No. 125642

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- CHALEAH BURGE, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-17-0399. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 16-CM-1074. Honorable John R. Kennedy, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

Because the legislature intended that all defendants pleading guilty do so knowingly and intelligently – not just those pleading guilty at arraignment – this Court should find that the admonishments required by 725 ILCS 5/113-4(c), regarding the potential consequences of pleading guilty, are mandatory and apply to *all* guilty pleas. Alternatively, this Court should find that a manifest injustice occurred when Chaleah Burge's guilty plea was accepted where she was not first admonished in accordance with 725 ILCS 5/113-4(c)(4)(B).

In her opening brief, Chaleah Burge argued that the appellate court erred in finding the admonishments required by 725 ILCS 5/113-4(c)(4)(B) (2017), addressing the possible employment consequences of pleading guilty, only apply at arraignment. The State disagrees, suggesting the statute's plain language, structure, and relationship to other statutes governing guilty pleas shows that section 113-4 only applies at arraignment. However, when viewed in the context of the interdependent system of statutes and Illinois Supreme Court Rules governing guilty pleas, section113-4 applies to every guilty plea – including Burge's.

Burge also argued that the provisions of subsection 113-4(c) are mandatory, rather than permissive, and are also mandatory, rather than directory. Before the appellate court the State did not dispute that the statute is mandatory, instead of permissive. As such, this issue is not properly before this Court, and the appellate court's finding that it is mandatory should stand. See *Certain Underwriters at Lloyd's London v. Metropolitan Builders, Inc.,* 2019 IL App (1st) 190517, ¶ 22 ("It is fundamental that the forum of courts of appeal should not be afforded to successful parties who may not agree with the reasons, conclusion, or findings below."); *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) (citing *People v. Harvey*, 211 Ill. 2d 368, 385 (2004)) ("The rule of invited error or acquiescence is a procedural default sometimes described as estoppel."); "*People v. Burge*, 2019 IL App (4th) 170399, ¶¶ 30-31. Because the State now concedes the statute is mandatory, not directory, it effectively concedes Burge is entitled to withdraw her plea.

Finally, even if this Court does not agree the statute is mandatory, Burge should be allowed to withdraw her plea because a manifest injustice occurred when she suffered prejudice after receiving inadequate admonishments.

A.

The legislature intended that the admonishments required under subsection 113-4(c) be given at all guilty pleas, not only at guilty pleas entered at arraignment.

Burge contends that subsection 113-4(c) – detailing the penalties and potential consequences of pleading guilty a defendant must be advised of – applies to all guilty pleas. The State disagrees, arguing section 113-4 only governs pleas made at arraignment. (St. Br., 10) The State argues that Burge views the issue too generally. (St. Br., 9) According to the State, the most reliable indicator of legislative intent is to give the language of the statute its plain and ordinary meaning. (St. Br., 8) The State follows the appellate court down the rabbit hole to the absurd conclusion that section 113-4 only applies at arraignment by viewing isolated portions of the guilty plea statutory scheme in a vacuum. (St. Br., 9-14).

But this Court's view is not so constrained, as interpretation of a statute is not confined to a literal examination of the statute's language. (St. Br., 8-9); *People v. Pronger*, 118 Ill. 2d 512, 520 (1987); see also *People v. McCarty*, 223 Ill. 2d 109, 133-134 (2006) (citing *People v. Taylor*, 221 Ill. 2d 157, 161 n. 1 (2006); *Land v. Board of Education of the City of Chicago*, 202 Ill.2d 414, 422 (2002)). Statutes addressing the same subject, and the various provisions of a single statute, must all be considered together as a whole and given a "harmonious effect." *McCarty*, 223 Ill. 2d at133-134. In other words, each guilty plea stands on a foundation built brick by brick from the relevant Rules and statutory provisions governing guilty pleas. When a brick is missing, the entire structure loses its integrity.

The State argues that construing section 113-4 as applying only at arraignment does not require every statute in Article 113 (titled "Arraignment")

be limited to arraignment. (St. Br., 16-17) The State frames Burge's argument as suggesting that if section 113-4 is limited to pleas tendered at arraignment, then the right to counsel provided for by section 113-3 must also be so limited, as it falls under Article 113. (St. Br., 16-17) The State flips Burge's argument on its head. It is the fact that there are other provisions under Article 113 that are not limited to applying at arraignment that indicates the legislature never intended such a limitation to apply to Article 113's provisions. (Def. Opening Br., 17-20) And, the State agrees that whether other statutes in Article 113 only apply at arraignment depends on the plain language of those statutes. (St. Br., 17)

Illinois Supreme Court Rule 402 requires that before a guilty plea can be accepted the court must provide certain admonishments, and determine whether the plea is voluntary and if there is a factual basis for it. Ill. S. Ct. Rule 402. But the specific details necessary to comply with Rule 402 are found in a variety of complementary statutes. "[Illinois Supreme Court] Rules 402, 604(d) and 605(b), which concern guilty pleas, are meant to mesh together not only to ensure that defendants' constitutional rights are protected, but also to avoid abuses by defendants." *People v. Wilk*, 124 Ill. 2d 93, 103 (1988). "These rules are not written in a vacuum and they represent our best efforts at ordering the complex and delicate process of plea bargains and guilty pleas." *Wilk*, 124 Ill. 2d at 104. The Rules and statutes governing guilty pleas are interdependent. For example, in order to properly admonish a defendant regarding the possible sentence that could be imposed, as required by Rule 402(a)(2), the court must rely on information found in: (1) the statute outlining the offense – to determine what class of offense applies; (2) the statute listing the possible penalties for that class of offense; and (3) the statute explaining when consecutive sentences can be imposed.

Without the complimentary statutes, a court would be unable to fully comply with Rule 402. As such, when the foundation of necessary Rules and statutes a

plea rests on is missing a brick, that plea loses its integrity, and cannot stand. See *People v. Whitfield*, 217 Ill. 2d 177, 188, 205 (2005) (finding Rule 402 was not complied with where the defendant was not admonished regarding the MSR period that was part of the sentence imposed). Similarly, subsection 113-4(c) – outlining the penalties and potential consequences of pleading guilty – compliments Rule 402, and facilitates enforcing its purpose of ensuring defendants pleading guilty do so knowingly, intelligently, and voluntarily. See *People v. Dougherty*, 394 Ill. App. 3d 134, 138 (3rd Dist. 2009) (purpose of Rule 402 admonishments is to ensure a defendant understands his plea, the rights he waives by pleading guilty, and the consequences of that action).

The State claims that – just as knowing the purpose of statutory speed limits does not indicate where and when those limits apply without guidance from roadside signs – knowing the purpose of subsection 113-4(c) does not indicate when it applies without additional direction. (St. Br., 9) The State argues that the language in each of the subsections of section 113-4 confirms the statute only applies at arraignment, unless otherwise specified. (St. Br., 10) To the contrary, accepting the State's invitation to look at the plain language of section 113-4 reveals that the statute provides the necessary direction that its provisions apply to all guilty pleas where it does not explicitly state otherwise. (St. Br., 8) Section 113-4 is labeled "plea." 725 ILCS 5/113-4 (2017). Thus, the statute clearly applies to pleas. 725 ILCS 5/113-4. Section 113-4 has no general provisions that apply to all of its subsections. 725 ILCS 5/113-4. Absent any limiting qualifiers, the plain language indicates that the statute applies to *all* pleas. Taken at face value, section 113-4 applies any time a defendant pleads guilty; no clarifying roadside signs required.

A plain reading of each subsection of 113-4 establishes the legislature clarified where it intended to limit application of a certain provision. 725 ILCS 5/113-4; see *People v. Edwards*, 2012 IL 111711, ¶ 27 ("Where language is included in one

section of a statute but omitted in another section of the same statute, we presume the legislature acted intentionally and purposely in the inclusion or exclusion.").

First, subsection 113-4(a) specifies "[w]hen called upon to plead *at arraignment*" a defendant shall be furnished with a copy of the charge and shall plead guilty, guilty but mentally ill, or not guilty. 725 ILCS 5/113-4(a) (2017). Subsection 113-4(a) is the only portion of section 113-4 explicitly limiting its application to arraignment. Yet the State contends reading this language in the context of the statute's structure, and in relation to other statutes addressing guilty pleas, somehow adds unwritten limiting language to all of section 113-4. (St. Br., 9-10) But the statutory structure and interplay with other provisions governing guilty pleas infers no such limitation. As explained in Burge's opening brief, some of section 113-4' s provisions apply to proceedings outside of arraignment. (Def. Opening Br., 13-19) And, if the legislature intended"at arraignment" to apply to all of the subsections, it would have added a top-line provision to the statute saying so, and nested the various subsections below it. See *Edwards*, 2012 IL 111711, ¶ 27. Instead, it only included that language in subsection 113-4(a).

Second, subsection 113-4(b) directs that where a "defendant stands mute a plea of not guilty shall be entered for him and the trial shall proceed on such plea." 720 ILCS 5/113-4(b)(2017). The State indicates arraignment is the only time this question can arise, and suggests subsection 113-4(b) cannot be construed as a statute governing trial. (St. Br., 11) On that basis, the State argues the language in subsection 113-4(b) is consistent with interpreting all of section 113-4 as applying only at arraignment. (St. Br., 11) The State views the subsection's plain language in a vacuum. Subsection 113-4(b) provides a circumstance where a case should proceed to trial – thus addressing a matter other than arraignment. 720 ILCS 5/113-4(b). Subsection 113-4(b) does not provide procedural rules as to how a trial should proceed, relying on other statutes for that guidance. In that regard subsection

113-4(b) is one of the many bricks building the foundation of all pleas. See *Wilk*, 124 Ill. 2d at 103-104; *Pronger*, 118 Ill. 2d at 520; *McCarty*, 223 Ill. 2d at 133-134.

Third, the State concedes subsections 113-4(c) (providing admonishments regarding the penalties and consequences of pleading guilty) and 113-4(d) (providing for the acceptance of a plea of guilty but mentally ill) – which both indicate a plea "shall not" be accepted unless its provisions are complied with – could govern pleas that are not made at arraignment. (St. Br., 13) But the State argues the existence of 725 ILCS 5/115-2 (2017) (providing direction for the acceptance of pleas of guilty and guilty but mentally ill before or during trial) demonstrates this is not the case. (St. Br., 13) According to the State, construing subsection113-4(c) as prohibiting a court from accepting a plea before or during trial without first admonishing the defendant of the collateral consequences of entering that plea creates a conflict with section 115-2(a), which provides the parameters for accepting pleas of guilty and guilty but mentally ill before or during trial. (St. Br., 13-14) In a footnote the State also alleges Burge conceded section 115-2(a) does not require admonishments regarding collateral consequences because she admitted the previous version of subsection 113-4(c) did not require them, and the language of those two statutes is materially indistinguishable. (St. Br., 14, n. 3) The State concludes that if the legislature intended the admonishments in subsection 113-4(c) be required before accepting a plea before or during trial, it would have included them in subsection115-2(a). (St. Br., 14)

First, the plain language of subsection 113-4(c) indicates what should happen "[i]f the defendant pleads guilty * * *." 725 ILCS 5/113-4(c) (2017). Again, as there is no limiting or qualifying language, this subsection applies to all guilty pleas.

Similarly, the plain language of subsection 113-4(d) states "the court shall not accept" a plea of guilty but mentally ill until the defendant undergoes an examination, a report from which is reviewed, the court holds a hearing on the

issue of the defendant's mental condition, and is satisfied there is a factual basis the defendant was mentally ill at the time of the offense. 725 ILCS 5/113-4(d) (2017). Because it is virtually impossible this could occur at arraignment, the plain language of subsection 113-4(d) clearly indicates it applies to all such pleas.

Second, Burge does not concede that subsection 115-2(a) does not require the admonishments from subsection 113-4(c). Burge argues the legislature's decision to add new admonishments to subsection 113-4(c) indicates it sought to add protections ensuring defendants enter informed pleas. (Def. Opening Br., 12-23)

And, because the doctrine of *in pari materia* requires subsection 113-4(c) and subsection 115-2(a) be read in harmony, subsection 115-2(a) should be read as requiring subsection 113-4(c)'s admonishments. See *McCarty*, 223 Ill. 2d at 133-134. Subsection 115-2(a)(2) requires a defendant be informed of "the consequences of his plea and of the maximum penalty." 725 ILCS 5/115-2(a)(2) (2017). The statute does not limit this to direct consequences. 725 ILCS 5/115-2(a)(2). Nor does subsection 115-2(a)(2) list any consequences or penalties, thus inherently requiring a court to rely on other statutes and Rules to provide that information. 725 ILCS 5/115-2(a)(2); See *Wilk*, 124 Ill. 2d at 103-104; *Pronger*, 118 Ill. 2d at 520; *McCarty*, 223 Ill. 2d at 133-134. Subsection 113-4(c) is one of those statutes.

Moreover, under the State's logic, a court would not be able to accept a plea of guilty, or a plea of guilty but mentally ill, at arraignment, because those types of pleas are governed by section 115-2, which resides in Article 115 (addressing trials). 725 ILCS 5/115-2. But section115-2 provides that a plea of guilty or plea of guilty but mentally ill may be accepted by the trial court before trial. 725 ILCS 5/115-2(a), (b) (2017). Arraignment happens before trial. See 725 ILCS 5/102-4 (2017). Accordingly, this does not create a conflict between the two statutes.

Next, the State's position suggests ambiguity in the statute. But, if there is an alleged conflict between two statutes, the Court should interpret them in

a manner that avoids inconsistency and gives effect to both statutes if possible. *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311-312 (2001). Because the statutes can be read as complimenting each other, this Court should not read subsection 113-4 as ambiguous. And, should it read any ambiguity into the statute, that should be interpreted in Burge's favor. See *People Gaytan*, 2015 IL 116223, ¶ 39.

Finally, because the legislature intended the admonishments from subsection 113-4(c) to apply to all guilty pleas, it did not need to add that language to subsection 115-2(a), as it would have been unnecessary. See *McCarty*, 223 Ill. 2d at 125.

Fourth, the State argues that subsection 113-4(e)'s language specifying the *in absentia* admonishment should be given at any later date, if it is not given when he pleads guilty, confirms the legislature meant for all of the provisions of section 113-4 to apply at arraignment, unless it specified otherwise. (St. Br., 11) But the plain language of subsection 113-4(e) supports Burge's position that the provisions of 113-4 are not limited to arraignment unless the statute otherwise specifies. As written, subsection 113-4(e) would apply if a defendant pled guilty at arraignment, withdrew his plea, and pled not guilty at some later time. 725 ILCS 5/113-4(e) (2017). This suggests the legislature clarified what parts of section 113-4 only apply at arraignment, and intended the other provisions to apply to pleas entered at any time.

Citing *People v. Phillips*, 242 Ill. 2d 189, 195 (2011), the State notes that section 113-4 governs at arraignment. (St. Br., 10) Burge does not dispute that pleas entered at arraignment are encompassed under section 113-4; but she rather argues the statute is not limited to applying in such situations. *Phillips* does not suggest otherwise. In *Phillips* this Court addressed whether a defendant waives his right to be admonished in open court that he can be tried *in absentia* by signing a bail bond slip warning of that possibility. *Phillips*, 242 Ill. 2d at 191. This Court explained Article 113 governs arraignment, and section 113-4 governs when a

defendant is called to plead at arraignment. *Phillips*, 242 Ill. 2d at 195-196. While discussing a prior verison of section 113-4, this Court found that subsection 113-4(e)'s *in absentia* admonishment applies only to a defendant when he appears and pleads not guilty at arraignment, or is present at a date after arraignment. *Id.* at 196. Given the nature of the *in absentia* admonishment, this Court found it was most effective at arraignment, and that it must be given in open court. *Id.* at 197, 199-200 (citing *People v. Garner*, 147 Ill. 2d 467, 478 (1992)).

Nothing in *Phillips* indicates any portion of section 113-4 that does not explicitly apply only at arraignment is limited to application at that time. Instead, *Phillips* indicates that the *in absentia* warning should be given at the earliest available opportunity, even if that is *not* at arraignment. Yet according to the State, if subsection 113-4(a) is the only subsection the legislature intended to apply only at arraignment, the "at any later court date" language in subsection 113-4(e) is rendered superfluous. (St. Br., 11-12) But the purpose of the admonishment is to notify the defendant prior to trial of the risk of being absent. See *Garner*, 147 Ill. 2d at 482. Directing a court to provide the admonishment at a later time is necessary, even though the statute applies to *all* not guilty pleas, because a defendant can plead not guilty at a time other than arraignment. For example, if a defendant pleads guilty at arraignment, then files a successful motion to withdraw that plea and pleads not guilty, the statute clarifies that the admonishments should be given at the time of the plea of not guilty, or sometime thereafter, even though this plea was made after arraignment. The purpose of the "at any later court date" language is to advise the court that the warning should be given some time prior to trial, even if it is not given when the not guilty plea enters. As such, the language is not superfluous.

The State further argues that without the "at any later court date" language subsection 113-4(e) would be limited to arraignment. (St. Br., 12) But without

that language the statute would read "[i]f a defendant pleads not guilty, the court shall advise him at that time * * * if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence." 720 ILCS 5/113-4(e). This version of subsection 113-4(e) does not include any limiting language and would still apply any time a defendant pleads not guilty. The only difference would be the admonishment would have to be given at that time.

The State further argues that subsection 113-4(e) demonstrates the legislature knew how to express intent that a subsection not be limited to arraignment. (St. Br., 12-13) Burge responds that subsection 113-4(a) more clearly shows that the legislature expressed when it intended a provision be limited to arraignment. In the event this Court finds these provisions create ambiguity, it should be resolved in Burge's favor. See *Gaytan*, 2015 IL 116223, ¶ 39.

The State also argues Burge's reliance on *People v. Delvillar*, 235 Ill.2d 507 (2009), is misplaced, as *Delvillar* addresses section 113-8, and the scope of section 113-4 turns on the language of section 113-4. (St. Br., 1) The State correctly notes that *Delvillar* does not explicitly address whether section 113-8 applied only at arraignment. (St. Br., 17-18) Burge does not suggest *Delvillar* directly answers the question posed in this case, but, like Justice Harris, Burge finds the decision instructive to the matter *sub judice*. See *Burge*, 2019 IL App (4th) 170399, ¶¶ 54-55 (Harris, J. specially concurring). Such a comparison is appropriate under the doctrine of *in pari materia*, as both statutes are part of Article 113 and address admonishments regarding collateral consequences that should be presented at a guilty plea. See *McCarty*, 223 Ill. 2d at133. *Delvillar* is instructive in the sense that this Court did not find the fact that the plea in that case occurred after arraignment was a threshold barrier precluding application of section 113-8 to

the plea – despite the fact that it is part of Article 113. This suggests the similar provisions of subsection 113-4(c) also face no such barrier.

The State argues that in the three cases reviewing the amended version of the statute, the appellate courts' silence on the issue of whether subsection 113-4(c) only applies at arraignment cannot be construed as implicit holdings on that issue. (St. Br., 18) But, similar to *Delvillar*, the fact that those reviewing courts did not find review of the issues regarding subsection 113-4(c) raised in those cases to be barred simply because the pleas occurred after arraignment is instructive. (Def. Opening Br., 10) The State cites *People v. Boeckmann*, 238 Ill. 2d 1, 12 (2010), for the proposition that it is not appropriate to address issues the parties have not raised or argued. (St. Br., 18) But under *Boekmann* it was inappropriate for the appellate court here to find subsection 113-4(c) did not apply to Burge's plea, as that issue was not raised on appeal. See *Boeckmann*, 238 Ill. 2d at 12.

The State then argues that because the usual tools of statutory construction establish the legislature's intent in authoring subsection 113-4(c), the rule of lenity does not apply. (St. Br., 19) Burge agrees the plain language of the statute, its structure, and its interplay with other relevant statutes establishes the legislature's intent: that subsection 113-4(c) applies to all pleas. If this Court disagrees and finds the statute is ambiguous, for the reasons argued in her opening brief, Burge asks any perceived ambiguity be resolved in her favor. (Def. Opening Br., 12)

Citing *People v. Gutman*, 2011 IL 110338, ¶¶43-44, the State claims this Court has rejected the argument that ambiguity in a criminal statute must be construed in a defendant's favor. (St. Br., 19) But *Gutman* only found that the "rule of lenity must not be stretched so far or applied so rigidly as to defeat the legislature's intent." *Gutman*, 2011 IL 110338, ¶ 43. This Court found the statute at issue in *Gutman* was ambiguous, but not the type of "grievous ambiguity" requiring application of the rule of lenity. *Id.*, ¶ 44. Under *Gutman*, a substantial

ambiguity in the statute should still be resolved in a defendant's favor. *Gutman*, 2011 IL 110338, ¶¶43-44. If this Court finds subsection 113-4(c) is ambiguous, Burge argues the ambiguity was grievous, thus the rule of lenity applies. See *Id.*

The State further argues that construing subsection 113-4(c) as limited to guilty pleas at arraignment does not lead to absurd results. (St. Br., 14) In a footnote the State suggests such an argument should be directed to the legislature. (St. Br., 14, n. 4) But where "a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.'" *People v. Hanna*, 207 Ill. 2d 486, 498 (2003) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459-460 (1892)). In the event this Court finds that the plain language of subsection 113-4(c) suggests its provision only apply at arraignment, it should avoid such a construction to avoid the resulting absurdity.

And, contrary to the State's assertion, this Court has the authority to direct policy and provide guidance to the legislature. See *People v. Woodell*, 219 Ill. 2d 166, 179-180 (2006) (noting the legislature amended the Speedy Trial Act in response to a problem identified in *People v. Garett*, 136 Ill. 2d 318, 330 (1990)). If this Court finds the statute must be interpreted as providing the absurd interpretation that subsection 113-4(c) only applies at arraignment, it should suggest the legislature fix this issue to ensure all defendants are admonished of the possible consequences of pleading guilty before entering those pleas.

Moreover, the legislature would not have written a statute requiring the court to provide these admonishments if assuming counsel would fulfill her duty to provide them was adequate. "Counsel is presumed to know the law." *People v. Perkins*, 229 Ill. 2d 34, 51 (2007). Even so, this Court's Rules and the legislature require the court to admonish a defendant before accepting a plea. Of course counsel should review collateral consequences with her clients – but that is also true of the direct consequences the court is required to explain before a plea can be accepted.

See Ill. S. Ct. Rule 402. This Court and the legislature have indicated the court should provide these admonishments because it is necessary for the record to establish that a plea was knowing and voluntary. See *Phillips*, 242 Ill. 2d at 199 (it is necessary to provide the *in absentia* warning in open court). The fact that counsel has a duty to review collateral consequences with her clients does not lessen the importance of the court admonishing a defendant of those possible consequences when they plead guilty. Also, requiring the court to admonish the defendant cures any prejudice caused by counsel's oversight, which promotes judicial efficiency. See *People v. Valdez*, 2016 IL 119860, ¶ 32 (finding any prejudice the defendant suffered from counsel's failure to inform him of the immigration consequence of pleading guilty was cured by the court's proper admonishment).

Furthermore, counsel is often present at arraignment. This rebuts the State's claim that the legislature only saw fit to deputize courts to explain collateral consequences that would otherwise come from counsel at arraignment, where a defendant is not represented. (St. Br., 16) The State wants to have it both ways, arguing that expecting the court to read the additional admonishments is too burdensome – except at arraignment, when it inexplicably is not. (St. Br., 16, 20) The legislature clearly disagreed. And, any slight burden on the court is outweighed by the benefit of having pleas that are knowingly and intelligently made.

Also, the State's reasoning produces an absurd result. A *pro se* defendant pleading guilty at arraignment waives his right to counsel. However, under the State's logic, a defendant who pleads not guilty at arraignment, then later pleads guilty *pro se*, is not entitled to be admonished about the collateral consequences of entering that plea, though he would have if he pled guilty at arraignment.

Accordingly, Burge asks this Court to find that subsection 113-4(c) applies to all guilty pleas, not only those entered at arraignment.

B.

Subsection 113-4(c) is a mandatory, rather than directory, statute because the statute contains negative language prohibiting further action in the case of noncompliance, and because the right it seeks to protect would be generally injured by a directory reading.

Before the appellate court the State did not dispute that subsection 113-4(c) is mandatory, rather than permissive. Because it now concedes that the statute is mandatory, not directory, it has conceded the statute is mandatory in both contexts; thus Burge should be allowed to withdraw her plea.

As a preliminary matter, the issue of whether the statute is mandatory or permissive is not properly before this Court. Before the appellate court, the State did not challenge, and thus implicitly conceded, that subsection 113-4(c) is mandatory, rather than permissive. (St. Appellate Br., 4); *Leafblad v. Skidmore*, 343 Ill. App. 3d 640, 642 (2nd Dist. 2003) (the plaintiff implicitly conceded the appeal was moot where he admitted having already paid the tax he sought to enjoin collection of). Because the State did not argue the statute was permissive, there is no adverse ruling to appeal from, making this an impermissible a cross-appeal. See *Woodard v. Krans*, 234 Ill. App. 3d 690, 699 (2nd Dist. 1992) (after receiving a favorable judgment defendants' cross-appeal was impermissible). The State does not ask this Court to review this argument under any exceptions to the forfeiture rule. Because the State is estopped from raising this argument, Burge asks this Court to disregard it. See *Swope*, 213 Ill. 2d at 217. ("The rule of invited error or acquiescence is a procedural default sometimes described as estoppel."). As such, the appellate court's finding that the statute is permissive should stand. *Burge*, 2019 IL App (4th) 170399, ¶¶ 30-31; see *Boeckmann*, 238 Ill. 2d at 12.

Furthermore, the State's argument has no merit. A statute can be mandatory or permissive. *Delvillar*, 235 Ill. 2d at 514. In this context, the term mandatory "refers to an obligatory duty which a governmental entity is required to perform,"

whereas the term permissive "refers to a discretionary power, which a governmental entity may exercise or not as it chooses." *Delvillar*, 235 Ill. 2d at 514. (quoting *People v. Robinson*, 217 Ill. 2d 43, 51 (2005)) (internal quotations omitted).

Subsection 113-4(c) is mandatory, rather than permissive. The statute dictates that "[i]f the defendant pleads guilty such plea shall not be accepted until the court shall have fully explained to the defendant the following." 725 ILCS 5/113-4(c). Per the statutory language, the trial court has a duty to perform the admonishments before it can accept a guilty plea. Use of the term "shall" indicates the court does not have discretionary power to give the admonishments or not as it chooses. See *Delvillar*, 235 Ill. 2d at 514.

Similarly, this Court found that section 113-8 is mandatory in the sense that it imposes an obligation on courts to admonish all defendants of the possible immigration consequences of a guilty plea. *Id.* at 519; 725 ILCS 5/113-8 (2006). It logically follows that the requirement to admonish a defendant of other possible consequences under such a similar statutory provision is also mandatory. The appellate court agreed. *Burge*, 2019 IL App (4th) 170399, ¶¶ 30-31.

The State now argues, for the first time, that construing subsection 113-4(c) as mandatory, rather than permissive, violates the separation of powers doctrine. (St. Br., 20) According to the State, a mandatory reading of subsection 113-4(c) creates a conflict with Rule 402, and improperly burdens courts with the duties of counsel. (St. Br., 20, 22-25) For the reasons presented in Burge's opening brief, and *supra*, at 2-13, subsection 113-4(c) compliments, rather than conflicts with, Rule 402, and places no undue burden on the court. (Def. Opening Br.,33-40)

As to the issue of the statute being mandatory rather than directory, Burge accepts the State's concession that the statute is mandatory. (St. Br., 19) As the State has not asked this Court to honor Burge's forfeiture for failing to raise this argument before the appellate court, it has forfeited the opportunity to raise such

an argument. See *Swope*, 213 Ill. 2d at 217 (a party cannot complain of error to which it consented).

C.

Because Chaleah Burge was prejudiced by the trial court's failure to properly admonish her in accordance with subsection 5/113-4(c)(4)(B), a manifest injustice occurred when her guilty plea was accepted, and her motion to withdraw should have been granted.

The State argues that because loss of employment is a collateral consequence of pleading guilty, the inadequate admonishments here did not affect the voluntariness of Burge's plea, as compliance with Rule 402 is all that due process required. (St. Br., 27-28) But, as Burge argued in her opening brief, the trial court had discretion to grant the withdrawal of her guilty plea; and that discretion "should always be exercised in favor of innocence and liberty." (Def. Opening Br., 42); *People v. Schraeburg*, 340 Ill. 620, 628 (1930). And, though failure to admonish a defendant of collateral consequences does not amount to a constitutional violation, the trial court could still have considered the misapprehension regarding a collateral consequence as a basis to allow Burge to withdraw her plea, as she suffered prejudice. (Def. Opening Br., 41); see *Delvillar*, 235 Ill. 2d at 515, 519, 522. Because Burge lost her job as the direct result of her misapprehension, she was prejudiced, and should be allowed to withdraw her plea. See *Id.*

The State suggests Burge did not suffer prejudice because proper admonitions would not have corrected her misapprehension, as the statute only required the court to explain that there *may* be an impact on her ability to retain or obtain employment. (St. Br., 28-29) But this actually supports Burge's position that she suffered prejudice, because without any warning that there could be an impact on her employment, she suffered the harshest employment consequence.

The State also argues that the record does not support Burge's misapprehension that pleading guilty would not cause her to lose her job. (St.

Br., 29) The State cites no authority indicating a reasonable misapprehension – what Burge possessed – requires a defendant to be unequivocally certain that an unexpected consequence would occur. (St. Br., 25-30)

The State then argues that regardless of whether Burge could have reasonably believed the allegations were irrelevant to her employment status, she could not have reasonably believed that pleading guilty and being convicted would also be irrelevant. (St. Br., 29) However, Burge's only prior involvement with the criminal justice system related to receiving court supervision in 2012 for a misdemeanor charge of consumption of alcohol by a minor. (R20) She was only 23 when she pled guilty in this case, and did not work in the legal field. (R32, R34) Burge was unfamiliar with the nuances of the criminal justice system, and may not have understood the significance between being accused of a crime and being convicted of one. This is especially true given that her only prior experience was resolved with supervision, which did not result in a conviction or its attendant consequences.

And, contrary to the State's argument, the record does not affirmatively establish that the timeline Burge provided proves her employment at Help at Home ended when she was charged with this case. (St. Br., 30) On the date of the plea, Burge was employed at Aging in Place, and had worked there for three months. (R33, R36) She worked for her previous employer, Help at Home, for almost one year. (R36) Burge never testified that she was fired from Helping at Home. If Burge worked at Aging in Place for three months as of March 20, 2017, the date of the plea, she started that job in January 2017 – approximately three months after the alleged September 1, 2016, incident. (C5, C7) The record does not establish Burge did not remain employed at Help from Home during the three months between the alleged incident and the time she started working at Aging in Place.

The State claims that Burge failed to show that but for the absence of the admonishment she would not have pled guilty. (St. Br., 30) The record rebuts the

State's assertion, as Burge testified that she did not realize that by pleading guilty to this charge she would lose her job, and that if she had known she would lose her job, she would not have pled guilty. (R35) The State cites *People v. Hughes*, 2012 IL 112817, ¶ 66. (St. Br., 30) *Hughes* addressed a situation where the defendant had to establish his attorney was deficient for failing to advise him of the possibility that a sexually violent person (SVP) petition could be filed in his case. *Hughes*, 2012 IL 112817, ¶¶ 61-62. In *Hughes* the defendant's testimony was not clear as to whether he knew before his plea that such a petition could be filed. *Id.*, ¶ 62. Because it was the defendant's burden to establish the plea was not knowing, and he testified that he had a conversation with counsel about an SVP petition, this Court could not say he met hat burden. *Id*. This Court noted that even if there was deficient representation, the defendant still had to prove he was prejudiced under *Strickland* by proving there was a reasonable probability that, but for counsel's errors, he would not have pled guilty. *Id.*, ¶ 63. In that context, a bare allegation that the defendant would have pled not guilty had counsel not been deficient did not establish prejudice. *Id.*, ¶ 64.

By contrast, here, Burge did not testify she knew that she might suffer the consequences she was not advised of. More importantly, the court found Burge's testimony credible, and that she had suffered a consequence as a result of the plea – which is akin to finding she suffered prejudice where counsel and the court both failed to properly admonish her. (C5-C6, C27; R32-R50); see *Valdez*, 2016 IL 119860, ¶ 32 (finding any prejudice the defendant suffered from counsel's failure to inform him of the immigration consequence of pleading guilty was cured by the court's proper admonishment). Accordingly, *Hughes* does not preclude this Court from finding Burge suffered prejudice from the incomplete admonishments.

The State further alleges any argument Burge raises regarding doubt as to her guilt is forfeited and meritless. (St. Br., 30) In support the State refers to

counsel answering "I believe so" when the court inquired if the State could present sufficient evidence to support a factual basis for the plea. (St. Br., 31); (R20) The State characterizes this as Burge "affirmatively conced[ing]" that it could present sufficient evidence she committed the offense. (St. Br., 31) The State also complains that raising this argument now denied it the opportunity to respond by offering a fuller explanation of the evidence against Burge at the plea. (St. Br., 31)

First, to be clear, Burge is not asking this Court to find the evidence would have been insufficient to find her guilty at trial. Nor is she raising a new basis for her motion to withdraw her guilty plea. Burge simply clarifies that the appellate court's finding that there was no doubt as to her guilt was incorrect. See *Burge*, 2019 IL App (4th) 170399, ¶ 46. The factual basis presented indicates Burge was prejudiced by the improper admonishments, as there could conceivably be a different outcome should she be permitted to withdraw her plea and go to trial. (Def. Opening Br., 46-48); As such, the evidence was not so overwhelming as to preclude this Court from finding a manifest injustice occurred, and to allow Burge to withdraw her plea. The State could then present any evidence it has against Burge at trial.

Second, counsel stipulating that, if the case proceeded to trial, the State could present a sufficient factual basis for a rational trier of fact to potentially find Burge guilty is different than affirmatively conceding the State could prove Burge took the money. By the State's reasoning, no guilty plea could ever be withdrawn where counsel stipulated to a factual basis. But, as the State acknowledges, a guilty plea can be withdrawn. (St. Br., 25); Ill. S. Ct. Rule 604(d).

Accordingly, because Burge was prejudiced by the absent admonishments, and a manifest injustice occurred when she suffered the exact consequence she was not warned of, the denial of her motion to withdraw her plea should be reversed. See *Delvillar*, 235 Ill. 2d at 522. Burge otherwise stands on the arguments raised in her opening brief. (Def. Opening Br., 8-48)

CONCLUSION

For the foregoing reasons, Chaleah Burge, petitioner-appellant, respectfully requests that this Court reverse and remand for further proceedings where Burge is allowed to withdraw her guilty plea.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is twenty pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- CHALEAH BURGE, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 4-17-0399. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 16-CM-1074. Honorable John R. Kennedy, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 24, 2020, the Reply Brief 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 Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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