No. 123492

IN THE
ILLINOIS SUPREME COURT

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

BRIEF AND ARGUMENT FOR RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General of Illinois

MICHAEL M. GLICK
Criminal Appeals Division Chief

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Carolyn Taft Grosboll
SUPREME COURT CLERK

BRIAN MCLEISH
Assistant Attorney General
100 West Randolph St., 12th Floor
Chicago, Illinois 60601-3218
(312) 814-3692
eserve.criminalappeals@atg.state.il.us

Counsel for Respondent-Appellee
People of the State of Illinois

POINTS AND AUTHORITIES

NATURE OF THE CASE

Petitioner-appellant Muhammad Abdullah appeals from a judgment dismissing his 735 ILCS 5/2-1401 petition for relief from judgment. The appellate court affirmed, holding that (1) under Rule 606(b) the circuit court retained jurisdiction to correct its initial, unauthorized sentence because counsel for the State filed a post-judgment motion and (2) the firearm enhancement imposed as part of petitioner's sentence for his attempted murder conviction, while perhaps an *ex post facto* violation, did not render the sentence void. *People v. Abdullah*, 2018 IL App (2d) 150840, ¶¶ 9-21. No issue is raised concerning the charging instrument.

ISSUES PRESENTED

1. Whether the appellate court correctly held that the State may file a post-judgment motion asking the circuit court to correct an unlawful sentence.

2. Whether the appellate court correctly held that the word "counsel" in Rule 606(b) should be given its ordinary meaning, which encompasses both counsel for the State and for the defense.

3. Whether a sentence imposed in violation of *ex post facto* principles is merely voidable, and not void.

4. Whether this Court should exercise its supervisory authority to impose a sentence that complies with all relevant statutory and constitutional principles.

SUPREME COURT RULE INVOLVED

The version of Rule 606(b) in effect when petitioner was sentenced stated, as relevant here:

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

Ill. Sup. Ct. R. 606(b) (West 2005).

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612, and 651. This Court allowed petitioner's petition for leave to appeal on September 26, 2018.

STATEMENT OF FACTS

Trial and Sentencing

In March 2004, petitioner shot Marco Wilson and Luis Melendez, killing Wilson and puncturing Melendez's lung. R685; R942-43. A Lake County jury convicted petitioner of murder, attempted murder, and aggravated battery with a firearm. C240-42; R1263. The State notified the circuit court that consecutive sentences for the two offenses were mandatory under 730 ILCS 5/5-8-4(a). R1321; R1351. Nevertheless, the circuit court

sentenced petitioner to concurrent prison terms of forty years for murder and twenty years for attempted murder. R1349; R1351-52.

After sentencing, the State filed a motion asking the circuit court to impose the statutory minimum forty-five-year sentence for murder, as required by 730 ILCS 5-8-1(a)(1)(d)(iii), and to order the sentences to run consecutively, as required by 730 ILCS 5/5-8-4(a)(i).

Before the circuit court ruled on the State's motion, petitioner filed a notice of appeal. C276-78. The circuit court struck the notice of appeal, C306, and re-sentenced petitioner to consecutive prison terms of fifty years for murder and twenty-six years for attempted murder, C308. The sentence for attempted murder included a twenty-year enhancement pursuant to 720 ILCS 5/8-4(c)(1)(C) because petitioner personally discharged a firearm while committing the offense. C308. At the time of petitioner's crimes, this Court had declared 5/8-4(c)(1)(C) unconstitutional. *See People v. Morgan*, 203 Ill. 2d 470, 492 (2003). But before petitioner was resentenced, this Court abrogated *Morgan* and declared that the statute was constitutional. *See People v. Sharpe*, 216 Ill. 2d 481, 519 (2005).

Direct appeal and postconviction review

The appellate court affirmed petitioner's convictions on direct appeal, *People v. Muhammad*, No. 2-06-0086 (Ill. App. Ct. Apr. 16, 2008) (Rule 23 order), and the circuit court dismissed his postconviction petition, C418-20.

Petition for relief from judgment

Petitioner filed a petition for relief from judgment under 735 ILCS 5/2-1401 that the circuit court denied. R1504-06. On appeal, petitioner argued that (1) his sentences for murder and attempted murder were void because the circuit court lacked jurisdiction to correct its sentence after he filed a notice of appeal, and (2) his sentence for attempted murder was void because 5/8-4(c)(1)(C) had been declared void *ab initio* at the time he committed the offense. The appellate court rejected both arguments and affirmed. *People v. Abdullah*, 20185 IL App (2d) 150840, ¶¶ 9-21.

STANDARD OF REVIEW

The trial court's jurisdiction is a legal question to be reviewed de novo. *People v. Hughes*, 2012 IL 112817, ¶ 19. Likewise, this Court reviews de novo lower courts' interpretation of Supreme Court rules. *People v. Salem*, 2016 IL 118693, ¶ 11.

ARGUMENT

I. The State May File a Post-Judgment Motion Asking the Trial Court to Correct an Unauthorized Sentence.

Petitioner argues that the State may never file a post-judgment motion to correct a defendant's sentence, even when the sentence is unauthorized by statute. *See, e.g.*, Def. Br. 19. This Court has never endorsed such a rule, and it should not do so now.

No statute or rule prohibits the State from filing a post-trial motion to correct a defendant's sentence. And when this Court intends to limit the

State's opportunity to seek review, it knows how to do so. *See, e.g.*, Ill. Sup. Ct. R. 604(a) (limiting appeals by the State in criminal proceedings).

Moreover, petitioner does not dispute that the circuit court, for as long as it had jurisdiction, also had the authority to correct itself and impose a statutorily mandated sentence *sua sponte*. And there is no policy reason to prohibit the State from filing a motion asking the court to exercise that authority. If the legislature or this Court wanted to prohibit the State from filing such a motion, they both knew how to do so. *See, e.g.*, *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996) (725 ILCS 5/122-2.1 prohibits State from participating in "first stage" postconviction proceedings).

In many cases, a post-sentencing motion will be the State's only opportunity to correct an unauthorized sentence. Petitioner argues that mandamus is available, but mandamus is an extraordinary remedy that may not be available even when the trial court's sentence is "clearly improper as a matter of law." *People ex rel. Raoul v. Gaughan*, No. 124535 (Ill. Mar. 19, 2019) (Kilbride, J., concurring). The circuit court, not this Court, is best positioned to correct an unlawful sentence and to do so shortly after it has been imposed. This Court should not create a rule that would funnel the State's post-judgment motions to this Court as mandamus petitions, particularly because the circuit court is in the best position to correct its errors quickly and efficiently.

II. "Counsel" Means "Counsel," Not "Defense Counsel," in Rule 606(b).

This Court should apply the plain language of Rule 606(b), which provides that any pending timely motion filed by counsel or an unrepresented defendant nullifies a notice of appeal.

This Court applies the same principles when interpreting its own rules as it applies when interpreting statutes. *People v. Tousignant*, 2014 IL 115329, ¶ 8. The first such principle is to apply the "plain and ordinary meaning" of the rule's language, as it is the best indicator of the drafters' intent. *People v. Howard*, 233 Ill. 2d 213, 218 (2009). Reviewing courts should not "rewrite a [rule] to add provisions or limitations the [drafters] did not include." *People v. Smith*, 2016 IL 119659, ¶ 28.

Petitioner asks this Court to add language to Rule 606(b)'s second sentence, replacing "by counsel or by defendant, if not represented by counsel" with "by defense counsel or by defendant, if not represented by counsel." But both the ordinary meaning of "counsel" and its use within Rule 606(b) show that it is not limited to defense counsel.

"Counsel," when referring to a person, means "[o]ne or more lawyers who, having the authority to do so, give advice about legal matters, [especially] a courtroom advocate." Counsel Definition, *Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw. This definition necessarily includes both a prosecutor and a defense attorney.

The rest of Rule 606(b) supports the ordinary meaning of "counsel," which includes both defense counsel and a prosecutor. The first sentence of Rule 606(b) provides that "the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion." Thus, any motion directed against the judgment, including a motion filed by the State, tolls the time for filing a notice of appeal until the motion is resolved. Petitioner's reading of "counsel" would allow a defendant to strip the circuit court of jurisdiction to consider such a motion.

The phrase "defendant, if not represented by counsel" merely includes unrepresented defendants in the set of people who can file a post-judgment motion that preserves the circuit court's jurisdiction. A parallel provision for the State would be unnecessary, as the State will always be represented by counsel.

Even petitioner's plain language argument weighs in favor of the inclusive reading of "counsel." According to petitioner, "counsel" should be read as "defense counsel" throughout Rule 606(d). Def. Br. 12-15. Under this reading, the circuit court would retain jurisdiction only when a post-judgment motion is filed "by defense counsel or by defendant, if not represented by defense counsel." Petitioner's reading adds only redundancy, not clarity.

Petitioner's historical and policy arguments, *see* Pet. Br. 15-26, do not justify petitioner's reading of Rule 606(b). Indeed, these arguments all hinge on the premise that the State is prohibited from filing post-judgment motions. But as Section I demonstrates, the State may file such motions. So this Court should reject petitioner's reading of Rule 606(b), which would allow a defendant to prevent the circuit court from considering any such motion.

III. A Sentence Imposed in Violation of *Ex Post Facto* Principles Is Voidable, Not Void.

This Court recognizes only two types of judgments as void: (1) judgments entered by a court that lacked personal or subject-matter jurisdiction; and (2) judgments based on a statute that is facially unconstitutional and void *ab initio*. *People v. Price*, 2016 IL 118613, ¶ 31.

Petitioner argues that the firearm enhancement added to his attempted murder sentence is void because the firearm enhancement regime for attempted murder had been declared void *ab initio* when petitioner committed the crime in March 2004. But the firearm enhancement regime was *not* void when petitioner was sentenced in November 2005. *See People v. Sharpe*, 216 Ill. 2d 481, 519 (2005).

To be sure, petitioner has a compelling *ex post facto* argument: the retroactive application of *Sharpe* created an unforeseeable additional penalty for petitioner's conduct, thereby depriving him of due process. But even an error of "constitutional dimension" does not render a judgment void and

therefore immune from waiver or forfeiture. *People v. Smith*, 406 Ill. App. 3d 879, 887 (1st Dist. 2010). Instead, a defendant may waive the benefit of a constitutional (or statutory) right that is designed to protect individual defendants. *Chicago-Sandoval Coal Co. v. Indus. Comm'n*, 301 Ill. 389, 391 (1922). Accordingly, a defendant may waive the constitutional rights to be free from double jeopardy, to a speedy trial, and to a twelve-person jury, *People v. Houston*, 226 Ill. 2d 135, 157-58 (2007), but not a presentence investigation report, *People v. Youngbey*, 82 Ill. 2d 556, 565 (1980) (report is not for defendant's benefit but a "useful tool for the sentencing judge"), or a valid Rule 604(d) certificate, *People v. Munetsi*, 283 Ill. App. 3d 326, 332-33 (4th Dist. 1996) ("[A] Rule 604(d) certificate is primarily for the benefit of the trial and appellate courts."). Constitutional *ex post facto* principles exist for the personal benefit of defendants and potential defendants, not the courts or the general public.[1] Accordingly, this Court should hold that *ex post facto* rights are subject to waiver.

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[1] Thus, nearly every jurisdiction to consider the question has held that the protection may be waived (or forfeited). *See, e.g.*, *People v. Douglas*, 2017 IL App (4th) 120617-B, ¶¶ 13, 18 (*ex post facto* argument forfeited); *United States v. Silva*, 554 F.3d 13, 22 (1st Cir. 2009) (*ex post facto* argument waived); *United States v. Riggi*, 649 F.3d 143, 148 (2d Dist. 2011) (same); *United States v. Harrison*, 393 F.3d 805, 806-07 (8th Cir. 2005) (same); *United States v. Gilcrist*, 106 F.3d 297, 301-02 (9th Cir. 1997) (same); *Furnish v. Commonwealth*, 95 S.W.3d 34, 50-51 (Kent. 2002) (same); *State v. Fortin*, 843 A.2d 974, 1013-15 (N.J. 2004) (same); *State v. McDonnell*, 987 P.2d 486, 495 (Or. 1999) (same); *but see Raimondo v. Kiley*, 172 Ill. App. 3d 217, 225 (1st Dist. 1988) (cannot waive *ex post facto* argument).

In doing so, this Court need not reconcile the "void sentence" cases on which petitioner relies. *See* Def. Br. 32-33 (citing *People v. Taylor*, 2015 IL 117267, *People v. Blair*, 2013 IL 114122, and *People v. Williams*, 2012 IL App (1st) 100126). When these cases were decided, any unauthorized sentence was considered void. But this Court disavowed the "void sentence" rule in *People v. Castleberry*, 2015 IL 116916. In light of *Castleberry*, a sentence that violates *ex post facto* principles is voidable, not void. These decisions — and the State's concession of a void sentence in *Williams* — do not survive *Castleberry*.

IV. This Court Should Exercise Its Supervisory Authority to Modify Petitioner's Sentence to Comply with 730 ILCS 5/5-8-4(a)(i), 730 ILCS 5/5-8-1(a)(1)(d)(iii), and *Ex Post Facto* Principles.

The Illinois Constitution vests this Court "with supervisory authority over all of the lower courts of this state." *People v. Salem*, 2016 IL 118693, ¶ 20; *see also* Ill. Const. 1970, art. VI, § 16. This supervisory authority is "unlimited in extent and hampered by no specific rules or means for its exercise." *In re Estate of Funk*, 221 Ill. 2d 30, 97 (2006). Ordinarily, the Court "will issue a supervisory order only if the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice, or where intervention is necessary to keep an inferior court or tribunal from acting beyond the scope of its authority." *In re J.T.*, 221 Ill. 2d 338, 347 (2006).

The firearm enhancement to petitioner's attempted murder sentence violates *ex post facto* principles. Further, petitioner does not (and cannot plausibly) dispute that the circuit court was required by statute to impose consecutive sentences on the attempted murder and murder convictions.

If this Court agrees with the State that the firearm enhancement to petitioner's attempted murder sentence is not void, it should exercise its supervisory authority to remove the firearm enhancement from petitioner's attempted murder sentence, in compliance with *ex post facto* principles.

If this Court instead finds that the circuit court's order modifying petitioner's sentence is void, it should exercise its supervisory authority to remand to the circuit court with orders to resentence petitioner in compliance with 730 ILCS 5/5-8-1(a)(1)(d)(iii) and 730 ILCS 5/5-8-4(a)(i).

CONCLUSION

This Court should affirm the appellate court's judgment and exercise its supervisory authority to impose a sentence that complies with *ex post facto* principles. Alternatively, this Court should exercise its supervisory authority to remand for resentencing in compliance with all applicable statutes.

May 10, 2019

Respectfully Submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General of Illinois

MICHAEL M. GLICK
Criminal Appeals Division Chief

By: *s/ Brian McLeish*
BRIAN MCLEISH
Assistant Attorney General
100 West Randolph St., 12th Floor
Chicago, Illinois 60601-3218
(312) 814-3692
eserve.criminalappeals@atg.state.il.us

Counsel for Respondent-Appellee
People of the State of Illinois

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 twelve pages.

May 10, 2019

s/ Brian McLeish

BRIAN MCLEISH
Assistant Attorney General
100 West Randolph St., 12th Floor
Chicago, Illinois 60601-3218
(312) 814-3692
eserve.criminalappeals@atg.state.il.us

Counsel for Respondent-Appellee
People of the State of Illinois

CERTIFICATE OF FILING AND SERVICE

Under penalty of law as provided in 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct, including that the foregoing **Brief and Appendix of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois on May 10, 2019, using the Odyssey electronic filing system, which will provide service to the persons listed below.

Patricia Mysza, Deputy Defender
David T. Harris, Assistant Appellate Defender
First Judicial District
203 North LaSalle Street, 24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us

David J. Robinson, Chief Deputy Director
State's Attorneys Appellate Prosecutor
2032 Larkin Avenue
Elgin, Illinois 60123
2nddistrict.eserve@ilsaap.org

Michael G. Nerheim
Lake County State's Attorney
18 North County Street, 4th Floor
Waukegan, Illinois 60085
StatesAttorney@lakecountyil.gov

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

May 10, 2019

s/ Brian McLeish
BRIAN MCLEISH
Assistant Attorney General
100 West Randolph St., 12th Floor
Chicago, Illinois 60601-3218
(312) 814-3692
eserve.criminalappeals@atg.state.il.us