

No. 116572

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

	<u>Page(s)</u>
ARGUMENT	5
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).	6
<i>People v. Hickey</i> , 204 Ill. 2d 585 (2001).	6
I. <i>People v. White</i> Does Not Apply Retroactively to Convictions that Were Final at the Time It Was Decided	6
A. <i>White</i> Did Not Establish a Constitutional Rule of Criminal Procedure	7
<i>People v. White</i> , 2011 IL 109616.....	7, 8, 9
<i>People v. Whitfield</i> , 228 Ill. 2d 502 (2007).	8
<i>People v. Hickey</i> , 204 Ill. 2d 585 (2001).	7, 9
<i>People v. Arna</i> , 168 Ill. 2d 107 (1995).....	8
<i>People v. Wade</i> , 116 Ill. 2d 1 (1987).	8
Ill. Const. 1970, art. II, § 1.....	8
730 ILCS 5/5-8-1(a) (2004).....	7, 8
B. <i>White</i> Does Not Apply Retroactively Under the <i>Teague</i> Framework	9
1. The <i>Teague</i> framework	9
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).	9
<i>People v. Sanders</i> , 238 Ill. 2d 391 (2010).	9
<i>People v. Morris</i> , 236 Ill. 2d 345 (2010).	9
<i>People v. Flowers</i> , 138 Ill. 2d 218 (1989).	9

2. <i>White</i> is not retroactive under <i>Teague</i>.	10
a. Defendant's conviction was final when <i>White</i> was decided.	10
<i>Gonzalez v. Thaler</i> , 132 S. Ct. 641 (2012).....	10
<i>Caspari v. Bohlen</i> , 510 U.S. 383 (1994).....	10
<i>People v. Wallace</i> , 406 Ill. App. 3d 172 (2d Dist. 2010).....	10, 11
S. Ct. R. 13(1).....	10
Ill. Sup. Ct. R. 604(d).....	10
b. <i>White</i> established a new rule.	11
<i>Chaidez v. United States</i> , 133 S. Ct. 1103 (2013).....	11, 14, 15, 16
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	14
<i>Lambrix v. Singletary</i> , 520 U.S. 518 (1997).....	11, 15, 17
<i>Butler v. McKellar</i> , 494 U.S. 407 (1990).....	11, 15, 19
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	11, 13, 16
<i>People v. White</i> , 2011 IL 109616.....	<i>passim</i>
<i>People v. Morris</i> , 236 Ill. 2d 345 (2010).....	11, 13, 15, 16, 19
<i>People v. Torres</i> , 229 Ill. 2d 382 (2008).....	12
<i>People v. Brown</i> , 225 Ill. 2d 188 (2007).....	16, 17
<i>People v. Jamison</i> , 197 Ill. 2d 135 (2001).....	12, 17
<i>People v. Gaultney</i> , 174 Ill. 2d 410 (1996).....	17
<i>People v. Young</i> , 2013 IL App (1st) 111733.....	17
<i>People v. Deng</i> , 2013 IL App (2d) 111089.....	18

<i>People v. Avery</i> , 2012 IL App (1st) 110298.....	16, 17
<i>People v. McRae</i> , 2011 IL App (2d) 090798.....	18
<i>People v. Kizer</i> , 318 Ill. App. 3d 238 (1st Dist. 2000).....	11
c. <i>White's new rule is not retroactive under either</i>	
<i>Teague</i> exception.	19
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	21
<i>Sawyer v. Smith</i> , 497 U.S. 227 (1990).....	20
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).	19, 20
<i>Mackey v. United States</i> , 401 U.S. 667 (1971).	20
<i>People v. Sanders</i> , 238 Ill. 2d 391 (2010).	20
<i>People v. Morris</i> , 236 Ill. 2d 345 (2010).	19, 20
<i>People v. De La Paz</i> , 204 Ill. 2d 426 (2003).	21
II. Defendant Is Estopped From Arguing that His Sentence Is Void.....	21
<i>Brady v. United States</i> , 397 U.S. 742 (1970).....	23
<i>People v. Donelson</i> , 2013 IL 113603.....	23
<i>People v. White</i> , 2011 IL 109616.....	23, 24
<i>People v. Caballero</i> , 206 Ill. 2d 65 (2002).	22, 23
<i>People v. Jamison</i> , 197 Ill. 2d 135 (2001).....	24
<i>People v. Evans</i> , 174 Ill. 2d 320 (1996).....	23, 24
<i>People v. Young</i> , 2013 IL App (1st) 111733.	22, 24
<i>Lee v. State</i> , 816 N.E. 2d 35, 40 (Ind. 2004).	24
<i>Rhodes v. State</i> , 240 S.W. 3d 882 (Tex. Crim. App. 2007).....	24, 25

<i>Punta v. State</i> , 806 So. 2d 569 (Fla. Dist. Ct. App. 2002).....	25
<i>Graves v. State</i> , 822 So. 2d 1089 (Miss. Ct. App. 2002).....	25
<i>People v. Hester</i> , 992 P.2d 569 (Cal. 2000).....	25
<i>State v. Moore</i> , 303 S.W. 3d 515 (Mo. 2010).	25
Ill. S. Ct. R. 604(d).....	24
31 C.J.S. Estoppel and Waiver § 172.	25
III. If This Court Affirms the Judgment of the Appellate Court, It Should Remand with Instructions to Permit the People to Amend the Indictment and Factual Basis to Omit Reference to a Firearm.....	26
<i>People v. White</i> , 2011 IL 109616.....	26

NATURE OF THE ACTION

In May 2011, pursuant to a negotiated plea agreement, defendant pleaded guilty to one count of first degree murder; in exchange, the People dismissed the remaining charges, recommended a thirty-year prison term, and withdrew their previously-filed notice of intent to seek a firearm sentencing enhancement. C329; R200-204.¹ The court accepted the plea and sentenced defendant to a thirty-year prison term in accordance with the plea agreement. C330; R214-216.

In August 2011, defendant filed a postconviction petition arguing that his sentence was void under *People v. White*, 2011 IL 109616, because it did not include a mandatory firearm sentencing enhancement. C363. The trial court dismissed the petition as frivolous and patently without merit. C361. The appellate court reversed, holding that *White* applied retroactively, rendering defendant's sentence void. *People v. Smith*, 2013 IL App (3d) 110738, ¶ 14. The court remanded with directions to permit defendant to withdraw his guilty plea and proceed to trial. *Id.* at ¶ 18. The People appealed the appellate court's judgment. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the rule established in *People v. White*, 2011 IL 109616 — holding that the defendant's sentence, imposed as part of a negotiated plea agreement, was void because it did not include a mandatory sentencing enhancement — applies retroactively to convictions that were final at the time it was decided.

¹ The common law record is cited as "C__." The report of proceedings is cited as "R__." The appendix to this brief is cited as "A__."

2. Whether defendant is estopped from attacking the negotiated plea agreement on the ground that the sentence he received as a benefit of the agreement he bargained for is void.

3. Whether, if this Court determines that defendant's sentence is void, it should remand with instructions to permit the People to amend the indictment and factual basis to bring them into compliance with the principles of *White*.

STANDARD OF REVIEW

This Court reviews the dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001).

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On November 27, 2013, this Court allowed the People's timely petition for leave to appeal.

STATEMENT OF FACTS

In August 2010, a Will County grand jury indicted defendant for the first degree murder of Douglas White. C2-4. The indictment charged defendant under two alternative theories of first degree murder: Count I charged that he shot White with a handgun without justification and with intent to cause him great bodily harm; Count II charged that defendant shot White with knowledge that "such an act created a strong probability of death or great bodily harm." *Id.* The grand jury later amended the indictment to also charge defendant with being an armed habitual criminal in Count III. C49-51. The People filed a notice of intent to seek a sentencing enhancement of twenty-five years to natural life imprisonment on the ground that defendant murdered White by discharging a firearm.

In May 2011, defendant pleaded guilty to the first degree murder charge in Count II as part of a negotiated plea agreement. C329; R200. Under that agreement, in exchange for defendant's guilty plea, the People (1) dismissed Counts I and III, (2) recommended a thirty-year term of imprisonment; and (3) withdrew their notice of intent to seek the firearm sentencing enhancement. R200-204. At the plea hearing, the prosecutor's factual basis for the plea explained that the evidence at trial would establish that, in the early morning hours of June 29, 2010, defendant confronted Douglas White in a garage and killed him by shooting him with a handgun. R207-213. Defendant declined to add or amend the factual basis recited by the prosecutor. R213. The court then found that the guilty plea was supported by a factual basis, accepted defendant's guilty plea, and sentenced him to a thirty-year prison term, acknowledging that the People withdrew their request for a firearm enhancement. C330; R213-216.

In August 2011, defendant filed a postconviction petition arguing that his sentence was void under *People v. White*, 2011 IL 109616, because it did not include a mandatory firearm sentencing enhancement. C363. The trial court dismissed the petition as frivolous and patently without merit. C361.

On appeal, defendant argued that his sentence was void because it did not include a firearm enhancement that, as set forth in 730 ILCS 5/5-8-1,² must be part of a sentence where, as here, a firearm was used in the commission of a murder. *People v. Smith*, 2013 IL

² As it did at the time of defendant's conviction in May 2011, 730 ILCS 5/5-8-1(a)(1)(d)(iii), provides that a defendant is to receive an additional term of twenty-five years to life "if, during the commission of the offense, [he] personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person."

App (3d) 110738, ¶¶ 6-9. Relying on *White*, he argued that the trial court's failure to include the enhancement rendered the sentence void, even though the People chose not to seek the enhancement as part of the negotiated plea agreement. *Id.* In response, the People argued that defendant could not benefit from the rule announced in *White* because it was decided after defendant's conviction was final. *Id.* at ¶ 11.

The Third District reversed the trial court's judgment, holding that defendant's sentence was void under *White* because the indictment and factual basis indicated that defendant used a firearm in the murder, requiring imposition of the firearm enhancement. *Id.* at ¶ 10. In so holding, the court observed that the firearm enhancement statute required the trial court to impose a twenty-five-year prison term in addition to the minimum twenty-year prison term for murder, resulting in a minimum sentence of forty-five years in prison. *Id.* Accordingly, it determined that defendant's thirty-year term fell below the statutory minimum for his crime. *Id.*

Rejecting the People's argument that *White* did not apply retroactively because it was decided after defendant's conviction was final, the court held that *White* did not announce a new rule of law, concluding that "*White* did not break new ground or impose a new obligation," but merely "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." *Id.* at ¶ 12. Having determined that *White* did not announce a new rule, the appellate court concluded that *White*'s holding therefore applied to defendant's case under the retroactivity test established in *Teague v. Lane*, 489 U.S. 288, 301 (1989) (with two exceptions, a new rule of law

generally does not apply to cases that are final at the time of decision establishing rule). *Smith*, 2013 IL App (3d) 110738, at ¶¶ 12-14. Accordingly, the appellate court reversed and remanded with directions to permit defendant to withdraw his guilty plea and proceed to trial. *Id.* at ¶ 14.

Justice Schmidt, who authored the lead opinion, separately expressed concern about the fairness of this result, noting that defendant had received the benefit of his plea bargain, as part of which the People agreed not to seek the firearm enhancement. *Id.* at ¶ 15. He suggested that there may be “a number” of such cases, and that the court’s holding could permit a defendant sentenced pursuant to such an agreement to wait to raise the issue “until he knows that a key witness or witnesses have disappeared.” *Id.* Justice Schmidt wrote that, were he able, he would remand the case to allow the People to “conform the indictment and factual basis for the plea agreement to the original plea agreement,” permitting defendant to withdraw his guilty plea only if the People refused to so amend the indictment and factual basis. *Id.* at ¶ 16. He observed that this procedure would not prejudice defendant because he would receive the benefit of the bargain, and it would “obviate the risks associated with allowing a defendant to withdraw a knowing plea after the passage of time.” *Id.* The other two justices on the panel did not join this portion of the lead opinion. *Id.* at ¶¶ 20-22.

ARGUMENT

This Court’s decision in *People v. White* does not apply retroactively to this case for two reasons: (1) it did not establish a constitutional rule of criminal procedure and so is not cognizable in postconviction proceedings; and (2) the rule it established was new under the

framework established in *Teague v. Lane*, 489 U.S. 288, 301 (1989), and adopted by this Court. *People v. Hickey*, 204 Ill. 2d 585, 628 (2001).

Alternatively, this Court should exercise its discretion to conclude that defendant is estopped from now attacking his freely-negotiated and voluntarily-entered plea agreement, for which he has received the full benefit of the bargain. Affirming the appellate court would produce the absurd result of permitting defendant to escape his bargained-for sentence and belatedly proceed to trial — with the potential benefit of facing a weaker prosecution case due to the passage of time — on the ground that the sentence he received was too lenient. Defendant should be estopped from receiving such a windfall where he has received the full benefit of the plea agreement.

Finally, if this Court affirms the judgment of the appellate court, it should remand to the trial court with instructions to permit the People to amend the indictment and factual basis to omit reference to a firearm and, if the People do so, to reinstate defendant's plea and thirty-year sentence.

I. *People v. White* Does Not Apply Retroactively to Convictions that Were Final at the Time It Was Decided.

For two reasons, *People v. White* does not apply to convictions, like defendant's, that were final at the time it was decided. First, *White* did not establish a constitutional rule of criminal procedure, and thus, it does not apply to cases on postconviction review. Second, even if *White*'s rule were a constitutional rule of criminal procedure, it was new, and therefore does not apply retroactively under the test established in *Teague v. Lane*, and adopted by this Court.

A. *White* Did Not Establish a Constitutional Rule of Criminal Procedure.

White does not apply retroactively because it is not a constitutional rule of criminal procedure. As this Court has held, “[a]lleged violations of rules of procedure which do not violate a defendant’s constitutional rights do not warrant post-conviction relief.” *Hickey*, 204 Ill. 2d at 628. For this reason, *Hickey* held that new Supreme Court rules governing capital cases did not apply retroactively because the rules were not constitutional. *Id.* at 628-630. The rule announced in *White* is likewise a non-constitutional rule.

In *White*, as part of a negotiated plea agreement, the defendant pleaded guilty to first degree murder and possession of contraband, and he was sentenced to consecutive prison terms of twenty-eight years for murder and four years for possession. *White*, 2011 IL 109606, ¶ 4. According to the factual basis for the plea, White and an accomplice planned to rob the victim and, during their execution of that plan, the victim was shot with a handgun. *Id.* at ¶ 6. In this Court, White argued that his sentence was void because it did not include the mandatory firearm enhancement set forth in 730 ILCS 5/5-8-1(a) (2004), and thus fell below the statutory minimum prison terms for murder with that enhancement. *Id.* at ¶ 12. The People argued that the enhancement need not be applied where the parties agreed that defendant would plead to the “lesser offense” of murder without the enhancement. *Id.* at ¶ 22. In support, the People cited its “discretion to decide which offense to charge and, indeed, whether to charge at all.” *Id.* at ¶ 24.

White held that the sentence was void because the indictment and factual basis for the plea indicated that a firearm was used in the murder, requiring imposition of the firearm

enhancement. But the *White* rule was not grounded in the defendant's constitutional rights. Instead, *White* relied on the principles that a criminal sentence must conform to statutory guidelines, *id.* at ¶ 20, and that a sentence that does not conform to such guidelines is generally void, *id.* (citing *People v. Arna*, 168 Ill. 2d 107, 113 (1995)). *White* did not expressly rely on any constitutional protections, and the rule prohibiting sentences that do not conform to statutory guidelines is not based on constitutional rules of criminal procedure.

If any constitutional principle supports the prohibition against sentences that do not conform to statutory guidelines, it is separation of powers. See *People v. Whitfield*, 228 Ill. 2d 502, 511 (2007) (“legislature has authority to define crimes and establish the nature and extent of criminal penalties, and a court exceeds its authority if it orders a lesser sentence than is mandated by statute”) (quoting *People v. Wade*, 116 Ill. 2d 1, 6 (1987)). But although separation of powers is established in the Illinois Constitution, see Ill. Const. 1970, art. II, § 1, that principle protects each branch of the government from intrusion by another; it does not protect the rights of criminal defendants. Accordingly, the *White* rule — protecting the General Assembly's authority to enact mandatory sentencing enhancements — cannot reasonably be characterized as a constitutional rule of criminal procedure.

Moreover, although a sentence in *excess* of statutory guidelines might arguably offend a defendant's right to due process, that right is not implicated in *White*, where this Court concluded that the sentence was *below* the statutory minimum. See *White*, 2011 IL 109606, ¶ 21. *White* raised no concern that defendant was unfairly induced to plead guilty, or that he did not receive the benefit of his bargain. Instead, it held that the General Assembly's authority to establish mandatory sentencing enhancements is infringed when circumstances

of a plea agreement indicate that such an enhancement should apply, even where the parties agree to their mutual benefit not to include the enhancement. Thus, *White* did not establish a constitutional rule of criminal procedure, and does not apply retroactively on postconviction review. *Hickey*, 204 Ill. 2d at 628. Nor, as explained *infra*, did *White* meet other possible exceptions to the non-retroactivity principle. This Court should therefore reverse the judgment of the appellate court.

B. *White* Does Not Apply Retroactively Under the *Teague* Framework.

Alternatively, even if *White* established a constitutional rule of criminal procedure, it does not apply retroactively under the *Teague* framework because the rule established in *White* was new.

1. The *Teague* framework

Under *Teague*, a new constitutional rule will not apply retroactively unless the rule (1) “places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe,” or (2) is a “ ‘watershed rule’ of criminal procedure.” *People v. Morris*, 236 Ill. 2d 345, 359 (2010) (quoting *Teague*, 489 U.S. at 311); see *People v. Flowers*, 138 Ill. 2d 218, 237 (1989). “The purpose of the *Teague* framework is to promote the government’s interest in the finality of criminal convictions,” and to “validate” state court interpretations of existing precedent even if later decisions are to the contrary. *People v. Sanders*, 238 Ill. 2d 391, 401 (2010).

Thus, if this Court concludes that *White* established a constitutional rule of criminal procedure, it must then determine (1) whether defendant’s conviction was final at the time that *White* was decided; (2) whether *White* established a new rule; and (3) whether *White* falls

within one of the two *Teague* exceptions. As demonstrated below, *White* is not retroactive because it established a new rule that did not place conduct beyond the General Assembly's power to proscribe, and because its holding was not a "watershed rule" of criminal procedure.

2. *White* is not retroactive under *Teague*.

a. Defendant's conviction was final when *White* was decided.

Defendant pleaded guilty and was sentenced on May 4, 2011. C329; R200-204. He did not pursue a direct appeal of his conviction. Thus, his conviction was final when the time for seeking direct review expired thirty days later, on June 3, 2011, prior to this Court's June 16, 2011 decision in *White*. Ill. S. Ct. R. 604(d); see *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (for purposes of the *Teague* analysis, a conviction is final "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."). A defendant convicted in state court generally has ninety days from the date on which the state court of last resort denies a petition for discretionary review to file a petition for a writ of certiorari in the United States Supreme Court. S. Ct. R. 13(1). But when defendant's time to seek direct appeal of his conviction expired, so did his opportunity to seek review in the United States Supreme Court. Thus, his conviction was final when his time for seeking direct review lapsed, which was before *White* was decided. See generally *Gonzalez v. Thaler*, 132 S. Ct. 641, 653-656 (2012) (defendant who does not seek review in state appellate court cannot obtain review in Supreme Court); *People v. Wallace*, 406 Ill. App. 3d

172, 177-78 (2d Dist. 2010) (for purposes of Post-Conviction Hearing Act, defendant not entitled to tolling of ninety-day period to seek certiorari review in Supreme Court because he did not seek discretionary review in Illinois Supreme Court and, consequently, could not obtain certiorari review).

b. *White* established a new rule.

A decision of this Court establishes a new rule for purposes of the *Teague* framework where the rule was “not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Morris*, 236 Ill. 2d at 359 (quoting *Teague*, 489 U.S. at 301 (emphasis in original)). And “a holding is not so dictated . . . unless it would have been ‘apparent to all reasonable jurists.’” *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527–528 (1997)). Even where the court issuing the rule indicates that the result is “controlled” by its precedent, a rule is still new for purposes of *Teague* if, at the time it was decided, it was “susceptible to debate among reasonable minds.” *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

Under *Teague*, most rules established by this Court will be new. As one Illinois appellate decision has explained, *Teague* sets forth a “broad conception” of a new rule, as “[f]ew decisions on appeal or collateral review are “dictated” by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way.” *People v. Kizer*, 318 Ill. App. 3d 238, 246 (1st Dist. 2000) (quoting *Teague*, 489 U.S. at 333 (Brennan, J., dissenting)).

Under this precedent, *White* established a new rule. This Court framed the issue before it in *White* as follows:

When the factual basis entered for a guilty plea makes it clear that a defendant is subject to a mandatory sentencing enhancement, may the trial court enter judgment imposing a sentence that does not include the enhancement on the basis that the enhancement was excluded by the parties from the plea agreement?

White, 2011 IL 109616, ¶ 1. *White* observed that the factual basis for the plea indicated that a firearm was used in the commission of the murder, triggering the firearm enhancement set forth in 730 ILCS 5/5-8-1. *Id.* at ¶¶ 17-19. It then determined that the sentence was void under the general rule that the trial court “does not have authority to impose a sentence that does not conform with statutory guidelines,” and “exceeds its authority” when it imposes a sentence outside of those guidelines. *Id.* at ¶¶ 20-21.

Next, *White* turned to the State’s argument that the general rule prohibiting a sentence below the statutory range did not control where the parties mutually agreed not to include the enhancement. *Id.* at ¶¶ 22-23. This Court rejected that argument, relying primarily on nine state and federal cases outside of Illinois. *Id.* at ¶ 23. The Court cited only one Illinois case, *People v. Torres*, 229 Ill. 2d 382, 398 (2008), quoting dicta implying that the defendant could not negotiate a sentence below the statutory minimum. *Id.*

White then weighed the general rule prohibiting sentences outside the statutory guidelines against the prosecutor’s “exclusive discretion to decide which of several charges shall be brought, or whether to prosecute at all,” *id.* at ¶ 25 (quoting *People v. Jamison*, 197 Ill. 2d 135, 161 (2001)), recognizing that “this discretion permits the State to enter into plea agreements wherein the State, if it so chooses, may negotiate away the firearm element when a defendant is charged with armed robbery.” 2011 IL 109616, at ¶ 25. This Court ultimately held that *White*’s sentence was nonetheless void, even in the face of the prosecutor’s broad

discretion to make charging decisions and negotiate away certain elements, because the provision at issue was a mandatory enhancement, not a separate offense. *Id.*

Thus, *White* established a new rule because it was not “dictated” by existing precedent. *Teague*, 489 U.S. at 301 (emphasis in original); *Morris*, 236 Ill. 2d at 359. *White* addressed the open question of whether the general rule prohibiting sentences outside of the statutory range rendered void a negotiated plea where the plea and indictment suggested that a mandatory firearm enhancement applied. In doing so, it did not merely rely on existing precedent, but weighed the general rule prohibiting sentences below the statutory range against the State’s well-established discretion to (1) determine how and whether to charge a defendant and (2) negotiate plea bargains. Indeed, as already noted, in rejecting one of the People’s primary arguments — that the intent of the parties not to include the enhancement controlled in the face of a conflict between the negotiated plea and a mandatory enhancement — *White* relied primarily on cases outside of the jurisdiction. *Id.* at ¶ 23. Thus, *White* did substantially more than routinely apply an existing rule; for the first time, it established that the State’s broad authority to make charging decisions and negotiate pleas does not extend to negotiating away mandatory enhancements.

Holding otherwise, the appellate court in this case concluded that *White* “specifically relied upon existing precedent” 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.” *Smith*, 2013 IL App (3d) 110738, ¶ 5. But this holding ignores the fact that *White* does not merely stand for the unremarkable notion that an unauthorized sentence is void. Instead, *White* addressed whether that general rule applies even when the parties mutually agree to

exclude the enhancement as part of a negotiated plea agreement. *White*, 2011 IL 109616, ¶

1. The appellate court thus read the rule established in *White* too broadly, mistakenly reasoning that *White* did no more than restate an existing and well-established rule. In doing so, the court ignored not only the analysis and reasoning in *White*, but also *White*'s own statement of the issue presented, both of which focused on the substantially narrower question of how to balance a prosecutor's discretion against the rule that an unauthorized sentence is void. *Id.*

The Supreme Court's recent decision in *Chaidez* illustrates that for purposes of *Teague*, courts are to narrowly construe the rule at issue, addressing the precise holding as opposed to the broad legal concepts underpinning it. *Chaidez* held that the rule established in *Padilla v. Kentucky*, 559 U.S. 356 (2010) — “that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea” — was a new rule that did not apply retroactively to proceedings on collateral review. *Chaidez*, 133 S. Ct. at 1105. Applying *Teague*, *Chaidez* rejected the argument that *Padilla* did not announce a new rule because it merely involved a routine application of *Strickland v. Washington*, 466 U.S. 668 (1984). *Chaidez* explained that *Padilla* “did something more” than merely apply *Strickland* to counsel's deportation advice; it “considered [a] threshold question”: “Was advice about deportation ‘categorically removed’ from the scope of the Sixth Amendment right to counsel because it involved only a ‘collateral consequence’ of a conviction, rather than a component of the criminal sentence?” *Chaidez*, 133 S. Ct. at 1108 (quoting *Padilla*, 559 U.S. at 366). *Chaidez* reasoned that *Padilla* was new because it “had to develop new law, establishing that the Sixth Amendment

applied at all, before it could assess the performance of Padilla's lawyer under *Strickland*.” *Chaidez*, 133 S. Ct. at 1111.

Like *Padilla*, *White* had to establish new law before it could determine that the defendant's sentence was void. Again, prior to *White*, the general rule prohibiting sentences that do not conform to statutory requirements was in tension with the State's considerable charging discretion and latitude to negotiate pleas, and it was unclear which well-established principle prevailed in this context. Accordingly, just as *Padilla* was new because the Court had to decide whether *Strickland* applied to a particular form of attorney advice, *White* was new because it had to determine whether the general prohibition against sentences that did not conform to statutory requirements applied to sentences that were negotiated and implemented by consent of the parties.

In addition to reading *White* too broadly, the appellate court also placed undue emphasis on the fact that *White* “specifically relied upon existing precedent.” *Smith*, 2013 IL App (3d) 110738, ¶ 5. “Courts frequently view their decisions as being ‘controlled’ or ‘governed’ by prior opinions even when aware of reasonable contrary conclusions reached by other courts.” *Butler*, 494 U.S. at 415. “But the fact that a court says that its decision is within the ‘logical compass’ of an earlier decision, or indeed that it is ‘controlled’ by a prior decision, is not conclusive for purposes of deciding whether the current decision is a ‘new rule’ under *Teague*.” *Butler*, 494 U.S. at 415. Although *White* may have found footing in cases that preceded it, its rule was not “dictated” by existing precedent because, at the time it was decided, the holding in *White* would not have been “‘apparent to all reasonable jurists.’” *Chaidez*, 133 S. Ct. at 1107 (quoting *Lambrix*, 520 U.S. at 527–528); see *Morris*,

236 Ill. 2d at 361 (“The fact that our opinion in *Whitfield* was ‘in conformity’ with other opinions of the court . . . does not mean that our decision was ‘dictated’ . . . or ‘compelled’ by this court’s precedent.”) (internal citations omitted).

Several Illinois court decisions prior to *White* demonstrate why its rule was not “apparent to all reasonable jurists.” *Id.* Before *White*, this Court had established the State’s broad discretion relating to charging decisions and plea negotiations. *White*, 2011 IL 109616, ¶ 25 (and cases cited therein). This Court had also recognized at least one limited exception to the general rule that a sentence is void if it is not authorized by statute. *See People v. Brown*, 225 Ill. 2d 188, 205 (2007) (sentence not authorized by statute is void only to extent that it exceeds what law permits; the legally authorized portion remains valid).

Additionally, prior to *White*, whether the State could negotiate away an otherwise mandatory firearm enhancement was unsettled in the appellate court. For example, in *People v. Avery*, the defendant appealed the denial of his postconviction petition on the ground that his negotiated sentence did not include a mandatory firearm enhancement and, therefore, he should have been allowed to withdraw his plea pursuant to *White*. *People v. Avery*, 2012 IL App (1st) 110298, ¶ 27. The First District rejected the claim, holding that *White* was not retroactive because it announced a new rule. *Id.* at ¶ 39. In so holding, the First District observed that, prior to *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.

Id. (citing *Jamison*, 197 Ill. 2d at 161). As evidence of the confusion that existed prior to *White*, the First District cited its decision in *Avery*'s direct appeal, where it concluded that the trial court's failure to impose the sentencing enhancement did not render the sentence void. *Avery*, 2012 IL App (1st) 110298, ¶ 39.

The record here further demonstrates that *White*'s rule was new. Nothing in this record indicates that the trial court, the parties, or the attorneys involved in negotiating the plea believed that mention of the firearm in the indictment or factual basis would render defendant's sentence void. We presume that the trial court knew the law when it accepted defendant's plea, see *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996), and there is no reason to believe that the court, the parties, or the attorneys involved proceeded under the belief that the negotiated sentence was void. This lack of doubt on the part of the trial court and its officers regarding the plea's propriety suggests that the *White* rule was not "apparent to all reasonable jurists." *Lambrix*, 520 U.S. at 527–528.

Other Illinois cases also demonstrate that prior to *White*, it was unclear whether parties could negotiate away an otherwise mandatory firearm enhancement as part of a plea bargain. *People v. Young*, 2013 IL App (1st) 111733, held that *White* was not retroactive under *Teague* because it established a new rule, explaining that prior to *White*, "there was confusion" concerning "whether the State could, in its discretion, negotiate pleas without 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." *Id.* at ¶ 29. *Young* observed that the record in that case evinced such confusion because the "the attorneys and the trial judge agreed that the sentences were appropriate," even though the factual basis for the first

degree murder and attempted murder charges to which the defendant pleaded guilty indicated that the defendant fired a gun. *Id.* at ¶ 30.

Even the lead opinion below demonstrates that confusion existed over whether the parties could negotiate away a firearm enhancement in these circumstances. Expressing his dissatisfaction with the result, Justice Schmidt posited that the holding raised “the spectre of some real mischief that might be lurking in the bushes” because there are likely a “number” of “void sentences based upon knowing agreements between the State and defendants.” *Smith*, 2013 IL App (3d) 110738, ¶ 15. The “number” of cases in which the parties have negotiated away a firearm enhancement demonstrates that many jurists did not believe it was required prior to *White*. See, e.g., *People v. Deng*, 2013 IL App (2d) 111089 (parties stipulated to factual basis indicating victim was shot but sentence did not include firearm enhancement); *People v. McRae*, 2011 IL App (2d) 090798 (same). Yet Justice Schmidt’s concern about the number of such cases cannot be reconciled with his conclusion that *White*’s rule was not new. That is, one cannot reasonably conclude that the *White* rule was apparent to all reasonable jurists in the face of so many cases, involving so many separate trial courts and attorneys, in which the courts accepted negotiated plea agreements that would have been void under *White*’s rule. The gravity of the problem highlighted by Justice Schmidt demonstrates that prior to *White*, many jurists, including those in this case, believed that the parties could negotiate away a firearm enhancement as part of a plea agreement, even if the factual basis for the plea indicated that the enhancement applied.

In short, the appellate court erred in two ways: (1) it construed the *White* rule too broadly, mischaracterizing *White* as reiterating only that a sentence is void if it does not

conform to statutory guidelines, whereas *White* actually decided that this general rule prevailed over the prosecutor's well-established discretion to make charging decisions and to negotiate plea agreements where a plea's factual basis indicates that an enhancement applies; and (2) it placed undue emphasis on the fact that *White* relied on existing precedent, ignoring the admonitions from this Court and the United States Supreme Court that a rule is new if it was not apparent to all reasonable jurists, even where it is "in conformity with," *Morris*, 236 Ill. 2d at 361 (internal citations omitted), or "'controlled' by a prior decision," *Butler*, 494 U.S. at 415. Because *White* (1) established for the first time that the parties are not free to negotiate away a firearm enhancement where the indictment and factual basis indicate that the enhancement should apply, and (2) this result was not apparent to all reasonable jurists, its rule is "new" under *Teague*'s framework.

c. *White*'s new rule is not retroactive under either *Teague* exception.

The new rule established in *White* (1) does not place "certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe," and (2) is not a "'watershed rule' of criminal procedure." *Morris*, 236 Ill. 2d at 359 (quoting *Teague*, 489 U.S. at 311). Because *White* does not fit under either *Teague* exception, it does not apply retroactively.

The first exception does not apply because *White* did not implicate the General Assembly's authority to limit private, individual conduct. See *Morris*, 236 Ill. 2d at 361. *White* says nothing about substantive criminal law.

Under the second exception, a new rule will apply retroactively only if it is “a watershed rule of criminal procedure, requiring the observance of those procedures that are implicit in the concept of ordered liberty.” *Sanders*, 238 Ill. 2d at 412 (citing *Teague*, 489 U.S. at 311). The exception “should be limited to those new procedures without which the likelihood of an accurate conviction is seriously diminished.” *Sanders*, 238 Ill. 2d at 412 (citing *Teague*, 489 U.S. at 313). “A rule that qualifies under this exception must not only improve accuracy, but also “alter our understanding of the bedrock procedural elements” essential to the fairness of a proceeding.” *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (quoting *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971))). Even where a new rule is grounded in a “bedrock constitutional right,” it will not apply retroactively under this exception unless it can “be characterized as a profound and sweeping change to rules of criminal procedure which is essential to the fundamental fairness of criminal proceedings.” *Morris*, 236 Ill. 2d at 363. “[A] rule that only affects the enhancement of a defendant’s sentence does not amount to an error which seriously affects the fairness, integrity or public reputation of judicial proceedings so as to fall within the second *Teague* exception requiring retroactivity in all cases.” *Id.*

The *White* rule concerns only the enhancement of the defendant’s sentence; for this reason alone, it does not fit within *Teague*’s second exception. *Morris*, 236 Ill. 2d at 363. In any event, *White* did not “alter our understanding” of “bedrock” procedures that are “fundamental to the fairness of a proceeding.” *Sawyer*, 497 U.S. at 242. The rule in *White* was not formed out of concern for the fundamental fairness of trials, nor was it grounded in defendants’ core due process rights affecting the accuracy and fairness of criminal

proceedings. Rather, it was grounded in concern for ensuring that sentencing terms deemed mandatory by the General Assembly are actually implemented, and thus, though *White* may benefit certain defendants imprisoned under freely negotiated plea agreements who wish to return to the circuit court for a trial, it is not essential to fundamental fairness, nor “implicit in the concept of ordered liberty.” Consequently, the *White* rule is not a watershed rule of criminal procedure for purposes of the *Teague* framework, and it does not apply retroactively. See generally *People v. De La Paz*, 204 Ill. 2d 426, 438-39 (2003) (new rule established in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), “is not such a ‘bedrock procedural element’ as requires retroactive application under the second *Teague* exception”).

Because neither *Teague* exception applies to the new rule established in *White*, the rule does not apply retroactively to cases that were final at the time it was decided. Accordingly, even if this Court determines that *White* established a constitutional rule of criminal procedure, the judgment of the appellate court should be reversed.

II. Defendant Is Estopped From Arguing that His Sentence Is Void.

Retroactivity of *White* aside, principles of judicial estoppel prevent defendant from now withdrawing his guilty plea. That doctrine prohibits parties from taking contrary positions in successive legal proceedings, and should apply here, where defendant is now contending that the plea agreement that he voluntarily entered, and for which he has received the full benefit of his bargain, is invalid because the sentence he received was too short under statutory guidelines. At least one appellate court district has applied judicial estoppel in this precise context, where a defendant sought to withdraw his voluntary plea on the ground that his sentence was void under *White* because it did not include a mandatory firearm

enhancement, *see People v. Young*, 2013 IL App (1st) 111733, ¶¶ 36-50. Under the reasoning set forth in that case, should this Court find that *White* is retroactively applicable, it should nonetheless reverse the appellate court's judgment on the alternative ground that defendant is judicially estopped from withdrawing his plea.

Under the doctrine of judicial estoppel, a party generally cannot take a position in a proceeding that is contrary to a position the party took in an earlier proceeding. *People v. Caballero*, 206 Ill. 2d 65, 80 (2002). The doctrine is not grounded in due process, but instead in “public policy which upholds the sanctity of the oath and its purpose is to bar as evidence statements and declarations which would be contrary to sworn testimony the party has given in the same or previous judicial proceedings.” *Id.* For the doctrine to apply, the party to be estopped

must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it.

Id.

All five elements apply in this case. Defendant took two inconsistent positions in two separate judicial proceedings when he entered a plea agreement that did not include a firearm enhancement at his plea hearing and then, in the subsequent postconviction proceedings, argued that the plea agreement was void. He intended the court to accept the validity of the plea agreement, and he benefitted from the court's acceptance of the agreement by receiving a favorable sentence of thirty years, while the minimum term with the enhancement was forty-five years.

Moreover, although application of judicial estoppel is discretionary, *Caballero*, 206 Ill. 2d at 80, this Court should apply it in this case, where doing so would uphold the sanctity of plea proceedings, and ensure that defendant and the State each receive the full benefit of their freely negotiated agreement. As the special concurrence in *White* observed, “Plea bargaining is an important and, perhaps, the central component of our criminal justice system.” *White*, 2011 IL 109616, ¶ 35 (Theis, J., specially concurring) (citing *People v. Evans*, 174 Ill. 2d 320, 325 (1996)). “Plea bargaining leads to prompt disposition of cases, preserves finite judicial and financial resources, and allows the State to focus its prosecutorial efforts where they are most needed.” *People v. Donelson*, 2013 IL 113603, ¶ 18. And for a defendant facing the possibility of conviction, “the advantages of pleading guilty and limiting the probable penalty are obvious — his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.” *White*, 2011 IL 109616, ¶ 35 (Theis, J., specially concurring) (quoting *Brady v. United States*, 397 U.S. 742, 751-52 (1970)). For these reasons, it is crucial that freely negotiated plea agreements, like defendant’s, are enforced because the defendant receives the full benefit of the bargain. *See generally Donelson*, 2013 IL 113603, ¶ 18 (“principal inquiry” in determining whether State’s promise to defendant in plea agreement has been fulfilled “is whether the defendant has received the benefit of his bargain”).

Moreover, even if this Court decides that the trial court erred by failing to include the firearm enhancement in defendant’s sentence, that error in no way prejudiced defendant; as explained, he is currently serving a prison term that is fifteen years *shorter* than the statutory minimum term with the enhancement. Thus, defendant does not seek conformity with the

statutory guidelines; he is seeking to rescind his plea agreement so that he can belatedly proceed to trial. Permitting him to do so where he has received the full benefit of his bargain not only offends the sanctity of the plea process, but also contradicts the public interest in finality of convictions that this Court has consistently protected in the plea context. *See* Ill. S. Ct. R. 604(d) (no appeal from judgment entered upon guilty plea unless defendant moved to withdraw plea or reconsider sentence within thirty days of sentencing); *Jamison*, 197 Ill. 2d at 163 (“[a] defendant does not have an automatic right to withdraw a plea of guilty,” but “must show a manifest injustice under the facts involved”) (internal quotation marks omitted); *see also Evans*, 174 Ill. 2d at 326 (pleading guilty is “a grave and solemn act,” and “not a temporary and meaningless formality reversible at the defendant’s whim”) (internal quotation marks and citations omitted).

Estoppel of a defendant seeking a new trial under a *White*-type claim is not novel. Although this Court has not yet applied judicial estoppel in this context, as *Young* explained, “courts from other jurisdictions have recognized the prejudice to the State under these circumstances and have estopped defendants from enjoying the benefits of the negotiated plea agreement while simultaneously challenging their validity.” *Young*, 2013 Il App (1st) 111733, ¶ 42 (citing *Lee v. State*, 816 N.E. 2d 35, 40 (Ind. 2004) (“A defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence”) (internal quotation marks and citation omitted); *Rhodes v. State*, 240 S.W. 3d 882, 889 (Tex. Crim. App. 2007) (“A defendant who has enjoyed the benefits of an agreed judgment prescribing a too-lenient punishment should not be permitted to collaterally attack that judgment on a later date on the basis of the illegal

leniency”); *Punta v. State*, 806 So. 2d 569, 571 (Fla. Dist. Ct. App. 2002) (having received benefit of voluntarily entered plea agreement, defendant could not challenge it on the ground that it was illegal); *Graves v. State*, 822 So. 2d 1089, 1092 (Miss. Ct. App. 2002) (defendant may not “reap the benefits of an illegal sentence, which is lighter than what the legal sentence would have been, and then turn around and attack the legality of the illegal, lighter sentence when it serves his interest to do so”); *People v. Hester*, 992 P.2d 569, 572 (Cal. 2000) (“Where the defendants have pleaded guilty in return for a specified sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack fundamental jurisdiction.”)); *see also State v. Moore*, 303 S.W. 3d 515, 522 (Mo. 2010) (“A person who accepts the benefits of a judicial order is estopped from denying its validity or propriety”); 31 C.J.S. Estoppel and Waiver § 172 (“A person who accepts the benefits of a judgment, decree, or judicial order is estopped from denying the validity or propriety thereof, or of a part thereof, on any grounds”) (citing *Rhodes*, 240 S.W. 3d 882).

Defendant has received the benefit of his freely negotiated, voluntarily entered, and favorable plea agreement. Such agreements are a cornerstone of our criminal justice system; they save considerable resources, provide finality to victims and the community, and afford defendants the opportunity to promptly receive more favorable outcomes than they might achieve following trial. Defendant took advantage of such an opportunity when he pleaded guilty in this case, and he should not now be permitted to rescind that agreement and proceed to trial on the basis that the agreement was too favorable to him.

III. If This Court Affirms the Judgment of the Appellate Court, It Should Remand With Instructions to Permit the People to Amend the Indictment and Factual Basis to Omit Reference to a Firearm.

If this Court affirms the judgment of the appellate court and holds that defendant's sentence is void under *White*, it should remand to the trial court with instructions to permit the People — if they so choose — to amend the indictment and factual basis to omit reference to a firearm and, if the People do so, enter judgment pursuant to the negotiated plea agreement. This remedy would be consistent with the principles in *White* and give both defendant and the State the benefit of the freely negotiated and voluntarily entered plea agreement.

The special concurrence in *White* addressed the State's "exclusive discretion to decide whether to prosecute," and the attendant "latitude in choosing which offenses to charge and ultimately, how to dispose of them — by proceeding to trial, or negotiating a guilty plea." *White*, 2011 IL 109616, at ¶ 34 (Theis, J., specially concurring). Justice Theis emphasized the considerable value of plea bargaining to the criminal justice system, and admonished that to avoid the result in *White*, the State should have "negotiated around" the enhancement by referring to a "dangerous weapon," as opposed to a "firearm," in both the indictment and factual basis. *Id.* at ¶ 40-41. The State should be afforded an opportunity to do so in this case to ensure that both parties receive the benefits of the plea agreement. Defendant should not receive the windfall of a belated trial, after the passage of time has potentially damaged the State's ability to prosecute him for these serious crimes. As Justice Schmidt cautioned in the decision below, a defendant with a colorable *White* claim

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.

Smith, 2013 IL App (3d) 110738, ¶ 15. To avoid such an absurd result, in the event that this Court applies *White* to defendant's case and rejects the State's estoppel argument, it should nevertheless exercise its broad supervisory authority to instruct the trial court to permit the State to amend the indictment and factual basis to omit reference to a firearm and, if the State does so, re-instate the plea agreement.³

³ Of course, if this Court finds that defendant's sentence is void and permits him to withdraw his plea, the People may instead reinstate Counts I and III and elect to proceed to trial on all three counts.

CONCLUSION

The People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court and remand for further proceedings.

February 6, 2014

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RULE 341(c) CERTIFICATE OF COMPLIANCE

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

/s/ Stephen M. Soltanzadeh

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APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

Index to the Record.	A1
<i>People v. Smith</i> , 2013 IL App (3d) 110738 (Aug. 2, 2013).....	A10
Notice of Appeal.	A19
Order Denying Postconviction Petition.....	A20

INDEX TO THE RECORD**Common Law Record**

(Volume One of Two)

Indictment (Nov. 10, 2010).....	C2
Complaint (June 29, 2010).....	C5
Arrest Warrant (June 29, 2010).....	C6
Application for Arrest Warrant (June 29, 2010).....	C7
Mittimus (Nov. 15, 2010).....	C8
Affidavit of Assets and Liabilities (Nov. 15, 2010).....	C9
Witness List (Nov. 17, 2010).....	C11
Notice of Statement Summaries (Nov. 17, 2010).....	C13
Statements of Defendant (Nov. 17, 2010).....	C14
Notice of Physical Evidence (Nov. 17, 2010).....	C15
Record of Conviction (Nov. 17, 2010).....	C16
Grand Jury Minutes (Nov. 17, 2010).....	C17
Application for Arrest Warrant (June 29, 2010).....	C19
Complaint (June 29, 2010).....	C20
Arrest Warrant (June 29, 2010).....	C21
Supplemental Witness List (Dec. 9, 2010).....	C22
Supplemental Notice of Statement Summaries (Dec. 9, 2010).....	C23
Notice of Physical Evidence (Dec. 9, 2010).....	C25
Grand Jury Minutes (Dec. 9, 2010).....	C26

Supplemental Witness List (Dec. 14, 2010).	C29
Supplemental Notice of Statement Summaries (Dec. 14, 2010).	C30
Record of Conviction (Dec. 14, 2010).	C32
Information (Dec. 10, 2010).	C35
Notice of Expert Witness (Dec. 16, 2010).	C39
Supplemental Notice of Statement Summaries (Dec. 16, 2010).	C40
Notice of Subpoena (Dec. 16, 2010).	C42
Supplemental Notice of Statement Summaries (Dec. 20, 2010).	C43
Supplemental Witness List (Dec. 22, 2010).	C45
Supplemental Notice of Statement Summaries (Dec. 22, 2010).	C46
Record of Conviction (Dec. 22, 2010).	C47
Superseding Indictment (Dec. 23, 2010).	C49
Motion for Supplemental Discovery (Dec. 27, 2010).	C55
Grand Jury Minutes (Dec. 29, 2010).	C58
Motion to Consume DNA Evidence (Jan. 4, 2011).	C62
Laboratory Report (Jan. 4, 2011).	C64
Notification of Limited Sample (Dec. 29, 2010).	C66
Notice of Supplemental Expert Witness (Jan. 4, 2011).	C67
Supplemental Notice of Statement Summaries (Jan. 4, 2011).	C68
Supplemental Witness List (Jan. 4, 2011).	C70
Supplemental Notice of Statement Summaries (Jan. 4, 2011).	C71
Supplemental Witness List (Jan. 5, 2011).	C73

Supplemental Notice of Statement Summaries (Jan. 5, 2011).....	C74
Notice of Physical Evidence (Jan. 5, 2011).....	C75
Notice of Intent to Seek Sentencing Enhancement (Jan. 5, 2011).....	C77
Order Granting Motion to Consume DNA Evidence (Jan. 6, 2011).....	C79
Supplemental Notice of Statement Summaries (Jan. 6, 2011).....	C81
Notice of Physical Evidence (Jan. 6, 2011).....	C82
Supplemental Witness List (Jan. 10, 2011).....	C84
Supplemental Notice of Statement Summaries (Jan. 10, 2011).....	C85
Notice of Physical Evidence (Jan. 10, 2011).....	C86
Supplemental Notice of Statement Summaries (Jan. 10, 2011).....	C88
Supplemental Witness List (Jan. 12, 2011).....	C90
Supplemental Notice of Statement Summaries (Jan. 12, 2011).....	C91
Supplemental Notice of Statement Summaries (Jan. 12, 2011).....	C93
Motion for Supplemental Discovery (Jan. 18, 2011).....	C96
Supplemental Notice of Statement Summaries (Jan. 18, 2011).....	C99
Order Granting Motion for Supplemental Discovery (Jan. 19, 2011).....	C101
Supplemental Notice of Statement Summaries (Jan. 20, 2011).....	C103
Supplemental Witness List (Jan. 20, 2011).....	C105
Supplemental Notice of Statement Summaries (Jan. 20, 2011).....	C106
Notice of Physical Evidence (Jan. 20, 2011).....	C107
Petition for Advanced Travel Witness Fees (Jan. 21, 2011).....	C110
Order for Advanced Travel Witness Fees (Jan. 21, 2011).....	C113

Motion to Command Out-of-State Witness to Testify (Jan. 21, 2011).	C116
Petition for Advanced Travel Witness Fees (Jan. 21, 2011).	C122
Motion to Command Out-of-State Witness to Testify (Jan. 21, 2011).	C126
Supplemental Notice of Statement Summaries (Jan. 21, 2011).	C131
Supplemental Witness List (Jan. 21, 2011).	C133
Supplemental Notice of Statement Summaries (Jan. 21, 2011).	C135
Supplemental Witness List (Jan. 21, 2011).	C138
Supplemental Notice of Statement Summaries (Jan. 21, 2011).	C139
Supplemental Witness List (Jan. 21, 2011).	C140
Supplemental Notice of Statement Summaries (Jan. 21, 2011).	C141
Notice of Physical Evidence (Jan. 21, 2011).	C143
Supplemental Witness List (Jan. 25, 2011).	C146
Supplemental Notice of Statement Summaries (Jan. 25, 2011).	C147
Notice of Physical Evidence (Jan. 25, 2011).	C148
Notice of Expert Witness (Jan. 26, 2011).	C150
Supplemental Notice of Statement Summaries (Jan. 26, 2011).	C151
Motion for Supplemental Discovery (Jan. 27, 2011).	C155
Laboratory Report (Jan. 27, 2011).	C158
Notice of Expert Witness (Jan. 27, 2011).	C159
Supplemental Notice of Statement Summaries (Jan. 27, 2011).	C160
Supplemental Notice of Statement Summaries (Jan. 27, 2011).	C162

Order Granting Motion to Allow Defendant Telephone Calls (Jan. 28, 2011).	C164
Order Granting Motion for Supplemental Discovery (Jan. 28, 2011).	C165
Subpoena (Jan. 28, 2011).	C168
Supplemental Record of Conviction (Jan. 28, 2011).	C169
Supplemental Notice of Statement Summaries (Jan. 28, 2011).	C171
Notice of Expert Witness (Jan. 24, 2011).	C173
Supplemental Notice of Statement Summaries (Jan. 24, 2011).	C174
Notice of Expert Witness (Feb. 4, 2011).	C176
Supplemental Notice of Statement Summaries (Feb. 4, 2011).	C177
Motion to Bar Evidence and to Continue Trial (Feb. 4, 2011).	C180
Motion to Extend Period for Speedy Trial (Feb. 7, 2011).	C184
Supplemental Witness List (Feb. 8, 2011).	C189
Supplemental Notice of Statement Summaries (Feb. 8, 2011).	C190
Notice of Physical Evidence (Feb. 8, 2011).	C191
Supplemental Witness List (Feb. 14, 2011).	C194
Supplemental Notice of Statement Summaries (Feb. 14, 2011).	C195
Order Continuing Subpoenas (Feb. 14, 2011).	C198
Supplemental Notice of Statement Summaries (Feb. 22, 2011).	C199
Supplemental Notice of Statement Summaries (Mar. 7, 2011).	C201
Supplemental Notice of Statement Summaries (Mar. 13, 2011).	C203
Supplemental Notice of Statement Summaries (Mar. 15, 2011).	C205
Notice of Expert Witness (Mar. 15, 2011).	C207

Supplemental Notice of Statement Summaries (Mar. 15, 2011).....	C208
Supplemental Notice of Statement Summaries (Mar. 22, 2011).....	C211
Notice of Expert Witness (Mar. 24, 2011).....	C213
Notice of Expert Witness (Mar. 24, 2011).....	C215
Supplemental Notice of Statement Summaries (Mar. 24, 2011).....	C216
Motion to Sever (Mar. 25, 2011).....	C219
Supplemental Notice of Statement Summaries (Mar. 29, 2011).....	C222
Supplemental Notice of Statement Summaries (Mar. 29, 2011).....	C224
Supplemental Disclosure (Mar. 29, 2011).....	C227
Answer to Discovery (Mar. 29, 2011).....	C227

Common Law Record
(Volume Two of Two)

Answer to Discovery (continued).	C251
Supplemental Notice of Statement Summaries (Mar. 31, 2011).....	C313
Motion to Continue Trial (Apr. 1, 2011).....	C317
Order Permitting Defendant to Receive Telephone Calls (Apr. 1, 2011).	C319
Order Continuing Trial (Apr. 1, 2011).....	C320
Supplemental Notice of Statement Summaries (Apr. 14, 2011).	C321
Supplemental Witness List (Mar. 21, 2011).	C323
Supplemental Notice of Statement Summaries (Mar. 31, 2011).....	C324
Notice of Filing of Subpoena (Apr. 15, 2011).....	C326
Notice of Filing of Subpoena (May 3, 2011).....	C327

Guilty Plea (May 4, 2011)	C329
Judgment and Sentence (May 4, 2011)	C330
Criminal Cost Sheet (May 4, 2011)	C331
Motion to Return Certain Evidence (May 16, 2011)	C336
Order Granting Motion to Return Evidence (May 17, 2011)	C343
Official Statement of Facts (May 17, 2011)	C345
Sheriff/Jail/DOC Receipt (May 19, 2011)	C353
Supplemental Witness List (June 29, 2011)	C355
Supplemental Notice of Statement Summaries (Apr. 14, 2011)	C356
Order to Imprison Defendant (July 22, 2011)	C358
Order Releasing Money to Defendant's Daughter (Aug. 5, 2011)	C359
Notice of Filing of Subpoena (Aug. 15, 2011)	C360
Order Denying Postconviction Petition (Aug. 25, 2011)	C361
Letter From Defendant to the Clerk (Aug. 14, 2011)	C362
Postconviction Petition (Aug. 16, 2011)	C363
Supplemental Notice of Statement Summaries (Aug. 16, 2011)	C366
Notice of Physical Evidence (Aug. 22, 2011)	C367
Receipt (Aug. 29, 2011)	C369
Letter From Defendant to the Clerk (Sep. 8, 2011)	C371
Motion to Reconsider Postconviction Petition (Sep. 8, 2011)	C372
Order Denying Motion to Reconsider (Sep. 15, 2011)	C391

Receipt (Sep. 16, 2011).	C392
Motion for Leave to Appeal (Sep. 23, 2011).	C393
Notice of Appeal (Oct. 4, 2011).	C400
Certificate of Notification to Court Reporters (Oct. 4, 2011).	C402
Letter from Appellate Court (Oct. 12, 2011).	C403
Docket Sheet (Nov. 28, 2011).	C405
Certification of Record.	C426

Reports of Proceedings
(One Volume)

Arraignment (Nov. 15, 2010).	R5
Discovery Hearing (Dec. 13, 2010).	R10
Discovery Hearing (Dec. 16, 2010).	R13
Re-Arraignment (Dec. 23, 2010).	R18
Discovery Motion Hearing (Dec. 29, 2010).	R23
Discovery Motion Hearing (Jan. 3, 2011).	R26
Discovery Motion Hearing (Jan. 6, 2011).	R33
Discovery Motion Hearing (Jan. 19, 2011).	R36
Discovery Motion Hearing (Jan. 24, 2011).	R44
Discovery Motion Hearing (Jan. 28, 2011).	R49
Motion Hearing (Feb. 7, 2011).	R54
Status Hearing (Feb. 14, 2011).	R71
Motion Hearing (Feb. 17, 2011).	R76

Discovery Hearing (Mar. 22, 2011).....	R81
Testimony of William E. Frank.....	R84
Direct Examination.....	R84
Cross-Examination.....	R156
Motion Hearing (March 28, 2011).....	R173
Finding of the Court (March 30, 2011).	R180
Motion Hearing (April 1, 2011).....	R187
Motion Hearing (May 2, 2011).	R192
Plea and Sentencing Hearing (May 4, 2011).....	R196
Motion Hearing (May 17, 2011).	R220
Motion Hearing (Aug. 5, 2011).....	R224
Postconviction Petition Hearing (Aug. 18, 2011).	R229
Postconviction Petition Hearing (Aug. 18, 2011).	R233
Motion Hearing (Sep. 15, 2011).	R238
Hearing (Sep. 26, 2011).....	R242
Hearing (Sep. 30, 2011).....	R246
Hearing (Oct. 3, 2011).....	R250

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.

NOTICE OF APPEAL

**APPEAL TAKEN FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN
WILL COUNTY, ILLINOIS
APPEAL TAKEN TO THE APPELLATE COURT, THIRD JUDICIAL DISTRICT, ILLINOIS**

The People of the State of Illinois

Plaintiffs-Appellees,

-vs-

Case No. 10 CF 1345

MICKEY D. SMITH (N-94725)

Defendant-Appellant

FILED
11 OCT -4 PM 2:07
WILL COUNTY, ILLINOIS

An appeal is taken from the Order of Judgment described below:

- (1) Court to which appeal is taken is the Appellate Court.
(2) Name of Appellant and address to which notices shall be sent.

NAME: MICKEY D. SMITH (N-94725)

ADDRESS: STATEVILLE CORRECTIONAL CENTER, P.O. BOX 112, JOLIET IL 60434

- (3) Name and address of Appellant's Attorney on appeal.

NAME: Peter A. Carusona, Deputy Defender
Office of the State Appellate Defender
Third Judicial District
1100 Columbus Street
Ottawa, Illinois 61350

If Appellant is indigent and has no attorney, does he/she want one appointed?
YES

- (4) Date of Judgment or Order: MAY 4, 2011

(a) Sentencing Date: MAY 4, 2011(b) Motion for New Trial: NA(c) Motion to Vacate Guilty Plea: NA(d) Other: POST-CONVICTION PETITION DENIED 8-25-11, MOTION TO RECONSIDER POST-CONVICTION PETITION DENIED 9-15-11

- (5) Offense of which convicted: _____

FIRST DEGREE MURDER

- (6) Sentence: _____

30 YEARS D.O.C, CREDIT FOR 184 DAYS SERVED

- (7) If appeal is not from a conviction, nature of order appealed from: _____

PAMELA J. McGUIRE
Clerk of the Circuit Court
NOAPL

cc: State's Attorney
Attorney General

MICH

10042011

C000400

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,

vs.

MICKEY D. SMITH,
Petitioner,

)
)
)
)
)
)
)

10 CF 1345

ORDER

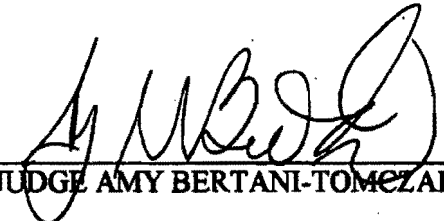
This matter comes before the Court in on Petitioner's Petition for Post-Conviction Relief. The Court has reviewed the allegations contained therein and finds that the allegations are frivolous and patently without merit. Petitioner alleges that he was not properly admonished of his sentencing range in that he was subject to a 15 year enhancement for being armed with a firearm.

Pursuant to a plea agreement the defendant was sentenced to 30 years in the Department of Corrections for the offense of First Degree Murder. The plea agreement contemplated that the State would, and in fact did so, withdraw their Notice of Intent to Enhance Sentencing Upon Conviction. The petitioner then plead guilty to First Degree Murder and was sentenced to the agreed upon sentence of 30 years. The petitioner received the benefit of his plea agreement and was not sentenced an additional 15 years in this matter.

The Clerk is directed to send a copy of this Order to the defendant at the Department of Corrections.

8.24.11

DATE



JUDGE AMY BERTANI-TOMCZAK

11 AUG 25 AM 11:48
CLERK
WILL COUNTY ILLINOIS

FILED

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on February 6, 2014, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and three copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

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Ottawa, Illinois 61350

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

/s/ Stephen M. Soltanzadeh
STEPHEN M. SOLTANZADEH
Assistant Attorney General

***** Electronically Filed *****

No.116572

02/06/2014

Supreme Court Clerk
