

PRAYER FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rules 315, 604(a)(2), and 612(b), the People of the State of Illinois respectfully petition for leave to appeal from the judgment of the Appellate Court, Third District, reversing the trial judge's dismissal of defendant's *pro se* post-conviction petition as frivolous and patently without merit. The Third District's decision here relied on the holding in People v. White, 2011 IL 109616, that the trial court must impose the firearm enhancement as part of the sentence where the factual basis supports it, regardless of whether the parties excluded the enhancement in the plea agreement. Id. at ¶ 23-27. However, the Third District's decision conflicts with the holding in People v. Avery, 2012 IL App (1st) 110298, that the ruling in White may not be applied retroactively to cases on collateral review. Avery, at ¶ 30, citing Teague v. Lane, 489 U.S. 288 (1989).

Leave to appeal should be allowed to resolve the conflict between Avery and the majority's holding here and to instruct courts generally on this issue. Alternatively, the Court should exercise its supervisory authority to remand the case so the People may amend both the indictment and the factual basis for the plea agreement.

STATEMENT REGARDING JUDGMENT AND REHEARING

Defendant pleaded guilty to first degree murder and was sentenced to thirty years of imprisonment. In lieu of a direct appeal, defendant filed a *pro se* postconviction petition. After the trial judge summarily dismissed the petition as frivolous and patently without merit, defendant appealed. The appellate court reversed and remanded in an opinion filed on August 2, 2013. The People did not seek rehearing.

POINT RELIED UPON IN SEEKING REVIEW

The Third District's Ruling Here, That People v. White Applies Retroactively To Cases On Collateral Review Conflicts With The First District's Decision In People v. Avery.

STATEMENT OF FACTS

Defendant pled guilty to first degree murder on May 4, 2011 (C. 329) and was sentenced to thirty years of imprisonment. Rather than seeking a direct appeal, defendant filed a *pro se* postconviction petition (C. 363-365), which the trial judge summarily dismissed as frivolous and patently without merit. (C. 361)

On appeal, defendant argued that the trial judge erred in summarily dismissing his postconviction petition at the first stage, contending that he presented the gist of a constitutional claim. His negotiated guilty plea was void. (Def's. Br. at 7-12) The People responded that White did not apply retroactively and that the trial judge did not err in summarily dismissing defendant's post-conviction petition. The appellate court reversed and remanded the trial court's judgment in an opinion filed on August 2, 2013.

ARGUMENT

The Third District's Judgment Here, that the Rule of People v. White Applies Retroactively to Cases on Collateral Review, Conflicts with the First District's Decision in People v. Avery.

The Appellate Court erroneously determined that defendant's sentence was void based on People v. White, 2011 IL 109616. The court held that White would apply retroactively because the case did not break new ground or impose a new obligation on the States or the Federal Government. Id., at ¶ 12. People v. Avery, 2012 IL App (1st) 110298, previously decided this issue and held that White did not apply retroactively to cases on collateral review. Here, the Third District disagreed with the holding in Avery. But Avery's reasoning is sound and should apply to the present case.

Avery entered into a negotiated plea agreement and pleaded guilty to one count of first degree murder in exchange for a sentence of thirty-three years of imprisonment and the dismissal of all remaining charges. Id. at ¶ 4. Count I of the indictment alleged: "Jacques Avery committed the offense of first degree murder in that he, without lawful justification, intentionally or knowingly shot and killed Eduardo Flores while armed with a firearm." Id. at ¶ 4. Avery filed a *pro se* motion to withdraw his guilty plea and a motion for new counsel. Both motions were denied. Id. at ¶ 14. Avery then appealed the dismissal of his *pro se* motion to withdraw his guilty plea, asserting that his guilty plea was void because his thirty-three year sentence fell below the minimum sentence required by the statute for first degree murder while armed with a firearm. The appellate court rejected the argument.

Following the summary dismissal of his *pro se* postconviction petition, on postconviction appeal, Avery argued for the first time that his plea and

sentence were void under this Court's decision in White. The appellate court ultimately concluded that White set forth a new rule of law that could not be applied to a case on collateral review. Id. at ¶ 30-46, (Citing See People v. Flowers, 138 Ill.2d 218, 237 (1990)("Flowers I"); adopting, Teague v. Lane, 489 U.S. 288, (1989). The same result is warranted here.

White's new rule of law, decided on direct appeal of the denial of a motion to withdraw a guilty plea, is not dispositive of the present collateral appeal. Teague's nonretroactivity test compels the conclusion that prior to this Court's decision in White,

there was confusion as to whether the State could, in its discretion, negotiate pleas that did not include the firearm enhancement for first degree murder, even where the factual basis for the plea included the use of a firearm in the commission of the offense, since it was within the State's discretion to determine what charges to pursue.

Avery, 2012 IL App (1st) at ¶ 39.¹

Teague sets out a three-step process for determining the applicability of a new rule on collateral review. 489 U.S. 301. A rule is "new" if it "was not *dictated* by precedent existing at the time the defendant's conviction became final." Id. (emphasis in original). A defendant's conviction is deemed final when his time for filing a direct appeal has expired. People v. Simmons, 388 Ill.App.3d 599, 903 N.E.2d 437, 448 (1st Dist. 2009). Pursuant to Teague, a new rule applies on collateral review only if it: (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law making

¹ But cf. People v. Hubbard, 2012 IL App (2d) 120060, ¶ 17 n.1 (declining to decide whether the rule in White is retroactive under Teague).

authority to proscribe”; or (2) “requires the observation of those procedures that are implicit in the concept of ordered liberty.” Flowers I, 138 Ill.2d at 241.

Because defendant did not move to withdraw his plea, as he must to pursue a direct appeal, his conviction became final thirty days after the trial court entered judgment — i.e., on June 3, 2011. See People v. Flowers, 208 Ill.2d 291, 303 (2003) (“Flowers II”). This date preceded the Court’s decision in White on June 16, 2011.

Because precedent as of the date petitioner’s conviction became final did not dictate that the first degree murder firearm enhancement is automatically triggered when it is part of the factual basis for the underlying offense, regardless of whether the State seeks to pursue it as an aggravating factor, the White rule is new. Therefore, the White rule is new within the meaning of Teague. See Simmons, 903 N.E.2d at 449 (existence of “confusion and disagreement” as to appropriate rule means precedent did not “dictate” a particular result).

Accordingly, to apply the White rule retroactively, petitioner must meet one of Teague’s narrow exceptions. He cannot because White did not involve the criminality of primary conduct, nor did it espouse a rule that is essential to due process. Rather, White merely mandated the application of the firearm enhancement provision of the murder statute (730 ILCS 5/5-8-1(a)(1)(d)(i) (2004)) any time the factual basis of a plea agreement includes the use of a firearm. Avery, at ¶ 46. Accordingly, the rule “affects the enhancement of a defendant’s sentence” and not the integrity or the reputation of the judicial system. Id. Therefore, if Teague’s rule applies, petitioner cannot obtain a remedy under White in this postconviction action. See Flowers I, 138 Ill.2d at 242 (declining to apply new rule that did not meet either exception).

Alternatively, this Court should exercise its supervisory authority to remand the case so the People may amend both the indictment and the factual basis for the plea agreement. This solution neither prejudices defendant nor provides him a windfall when he seeks to withdraw his plea after a passage of time or the loss of witnesses. See Smith, at ¶ 15-16.

This Court should allow leave to appeal to resolve the conflict between the appellate districts regarding the retroactive application of this Court's decision in White.

CONCLUSION

The People request that this Court allow leave to appeal from the judgment of the Illinois Appellate Court, Third District. Alternatively, this Court should exercise its supervisory authority to remand the case so the People may amend both the indictment and the factual basis for the plea agreement.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
100 West Randolph, 12th Floor
Chicago, Illinois 60601

PATRICK DELFINO
Director
TERRY A. MERTEL
Deputy Director
Nadia L. Chaudhry
Staff Attorney
State's Attorneys
Appellate Prosecutor
628 Columbus Street, Suite 300
Ottawa, Illinois 61350
(815) 434-7010

James W. Glasgow
State's Attorney
Will County Courthouse
Joliet, Illinois 60431
(815) 727-8453

OF COUNSEL

COUNSEL FOR PLAINTIFF-PETITIONER
PEOPLE OF THE STATE OF ILLINOIS

CERTIFICATE OF COMPLIANCE

I certify that this petition for leave to appeal conforms to the requirements of Rules 315(c) and 341(a). The length of this petition for leave to appeal, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the petition for leave to appeal under Rule 342(a), is 7 pages.

/s/Nadia L. Chaudhry

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APPENDIX

2013 IL App (3d) 110738

Opinion filed August 2, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

v.

MICKEY D. SMITH,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
) Will County, Illinois,
)
) Appeal No. 3-11-0738
) Circuit No. 10-CF-1345
)
) Honorable
) Amy M. Bertani-Tomczak,
) Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court, with opinion
Justice Carter specially concurred, with opinion, joined by Presiding Justice Wright.

OPINION

¶ 1 Pursuant to a fully negotiated plea agreement, defendant, Mickey D. Smith, pled guilty to first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and was sentenced to 30 years' imprisonment. Defendant appeals from the summary dismissal of his postconviction petition, arguing that he presented the gist of a constitutional claim that his sentence is void. We reverse and remand.

¶ 2 **FACTS**

¶ 3 On May 4, 2011, defendant entered into a fully negotiated plea agreement, in

which he pled guilty to one count of first degree murder. 720 ILCS 5/9-1(a)(2) (West 2010). The indictment and factual basis for the plea established that on June 29, 2010, defendant shot and killed Douglas White with a handgun. During the admonitions, the trial court advised defendant that the State was withdrawing its notice of intent to seek a firearm enhancement of 25 years. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). Defendant was then advised that he was eligible for a sentence of 20 to 60 years' imprisonment. Defendant's plea was accepted, and the court sentenced defendant to the agreed 30 years' imprisonment. Defendant did not pursue a direct appeal.

¶ 4 On August 16, 2011, defendant filed a *pro se* postconviction petition, alleging that his guilty plea should be vacated under *People v. White*, 2011 IL 109616. Defendant alleged that his plea agreement and sentence were void because he was neither admonished of, nor did his sentence include, the mandatory firearm enhancement, which was statutorily required based on the factual basis for his plea. The trial court summarily dismissed defendant's petition as frivolous and patently without merit, noting that defendant received the benefit of his plea agreement when the State withdrew its intent to seek the firearm enhancement. Defendant filed a motion to reconsider, which the trial court denied. Defendant appeals.

¶ 5 ANALYSIS

¶ 6 On appeal, defendant contends that his plea agreement and 30-year sentence are void because they do not conform to statutory requirements. Specifically, defendant argues that because the indictment and factual basis for his plea assert that he personally discharged a firearm during the commission of the offense, the trial court was required to

impose a 25-year firearm enhancement, thereby requiring him to serve a minimum of 45 years' imprisonment.

¶ 7 The Post-Conviction Hearing Act provides for a three-stage review process for the adjudication of postconviction petitions. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 8 Section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections sets out a sentencing enhancement for use of a firearm and provides that if, during the commission of the offense, defendant personally discharged a firearm that proximately caused death to another, 25 years shall be added to the term of imprisonment. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). The indictment and factual basis for defendant's plea revealed that he shot and killed the victim with a firearm.

¶ 9 Defendant relies on *White*, 2011 IL 109616, to support his claim that his 30-year sentence is void because it did not include the mandatory firearm enhancement. In *White*, our supreme court held that the trial court must impose the firearm enhancement as part of the sentence where the factual basis supports it, regardless of whether the parties excluded the enhancement in the plea agreement. *Id.* at ¶¶ 23-27. The court held that because defendant's sentence did not include the mandatory sentencing enhancement,

which was required based on the factual basis for the plea, the sentence did not conform to the statutory requirements and was therefore void. *Id.* at ¶¶ 21, 29. Additionally, the court noted that because defendant was not properly admonished regarding the enhancement, his entire plea agreement was also void. *Id.* at ¶ 21.

¶ 10 Here, the factual basis for defendant's plea referred to defendant's use of a firearm, which caused the victim's death. Thus, under the firearm enhancement statute, the trial court was required to add 25 years to the 20-year minimum sentence defendant faced for first degree murder, thereby requiring a minimum sentence of 45 years. See 730 ILCS 5/5-4.5-20(a)(1), 5-8-1(a)(1)(d)(iii) (West 2010); *White*, 2011 IL 109616. Since defendant's 30-year sentence fell below the mandatory minimum sentence, his sentence is void. See *White*, 2011 IL 109616. Here, there was no admonishment about the firearm enhancement because it was understood by all that the State was seeking a sentence without the enhancement and defendant understood that his sentence would not include the enhancement.

¶ 11 The State, noting that *White* was issued after this case was decided in the trial court, relies on *People v. Avery*, 2012 IL App (1st) 110298, to claim that *White* announced a new rule of law and thus cannot be applied retroactively to the instant case. In *Avery*, the court found that prior to *White*, the law was unclear as to whether the State could negotiate pleas that did not include the firearm enhancement, even where the indictment and factual basis for the plea included the use of a firearm in the commission of the offense. *Avery*, 2012 IL App (1st) 110298. The court emphasized the lack of clarity by citing to its prior ruling on defendant's direct appeal, where the court held that

defendant's sentence was not void, even though the factual basis supported an enhancement that was not imposed. *Id.* at ¶ 39. The court claimed that *White* created a new rule, not dictated by existing case law, when it mandated the application of a firearm enhancement any time the factual basis for the guilty plea supports it. *Id.* at ¶¶ 39-40.

¶ 12 We respectfully disagree with *Avery*. As set out in *Avery*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Avery*, 2012 IL App (1st) 110298, ¶ 37 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). *White* did not break new ground or impose a new obligation. Instead, *White* specifically relied upon existing precedent, which set out the long-standing rule that courts are not authorized to impose a sentence that does not conform to statutory guidelines, because a sentence not authorized by law is void. See *People v. Whitfield*, 228 Ill. 2d 502 (2007); *People v. Harris*, 203 Ill. 2d 111 (2003); *People v. Pullen*, 192 Ill. 2d 36 (2000); *People v. Arna*, 168 Ill. 2d 107 (1995); *People v. Wade*, 116 Ill. 2d 1 (1987). Thus, even without *White*, in applying the rules of law that existed at the time defendant's conviction became final, his sentence is void because it fell below the mandatory minimum. See *People v. Torres*, 228 Ill. 2d 382 (2008) (noting that a sentence is void when it falls outside the lawful sentencing range required by a firearm enhancement); *People v. Thompson*, 209 Ill. 2d 19 (2004) (holding that a court has no authority to impose a sentence that is not authorized by statute); *People ex rel. Ryan v. Roe*, 201 Ill. 2d 552 (2002) (holding that a sentence agreed to by the parties and imposed by the trial court is void when in violation of a statute).

¶ 13 Furthermore, the majority and concurring opinion in *White* lead us to believe that

a new rule was not created. The court emphasized that the State has always retained the authority to negotiate around the mandatory sentence enhancement, but must do so by amending the indictment and presenting a factual basis that does not include any allegations that would invoke the enhancement. *White*, 2011 IL 109616; *id.* (Theis, J., specially concurring). We also find support for our position in *People v. Cortez*, 2012 IL App (1st) 102184, and *People v. Hubbard*, 2012 IL App (2d) 120060. In *Cortez*, the court relied on *White* to vacate a plea agreement that contained unauthorized sentencing credit. *Cortez*, 2012 IL App (1st) 102184. Similarly, in *Hubbard*, the court followed the principles of *White* when it held that the State and a defendant have the right to negotiate what facts are presented to the court in support of a plea agreement, but those facts must be statutorily consistent with the agreed sentence. *Hubbard*, 2012 IL App (2d) 120060. Although the court did not expressly rely on *White* to grant relief, it suggested that the holding in *White* did not create a new rule, as it applied the rule of law established in *Arna*, 168 Ill. 2d 107. See *Hubbard*, 2012 IL App (2d) 120060.

¶ 14 Accordingly, we conclude that *White* did not create a new rule of law and is therefore applicable to the instant case. In finding that defendant's sentence is clearly void for noncompliance with the mandatory sentencing enhancement, we need not remand for further postconviction proceedings on this issue. See *People v. Jimerson*, 166 Ill. 2d 211 (1995) (finding that remand for further postconviction proceedings unnecessary where the error is plain from the record). Instead, we remand this cause to the trial court with directions to allow defendant to withdraw his guilty plea and proceed to trial, if he chooses.

¶ 15 While the law compels this result, the author (and as is made clear by the special concurrence, only the author) is less than satisfied with the result. As the trial court pointed out in dismissing defendant's postconviction petition, defendant received the benefit of his plea agreement (or would have, had the sentence not been void). The State made it clear that it was not seeking a firearm enhancement as part of the plea negotiation. In *White*, the supreme court pointed out (specifically Justice Theis in her special concurring opinion) the State needed to do more than state it was not seeking the mandatory firearm enhancement; it needed to amend the indictment and present a factual basis that did not include a reference to a firearm. *White*, 2011 IL 109616, ¶ 41 (Theis, J., specially concurring). Therefore, because the State failed to amend the indictment and rephrase the factual basis of the plea to conform to what clearly was the agreement of the parties, this sentence is void; because it is void, this sentence can be attacked at any time. This scenario raises the spectre of some real mischief that might be lurking in the bushes. We have no idea how many other such void sentences based upon knowing agreements between the State and defendants are out there. It seems reasonable to assume that there are a number of them. A defendant incarcerated under such an agreement can wait until he knows that a key witness or witnesses have disappeared and then raise this argument in a postconviction petition, knowing that the State's chances of convicting him of the offense to which he pled guilty are greatly reduced, if not totally obviated. This does not seem like a happy circumstance. The supreme court recently acknowledged this problem in *People v. Donelson*, 2013 IL 113603, ¶ 17. However, in *Donelson*, the court was able to make the agreed sentence fit within statutory guidelines. Here, because of the State's

failure to amend the indictment and factual basis, we cannot do the same.

¶ 16 If able, I would send this case back to the trial court and give the State the opportunity to conform the indictment and factual basis for the plea agreement to the original plea agreement. Then if, and only if, the State would refuse to amend the indictment and factual basis would I instruct the trial court to allow defendant to withdraw his guilty plea and proceed to trial. There is no prejudice to a defendant in this approach since it gives defendant exactly that for which he or she bargained. Had the State simply amended the indictment and the factual basis from "defendant shot the victim," to "defendant intentionally murdered the victim," the sentence would not be void. Again, by allowing the State to amend the indictment and factual basis for the plea, we would be doing nothing more than conforming the record to actually reflect what was clearly the agreement between defendant and the State. This would visit no prejudice upon defendant and would obviate the risks associated with allowing a defendant to withdraw a knowing plea after the passage of time. It also seems that this approach would do nothing to further escalate the natural tension that exists between the General Assembly's power to prescribe penalties, even mandatory penalties, and the State's Attorney's exclusive discretion with respect to what charges, if any, to prosecute. Just a thought.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause is remanded with directions.

¶ 19 Reversed and remanded with directions.

¶ 20 JUSTICE CARTER, specially concurring.

¶ 21 I agree with the conclusion that this case should be reversed and remanded with directions to allow the defendant to withdraw his guilty plea and to proceed to trial, if he so chooses. However, I write separately to clarify that I do not join in paragraphs 15 and 16 of the lead opinion.

¶ 22 PRESIDING JUSTICE WRIGHT joins in this special concurrence.