No. 123492

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MUHAMMAD S. ABDULLAH Defendant-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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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REPLY BRIEF FOR DEFENDANT-APPELLANT

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 question for this Court is whether a State's motion to reconsider the sentence has any jurisdictional impact upon a notice of appeal. That is, whether such a motion triggers Rule 606(b)'s notice of appeal provision that directs a trial court to strike a notice of appeal and retain jurisdiction when a timely "post-trial or post-sentencing motion" is filed "by counsel or by defendant, if not represented by counsel." Ill. S. Ct. R. 606(b).

Abdullah offered many reasons why this provision only applies to defense motions. The State's main argument addresses Abdullah's position that the State is not authorized to file a motion to reconsider the sentence,

one of several reasons that the notice of appeal provision does not apply to such motions. (Argument I.C.) The State claims that it may do so. (St. Br. at 4–5) But even if the State could file such motions, this does not mean it triggers Rule 606(b)'s exception to the jurisdictional impact of a notice of appeal; it does not answer whether the motion is one filed "by counsel or by defendant, if not represented by counsel."

The State also addresses the plain language (Argument I.A.) and the tolling provision in the rule (Argument I.F), but provides little-to-no response to many of the points Abdullah made in his brief.

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

Abdullah is not, as the State suggests, asking this Court to add the word "defense" to Rule 606(b)'s second sentence. (St. Br. at 6) Rather, he asks this court to apply basic rules of statutory construction, giving the same words in the rule the same meaning, *McMahan v. Insdustrial Com'n*, 183 Ill. 2d 499, 514 (1998), and to understand a word's meaning by looking to its neighboring terms, *United States. v. Williams*, 553 U.S. 285, 294; *Corbett v. County of Lake*, 2017 IL 121536, ¶31. (Def. Br. at 14) The phrase "counsel, or defendant if not represented by counsel," uses the term "counsel" twice. The second time refers only to counsel for the defense; so too must the first term. *Id.* This interpretation of the relevant phrase is clear and not redundant, contrary to the State's claim: the trial court should strike a notice of appeal when the defense files a timely post-trial or post-sentencing motion, either through counsel or *pro se*.

The State ignores this Court's recent decision in *People v. Johnson* describing Rule 606(b) in precisely this manner, which Abdullah cited in his opening brief. (Def. Br. at 14) This Court wrote, "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). The State offers no response.

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.

The State does not address Abdullah's examination of the history of the notice of appeal provision and explanation of how it supports his reading of the rule. (Def. Br. at 15–17) The State merely writes in passing that this historical argument hinges on the premise that the State is prohibited from filing post-judgment motions. (St. Br. at 8) This misreads Abdullah's argument. Whether the State may file such motions is only one aspect of his argument; even if the State may file the motion, there remains the question of the jurisdictional impact of such a motion. *See* (Arg. I.C.)

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.

Without supporting authority, the State asserts that it has the right to file a motion to reconsider a defendant's sentence. (St. Br. at 4–5) Rather than positive authority, the State relies on the absence of an explicit prohibition. (St. Br. at 4) The State does not address Abdullah's argument

that a State's motion cannot trigger Rule 606(b)'s notice of appeal provision because the provision expressly applies to a "post-trial or post-sentencing motion," and every provision in the Code of Criminal Procedure and the Code of Corrections regarding these motions in criminal cases refers explicitly and exclusively to defense motions. (Def. Br. at 18–19), *citing* 725 ILCS 5/116-1, 116-2, 116-3, 116-4, 116-6; 730 ILCS 5/5-4.5-50(d). The legislature knows how to authorize filings and chose not to authorize State's motions attacking the sentence. *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"). Where the legislature has only authorized post-trial and post-sentencing motions by the defense in criminal cases, Rule 606(b)'s language does not encompass State's motions to reconsider a sentence.

The State also does not acknowledge that Rule 606(e) and Rule 604(e) both explicitly refer to "the State," indicating that this Court knows how to include the State when it intends to do so; it chose not to regarding the notice of appeal provision. (Def. Br. at 17–18)

Lastly, the State asserts that because a circuit court can correct a sentence *sua sponte* "as long as it has jurisdiction," there is no reason to prohibit the State from filing a motion asking the court to exercise that authority. (St. Br. at 5) The State seems to overlook the key feature: "as long as it has jurisdiction." A trial court that recognizes a sentencing error cannot correct the error once it loses jurisdiction, which happens upon the timely

filing of a notice of appeal. *People v. Bounds*, 182 Ill. 2d 1, 3 (1998). This jurisdictional prerequisite remains even if a party files a motion. Under either scenario—*sua sponte* or upon a request by a party—the circuit court must have jurisdiction to enter an order. *People v. Price*, 2016 IL 118613, ¶31 (a judgment entered by a court without jurisdiction is void). Thus, again, even if the State may *file* a motion to reconsider the sentence, this does not necessarily answer the question of whether such a filing satisfies the notice of appeal provision in Rule 606(b) or has any jurisdictional impact upon an otherwise timely-filed notice of appeal. *See* (Arg. I.E.)

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

The State does not address this argument or the authority cited therein. Because the State cannot appeal a criminal sentence, it has no right to a circuit court ruling on a motion attacking the sentence after a notice of appeal. (Def. Br. at 19–21)

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.

The State does not address this argument other than to assert that its post-sentencing motion was authorized by an absence of prohibition. (St. Br. at 4); *see* (Arg. 1.C.)

Notably, the State ignores *People v. Mabry*, 398 Ill. App. 3d 745, 757 (1st Dist. 2010), in which the State conceded and the appellate court held

that the trial court lacked jurisdiction to grant a State's motion for mandatory consecutive sentences—just like here—after the defendant filed a notice of appeal. (Def. Br. at 21)

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.

The State discusses Rule 606(b)'s tolling provision as part of its plain-language argument. (St. Br. at 7) However, the State does not address Abdullah's argument that the fact that the tolling provision applies to State's motions regarding interlocutory orders does not mean that the notice of appeal provision applies to State's motions attacking final judgments of sentence. (Def. Br. 23–25) The State likewise does not engage with Abdullah's detailed discussion of *People v. Marker*, 233 Ill. 2d 158 (2009), which addressed the tolling provision. (Def. Br. at 23–25) As *Marker* explained, the tolling provision allows the party "entitled to appeal" the opportunity to first seek relief in the circuit court. (Def. Br. at 24), *citing Marker*, 233 Ill. 2d at 166–67, 172, 177–78. Because the State can never be the party "entitled to appeal" a sentence, there is no basis to allow a State's motion attacking the sentence to vitiate a defendant's notice of appeal.

Moreover, the language used to describe the motions that trigger these respective provisions differs in a way that favors Abdullah's interpretation. The tolling provision tolls the time for a notice of appeal when "a motion" directed against the judgment is filed. Ill. S. Ct. R. 606(b). This provision applies to motions by the State in the limited circumstances in which it is

authorized to appeal. *Marker*, 233 Ill. 2d at 166–78. The notice of appeal provision, in contrast, uses the phrase "post-trial or post-sentencing motion." The use of different terms in different places within the same rule should be given meaning. *Id*. ("judgment" has a different meaning than "final judgment" within Rule 606(b)). Just as "final judgment" is narrower than "judgment," the phrase "post-trial or post-sentencing motion" is narrower than the tolling provision's generic "motion." This limiting language limits such motions to the defense, as further detailed in Argument I.C. regarding the Code of Criminal Procedure and Code of Corrections.

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

As with this history of the rule, the State offers no response other than to claim that Abdullah's policy argument depends on the premise that the State is prohibited from filing post-trial and post-sentencing motions. (St. Br. at 8) Yet this policy argument does not turn on whether State may ask a trial court to correct a sentence in writing, but whether such a request has a jurisdictional impact despite a timely notice of appeal. (St. Br. at 25–27) The State does not address the harm this might cause, which Abdullah's discussed in his opening brief. (Def. Br. at 25–27)

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*.

The State does not like the available remedy of *mandamus* because it difficult. (St. Br. at 5) The State cites this Court's recent denial of *mandamus*

in *People ex rel. Raoul v. Gaughan*, No. 123535 (Ill. Mar. 19, 2019), for the proposition that this remedy may not be available "even when a sentence is 'clearly improper as a matter of law.'" (St. Br. at 5), *quoting Gaughan* (Kilbride, J., concurring), ¶2. But that petition involved a judge's "discretionary sentencing" authority. *Id*. at ¶1–2. This case, in contrast, involves a statutorily mandated sentence. This Court has made *mandamus* available for "the State to challenge criminal sentencing orders where it is alleged that the circuit court violated a mandatory sentencing requirement." *People v. Castleberry*, 2015 IL 116916, ¶26. Thus, the State will not be harmed by giving jurisdictional effect to defense notices of appeal, because it retains this backstop of *mandamus* in cases like this if the trial court loses jurisdiction before correcting a sentence.

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

For the reasons above and in Abdullah's opening brief, this Court should find that the sentencing orders entered after his notice of appeal are void for want of jurisdiction and reinstate his original, August 17, 2005, sentencing order of concurrent 40- and 20-year sentences.

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.

The State concedes that this Court should strike Abdullah's 20-year firearm enhancement for attempt murder, though for a different reason: because it is an *ex post facto* violation, rather than a void judgment. (St. Br. at 8, 10) Abdullah welcomes this relief regardless of the reason.

That this enhancement is an *ex post facto* error does not mean that it was not also void under Illinois law. The sentences in *People v. Taylor*, 2015 IL 117267, ¶17, *People v. Williams*, 2012 IL App (1st) 100126, ¶51–54, and *People v. Blanton*, 2011 IL App (4th) 080120, ¶28–31, were all unquestionably *ex post facto* violations because they were imposed pursuant to statutes revived by legislative action after the offenses, yet courts held them void *ab initio* under Illinois' voidness jurisprudence regarding statutes that are declared unconstitutional by the judiciary. *See* (Def. Br. at 32–34)

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.

The State asserts that because the enhancement was not void at the time of Abdullah's resentencing, his enhancement is not void. This does not answer the question of whether a sentence that is void *ab initio* at the time of an offense remains void for that offender regardless of the law's status at the time of sentencing. (Def. Br. at 31–32)

B. The retroactive application of revived, previously unconstitutional and void criminal statutes is itself void,

as the State has conceded before.

The State suggests that this Court need not reconcile the "void sentence" cases Abdullah relied on in his opening brief. (St. Br. at 10) Contrary to the State's claim, those cases had nothing to do with the "void sentence rule" abolished by *People v. Castleberry*, which involved judgments that did not conform to a statutory requirement. *People v. Castleberry*, 2015 IL 116916, ¶13. Rather, those cases involved sentences that were void because, as here, they were authorized by a statute that this Court had held unconstitutional and void *ab initio* by the time of the offense. (Def. Br. at 32–33). This is an independent prong of voidness under Illinois law that survives *Castleberry*. *People v. Price*, 2016 IL 118613, ¶31. Thus, the cases are still relevant to Abdullah's appeal.

The State does not otherwise address Abdullah's argument. This Court should treat judicial cures to void *ab initio* statutes the same as legislative cures and hold that a statute that is declared void *ab initio* prior to a criminal offense and cured by a Court after the offense remains void when applied to that offender. *See People v. Taylor*, 2015 IL 117267, ¶¶17 (firearm enhancements that were unconstitutional at the time of the offense are void).

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

The State does not address the legal mess the appellate court's reasoning would entail. (Def. Br. at 35–39)

D. This Court should vacate Abdullah's void attempt

murder firearm enhancement.

This Court should strike the 20-year firearm enhancement from his attempt murder conviction either because it is void or pursuant to the State's request for this Court to do so as an act of supervisory authority.

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 or pursuant to the State's request for the exercise of this Court's supervisory authority.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/David T. Harris
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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 May 23, 2019, 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 defendant-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 Reply Brief to the Clerk of the above Court.

/s/Carol Chatman
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