virtue of Rule 606(b)'s notice of appeal provision.

G. Allowing a State's post-sentencing motion to vitiate a defense notice of appeal could cause irreparable harm to criminal defendants.

Interpreting Rule 606(b) to require the trial court to strike a notice of appeal and retain jurisdiction when the State files a post-sentencing motion could cause defendants to completely lose their opportunity to appeal. This Court should not condone such an irresponsible outcome that would stem from the appellate court's opinion in this case.

By the time the State files a post-sentencing motion, some defendants may find themselves without counsel. Defense counsel may have withdrawn from the case after the final judgment, perhaps even after filing a notice of

appeal. *See People v. Everage*, 303 Ill. App. 3d 1082, 1086 (5th Dist. 1999) ("it is not unusual for trial courts to direct the clerk of the circuit court to file a notice of appeal on behalf of the defendant on the day of sentencing . . . Trial counsel is discharged and the State Appellate Defender is appointed," and the "agency cannot act" within the short time for post-judgment motions); *Accord People v. Rowe*, 291 Ill. App. 3d 1018, 1020–22 (2d Dist. 1997). Critically, Rule 606(b) does not direct the trial court to inform prior counsel that the notice has been stricken. If a State's motion vitiates the notice of appeal, the defendant may lack counsel and be unaware of the need to file a new notice of appeal following an order disposing of the State's motion, or may have appellate counsel who "cannot act" on the continued trial court proceedings. *Everage*, 303 Ill. App. 3d at 1086; *Rowe*, 291 Ill. App. 3d at 1022. A judge who denies the State's motion without a hearing may not consider notifying the defendant and reappointing counsel. The defendant would never know of the need to file a new notice of appeal. This contrasts with the Post-Conviction Hearing Act, which requires courts to notify *pro se* defendants of final judgments. 725 ILCS 5/122-2.1(a)(2).

Also, imagine a scenario where the court has imposed a sentence and ruling on a defense motion to reduce, if one is filed. The judgment is final. *People v. Caballero*, 102 Ill. 2d 23, 51 (1984). The State then files a motion to reconsider the sentence, much like in this case. Only a defense motion to reduce the sentence makes a sentencing judgment non-final, so this State's motion has not affected the finality of judgment. 730 ILCS 5/5-4.5-50(d). The defendant waits beyond 30 days from the final judgment for a ruling on the

State's motion. The State then withdraws its motion before obtaining a ruling. This withdrawal is not an "entry of the order disposing of the motion" The State would effectively have deprived the defendant of the opportunity to appeal.

Giving a defendant's initial, timely notice of appeal jurisdictional effect regardless of a State's motion protects the defendant's right to appeal.

H. The State will not be harmed by this construction of Rule 606(b) because it has a separate method of seeking sentencing relief via *mandamus*.

Holding that a defendant's properly filed notice of appeal precludes a ruling on a State's post-judgment motion will not prevent the State from obtaining sentence corrections based on legal errors. If the sentence truly violates a sentencing statute as a matter of law, the State may seek corrective relief through a petition for writ of *mandamus*. *People v. Castleberry*, 2015 IL 116916, ¶26. This remedy "permits the State to challenge criminal sentencing orders where it is alleged that the circuit court violated a mandatory sentencing requirement." *Id*. at ¶27. Morever, the State does not need to wait for the defendant's appeal to conclude; it may seek *mandamus* immediately. *Id*.

This is not a new rule created by *Castleberry*. Rather, it was clear in 2005 when the court sentenced Abdullah in this case that the State could move for the imposition of consecutive sentences via *mandamus*. *People ex rel Waller v. McKoski*, 195 Ill. 2d 393, 401–02 (2001) (issuing writ of *mandamus* directing the trial court to impose mandatory consecutive sentences). Allowing State's attempts to thwart a timely notice of appeal by filing a

motion seeking an increased sentence will undermine *Castleberry* and allow the State to circumvent its import: that the State may not appeal an illegal sentence and courts cannot alter them *sua sponte*, but the State may seek corrective relief via the writ of *mandamus*. *Castleberry*, 2015 IL 116916, ¶¶19–26.

Allowing only defense motions to trigger Rule 606(b)'s directive to strike a defense notice of appeal will also not hamper reviewing courts or frustrate a State appeal. The State does not need to worry about preserving a sentencing issue for appellate review, because it is not allowed to appeal the sentence. Ill. S. Ct. R. 604(a). The appellate court does not need the "benefit of the trial court's reasoned judgment" on a post-sentencing request for an increase, *People v. Everage*, 303 Ill. App. 3d 1082, 1086 (5th Dist. 1999), because the appellate court cannot itself issue a judgment enlarging a defendant's sentence or making concurrent terms consecutive. *Castleberry*, 2015 IL 116916, ¶¶20–24. Likewise, the purpose of allowing for trial court consideration of post-trial motions even when the defense files a notice of appeal is to "insure[ ] that defendant's postverdict rights are maximized and that all sentencing issues are preserved for appeal." *Everage*, 303 Ill. App. 3d at 1086. This goal is furthered by striking the notice of appeal when the defense files a timely post-judgment motion, but is not furthered by allowing the State to obtain a sentence increase in the face of a timely defense notice of appeal.

Holding that a State's unauthorized motion to reconsider the sentence has no effect on the jurisdictional impact of a perfected appeal will not

damage any legitimate State's interest.

I. Because the circuit court lacked jurisdiction to alter Abdullah's sentence, his second sentencing order, entered on January 20, 2006, is void.

Because only defense post-judgment motions trigger the provision in Rule 606(b) requiring the circuit court to strike a notice of appeal, the State's motion in this case seeking a sentence increase, which finds no authority in statute or rule, did not vitiate Abdullah's notice of appeal. Absent Rule 606(b)'s exception to the jurisdictional effect of a timely notice of appeal, Abdullah's timely notice of appeal filed within 30 days of the final judgment removed jurisdiction to the appellate court instanter. Ill. S. Ct. R. 606(b); *People v. Bounds*, 182 Ill. 2d 1, 3 (1998). The trial court thereafter lacked jurisdiction to re-sentence Abdullah. *Id.*; *People v. Mabry*, 298 Ill. App. 3d 745, 757 (1st Dist. 2010)

A judgment entered by a court that lacks jurisdiction is void. *People v. Price*, 2016 IL 118613, ¶31; *see also Wierzbicki v. Gleason*, 388 Ill. App. 3d 921, 926–27 (collecting cases finding that judgments entered after a timely notice of appeal are void). Because the circuit court lacked jurisdiction to re-sentence Abdullah, its second sentencing order is void. Because a void order can be attacked at any time in any court with jurisdiction, this Court can grant relief in this appeal from a petition for relief from judgment. *In re N.G.*, 2018 IL 121939, ¶57. This Court should therefore vacate the sentences entered on November 17, 2005, and modified on January 20, 2006, and reinstate his original concurrent sentences of 40 years for murder and 20 years for attempt murder, which were entered August 17, 2005.

II. A judgment entered pursuant to an unconstitutional statute is void. Because the statute creating the firearm enhancements for attempt murder was unconstitutional at the time of Abdullah's offense, his firearm enhancement for attempt murder is void.

In 2003, applying a cross-comparison analysis, this Court held that the statute creating firearm enhancements for attempt murder was unconstitutional in violation of the Illinois proportionate penalty clause and void *ab initio*. *People v. Morgan*, 203 Ill. 2d 470, 489–92 (2003). Subsequently, Abdullah was charged with and found guilty of attempt murder in relation to a 2004 incident. (C. 14) The State neither charged a firearm enhancement for this offense nor sought a jury verdict regarding a sentence-enhancing firearm fact. (C. 14, C. 240-42) On August 17, 2005, the judge sentenced Abdullah to a term of imprisonment for attempt murder without the firearm enhancement. (C. 267; R. 1349)

Subsequently, on October 6, 2005, this Court held that Illinois courts would no longer employ the cross-comparison proportionate penalties analysis, overruling *Morgan* and reviving the firearm enhancements for attempt murder. *People v. Sharpe*, 216 Ill. 2d 481, 519 (2005). The circuit court then re-sentenced Abdullah to a prison term for attempt murder that included a 20-year firearm enhancement. (C. 319, R. 1409) Because the firearm enhancement was imposed pursuant to a statute that was unconstitutional at the time of Abdullah's offense, this enhanced sentence is void and must be vacated. *People v. Price*, 2016 IL 118613, ¶31.

Whether a judgment is void is a legal question reviewed *de novo*. *People v. Hall*, 2014 IL App (1st) 122868, ¶ 8.

A. The attempt murder firearm enhancement was void *ab initio* at the time of Abdullah's offense and his firearm enhancement for this offense is therefore void.

"When a statute is held facially unconstitutional, *i.e.*, unconstitutional in all its applications, the statute is said to be void *ab initio*." *See People v. Blair*, 2013 IL 114122, ¶ 28 (internal citations omitted). A statute that is void *ab initio* is "no law at all." *People v. Gersch*, 135 Ill. 2d 384, 390 (1990) (citations omitted). "The effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the amendment." *Id*. "[N]o one can be prosecuted under a unconstitutional statute." *Id*. at 401.

When this Court held in *Morgan* that the legislation adding firearm enhancements to the attempt murder statute violated the proportionate penalties clause, it did just this: found the statute unconstitutional in all its applications and therefore facially unconstitutional and void *ab initio*. *Morgan*, 203 Ill. 2d at 491 ("In sum, we find the attempt statute [ ] as amended by Public Act 91-404, is unconstitutional. . .").

In *Blair*, this Court made clear that *Morgan's* holding was one that renders a statute void *ab initio*. Prior to *Blair*, this Court held in *People v. Hauschild* that the firearm enhancements for armed robbery violate the proportionate penalties clause and were therefore unconstitutional. *People v. Hauschild*, 226 Ill. 2d 63, 86–87 (2007). *Blair* examined the effect of the legislative response to *Hauschild* and addressed the *Hauschild* holding as one declaring a statute facially unconstitutional and void *ab initio*. *Blair*, 2013 IL 114122, at ¶25–32. Thus, *Morgan*'s same proportionate penalties

holding likewise declared the firearm enhancements for attempt murder facially unconstitutional and void *ab initio*. *See id*.

A judgment based on a statute that is facially unconstitutional and void *ab initio* is itself void. *Price*, 2016 IL 118613, ¶31. Because *Morgan* held the firearm enhancements for attempt murder to be facially invalid and void *ab initio*, the law that existed at the time of Abdullah's offense did not include a firearm enhancement. *See Gersch*, 135 Ill. 2d at 390. Consequently, the trial court's sentencing order that includes a firearm enhancement for attempt murder, pursuant to a statute that was unconstitutional at the time of the offense, is itself void. *Price*, 2016 IL 118613, ¶31; *People v. Taylor*, 2015 IL 117267, ¶¶17 (firearm enhancements that were unconstitutional at the time of the offense are void).

B. The retroactive application of revived, previously unconstitutional and void criminal statutes is itself void, as the State has conceded before.

While unconstitutional and void enhancements can be revived for crimes committed after that revival, *Blair*, 2013 IL 114122, at ¶31–38, they are inapplicable to crimes committed during the time of their unconstitutionality, a position the State conceded in *People v. Williams*, 2012 IL App (1st) 100126.

In *Williams*, the defendant committed armed robbery after *Hauschild* invalidated the firearm enhancements for that offense and before the legislature passed ameliorative legislation. The First District of the Appellate Court found the firearm enhancements for these offenses void. *Williams*, 2012 IL App (1st) 100126, at ¶51. The State conceded that resentencing was

necessary: "The State concedes that the cause should be remanded for re-sentencing under the provisions that predated the invalid statutes, but for the reason that the defendant committed the crimes after the *Hauschild* decision and before the legislature's 2007 amendment. We agree that the case should be remanded for re-sentencing." *Id*. at ¶54. *Accord People v. Blanton*, 2011 IL App (4th) 080120, ¶28–31 (same). Here, too, Abdullah committed his crime after the invalidating decision, *Morgan*, and before the enhancement was revived.

This Court reached the same conclusion in *People v. Taylor*, 2015 IL 117267. There, the defendant committed an armed robbery prior to the legislative fix that revived the firearm enhancements for this offense, which *Hauschild* had found unconstitutioanl and void *ab initio* in violation of the proportionate penalties clause. *Taylor*, 2015 IL 117267, ¶17. This Court explained that the *Hauschild* holding "remains the legal interpretation" of the statute prior to the legislative fix that revived the enhancements. *Id*. Therefore, because the defendant committed his crime prior to the revival, this Court held that his sentence enhancement was still unconstitutional and void *ab initio*. *Id*. at ¶17.

Williams, *Taylor*, and *Blanton* involved legislative cures to unconstitutional statutes, while this case involves a judicial cure: *Sharpe* overruling *Morgan*. However, this Court has also held that after it finds a statute unconstitutional and later overrules that decision, the statute still cannot apply to acts committed while the original decision controlled. *People v. Patton*, 57 Ill. 2d 43, 48–49 (1974).

In *Patton*, this Court examined the effect of *People v. Steele*, 231 Ill. 340 (1907), on a ticket selling regulation with a financial penalty, pursuant to which the defendant was charged. *Steele* had found a ticket selling regulation unconstitutional in violation of due process, and the legislature subsequently enacted an identical statute that was similarly unenforceable due to *Steele*. *Patton*, 57 Ill. 2d at 45–46. The defendant was subsequently charged with a violation of this law that occurred while *Steele* was controlling law in Illinois and the statute was considered unconstitutional. *Id*. at 44–47. Based upon development in due process analysis after *Steele*, this Court found the analytic test *Steele* employed "unsatisfactory," abandoned it, and overruled *Steele*. *Id*. at 46–47. This Court held that although *Steele* used a now-invalid analytic framework, *Steele* still governed the defendant's prosecution and required dismissal of the charges. *Id*. at 49. This Court declared that it would be "unconscionable" to impose punishment based on a law that was invalid under *Steele*, which was controlling law at the time of the defendant's acts. *Id*. at 48–49.

The same considerations apply here. *Morgan* employed the cross-comparison analysis to find the attempt murder firearm enhancement void under the proportionate penalties clause. Abdullah committed his offense while *Morgan* was controlling law in Illinois. *Sharpe* later determined that the cross-comparison analysis was flawed and unsatisfactory, abandoning it an overruling *Morgan*. *Sharpe*, 216 Ill. 2d at 520 (cross-comparison analysis is "unworkable"). Consistent with *Patton*'s treatment of *Steele* regarding acts committed while *Steele* controlled, *Morgan* must still govern the punishment

for Abdullah's acts committed while *Morgan* controlled.

When the legislature cures the constitutional infirmity of a criminal statute, that fix can only apply prospectively and the application of the prior statute to crimes occurring before the cure is void. *Taylor*, 2015 IL 117267, ¶17; *Williams*, 2012 IL App (1st) 100126, ¶¶51, 56. The Statute on Statutes codifies this as well, providing, "No new law shall be construed to repeal a former law . . . as to any offense committed against the former law, or as to any act done, any penalty . . . or claim arising under the former law." 5 ILCS 70/4 (West 2018). The same must be true of judicial cures as well. *See Patton*, 57 Ill. 2d at 48–49.

This Court has an interest in "preserving a sound and uniform" body of law. *People v. Hamilton*, 179 Ill. 2d 319, 323 (1997). A consistent body of law would apply the same principle of voidness to legislative and judicial cures of unconstitutional statutes and give fidelity to the proposition that "the law that was in effect at the time of the commission of the crime is controlling." *People v. Gill*, 304 Ill. App. 3d 23, 30 (1st Dist. 1999). Any other result is "unconscionable." *Patton*, 57 Ill. 2d at 48.

C. The appellate court mistakenly held that the firearm enhancements for attempt murder were never unconstitutional, overlooking the absurd consequences of such a holding.

In rejecting Abdullah's claim, the appellate court wrote, "Here, the firearm enhancement factor for attempted murder was not unconstitutional prior to *Sharpe*; it was erroneously held to be unconstitutional." *People v. Abdullah*, 2018 IL App (2d) 150840, ¶20. To countenance such a holding would create a fiasco for the judiciary.

The appellate court treated *Morgan* as if it simply did not exist: that the statute declared unconstitutional in *Morgan* was in fact never unconstitutional, not even during the two-year period when *Morgan* was controlling law. *Id*. If this were the case, the State could—today—seek *mandamus* relief to impose a firearm enhancement on the *Morgan* defendant himself. The State could likewise seek enhanced sentences against any defendant who was sentenced under pre-enhancement versions of any offense with enhancements had been found invalid under the cross-comparison analysis, including at least nine different firearm add-ons. *See Sharpe*, 2016 Ill. 2d at 517 ("In the last three years, we have invalidated nine penalties") (collecting cases). The State could even petition for an increased sentence for the defendant in this Court's original cross-comparison analysis case, *People v. Wisslead*, 94 Ill. 2d 190, 195–96 (1983).

Treating overruled constitutional decisions as if they never existed also undermines a defendant's right to appeal. *See*. Ill. Const., art. 6, §6. It is not difficult to envision scenarios where, when granting relief on a broadly applicable constitutional challenge, a court declines to consider other challenges to the same offense or sentencing element. If the constitutional ruling is overturned years later and treated as though it never existed, and defendants are deprived of the relief they previously won, they would be deprived of the right to appellate review of arguments that were left unresolved. *E.g. Morgan*, 203 Ill. 2d at 492 (declining to address an alternate argument); *People v. Gayfield*, 2014 IL App (4th) 120216-B ("Because we vacate defendant's conviction for AUUW, we need not consider whether he

was denied a fair trial due to" prosecutorial misconduct in closing argument).

These concerns are not limited to firearm enhancements. For instance, this Court held in *People v. Aguilar* that the second amendment protects the right to carry a loaded, accessible handgun outside the home, finding certain forms of aggravated unlawful use of a weapon unconstitutional. *People v. Aguilar*, 2013 IL 112116, ¶20–21. Many convictions and sentences have been vacated pursuant to *Aguilar*. *E.g. People v. Atkins*, 2014 IL App (1st) 093418-B, ¶11 (vacating void aggravated unlawful use of a weapon conviction); *Gayfield*, 2014 IL App (4th) 120216-B, ¶30 (same); *People v. Dunmore*, 2013 Ill. App 1st 121170, ¶1–14 (same regarding a conviction pursuant to a guilty plea). *Aguilar* remedies have extended to related but not identical issues, including reversing a sentence where the trial court relied on an unconstitutional *Aguilar* conviction as aggravation, *People v. Smith*, 2016 IL App (2d) 130997, ¶26, and reversing a recidivist conviction where an *Aguilar* conviction was used as a predicate, *People v. Cavette*, 2018 IL App (4th) 150910, ¶26.

The *Aguilar* holding extends beyond the explicit reach of the United States Supreme Court's decision in *District of Columbia v. Heller*, which was faced only with the question of whether a ban on handguns in the home violated the second amendment. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008); *see Powell v. Tompkins*, 783 F.3d 332, 348 (1st Cir. 2015) (the Supreme Court has not said that publicly carrying a firearm is a protected second amendment right) (collecting cases regarding this debate); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (the *Heller* holding

addresses the limited question regarding handguns in the home). It is possible that, in the future and with the benefit of further judicial examination of this issue nationwide, this Court could overrule *Aguilar* or limits its reach to the home or the vicinity of the home. This is not far-fetched, as this Court has changed its course on related second amendment issues before. *People v. Burns*, 2015 IL 117387, ¶22 ("we now acknowledge that our reference in *Aguilar* to a 'Class 4 form' of the offense was inappropriate," expanding *Aguilar* to apply to Class 2 felonies as well); *In re N.G.*, 2018 IL 121939, ¶¶76, 84 (expressly overruling *People v. McFadden*, 2016 IL 117424, which held that a conviction that was unconstitutional under *Aguilar* could be used as a predicate for a recidivism offense, so long as that conviction had not yet been vacated).

If a reversal of *Aguilar* means that the original decision never existed, as the *Abdullah* court below opined regarding *Morgan*, a multitude of defendants could have their convictions reinstated. Would the *Smith* defendant, who obtained a new sentencing hearing due to the then-improper reliance on an *Aguilar* count, have his initial sentence reinstated, and would he be precluded from introducing mitigation that was only developed at the second sentencing hearing? *See Smith*, 2016 IL App (2d) 130997, ¶26–29. In some cases, the appellate court did not address claimed trial errors because it was vacating the conviction under *Aguilar*. *E.g. Gayfield*, 2014 IL App (4th) 120216-B. Those defendants would rightfully clamor for new direct appeals. In other cases, the appellate court considered a trial error in relation to a remaining conviction and not in relation to an *Aguilar* count it vacated. *See,*

e.g., Cavette, 2018 IL App (4th) 150910, ¶28–33 (vacating an *Aguilar* count and then considering a claimed plain error in relation solely to a count of cannabis possession). If an *Aguilar* count is reinstated, those defendants may ask for—and be entitled to—renewed direct appellate consideration of those same trial errors.

Treating *Morgan* as if it never existed would be an absurd legal fiction that could take years to unravel, and applying such a rule to other decisions would undermine "society's interest in the finality of criminal convictions." *People v. Szabo*, 186 Ill. 2d 19, 23 (1998). Giving *Morgan* and its void *ab initio* holding import from the date of its issuance until the date *Sharpe* overruled *Morgan* is the most sensible approach and comports with how criminal laws should work: providing notice and fair warning to citizens of the consequences of violating a given statute. *See People v. Hickman*, 163 Ill. 2d 250, 256 (1994).

When this Court declares a statute unconstitutional, that must be treated as an accurate assessment of the law for whatever period that decision controls.

D. This Court should vacate Abdullah's void attempt murder firearm enhancement.

In this case, Muhammad Abdullah committed his offense after *Morgan* invalidated the firearm enhancements for attempt murder and before *Sharpe* revived them. *Morgan* was decided on January 24, 2003. *Morgan*, 203 Ill. 2d at 470. Abdullah was convicted of an attempt murder that occurred on March 15, 2004. (C. 14) This Court issued *Sharpe* on October 6, 2005, well after the offense and even after Abdullah's original sentence. *Sharpe*, 216 Ill. 2d at

481.

Because the firearm enhancement statute was facially unconstitutional and void at the time Abdullah committed his offense, the enhancement added to his sentence is void. *People v. Price*, 2016 IL 118613, ¶31. The effect of declaring a statute unconstitutional is to revert to the statute as it existed before the amendment. *People v. Gersch*, 135 Ill.2d 384, 390 (1990). Abdullah therefore requests that this Court strike the 20-year firearm enhancement from his sentence for attempt murder.

CONCLUSION

For the foregoing reasons, Muhammad S. Abdullah, petitioner-appellant, respectfully requests that this Court vacate the sentences entered on November 17, 2005, and modified on January 20, 2006, and reinstate his original concurrent sentences of 40 years for murder and 20 years for attempt murder, which were entered August 17, 2005, pursuant to Argument I, or reduce the sentence for attempt murder to six years by removing the 20-year firearm enhancement, pursuant to Argument II.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David T. Harris, 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 41 pages.

/s/David T. Harris
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Assistant Appellate Defender

APPENDIX TO THE BRIEF

Muhammad S. Abdullah No. 123492

People v. Abdullah S. Muhammad, Lake County Circuit Court No.04 CF 1069, Second District Appellate Court No.2-06-0086

People v. Abdullah S. Muhammad, Lake County Circuit Court No.04 CF 1069, Second District Appellate Court No.2-06-0086

Witnesses	Direct	Cross	Redirect	Recross
Deshena Friar	R.0646	R.0650		
Luis Melendez	R.0653	R.0688	R.0713	
Demetrious Linder	R.0720	R.0737		
Bashir Linder	R.0753	R.0760		
Mike Cress	R.0769	R.0779		
Darcey Brown	R.0786	R.0790		
Salvatore Cecala	R.0792	R.0839	R.0848	
Leo Presley	R.0855	R.0875	R.0894	R.0896

William King	R.0906	R.0914		
Darcy Brown	R.0919	R.0926		
Jorge Mejia	R.0931	R.0937		
Michael Scheer	R.0944	R.0947		

Defense Witnesses				
William King	R.0964	R.0976		
Abdullah Muhammad	R.0978	R.1022	R.1047	R.1052
	R.1054			
Steven Newton	R.1055	R.1070	R.1072	R.1074
Michael Tyrone Bone	R.1082	R.1091		
Rosetta Abdullah	R.1100	R.1104		

People v. Abdullah S. Muhammad, Lake County Circuit Court No.04 CF 1069, Second District Appellate Court No.2-06-0086

Rebuttal Witnesses	Direct	Cross	Redirect	Recross
Fredrick Diez	R.1105	R.1117		

People v. Abdullah S. Muhammad, Lake County Circuit Court No.04 CF 1069, Second District Appellate Court No.2-06-0086

Supplemental Report of Proceedings - 11/17/2005
Imposition of Sentence

Supp. R. 8

2018 IL App (2d) 150840
No. 2-15-0840
Opinion filed February 27, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 04-CF-1069
MUHAMMAD S. ABDULLAH,	)	Honorable George Bridges,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Burke and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Muhammad S. Abdullah, appeals from an order of the circuit court of Lake County dismissing his petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). The petition sought relief regarding defendant's sentences for first-degree murder (720 ILCS 5/9-1(a) (West 2004)) and attempted first-degree murder (*id.* §§ 8-4(a), 9-1(a)). Defendant argues that orders modifying his original sentences are void because they were entered while an appeal was pending such that the trial court lacked jurisdiction over the case. Defendant alternatively argues that the orders are void, in part, because they were entered pursuant to a sentencing statute that was unconstitutional when the offenses were committed. We affirm.

¶ 2 Defendant's convictions arose from the shooting death of Marco Wilson and the nonfatal shooting of Luis Melendez. Defendant committed both crimes on March 15, 2004, and was found guilty following a jury trial. On August 17, 2005, the trial court sentenced defendant to concurrent prison terms of 40 years for first-degree murder and 20 years for attempted first-degree murder. On September 2, 2005, the State filed a "Motion to Impose Mandatory Minimum and Mandatory Consecutive Sentence." The State argued that consecutive sentences were mandatory under section 5-8-4(a)(i) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a)(i) (West 2004)). During the relevant time frame, section 5-8-4(a)(i) required consecutive sentences if "one of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." *Id.* Furthermore, for first-degree murder, the State sought to have defendant sentenced to a prison term of at least 45 years, representing the 20-year minimum prison term for that offense plus an additional 25 years because, in committing the offense, defendant personally discharged a firearm, causing Wilson's death (*id.* § 5-8-1(a)(1)(d)(iii)). On September 8, 2005, defendant filed a notice of appeal. On September 13, 2005, the State moved to dismiss the notice of appeal as untimely. The State argued that the sentences imposed on August 17, 2005, were invalid. According to the State, defendant could not bring an appeal until valid sentences had been imposed. On October 13, 2005, the trial court struck defendant's notice of appeal.

¶ 3 On November 17, 2005, the trial court resentenced defendant to consecutive prison terms of 50 years for first-degree murder and 31 years for attempted first-degree murder. Defendant moved for reconsideration, arguing, *inter alia*, that once the notice of appeal was filed the trial court lacked jurisdiction to increase defendant's sentences. The trial court rejected the argument. On January 20, 2006, the trial court reduced the prison term for attempted first-degree murder to

26 years, representing the 6-year minimum prison term for that offense plus an additional 20 years because, in committing the offense, defendant personally discharged a firearm (720 ILCS 5/8-4(c)(1)(C) (West 2004)). Defendant appealed, and we affirmed defendant's convictions and sentences. *People v. Muhammad*, No. 2-06-0086 (2008) (unpublished order under Illinois Supreme Court Rule 23) (*Abdullah I*).[1] Defendant subsequently filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)), which the trial court summarily dismissed (*id.* § 122-2.1(a)(2)).

¶ 4 On January 27, 2014, defendant filed a *pro se* petition under section 2-1401 in which he claimed that the addition of 25 years to his sentence for first-degree murder and 20 years to his sentence for attempted first-degree murder violated the constitutional prohibition of *ex post facto* laws. Defendant further argued that those additions to his sentences deprived him of due process because they were based on facts that were not alleged in the charging instrument and were not submitted to the jury and proved beyond a reasonable doubt. Defendant later filed *pro se* (1) a "Supplemental Argument," contending that the imposition of consecutive sentences likewise deprived him of due process, and (2) a "Motion for 'Additional § 2-1401 Relief from Void Judgment,' " contending that a fraudulent instruction had been given to the jury. Through counsel, defendant subsequently filed an "Amended Motion to Vacate a Portion of Defendant's Sentence as Void, Pursuant to 735 ILCS 2-1401; and, for Resentence," arguing again that the facts upon which the modifications to his sentences were based were not submitted to the jury and proved beyond a reasonable doubt. The State moved to dismiss defendant's petition and the

[1] We note that, although the record in that case gave defendant's name as Abdullah Muhammad, defendant represents himself, according to his own statement of his name on his *pro se* petition in this case, as Muhammad Abdullah.

trial court granted the motion. Defendant unsuccessfully moved for reconsideration and this appeal followed.

¶ 5 Section 2-1401 allows a litigant "to bring before the court facts which, had they been known at trial, would have prevented the entry of the contested judgment." *People v. Gray*, 247 Ill. App. 3d 133, 142 (1993). Normally, a petition under section 2-1401 must be filed more than 30 days, but not later than 2 years, after the entry of the judgment. 735 ILCS 5/2-1401(a), (c) (West 2016). The two-year limitations period does not apply where the petitioner alleges that the judgment is void. *Urban Partnership Bank v. Ragsdale*, 2017 IL App (1st) 160773, ¶ 16.

¶ 6 Defendant argues that the trial court's orders modifying his sentences were void for lack of jurisdiction. The State argues that the issues defendant raises are barred under the doctrines of *res judicata* and forfeiture. The State alternatively argues that the trial court had jurisdiction to modify defendant's sentences. We first consider the State's *res judicata* and forfeiture arguments.

¶ 7 In support of its *res judicata* argument, the State cites *People v. Johnson*, 2015 IL App (2d) 140388, which observed that " '[t]he doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the parties or their privies on the same cause of action.' " *Id.* ¶ 6 (quoting *People v. Carroccia*, 352 Ill. App. 3d 1114, 1123 (2004)). Collateral estoppel, which is a branch of *res judicata*, "provides a similar conclusive effect when the same parties or their privies attempt to relitigate the identical issues actually or necessarily decided by a court of competent jurisdiction in an earlier, but different, cause of action." *In re Marriage of Donnellan*, 90 Ill. App. 3d 1032, 1036 (1980).

¶ 8 The State observes that the effect of the notice of appeal was litigated in the trial court. However, in *People v. Harper*, 345 Ill. App. 3d 276, 285 (2003), cited by defendant in his reply brief, the court stated that, "[b]ecause a party may attack a void sentence literally 'at any time, either directly or collaterally' [citation], *res judicata* or the doctrine of waiver would not prevent a party from doing so [citation]." For the same reason, defendant did not forfeit his argument. *People v. Price*, 2016 IL 118613, ¶ 30 ("When we say that a judgment is void, that judgment may be challenged at any time, either directly or collaterally, and the challenge is not subject to forfeiture or other procedural restraints." (Internal quotation marks omitted.)). We therefore reject the State's arguments[2] and turn our attention to defendant's contention that his sentences are void.

¶ 9 It is well established that "the jurisdiction of the appellate court attaches upon the *proper filing* of a notice of appeal." (Emphasis added.) *Daley v. Laurie*, 106 Ill. 2d 33, 37 (1985). At that point, "the cause is beyond the jurisdiction of the trial court." *Id.* However, a premature notice of appeal is ineffective (*Penn v. Gerig*, 334 Ill. App. 3d 345, 353 (2002)) and does not divest the

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[2] In addition, the State argues that, in *Abdullah I*, we noted that defendant conceded that his sentences were "statutorily correct." *Abdullah I*, slip order at 14. In fact, defendant conceded only that the sentence for attempted murder was statutorily correct. More importantly, even if *res judicata* could bar relitigation of the question of voidness, the concession that the modified sentences were statutorily correct would not preclude defendant from arguing that the modified sentences are void because the trial court lacked jurisdiction to enter them. See *People v. Castleberry*, 2015 IL 116916, ¶ 15 (voidness is a question of jurisdiction, not statutory compliance).

trial court of jurisdiction (*McGary v. Illinois Farmers Insurance*, 2016 IL App (1st) 143190, ¶ 49).

¶ 10 The time for filing a notice of appeal in a criminal case is governed by Illinois Supreme Court Rule 606(b) (eff. Dec. 1, 1999). When defendant filed his notice of appeal, Rule 606(b) provided, in pertinent part:

> "Except as provided in Rule 604(d), the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion. When a timely post-trial or post-sentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending post-judgment motions shall have no effect and shall be stricken by the trial court. *** This rule applies whether the timely post-judgment motion was filed before or after the date on which the notice of appeal was filed." Ill. S. Ct. R. 606(b) (eff. Dec. 1, 1999).

¶ 11 Defendant filed his notice of appeal after the State filed its motion to modify his sentences but before the trial court ruled on that motion. Whether the trial court retained jurisdiction depends on whether the State's motion rendered defendant's notice of appeal ineffective. Defendant contends that it did not. He argues that, under Rule 606(b), only a motion filed by the defendant renders a notice of appeal ineffective. He also argues that no statute or Illinois Supreme Court rule authorized the type of motion that the State filed.

¶ 12 Defendant's argument initially requires us to interpret Rule 606(b). The principles of statutory construction likewise apply to the interpretation of supreme court rules. *People v.*

Geiler, 2016 IL 119095, ¶ 17. "In construing a statute or rule, our primary objective is to ascertain and give effect to the drafters' intent." *Id.* We look to the plain language of a statute or rule as the best indication of the drafters' intent. *Id.*

¶ 13 The first sentence of Rule 606(b) provides, in pertinent part, that "the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion." Ill. S. Ct. R. 606(b) (eff. Dec. 1, 1999). This sentence does not distinguish between motions filed by the defendant and those filed by the State. Under the plain language of this part of the rule, a notice of appeal filed before the disposition of a motion filed by either the defendant or the State would be premature and would not vest jurisdiction in the appellate court. Jurisdiction would thus remain in the trial court until the disposition of the motion.

¶ 14 Defendant's argument is founded on the second sentence of Rule 606(b), which provides, "[w]hen a timely post-trial or post-sentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending post-judgment motions shall have no effect and shall be stricken by the trial court." *Id.* Defendant interprets "counsel" to mean "defense counsel," such that only a pending *defense* motion renders the notice of appeal ineffective and requires it to be stricken. It is possible that the rule uses the term "counsel" in this limited sense. However, the State is also represented by counsel—usually an assistant state's attorney—in criminal cases, and the supreme court easily could have stated specifically "defense counsel." Accord *People v. Dunson*, 316 Ill. App. 3d 760 (2000) (where criminal case was prosecuted by assistant state's attorney who was not licensed to practice law, conviction was void). Thus, it is

possible to read "counsel" as a reference to counsel for the State as well as to counsel for the defendant.

¶ 15 In light of the foregoing, we conclude that Rule 606(b) is ambiguous. "A statute is ambiguous if it is capable of more than one reasonable interpretation." *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 11. When interpreting an ambiguous statute, "[a] court may look to the nature, purpose and necessity of the statute, any evils the statute was intended to remedy, and the consequences of each alternative construction." *Cella v. Sanitary District Employees' & Trustees' Annuity & Benefit Fund*, 266 Ill. App. 3d 558, 563 (1994).

¶ 16 Consideration of the consequences of the two alternative constructions favors reading "counsel" to include counsel for the State. If the trial court loses jurisdiction when a defendant files a notice of appeal while a motion by the State is pending, the appellate court would be unable to decide all of the issues before the trial court. Unless the defendant's conviction is reversed, a remand would be necessary to resolve the State's motion. If the State's motion were granted, the defendant might very well bring a second appeal. Considerations of judicial economy militate against that outcome. In contrast, if "counsel" includes counsel for the State, these problems are avoided. No appeal will take place until the State's motion has been resolved, and the appellate court will therefore have the opportunity to consider all issues in a single appeal.

¶ 17 The foregoing assumes that the State is entitled to file a motion to correct sentences that do not conform to the law. Defendant argues that the State may not file such a motion. Defendant contends that there is no statute or court rule that authorizes the State to do so. We are aware of no authority stating that all motions in criminal cases must be authorized by statute or rule. The cases cited by defendant—*People v. Miraglia*, 323 Ill. App. 3d 199 (2001), and *People*

v. Neal, 286 Ill. App. 3d 353 (1996)—are inapposite. In *Miraglia*, this court held that the defendant's second motion directed against the judgment did not extend the time for filing his notice of appeal. In *Neal*, it was held that a defendant who was represented by counsel had no authority to file a *pro se* motion directed against the judgment. The court further held that the unauthorized motion did not extend the time for filing a notice of appeal and did not nullify a notice of appeal filed within 30 days after the entry of the judgment. Accordingly, we reject defendant's argument.

¶ 18 Defendant next challenges, on constitutional grounds, the enhancement of his sentence for attempted first-degree murder. Defendant notes that in *People v. Morgan*, 203 Ill. 2d 470 (2003), the statute providing for such an enhancement was held to violate the proportionate-penalties clause of our state constitution. The *Morgan* court applied a cross-comparison analysis. However, as defendant notes, in *People v. Sharpe*, 216 Ill. 2d 481 (2005), our supreme court abandoned the cross-comparison analysis. Defendant admits that, under *Sharpe*, the applicable enhancement statute is presently constitutional. Defendant argues, however, that because he committed attempted murder during the interval between the decisions in *Morgan* and *Sharpe*, *Morgan* is controlling. According to defendant, during the interval between *Morgan* and *Sharpe*, the statute was unconstitutional on its face and therefore void *ab initio*. Thus, according to defendant his sentence is void.

¶ 19 In support of the proposition that *Morgan* controls here, defendant cites a California decision, *People v. Visciotti*, 825 P.2d 388 (Cal. 1992). As pertinent here, *Visciotti* relied, in part, on *In re Baert*, 252 Cal. Rptr 418 (Ct. App. 1988). In *Baert*, the court was called upon to decide which of two decisions interpreting a death penalty aggravating factor was applicable to a crime committed in the interval between the decisions. The earlier decision added an element to the

State's burden of proof. The later decision eliminated that element. The *Baert* court held that the later decision, if applied to crimes committed during the interval between the two decisions, would function as an *ex post facto* law.

¶ 20 Defendant's reliance on *Visciotti* (and, by implication, *Baert*) is misplaced. *Visciotti* and *Baert* do not support the proposition that the constitutionality of a statute varies over time. Here, the firearm enhancement factor for attempted murder was not unconstitutional prior to *Sharpe*; it was erroneously held to be unconstitutional. *Sharpe* might have functioned as an *ex post facto* law in this case, but it is too late to correct that error. Given that defendant did not file his petition within the ordinary two-year limitations period for section 2-1401 proceedings, he must show that the judgment he challenges is void. Defendant's only theory of voidness is that the applicable statute is void *on its face*. "A statute is facially invalid only if there is no set of circumstances under which the statute would be valid." *People v. Gray*, 2017 IL 120958, ¶ 58. An *ex post facto* challenge to a criminal law does not apply to crimes committed after the law takes effect, so the law is not unconstitutional on its face.

¶ 21 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 22 Affirmed.

Received 03/21/2018

STATE OF ILLINOIS
APPELLATE COURT
SECOND DISTRICT

CLERK OF THE COURT
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55 SYMPHONY WAY
ELGIN, IL 60120

TDD
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March 21, 2018

David Toby Harris
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601

RE: People v. Abdullah, Muhammad S.
General No.: 2-15-0840
County: Lake County
Trial Court No: 04CF1069

The Court today denied the petition for rehearing filed in the above entitled cause. The mandate of this Court will issue 35 days from today unless otherwise ordered by this court or a petition for leave to appeal is filed in the Illinois Supreme Court.

If the decision is an opinion, it is hereby released today for publication.

Honorable Robert D. McLaren
Honorable Michael J. Burke
Honorable Joseph E. Birkett

Robert J. Mangan
Clerk of the Appellate Court

cc: Barry W. Jacobs
Thomas Armond Lilien

Received 9/26/18

SUPREME COURT OF ILLINOIS

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September 26, 2018

In re: People State of Illinois, Appellee, v. Muhammad S. Abdullah, Appellant. Appeal, Appellate Court, Second District.
123492

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

A-1/2

No. 123492

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MUHAMMAD S. ABDULLAH Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-15-0840. There on appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 04 CF 1069. Honorable George Bridges, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

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Michael G. Nerheim, Lake County State's Attorney, 18 N. County St., 4th Floor, Waukegan, IL 60085, StatesAttorney@lakecountyil.gov;

Mr. Abdullah S. Muhammad, A/K/A Abdullah, Muhammad S., Register No. B77435, Stateville Correctional Center, P.O. Box 112, Joliet, IL 60434

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. On January 24, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Carol Chatman
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