

CUMULATIVE DIGEST

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§24-1

Generally

People v. Absher, 242 Ill.2d 77, 950 N.E.2d 659 (2011)

Generally, contract law principles apply to negotiated guilty pleas. Thus, neither party can unilaterally abrogate its obligations under the plea agreement.

By entering a fully negotiated plea and accepting an intensive probation sentence which required him to submit to searches by the probation department and agree that any evidence discovered in such searches was admissible at trial, defendant waived any Fourth Amendment issues concerning such evidence. The court acknowledged, however, that the waiver would not extend to searches that had no possible law enforcement objective or which so far exceeded any legitimate objective as to justify an inference that the officers' purpose was mere harassment. The court also stressed that it expressed no opinion concerning the validity of a similar condition where the defendant enters an open plea or is involuntarily placed on probation.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Hughes, 2012 IL 112817 (No. 112817, 11/29/12)

1. Jurisdiction stems from the Illinois Constitution, which assigns original jurisdiction to the circuit court in all "justiciable matters" except where the Supreme Court has original and exclusive jurisdiction. The court rejected the argument that the circuit court lacked jurisdiction to accept a guilty plea on a count on which a *nolle prosequi* order had been entered on the State's motion and which had not been refiled or reinstated.

To *nolle prosequi* a charge means simply that the State indicates an unwillingness to prosecute. Once the charge is *nol prossed*, the proceedings are terminated with respect to that particular charge, but the defendant is not acquitted. If a *nolle prosequi* is entered before jeopardy attaches, the State may re prosecute the defendant subject to other relevant statutory or constitutional defenses and so long as there is no harassment, bad faith, or fundamental unfairness.

2. Because jeopardy had not yet attached, the State's termination of the criminal prosecution by a *nolle prosequi* gave the State the right to either file a new charge or ask to vacate the dismissal and reinstate the original charge. The failure to do either did not deprive the trial court of jurisdiction, however, because an aggravated criminal sexual abuse indictment is a "justiciable matter" involving an offense created by the Criminal Code. Thus, even if the indictment was legally defective due to the *nolle prosequi*, the trial court had jurisdiction over the cause and could accept the guilty plea.

3. The court rejected the argument that defendant's plea was involuntary because he was not aware that the Attorney General could use the guilty plea as a basis to file a sexually dangerous person's petition. Due process principles provide that a guilty plea is knowing and voluntary only if the defendant has been advised of the "direct consequences" of the plea. A "direct consequence" is one which "has a definite, immediate and largely automatic effect on the range of the defendant's sentence."

By contrast, the trial court need not advise the defendant of the "collateral consequences" of a guilty plea. A "collateral consequence" is one which the circuit court has no authority to impose and which results from a discretionary action by an agency that is outside the trial court's control. Whether a consequence of a guilty plea is direct or collateral is a question of law which is reviewed *de novo*.

The court concluded that the possibility of commitment under the Sexually Violent Person's Commitment Act is merely a collateral consequence of a guilty plea, because it does not follow directly from the fact of a conviction and requires an petition by a prosecuting authority. Thus, a person who is convicted of a predicate sexual offense may or may not become the subject of a sexually violent person's petition, depending on action by an entity that is outside the trial court's control. Because a sexually violent person's proceeding is merely a collateral consequence of a plea, the trial court need not advise the defendant of the possibility of such a proceeding before accepting a guilty plea.

The court concluded, however, that in order to render effective assistance of counsel, defense counsel must inform a defendant who pleads guilty to a sexually violent offense that he will be subject to evaluation for possible commitment under the Sexually Violent Persons Act.

4. In dissent, Justices Freeman and Burke found that unless the State took steps to reinstate the *nol prossed* charge, there was no "justiciable matter" on which a guilty plea could have been entered.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Ware, 2014 IL App (1st) 120485 (No. 1-12-0485, 3/14/14)

A defendant does not have an absolute right to have a guilty plea accepted by the trial court. A trial court may reject a plea in the exercise of sound judicial discretion. Here, the prosecutor informed the court, midtrial, that defendant "wants to plead to 21 years." The court said it would not accept that agreement and told the parties they could "negotiate something different."

The Appellate Court rejected defendant's argument that the trial court rejected the plea agreement on the sole basis that the trial had already begun. The record instead shows that the trial court was open to a plea agreement, but instead indicated that it would consider a different agreement and suggested further negotiations. Under these facts, no error occurred.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. White, ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 109616, 6/16/11)

1. 730 ILCS 5/5-8-1(a)(1)(d)(I) provides that where first degree murder is committed while the offender is armed with a firearm, 15 years must be added to the term of imprisonment imposed by the court. The court concluded that where the factual basis for a guilty plea shows that the mandatory sentencing enhancement applies, the parties may not preclude the enhancement by entering a plea agreement for a sentence that does not conform to statutory requirements. The court rejected the argument that the State has discretion to enter a plea agreement which negotiates away a mandatory sentence, holding that the legislature has removed such discretion for sentences which are subject to the enhancement.

The court also noted that because defendant was not properly admonished concerning the mandatory enhancement, the entire plea agreement was void. The trial court's denial of defendant's motion to withdraw his plea was reversed, and the cause was remanded with directions to allow the defendant to withdraw his guilty plea if he chooses to do so.

2. In a concurring opinion, Justice Theis noted that the State has discretion to enter plea agreements which preclude mandatory sentencing enhancements, but must do so by amending the indictment to remove any allegations concerning the enhancements and presenting a factual basis which does not invoke those enhancements.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

People v. Andrews, 403 Ill.App.3d 654, 936 N.E.2d 648 (4th Dist. 2010)

The Appellate Court finds the dispositive holding of **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), to be that the trial court must inform the defendant that the MSR term will be added to his negotiated sentence, not that the MSR term is part of the negotiated sentence. The defendant prevailed in **Whitfield** only because the court made no reference at all to the MSR term, not because the court failed to inform defendant that the MSR term was part of his negotiated sentence. The statutorily-mandated MSR term cannot be part of a plea negotiation because there is nothing to negotiate. The MSR admonition is not required by Supreme Court Rule 402(b), which directs that the terms of the plea agreement be stated in open court, but by 402(a)(2), which directs the court to advise defendant of the minimum and maximum penalties prescribed by law. **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), does not change this analysis, even though **Morris** also makes reference to defendant's plea agreement.

Applying this analysis, the Appellate Court found no due process violation. The prosecutor accurately stated the plea agreement without reference to the MSR term. The court mentioned as part of its 402(a)(2) admonition that if defendant was convicted and sentenced to prison, there would be a one-year MSR term.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Cortez, 2012 IL App (1st) 102184 (No. 1-10-2184, mod. op. 8/10/12)

1. A plea agreement is void where an essential part of the agreement is unenforceable or illegal. Whether a provision of a plea agreement is essential is determined by its relative importance in light of the entire agreement.

Where defendant pleaded guilty in return for an agreement for a two-year sentence with 353 days credit for time served, meaning that defendant would not serve additional time in custody for this offense, the provision for sentence credit was an essential part of the plea agreement. Thus, the agreement was void where the trial court lacked authority to grant the contemplated credit because it was for time which defendant had served on an unrelated, consecutive sentence. The court concluded that the cause should be remanded to allow defendant to withdraw his plea if he wished.

2. Defendant did not forfeit the issue although he first raised it some 11 years after the guilty plea, when he appealed the denial of a §2-1401 petition which sought to force the Department of Corrections to implement the trial court's order granting the credit. The court noted that a void sentence can be challenged at any time.

The court also rejected the argument that defendant was estopped from challenging the plea because he received the benefit of the bargain when he obtained the minimum possible sentence. The court found the argument to be "disingenuous" because Illinois law prohibits defendant from receiving the benefit of his bargain - sentence credit for time previously served on an unrelated, consecutive sentence.

3. The court rejected the argument that **People v. White**, 2011 IL 109616, which held that the trial court may not impose an unauthorized sentence even though the parties reached a plea agreement calling for such a sentence, created a new rule that is inapplicable on collateral review. The court concluded that **White** merely applied the longstanding rule that a sentence not authorized by statute is void. (Distinguishing **People v. Avery**, 2012 IL App (1st) 110298 (No. 1-11-0298, 6/21/12) (**White** constitutes a new rule that is not to be applied retroactively)).

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

People v. Davis, 403 Ill.App.3d 461, 934 N.E.2d 550 (1st Dist. 2010)

Noting a conflict in appellate authority, the Appellate Court held that **People v. Whitfield** was not violated where the trial court admonished defendant at the plea hearing that he would be required to serve a term of mandatory supervised release, but failed to mention MSR at sentencing. (Affirming **People v. Marshall**, 381 Ill.App.3d 724, 886 N.E.2d 1106 (1st Dist. 2008)). The court stated that under **Whitfield**, a “constitutional violation occurs only when there is absolutely no mention to a defendant, before he actually pleads guilty, that he must serve an MSR term in addition to the agreed-upon sentence that he will receive in exchange for his plea of guilty.”

Because defendant knew before he entered the guilty plea that he would be sentenced to the penitentiary, and was told during the plea hearing that persons sentenced to the penitentiary must serve MSR, he was placed on notice that he would have to serve an MSR term in addition to the penitentiary sentence. The court acknowledged, however, that “[t]he better practice would incorporate the mandatory supervised release admonition when the specific sentencing is announced,” and that “the written sentencing judgment should also include the term of mandatory supervised release.”

The summary dismissal of defendant’s post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Deng, 2013 IL App (2d) 111089 (No. 2-11-1089, 6/14/13)

Where the factual basis for a guilty plea includes facts that qualify defendant for a mandatory sentencing enhancement, a sentence that does not include the enhancement is void and, if the defendant is not admonished about the enhancement, the plea agreement is void as well. A court may not impose a sentence inconsistent with the governing statutes even where the parties and the court agree to the sentence.

Defendant entered a negotiated plea of guilty to a felony murder charge and was sentenced to 35 years. The charge included no allegation that defendant had personally discharged a firearm that caused the death. The factual basis for the plea included that defendant shot the victim during a residential burglary. A mandatory enhancement of 25 years to life applies where a defendant personally discharges a firearm that proximately causes the death of another. The court did not admonish defendant that the mandatory enhancement applied when it accepted the plea and imposed sentence in accordance with the agreement.

Because the factual basis for the plea established that the enhancement applied, defendant was subject to the mandatory enhancement. The Appellate Court rejected the State’s argument that defendant pled guilty on an accountability theory because no accountability theory was presented in the factual basis. While the State may have intended to remove the enhancement where it was not alleged in the felony murder count, it did nothing to remove the enhancement from the factual basis for the plea. Because the court was required to sentence the defendant to the enhancement, making 45 years the minimum possible sentence, but defendant was sentenced to 35 years and was not admonished about the enhancement, his sentence and the plea agreement are void.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Dodds, 2014 IL App (1st) 122268 (No. 1-12-2268, 2/27/14)

1. The court accepted the State’s concession that a defendant who has completed his probation sentence and is ineligible to file a post-conviction petition may raise an ineffective assistance of counsel argument by way of a §2-1401 petition. The court stressed that defendant had no other avenue to raise his claim that his plea was involuntary due to counsel’s erroneous

advice concerning the sex offender registration requirements that would result from a guilty plea to possession of child pornography.

2. Although sex offender registration is merely a collateral consequence of a guilty plea, it is a mandatory consequence which carries stigmatizing and far-reaching consequences into every aspect of the registrant's life. The court concluded that under the rationale of **Padilla v. Kentucky**, 559 U.S. 356 (2010), which held that defense counsel must advise defendants of the possible risk of deportation resulting from a guilty plea, counsel has an affirmative duty to advise a guilty plea defendant concerning the possibility that he will be required to register as a sex offender.

The court also noted that even before **Padilla**, giving erroneous advice concerning a collateral consequence of a plea was treated differently than the failure to give advice at all. Here, counsel erroneously advised defendant that his guilty plea to child pornography would result in a requirement that he register as a sex offender for 10 years. After that 10-year-period had passed, defendant learned that in fact he would be required to register for life.

Because defense counsel was ineffective in advising defendant of the sex offender registration consequences of his guilty plea, the plea was involuntary. The plea and conviction were vacated and the cause remanded for further proceedings. The court ordered that the additional proceedings be conducted by a different judge, and reminded the parties that retrial might be difficult in light of their inability to obtain a record of the original proceedings.

People v. Donelson, 2011 IL App (1st) 092594 (No. 1-09-2594, 11/9/11)

Where the applicable statutes required consecutive sentences for first degree murder, home invasion, and aggravated criminal sexual assault, the trial court entered a void sentence by imposing concurrent sentences of 50, 30, and 30 years, respectively. Because a void sentence can be corrected at any time, defendant could raise the issue by a §2-1401 petition filed outside the normal two-year statute of limitations.

The court rejected defendant's request to vacate his plea, however, finding that the plea agreement was not void and that the appropriate remedy was to vacate the sentences and remand the cause for resentencing. A plea agreement is void where an essential term of the agreement is unenforceable or illegal under the relevant statutes. Whether a term or aspect of the agreement was essential is determined by its relative importance in light of the entire agreement.

Here, the essential terms of the plea agreement included that defendant entered a guilty plea to certain charges in return for a total sentence of 50 years. The court acknowledged that a plea agreement would be void if the agreed sentence could not be imposed under the relevant statutes; here, however, a total of 50 years could be imposed as consecutive sentences under the authorized sentencing ranges for the offenses. Because the essential terms of the plea agreement could be satisfied under the applicable statutes, remand for resentencing was appropriate.

Defendant's sentences were vacated and the cause remanded for imposition of consecutive sentences totaling the 50-year sentence contemplated by the plea agreement.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Guzman, 2014 IL App (3d) 090464 (Nos. 3-09-0464 & 3-10-0802, 1/23/14)

1. 725 ILCS 5/113-8 provides that before accepting a guilty plea, the trial court "shall" admonish the defendant that if he or she is not a U.S. citizen, the conviction may have consequences in terms of his or her immigration status. The court concluded that under **People v. Delvillar**, 235 IL 2d 507, 922 N.E.2d 330 (2009) the failure to give the §113-8

admonishment concerns only a collateral consequence of a plea and does not raise questions concerning the voluntariness of the plea.

2. In **Delvillar**, the Illinois Supreme Court found that the failure to admonish under §113-8 requires reversal where real justice has been denied or the defendant has been prejudiced. A defendant shows prejudice by demonstrating that he was subjected to potential immigration penalties or that he would not have entered a guilty plea had he been admonished that a conviction might affect his immigration status.

Here, defendant failed to show that he was prejudiced by the absence of a §113-8 admonishment where his motion to withdraw his plea merely stated that he wanted to withdraw his plea, without asserting that he was subject to immigration penalties or that he would have pleaded not guilty had the admonishment been given. Under these circumstances, the trial court did not abuse its discretion by denying leave to withdraw the plea.

3. In a specially concurring opinion, Justice Holdridge acknowledged that under **Delvillar**, immigration concerns are collateral consequences of a guilty plea. However, Justice Holdridge believed that **Delvillar** did not survive the United States Supreme Court's decision in **Padilla v. Kentucky**, 559 U.S. 356 (2010), which held that defense counsel must advise a guilty plea defendant of the risk of adverse immigration consequences resulting from a criminal conviction. Justice Holdridge also found that the trial court's failure to give the §113-8 admonishment renders a guilty plea involuntary.

4. In a dissenting opinion, Justice McDade stated that only the Illinois Supreme Court can determine whether **Delvillar** remains good law in light of **Padilla**.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Hughes, 2011 IL App (2d) 090992 (No. 2-09-0992, 7/19/11)

1. Defendant's guilty plea was not void although the count to which he pled had been *nolle prossed* by the prosecution some six years earlier, when the State sought to have defendant declared sexually dangerous. Although the trial court has no jurisdiction over a dismissed charge and the State is generally required to file a new charging instrument in order to reinstate a prosecution, under the revestment doctrine litigants may revest a court which has general jurisdiction with both personal and subject matter jurisdiction.

To revest jurisdiction, the parties must actively participate without objection in proceedings which are inconsistent with the merits of the prior judgment. Revestment depends not on the consent of the parties, but on their active participation in certain proceedings.

2. The court concluded that the revestment doctrine applied where the parties reached an agreement by which the trial court was to vacate its previous dismissal of the charges, defendant was to plead guilty to one count and receive a 14-year-sentence, and the State was to withdraw the petition under which defendant had been adjudicated sexually dangerous. By presenting the agreement, the parties clearly participated in proceedings that were inconsistent with the prior dismissal of the charges.

3. Defendant's plea was not involuntary although two weeks after entering a plea agreement by which the State withdrew a sexually-dangerous-person petition, the State filed a sexually-violent-person petition. At the hearing on his motion to withdraw the plea, defendant stated that he believed his guilty plea would dispose of the matter entirely. He also stated that he would not have entered a plea had he been aware that he could be subjected to additional proceedings. In addition, defense counsel testified that he and defendant did not discuss the possibility that the State would file a sexually-violent-person petition.

Generally, for a plea to be voluntary and intelligent, the defendant must be fully aware of the direct consequences of entering the plea. However, lack of knowledge concerning

collateral consequences of a plea are irrelevant to voluntariness. Direct consequences are those that are definite and immediate and which flow automatically from the plea. Direct consequences are those which may be imposed by the trial judge.

Collateral consequences, by contrast, are beyond the control of the trial judge and do not affect the length of the sentence. Collateral consequences may be known at the time of the plea, but do not follow the plea with certainty and result from action of the prosecutor or some other entity beyond the trial court's control.

Whether a sexually-violent-person petition is filed is not a “definite, immediate, or automatic consequence of a guilty plea.” Instead, sexually-violent-person proceedings depend on the State initiating the adjudicatory process by filing a petition. Thus, sexually-violent person proceedings are a collateral consequence and do not affect the voluntariness of a plea.

4. The court held that its conclusion was not affected by **Padilla v. Kentucky**, 559 U.S. ___, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), which rejected the “collateral - direct” distinction concerning defense counsel’s duty to advise a guilty plea defendant of the immigration consequences of a plea. In **Padilla**, the U.S. Supreme Court “expressly disavowed that it was considering whether” the “collateral - direct” distinction is ever appropriate. **Padilla** held only that because deportation is a “particularly severe penalty” that is nearly “automatic” for a broad class of offenders, the right to effective assistance of counsel requires disclosure of the likely immigration consequences of a guilty plea.

The court also noted that several factors relied upon by **Padilla** - that prevailing professional norms require advice concerning the possibility of deportation, that many clients may be more concerned about avoiding deportation than avoiding a prison sentence, and that some guilty pleas almost always result in deportation - are inapplicable to sexually-violent-person proceedings. The court also found that it is uncertain whether the Supreme Court intends to extend **Padilla** to situations other than deportation. Finally, the court noted that the record showed that at least some conversation concerning sexually-violent-person proceedings had transpired between defendant and defense counsel.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Kaye, 2013 IL App (4th) 120028 (No. 4-12-0028, 5/6/13)

A trial court lacks jurisdiction to convict a defendant based upon actions that do not constitute a criminal offense. A guilty plea must confess some punishable offense to form the basis of a sentence. The effect of a plea of guilty is a record admission of whatever is well alleged in the indictment. If the charge is insufficient, the plea confesses nothing.

Defendant pleaded guilty to a charge that he failed to register his employment change as a sex offender where he failed to report that he was no longer employed. The Sex Offender Registration Act requires sex offenders to report a change in the place of employment, but not a loss of employment. The Appellate Court vacated defendant’s conviction as void because his guilty plea was based on actions not constituting a criminal offense.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. McRae, 2011 IL App (2d) 090798 (No. 2-09-0798, 10/24/11)

When the factual basis for a plea of guilty triggers a mandatory sentencing enhancement, neither the State in plea negotiations, nor the court at sentencing, may fashion a sentence that does not include the mandatory enhancement. **People v. White**, 2011 IL 109616.

Defendant entered a plea of guilty to one count of an indictment charging him with first

degree murder without any sentencing enhancement, in return for a sentence of 27 years and dismissal of all other counts, including murder counts charging the enhancing factor that defendant personally discharged the firearm that proximately caused the death. The factual basis for the plea included references to evidence that defendant had personally discharged the firearm that caused the death, but the court admonished defendant that the sentencing range for first degree murder was 20 to 60 years.

Because defendant's sentence did not conform to the statutory requirement of a mandatory sentencing enhancement of 25 years to life for personally discharging a firearm that proximately resulted in the death of another, the 27-year sentence is void. Because the trial court failed to properly admonish defendant that he faced a mandatory sentence of 45 years to natural life, the entire plea agreement is also void.

(Defendant was represented by Panel Attorney Thomas Brandstrader, Chicago.)

People v. Schlabach, 2012 IL App (2d) 100248 (No. 2-10-0248, 1/31/12)

Defendant pleaded guilty to charges of intimidation and aggravated DUI in return for a nine-year sentence for intimidation and the entry of court costs only on the DUI conviction. The intimidation offense was committed while defendant was on pre-trial release on the DUI. Seven years later, defendant filed a petition pursuant to 735 ILCS 5/2-1401 seeking to vacate his DUI conviction.

1. The costs-only disposition on the aggravated DUI conviction was not authorized as aggravated DUI is a Class 4 felony, and court costs alone is not an authorized disposition for a felony. 625 ILCS 5/11-501(d)(2); 730 ILCS 5/5-5-3(b). Because defendant committed the intimidation offense while out on bond on the DUI offense, the sentences for those two offenses must run consecutively. 730 ILCS 5/5-8-4(h). The costs-only judgment was therefore void.

2. Simply adding an authorized sentence to the DUI conviction would deprive defendant of the benefit of his bargain and violate due process. Because the defendant could not receive a legally-authorized sentence within the terms of the plea agreement, the aggravated DUI and intimidation convictions were voidable. One option available to defendant was to seek modification of the aggravated DUI and intimidation sentences to ones that were authorized, but that would nevertheless give him the benefit of his bargain. Another option was for defendant to seek vacation of the guilty pleas, but that option was available only if defendant's delay in seeking relief did not result in undue prejudice to the State.

3. The resolution of the aggravated DUI case was not severable from the intimidation case. An unenforceable provision of a contract is severable unless it is so closely connected with the remainder of the contract that to enforce the valid provisions of the contract without it would be tantamount to rewriting the agreement. It is unlikely that the State would have agreed to a costs-only disposition for the DUI in a stand-alone agreement. Therefore, the plea agreement could not be considered as two separate agreements.

The court reversed the dismissal of the §2-1401 petition and remanded for further proceedings at which the defendant must be correctly admonished as to possible sentences. Defendant could then seek modification of his sentences or vacation of the pleas.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Smith, 2013 IL App (3d) 110738 (No. 3-11-0738, 8/2/13)

1. Under **People v. White**, 2011 IL 109616, when the charge and factual basis show that a weapon was used in a manner which gives rise to a mandatory firearm enhancement, the sentence imposed on a guilty plea must include the firearm enhancement even if the parties intended to exclude the enhancement through their plea agreement. The court

concluded that **White** did not create a “new” rule (rejecting **People v. Avery**, 2012 IL App (1st) 110298), and thus applies to cases in which guilty pleas were entered before **White** was decided.

Therefore, defendant was entitled to withdraw a fully-negotiated pre-**White** plea to first degree murder where the indictment and factual basis asserted that defendant discharged a firearm, but in accordance with the plea agreement the sentence did not include the mandatory 25-year enhancement.

2. Although defendant raised the issue for the first time in a post-conviction petition that was filed after **White** was decided, the court found that it need not remand the cause for further post-conviction proceedings. Instead, the court remanded the cause with directions to allow defendant to withdraw his guilty plea and proceed to trial should he so choose.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Weiser, 2013 IL App (5th) 120055 (No. 5-12-0055, 8/7/13)

A trial court does not obtain jurisdiction to sentence the defendant until it enters a judgment of conviction. The court must first adjudicate the defendant guilty.

The docket entry for defendant’s plea hearing merely stated that defendant pleaded guilty and set a sentencing hearing. But a transcript of the plea hearing showed that the court found a factual basis for the plea and accepted the plea only after finding that defendant understood both the charges against her and the rights she was giving up by pleading guilty. These findings constitute an adjudication of guilt that authorized the court to impose sentence.

(Defendant was represented by Assistant Defender Larry O’Neill, Mt. Vernon.)

People v. Young, 2013 IL App (1st) 111733 (No. 1-11-1733, 12/6/13)

In 2004, defendant entered fully negotiated guilty pleas to first degree murder and attempt murder and received negotiated consecutive sentences of 25 and 10 years. In 2011, defendant’s post-conviction petition alleging ineffective assistance of trial counsel was denied after a third-stage hearing. On appeal, defendant argued for the first time that his sentences were void because they did not include the mandatory statutory firearm enhancement of 20 years for personally discharging a firearm or 25 years to natural life if great bodily harm resulted from discharging a firearm. Defendant argued that he should be allowed to withdraw his plea and plead anew.

1. Noting a conflict in appellate authority, the Appellate Court found that **People v. White**, 2011 IL 109616, which prohibits the trial court from imposing a sentence which does not include the mandatory firearm enhancements when the allegations of the charge indicate that a firearm was used, announced a new rule of law which is not applied retroactively to convictions which were final before **White** was decided. The court reasoned that prior to **White**, there was confusion in the law concerning whether despite the allegation that a firearm was used, the State could negotiate a plea which did not include the firearm enhancement.

2. Alternatively, the court concluded that defendant was estopped from challenging the sentence because it had been freely negotiated and provided him with a benefit in that he received a far lower sentence than was required under the law. The court also stressed that the State would be disadvantaged at a trial by the passage of time and the possible unavailability of witnesses to testify.

The doctrine of judicial estoppel applies where a party takes inconsistent positions in separate judicial or quasi-judicial proceedings, intended that the trier of fact accept the truth

of the facts alleged at the prior hearing, and succeeded in asserting the first position and consequently receiving some benefit. The court acknowledged that Illinois courts have never applied judicial estoppel where criminal defendants entered a fully negotiated plea agreement and then challenged the sentence as too lenient. However, courts from other jurisdictions have recognized that the State is prejudiced under similar circumstances where a guilty plea is vacated years after it was entered, and have estopped defendants from enjoying the benefits of a negotiated plea agreement while challenging its validity.

Here, defendant voluntarily entered a plea calling for negotiated sentences totaling 35 years, and nearly ten years later claimed that the sentences should have been at least 76 years. The court concluded that the doctrine of judicial estoppel applied because the State could not be restored to its original position in that witnesses may have become unavailable for trial. The court also noted that defendant did not allege that any fraud or misrepresentation had occurred in the original plea agreement.

The court concluded:

Defendant has not cited, nor has our research disclosed an Illinois case in which a defendant has been permitted to withdraw his plea entered nearly a decade earlier and some 13 years after the offenses occurred, because the sentence was not harsh enough. It defies logic to suggest that defendant actually wants to serve a longer prison sentence than the improper sentence he received. . . . Rather, defendant . . . is using the improper sentence as a vehicle to withdraw his guilty plea, 10 years after its entry, and go to trial. Defendant's belated challenge could harm the State because it might endure hardship if forced to prosecute the case, given the passage of time and the recollection of witnesses.

The order denying the post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Kate Schwartz, Chicago.)

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Waiver of Counsel

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Plea Bargaining

Lafler v. Cooper, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2012 WL 932019 (2012) (No. 10-209, 3/21/12)

1. The Sixth Amendment right to counsel extends to the plea-bargaining process. The performance prong of **Strickland v. Washington**, 466 U.S. 668 (1984), requires a defendant to show that counsel's representation fell below an objective standard of reasonableness. To

establish **Strickland** prejudice in the context of a plea, defendant must show that the outcome of the plea process would have been different with competent advice.

2. When the ineffective advice leads to the rejection of a plea offer, defendant must show that but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

3. The court rejected the argument that there can be no finding of **Strickland** prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. The Sixth Amendment requires effective assistance at critical stages of a criminal proceeding, not just at trial. There is no rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself; instead, the inquiry is whether the trial cured the particular error at issue. Even if a trial is free from error, a defendant who goes to trial instead of taking a more favorable plea may be prejudiced from a conviction on more serious counts or imposition of a more severe sentence.

There is no requirement that defendant show that ineffective assistance of counsel led to his being denied a substantive or procedural right in addition to **Strickland** prejudice. **Lockhart v. Fretell**, 506 U.S. 364 (1993), and **Nix v. Whiteside**, 475 U.S. 157 (1986), merely hold that legitimate prejudice does not exist where defendant would receive a windfall as a result of the application of an incorrect legal principle or an illegitimate defense strategy.

In a criminal justice system which is for the most part a system of pleas, the scope of the Sixth Amendment is not limited to ensuring the reliability of a conviction following a trial. The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. In the context of plea bargaining, the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance. The fact that defendant is guilty does not mean that he was not entitled by the Sixth Amendment to effective assistance, or that he suffered no prejudice from his attorney's deficient performance during plea bargaining.

4. Any remedy for a Sixth-Amendment violation must neutralize the taint of the violation while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State invested in the prosecution. The injury to a defendant who declines a plea offer as a result of ineffective assistance may take two forms: First, a defendant who is convicted of the same charges to which he would have pleaded guilty could have received a lesser sentence under the plea. If defendant can demonstrate a reasonable probability that but for counsel's errors he would have accepted the plea, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between."

Resentencing may not suffice if the offer was for a plea to counts less serious than that for which defendant was convicted, or if a mandatory sentence confines a court's discretion after trial. "In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." The court "can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."

The court noted two factors that may inform the court's exercise of its discretion in fashioning a remedy. First, a court may take into account a defendant's earlier expressed willingness or unwillingness to accept responsibilities for his actions. Second, the court must attempt to restore the parties to the positions they occupied prior to rejection of the plea offer, without requiring the prosecution to incur the expense of a new trial.

5. Addressing the case before it, the Court concluded that the state court's adjudication was contrary to clearly-established federal law (28 U.S.C. §2254(d)) because it failed to apply **Strickland** to assess the ineffective-assistance claim. Therefore there is no statutory bar to the federal court granting relief.

Defendant satisfied **Strickland**'s two-part test. The parties agreed that counsel's performance was deficient when he advised defendant to reject a plea offer on the ground that he could not be convicted at trial. Defense counsel had told defendant that the State would be unable to establish his intent to murder because he had shot complainant below the waist, although he had also fired toward her head and had fired at her repeatedly when she fled.

Defendant showed that but for counsel's deficient performance there is a reasonable probability he would have accepted the State's plea offer to dismiss two charges and recommend a 51-to-81 month sentence. Defendant had communicated to the trial court his willingness to accept the offer. Defendant was prejudiced because as a result, he received a minimum sentence 3½ times greater than he would have received under the plea. The correct remedy is to order the State to reoffer the plea agreement. If defendant accepts, the state trial court can then exercise its discretion in determining whether to accept the plea agreement, vacate only some of the convictions and resentence defendant, or leave the convictions and sentences from trial undisturbed.

Missouri v. Frye, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ (2012) (No. 10-444, 3/21/12)

1. The Sixth Amendment guarantees the right to the assistance of counsel at all critical stages of the criminal process, including arraignment, post-indictment interrogations, post-indictment lineups, and entering a guilty plea. Because plea bargaining is central to the administration of the criminal justice system and more than 90% of all cases are resolved through bargaining, "the negotiation of a plea bargain . . . is almost always the critical point for a defendant." Thus, "defense counsel have responsibilities in the plea bargain process . . . which must be met to render the adequate assistance of counsel that the Sixth Amendment requires."

2. The court acknowledged that it is difficult to define the scope of defense counsel's duties concerning plea bargaining. It was unnecessary to resolve that issue here, however, where defense counsel failed to advise defendant of two plea offers, one of which would have allowed him to plead to a lesser charge and receive a lower sentence than was ultimately imposed on his open plea to the original charge. "[A]s a general rule, defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."

Because counsel failed to communicate a more favorable plea offer until after it had expired, his representation was objectively unreasonable under the first prong of **Strickland**. The court added that to prevent frivolous or fabricated claims that more advantageous plea offers were made but not communicated to defendants, the prosecution and trial courts may adopt measures such as requiring that plea offers be in writing, that the negotiation process be documented, and that formal offers be made part of the record in order to ensure that the defendant has been adequately advised.

3. To establish prejudice under the second prong of **Strickland**, a defendant who

claims that a plea offer lapsed or was rejected because of counsel's deficient performance must demonstrate a reasonable probability that: (1) had counsel been effective, defendant would have accepted a plea offer which would have resulted in a more favorable outcome, and (2) the plea would have been entered without the prosecution cancelling the offer or the trial court refusing to accept the plea. Where defense counsel did not inform defendant of two plea offers before they expired, one of the plea offers would have allowed defendant to plead to a misdemeanor and serve a 90-day sentence, and defendant subsequently entered an open plea to the original felony charge and received a three-year sentence, defendant made an adequate showing that he would have accepted the plea offer had he been made aware of it. The state court erred, however, by failing to require defendant to show that the prosecution would have gone through with the plea and the judge would have accepted it. Because these questions are matters of state law, the court remanded the cause to Missouri courts to determine whether: (1) either the prosecution or trial court is authorized under Missouri law to refuse to accept a defendant's attempt to accept a plea offer, and (2) there is a reasonable probability the prosecutor and judge would have adhered to the offer in this case.

People v. Bannister, ___ Ill.2d ___, ___ N.E.2d ___ (2009) (No. 105887, 10/29/09)

1. The credibility of a witness (a co-defendant) was not undermined to the extent that a fair trial was denied, although the witness's plea agreement with the State provided that in return for truthfully testifying against the defendant, two first degree murder convictions would be vacated so the witness could plead guilty to one first degree murder and be resentenced to 60 years in a medium security institution. Although the witness was required to testify consistently with his prior statements, the agreement specifically provided that it would be "null and void" if the co-defendant's representations concerning the defendant were found to be false. It is not unreasonable to plea bargain for specific trial testimony that is consistent with information which the witness represents to be factually true, even if the benefit of the bargain is withheld until the witness has testified, so long as the "overriding requirement" of a plea agreement is that the testimony be truthful.

In dissent, Justices Freeman, Kilbride and Burke found that the majority had neglected to decide the issue raised by the defendant – whether due process is violated by a plea agreement which obligates a witness to testify consistently with prior statements.

2. Defendant did not have standing to challenge the validity of a plea agreement between the State and its witness. Absent due process concerns, the validity of a plea agreement is governed by contract law. Under contract law, there is a strong presumption that the agreement benefits only the parties who made it, and not a third party. Overcoming this presumption requires evidence manifesting an affirmative intent to benefit a third party.

Because the defendant was not an intended beneficiary of the plea agreement between the State and the co-defendant, he lacked standing to argue that the agreement was invalid.

Defendant's convictions and sentences were affirmed.

People v. Donelson, 2013 IL 113603 (No. 113603, 3/21/13)

1. The plea-bargaining process is vital to and highly desirable for the criminal justice system. 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. Because an agreement is comparable to an enforceable contract, when interpreting a plea agreement courts apply contract law principles where appropriate.

2. Under general principles of contract law, a mutual mistake by the parties may be rectified where the parties are in actual agreement and their true intent may be discerned.

Where the defendant and the State agreed to concurrent sentences of 50, 30, and 30 years, but mandatory consecutive sentences were required under Illinois law, both parties entered the agreement in the mistaken belief that concurrent sentences were permissible. Although concurrent sentences totaling 50 years were not statutorily authorized, the court concluded that the intent of the parties can be satisfied by imposing consecutive terms totaling 50 years, so long as such sentences are within the authorized sentencing ranges for the offenses. The court distinguished this situation from **People v. White**, 2011 IL 109616, where the authorized sentencing ranges would not have allowed the court to construct a sentence that was consistent with the plea agreement.

Because the intent of the parties could be satisfied by restructuring the sentences, the plea agreement was not void although it called for a sentence that was statutorily unauthorized.

3. The court rejected defendant's argument that he had negotiated for specific sentences which included concurrent sentences, and not merely for a sentencing cap. The court concluded that defendant had two concerns in entering the plea agreement - limiting the number of convictions and setting an upper limit on the prison term he would serve. Those concerns could be satisfied by adjusting the sentences within the authorized ranges. Imposing consecutive sentences also satisfies the State's interests in protecting the convictions it obtained and avoiding the need to retry a 14-year-old case.

The cause was remanded with instructions to reconfigure defendant's sentences to consecutive terms totaling 50 years.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Hale, 2013 IL 113140 (No. 113140, 10/3/13)

1. The Sixth Amendment right to the effective assistance of counsel applies to the plea bargaining process. Thus, a defendant has the right to be reasonably informed about the direct consequences of accepting or rejecting a plea offer, even if he rejects the offer and ultimately receives a fair trial.

2. The court concluded that defendant was unable to establish that defense counsel's faulty advice constituted ineffective assistance where he was unable to show that he would have accepted the State's plea offer had counsel accurately advised him that consecutive sentencing was mandatory.

People v. White, ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 109616, 6/16/11)

1. 730 ILCS 5/5-8-1(a)(1)(d)(I) provides that where first degree murder is committed while the offender is armed with a firearm, 15 years must be added to the term of imprisonment imposed by the court. The court concluded that where the factual basis for a guilty plea shows that the mandatory sentencing enhancement applies, the parties may not preclude the enhancement by entering a plea agreement for a sentence that does not conform to statutory requirements. The court rejected the argument that the State has discretion to enter a plea agreement which negotiates away a mandatory sentence, holding that the legislature has removed such discretion for sentences which are subject to the enhancement.

The court also noted that because defendant was not properly admonished concerning the mandatory enhancement, the entire plea agreement was void. The trial court's denial of defendant's motion to withdraw his plea was reversed, and the cause was remanded with directions to allow the defendant to withdraw his guilty plea if he chooses to do so.

2. In a concurring opinion, Justice Theis noted that the State has discretion to enter plea agreements which preclude mandatory sentencing enhancements, but must do so by

amending the indictment to remove any allegations concerning the enhancements and presenting a factual basis which does not invoke those enhancements.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

People v. Barghout, 2013 IL App (1st) 112373 (No. 1-11-2373, 12/20/13)

A defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer. Counsel thus has the obligation to inform his or her client about the maximum and minimum sentences applicable for the charged offenses.

Here, the petition alleged that trial counsel failed to advise defendant that if he rejected the State's 12-year plea offer and was found guilty, he faced a prison term of 6 to 60 years; instead counsel erroneously advised defendant that he would be eligible for probation. The petition also alleged that defendant would have accepted the State's offer if counsel had properly advised him of the correct sentencing range. These allegations made an arguable claim that trial counsel provided ineffective assistance and that defendant suffered prejudice because he would have accepted the plea bargain if he had received accurate advice about the sentencing range.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Buckner, 2013 IL App (2d) 130083 (No. 2-13-0083, 9/24/13)

Defendant agreed to plead guilty to three counts in exchange for the State's agreement to nolle three other counts. There was no agreement with respect to the sentence. Defendant filed no motion to withdraw her plea, but filed a motion to reconsider her sentence contending that two of the counts to which she pleaded guilty should merge under the one-act, one-crime doctrine.

Generally, a defendant who pleads guilty must file a motion to withdraw his guilty plea if he seeks to challenge his conviction. Where a defendant agrees to plead guilty to certain charges and the State agrees to drop the remaining charges, the defendant forfeits any consideration of a claim that two of the counts to which he pleaded guilty should merge under the one-act, one-crime rule, where he fails to file a motion to withdraw his guilty plea raising this issue. There is no plain error review. To do so would allow the defendant to receive the full benefit of his bargain under the plea agreement, while later avoiding his own obligation by unilaterally reducing the convictions to which he had agreed.

Defendant could not challenge the convictions to which she pleaded guilty where she filed no motion to withdraw the plea. She could not seek to vacate one of her convictions by filing a motion to reconsider sentence.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Cortez, 2012 IL App (1st) 102184 (No. 1-10-2184, mod. op. 8/10/12)

1. A plea agreement is void where an essential part of the agreement is unenforceable or illegal. Whether a provision of a plea agreement is essential is determined by its relative importance in light of the entire agreement.

Where defendant pleaded guilty in return for an agreement for a two-year sentence with 353 days credit for time served, meaning that defendant would not serve additional time in custody for this offense, the provision for sentence credit was an essential part of the plea agreement. Thus, the agreement was void where the trial court lacked authority to grant the contemplated credit because it was for time which defendant had served on an unrelated, consecutive sentence. The court concluded that the cause should be remanded to allow

defendant to withdraw his plea if he wished.

2. Defendant did not forfeit the issue although he first raised it some 11 years after the guilty plea, when he appealed the denial of a §2-1401 petition which sought to force the Department of Corrections to implement the trial court's order granting the credit. The court noted that a void sentence can be challenged at any time.

The court also rejected the argument that defendant was estopped from challenging the plea because he received the benefit of the bargain when he obtained the minimum possible sentence. The court found the argument to be "disingenuous" because Illinois law prohibits defendant from receiving the benefit of his bargain - sentence credit for time previously served on an unrelated, consecutive sentence.

3. The court rejected the argument that **People v. White**, 2011 IL 109616, which held that the trial court may not impose an unauthorized sentence even though the parties reached a plea agreement calling for such a sentence, created a new rule that is inapplicable on collateral review. The court concluded that **White** merely applied the longstanding rule that a sentence not authorized by statute is void. (Distinguishing **People v. Avery**, 2012 IL App (1st) 110298 (No. 1-11-0298, 6/21/12) (**White** constitutes a new rule that is not to be applied retroactively)).

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

People v. Deng, 2013 IL App (2d) 111089 (No. 2-11-1089, 6/14/13)

Where the factual basis for a guilty plea includes facts that qualify defendant for a mandatory sentencing enhancement, a sentence that does not include the enhancement is void and, if the defendant is not admonished about the enhancement, the plea agreement is void as well. A court may not impose a sentence inconsistent with the governing statutes even where the parties and the court agree to the sentence.

Defendant entered a negotiated plea of guilty to a felony murder charge and was sentenced to 35 years. The charge included no allegation that defendant had personally discharged a firearm that caused the death. The factual basis for the plea included that defendant shot the victim during a residential burglary. A mandatory enhancement of 25 years to life applies where a defendant personally discharges a firearm that proximately causes the death of another. The court did not admonish defendant that the mandatory enhancement applied when it accepted the plea and imposed sentence in accordance with the agreement.

Because the factual basis for the plea established that the enhancement applied, defendant was subject to the mandatory enhancement. The Appellate Court rejected the State's argument that defendant pled guilty on an accountability theory because no accountability theory was presented in the factual basis. While the State may have intended to remove the enhancement where it was not alleged in the felony murder count, it did nothing to remove the enhancement from the factual basis for the plea. Because the court was required to sentence the defendant to the enhancement, making 45 years the minimum possible sentence, but defendant was sentenced to 35 years and was not admonished about the enhancement, his sentence and the plea agreement are void.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Donelson, 2011 IL App (1st) 092594 (No. 1-09-2594, 11/9/11)

Where the applicable statutes required consecutive sentences for first degree murder, home invasion, and aggravated criminal sexual assault, the trial court entered a void sentence by imposing concurrent sentences of 50, 30, and 30 years, respectively. Because a void sentence can be corrected at any time, defendant could raise the issue by a §2-1401 petition

filed outside the normal two-year statute of limitations.

The court rejected defendant's request to vacate his plea, however, finding that the plea agreement was not void and that the appropriate remedy was to vacate the sentences and remand the cause for resentencing. A plea agreement is void where an essential term of the agreement is unenforceable or illegal under the relevant statutes. Whether a term or aspect of the agreement was essential is determined by its relative importance in light of the entire agreement.

Here, the essential terms of the plea agreement included that defendant entered a guilty plea to certain charges in return for a total sentence of 50 years. The court acknowledged that a plea agreement would be void if the agreed sentence could not be imposed under the relevant statutes; here, however, a total of 50 years could be imposed as consecutive sentences under the authorized sentencing ranges for the offenses. Because the essential terms of the plea agreement could be satisfied under the applicable statutes, remand for resentencing was appropriate.

Defendant's sentences were vacated and the cause remanded for imposition of consecutive sentences totaling the 50-year sentence contemplated by the plea agreement.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Douglas, 2014 IL App (4th) 120617 (No. 4-12-0617, 7/2/14)

Defendant pled guilty to a Class 2 offense, knowing that he would be eligible for Class X sentencing, in exchange for a sentencing cap of 10 years imprisonment. On appeal, defendant successfully argued that he was ineligible for Class X sentencing due to his age. The Appellate Court held that the appropriate remedy was not to vacate the plea agreement. Instead, since defendant was eligible for an extended term on his Class 2 offense (with a sentencing range of 3 -14 years), the interests of both parties could be served by remanding the matter to resentence defendant for his Class 2 offense, with a permissible sentence of between three and 10 years.

(Defendant was represented by Deputy Defender Jackie Bullard, Springfield.)

People v. Evans, 391 Ill.App.3d 470, 907 N.E.2d 935 (4th Dist. 2009)

The court reiterated that a defendant may, as part of a negotiated plea, agree to a specified sentence credit and a public defender fee. Where the plea agreement covers those issues, the defendant may not challenge either the sentence credit or the trial court's failure to hold a hearing on the defendant's ability to pay a public defender fee.

People v. Gooch, 2014 IL App (5th) 120161 (No. 5-12-0161, 9/3/14)

A defendant who is convicted pursuant to a negotiated guilty plea may not challenge his sentence by filing a motion to reconsider, and must instead file a motion to withdraw the plea. Supreme Court Rule 604(d). The court concluded that a "negotiated" plea is one in which the parties reach an agreement concerning sentencing. In other words, where there is no agreement as to sentence but the parties agree that some charges will be dismissed in exchange for the plea, the plea is not "negotiated" for purposes of Rule 604(d).

The court rejected the argument that sentencing considerations are involved in a plea whenever the State loses the ability to obtain sentences on dismissed charges. The court distinguished **People v. Diaz**, 192 Ill.2d 211, 735 N.E.2d 605 (2000), in which the plea agreement specified that the State agreed not to seek consecutive or extended term sentencing, and held that a "plea bargain that is silent as to sentencing is equivalent to an open plea."

Because defendant agreed to plead guilty to one count of criminal sexual assault in

exchange for the dismissal of two counts of predatory criminal sexual assault, and there was no agreement concerning sentencing, the plea was not negotiated. Therefore, defendant could challenge the sentence by filing a motion to reconsider the sentence and was not required to move to withdraw the plea.

People v. Guerrero, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0972, 5/18/11)

1. A defendant does not have a constitutional right to plea bargain. If the State chooses to bargain, however, there is a right to effective assistance of counsel during the negotiations. Providing effective assistance of counsel during plea negotiations includes accurately informing the accused concerning the direct consequences of accepting or rejecting a plea offer, including the maximum and minimum sentences that could be imposed if the defendant is convicted of the charged offenses.

The right to the effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial.

2. Although counsel acted unreasonably where he did not realize that defendant was subject to mandatory consecutive terms and advised that defendant would likely get probation if convicted, defendant could not show prejudice where there the State had not offered a plea agreement and showed no interest in conducting negotiations. In the absence of any reason to believe that plea negotiations would have occurred had defendant asked, there was no reasonable probability that the outcome would have been different had counsel given accurate information.

3. The trial court has no obligation to inform the defendant of possible sentences except in guilty plea situations, where the defendant must make a knowing and voluntary waiver of the right to trial. Where the trial court has no obligation to inform the defendant of the possible sentences, due process is not violated if the trial court elects to advise defendant of the penalties but gives erroneous advice.

People v. Hubbard, 2012 IL App (2d) 120060 (Nos. 2-12-0060 & 2-12-0348 cons., 10/17/12)

The State and the defendant have the right to negotiate what facts are presented to the court in a plea agreement. Those facts must be statutorily consistent with the agreed sentence or sentencing range. The factual basis and the count of the charging instrument to which the defendant pleads guilty are the principal means of placing those facts before the court, and it is those facts that determine the validity of the sentence. A sentence is void where the factual basis for the plea demonstrates that the sentence is not statutorily authorized. **People v. White**, 2011 IL 109616.

Defendant entered a plea of guilty to a charge of aggravated criminal sexual assault under a plea agreement that he would be sentenced to a term of years, even though natural life was the only statutorily-authorized sentence due to defendant's prior conviction for predatory criminal sexual assault. The factual basis contained no reference to the prior conviction. The defendant attacked this plea as void by filing a §2-1401 petition (735 ILCS 5/2-1401).

The Appellate Court affirmed the circuit court's dismissal of the petition, concluding that the agreed sentence was not void. Unlike **White**, defendant's prior conviction was only mentioned at the Rule 402 conference and during preliminary proceedings prior to entry of the plea to memorialize the clear intent of the parties to omit the prior conviction from the factual basis for the plea. The trial court was not required to take judicial notice of the conviction where it had not been requested to do so by either party. Because the prior conviction was not

formally presented to the court at the plea proceedings, the mandatory natural life sentence was not triggered.

People v. Hudson, 2012 IL App (2d) 100484 (No. 2-10-0484, 1/27/12)

Noting a conflict in Illinois authority, the Appellate Court rejected the argument that a plea agreement is void if it calls for a longer sentence than is statutorily authorized (rejecting **People v. Gregory**, 379 Ill.App.3d 414, 883 N.E.2d 762 (4th Dist. 2008)).

Due process entitles a defendant to the benefit of his bargain in a plea agreement. There are two possible remedies when a defendant does not receive the benefit of the bargain - either the promise must be fulfilled, or the defendant must be given the opportunity to withdraw the plea. Where a plea agreement calls for a sentence that is longer than that statutorily authorized, the sentence can be reduced to that which is statutorily authorized. Under such circumstances, the defendant is afforded a better bargain than he negotiated, because he serves a lower sentence than that to which he agreed.

The court acknowledged that where a plea agreement provides for a sentence less severe than is legally possible, due process may require that defendant be allowed to withdraw his plea. Where the plea agreement requires a sentence which is longer than statutorily authorized, however, due process is satisfied if the defendant is given a windfall by being placed in a better position than the agreement contemplated.

Defendant's five-year-sentence for aggravated DUI was reduced to three years.
(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. McDermott, 2014 IL App (4th) 120655 (Nos. 4-12-0655 & 4-12-0664, 6/10/14)

Defendant was convicted in five counties of charges relating to the fraudulent buying and selling of motor vehicles. He was sentenced to imprisonment.

Subsequently, defendant pleaded guilty in Champaign County to aggravated battery. The prosecutor set forth the terms of the plea agreement in open court and stated that defendant would receive 222 days sentencing credit. Defendant asked the trial court to clarify that he would receive 222 days credit, and the court did so.

In McLean County, defendant agreed to plead guilty to several counts relating to odometer fraud and unlawful altering of title documents, in exchange for a sentence of five years imprisonment. The plea agreement stated that defendant would receive credit for 233 days. Defendant asked the trial court to clarify that he would receive 233 days credit against the five-year sentence, which was to be served consecutively to the sentences for convictions in two other counties. The trial court clarified that defendant would receive the credit.

Defendant subsequently filed post-conviction petitions seeking to obtain the sentencing credits involved in the Champaign and McLean County cases. He claimed that DOC assumed that the credits had already been given on defendant's sentences from other counties, and that giving double credit would violate Illinois law. Defendant's post-conviction petitions were dismissed as frivolous and patently without merit.

1. Where a specified amount of sentence credit is included in the terms of a plea agreement, defendant is entitled to that credit even if **People v. Latona**, 184 Ill. 2d 260, 703 N.E.2d 901 (1998), which holds that a defendant may not earn two sentence credits for a single day of custody, is violated. **People v. Clark**, 2011 IL App (2d) 091116; **People v. Lenoir**, 2013 IL App (1st) 113615. Similarly, a defendant who agrees to forgo sentencing credit as part of a plea agreement may not subsequently seek to obtain such credit. **People v. Williams**, 384 Ill. App. 3d 415, 892 N.E.2d 129 (4th Dist. 2008). In other words, when a defendant enters a negotiated plea of guilty in exchange for a specified sentence credit, both the State and the

defendant are bound by the agreement. To deny credit that is an essential part of the plea agreement would violate the due process right to receive the benefit of one's plea bargain.

2. Because the record clearly shows that the plea agreements included specified amounts of sentence credit, and defendant was not advised that those credits could not be given under Illinois law, the agreed-upon credits must be given. The court acknowledged that had defendant persisted in his pleas after being advised that Illinois law prohibited him from receiving the specified credits, the record would likely show that the credits were not essential conditions of the pleas. In that case, defendant would not be entitled to the credits.

Here, however, the credits were clearly essential conditions of the plea agreements. Thus, defendant was entitled to receive them.

3. Where a defendant does not receive the benefit of a plea bargain, either the unfulfilled promise must be implemented or the defendant must be given an opportunity to withdraw his plea. Because defendant clearly asserted that he did not want to withdraw the negotiated pleas and the State conceded that reducing defendant's sentences would closely approximate the terms of the original plea agreements, reducing the sentences was an appropriate remedy. The court reversed the orders dismissing the post-conviction petitions and remanded the causes with instructions to reduce the sentences.

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

People v. McRae, 2011 IL App (2d) 090798 (No. 2-09-0798, 10/24/11)

When the factual basis for a plea of guilty triggers a mandatory sentencing enhancement, neither the State in plea negotiations, nor the court at sentencing, may fashion a sentence that does not include the mandatory enhancement. **People v. White**, 2011 IL 109616.

Defendant entered a plea of guilty to one count of an indictment charging him with first degree murder without any sentencing enhancement, in return for a sentence of 27 years and dismissal of all other counts, including murder counts charging the enhancing factor that defendant personally discharged the firearm that proximately caused the death. The factual basis for the plea included references to evidence that defendant had personally discharged the firearm that caused the death, but the court admonished defendant that the sentencing range for first degree murder was 20 to 60 years.

Because defendant's sentence did not conform to the statutory requirement of a mandatory sentencing enhancement of 25 years to life for personally discharging a firearm that proximately resulted in the death of another, the 27-year sentence is void. Because the trial court failed to properly admonish defendant that he faced a mandatory sentence of 45 years to natural life, the entire plea agreement is also void.

(Defendant was represented by Panel Attorney Thomas Brandstrader, Chicago.)

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011)

If a plea discussion does not result in a plea of guilty, neither the plea discussion nor any resulting agreement, plea, or judgment is admissible against the defendant in any criminal proceeding. Supreme Court Rule 402(f). A statement is an inadmissible plea-related statement if: (1) the defendant exhibited a subjective expectation to negotiate a plea; and (2) the expectation was reasonable under a totality of the objective circumstances. Offers by the accused to cooperate, without more, do not constitute plea negotiations.

Defendant exhibited a subjective expectation to negotiate a plea and his expectation was reasonable under the circumstances. While in custody, defendant told both the police and a prosecutor that in exchange for his confession, he wanted a guarantee that he would receive

probation, and that he would talk if promised he would receive no jail time. In opening statement, the prosecutor characterized this evidence as an attempt by defendant “to broker a deal with the police in exchange for telling them what really happened.” The Appellate Court agreed that defendant’s statements went beyond mere offers to cooperate and were attempts to bargain for a specific sentence.

The court also found plain error as a result of the admission of defendant’s statements. Evidence of plea negotiations has a devastating effect and is prejudicial even in the presence of overwhelming evidence of guilt. Defendant’s plea-related statements were offered by two witnesses and argued with emphasis in the State’s closing arguments. “Given the potentially devastating effect of such testimony and the impossible task of parsing out what actual effect it had on the jury,” the court reversed and remanded for a new trial.

People v. Robinson, 2012 IL App (4th) 101048 (No. 4-10-1048, 8/27/12)

1. Whether to accept a plea agreement is a decision left to the defendant rather than to defense counsel. However, the defendant is limited to either accepting or rejecting the plea agreement that has been negotiated by defense counsel. In other words, defendant is not entitled to direct counsel in his or her negotiations with the prosecutor.

Because plea negotiations are generally governed by principles of contract law, the legal effect of making a counteroffer is to reject a standing offer. Furthermore, a rejected offer cannot be revived by a subsequent attempt at acceptance.

2. Defense counsel was not ineffective where, after he negotiated a plea agreement with an eight-year sentencing cap, he declined defendant’s request to attempt to negotiate a seven-year-cap but to accept the eight year offer if further negotiations were unsuccessful. Counsel’s refusal to follow the defendant’s instruction was not objectively unreasonable, because counsel likely realized that making a counteroffer for seven years would operate as a rejection of the State’s eight year offer. Because counsel’s actions were objectively reasonable, defendant could not satisfy the first element of **Strickland**.

The trial court’s order granting the State’s motion to dismiss the petition at the second stage was affirmed.

(Defendant was represented by Assistant Defender Christopher Gehrke, Chicago.)

People v. Schlabach, 2012 IL App (2d) 100248 (No. 2-10-0248, 1/31/12)

Defendant pleaded guilty to charges of intimidation and aggravated DUI in return for a nine-year sentence for intimidation and the entry of court costs only on the DUI conviction. The intimidation offense was committed while defendant was on pre-trial release on the DUI. Seven years later, defendant filed a petition pursuant to 735 ILCS 5/2-1401 seeking to vacate his DUI conviction.

1. The costs-only disposition on the aggravated DUI conviction was not authorized as aggravated DUI is a Class 4 felony, and court costs alone is not an authorized disposition for a felony. 625 ILCS 5/11-501(d)(2); 730 ILCS 5/5-5-3(b). Because defendant committed the intimidation offense while out on bond on the DUI offense, the sentences for those two offenses must run consecutively. 730 ILCS 5/5-8-4(h). The costs-only judgment was therefore void.

2. Simply adding an authorized sentence to the DUI conviction would deprive defendant of the benefit of his bargain and violate due process. Because the defendant could not receive a legally-authorized sentence within the terms of the plea agreement, the aggravated DUI and intimidation convictions were voidable. One option available to defendant was to seek modification of the aggravated DUI and intimidation sentences to ones that were authorized, but that would nevertheless give him the benefit of his bargain. Another option was for

defendant to seek vacation of the guilty pleas, but that option was available only if defendant's delay in seeking relief did not result in undue prejudice to the State.

3. The resolution of the aggravated DUI case was not severable from the intimidation case. An unenforceable provision of a contract is severable unless it is so closely connected with the remainder of the contract that to enforce the valid provisions of the contract without it would be tantamount to rewriting the agreement. It is unlikely that the State would have agreed to a costs-only disposition for the DUI in a stand-alone agreement. Therefore, the plea agreement could not be considered as two separate agreements.

The court reversed the dismissal of the §2-1401 petition and remanded for further proceedings at which the defendant must be correctly admonished as to possible sentences. Defendant could then seek modification of his sentences or vacation of the pleas.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Smith, 406 Ill.App.3d 879, 941 N.E.2d 975 (1st Dist. 2010)

Supreme Court Rule 402(d) prohibits a court from initiating plea discussions, but also contemplates the court's limited participation in negotiations, allowing the court to indicate its concurrence in a plea agreement reached by the parties. To show that a court's participation in plea negotiations rendered a guilty plea involuntary, the defendant must demonstrate that the court departed from its judicial function and participated in the negotiation process to the extent that improper influence was exerted on the defendant to plead guilty, or that defendant reasonably believed that he was no longer able to receive a fair and impartial trial so he must plead guilty and accept the sentence approved by the court. A court's improper involvement in a plea agreement does not render a conviction obtained pursuant to that agreement void.

Before trial began, the court participated in a conference with the defense and the prosecution pursuant to Supreme Court Rule 402(d)(2). Defendant did not plead guilty, but proceeded to trial. After the State had presented most of its case, defendant asked if he could accept the court's offer of a 32-year sentence that had resulted from the conference. The court accepted the defendant's plea of guilty and imposed a 32-year sentence, but failed to admonish defendant at the plea hearing of the applicable three-year MSR term.

Defendant filed a motion to vacate plea on the ground that the court had failed to admonish defendant of the MSR term. Defendant asked that he be allowed to vacate his plea rather than that his sentence be reduced by three years. The State responded that there had been no "traditional negotiated plea" between the parties, but an offer from the court, and that the proper remedy was to reduce the defendant's sentence to give him the benefit of the bargain. The court reduced defendant's sentence, indicating that the defendant had asked for the court's offer of 32 years and that the plea had not been negotiated with the State.

On appeal, defendant argued that his plea was involuntary and his conviction void because the court had no authority to negotiate a guilty plea.

1. Not only did the defendant forfeit any error arising from the court's participation in the plea agreement by failing to include the error in his post-plea motion, but defendant cannot complain because he invited the error. To allow a defendant to use the exact action he procured in the trial court to obtain a reversal on appeal would offend every notion of fair play and encourage duplicitous conduct. Defendant asked for the Rule 402 conference and then asked the court to enter judgment based on the offer derived from the conference. He cannot complain that the court erred in granting his requests.

2. Defendant's plea is not involuntary. The record does not support defendant's argument that he negotiated his plea with the court rather than the State.

In asking the court for a 402 conference prior to trial, defense counsel represented that there had been informal talks with the State regarding “maybe resolving the matter.” Even though defense counsel asked the court to reinstate its offer of 32 years when defendant sought to plead guilty during trial, and the court stated that it would reinstate the offer it had made before trial, this language does not unequivocally show that it was the trial court that first suggested the 32-year sentence, rather than that the court merely consented to the parties’ agreement to a 32-year sentence. The State’s reference to there not being a traditional negotiated plea could refer only to the unusual circumstance of defendant asking the court to reinstate the offer in the midst of trial. The State’s suggestion that the court reduce the defendant’s sentence to give the defendant of his bargain was an acknowledgment that an agreement did exist.

If the defendant had truly entered an open plea, defendant would not have been entitled to any relief because his sentence plus the MSR term was less than the maximum term that the court admonished him that he could receive for the offense. The trial court did provide defendant with post-plea admonitions in accordance with Supreme Court Rule 605(b), which applies to open pleas of guilty, rather than Supreme Court Rule 605(c), which applies to negotiated pleas (and limits defendant to a motion to vacate plea rather than a motion to reduce sentence as a possible post-plea remedy). However, that circumstance is not controlling of whether the plea was open or negotiated.

3. To determine the appropriate remedy where the defendant has not received the benefit of his bargain due to the court’s failure to inform him that a MSR term will be added to his negotiated sentence, the court must consider not only the defendant’s preference, but whether permitting the defendant to withdraw his plea based on the absence of a MSR admonition would be unduly prejudicial to the prosecution.

The trial court indicated that it would have allowed defendant to withdraw his plea if he had pled guilty before his trial began. The State had already presented witnesses in support of its case when the defendant asked to plead guilty. The State expended resources to present a significant portion of its case. Even though the witnesses may still be available or the State may be able to use a transcript of the testimony it did present at a new trial, such evidence would be a poor substitute for live testimony presented by witnesses with fresh memories. The defendant twice changed his mind about whether to plead guilty, and there is no guarantee that he will not change it a third time. Therefore the court did not err in finding that reducing defendant’s sentence was a more appropriate remedy than allowing him to vacate his plea.

(Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

People v. Smith, 2013 IL App (3d) 110738 (No. 3-11-0738, 8/2/13)

1. Under **People v. White**, 2011 IL 109616, when the charge and factual basis show that a weapon was used in a manner which gives rise to a mandatory firearm enhancement, the sentence imposed on a guilty plea must include the firearm enhancement even if the parties intended to exclude the enhancement through their plea agreement. The court concluded that **White** did not create a “new” rule (rejecting **People v. Avery**, 2012 IL App (1st) 110298), and thus applies to cases in which guilty pleas were entered before **White** was decided.

Therefore, defendant was entitled to withdraw a fully-negotiated pre-**White** plea to first degree murder where the indictment and factual basis asserted that defendant discharged a firearm, but in accordance with the plea agreement the sentence did not include the mandatory 25-year enhancement.

2. Although defendant raised the issue for the first time in a post-conviction petition

that was filed after **White** was decided, the court found that it need not remand the cause for further post-conviction proceedings. Instead, the court remanded the cause with directions to allow defendant to withdraw his guilty plea and proceed to trial should he so choose.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Stone, 2013 IL App (1st) 111344 (No. 1-11-1344, 3/29/13)

Where due to mutual mistake, the parties enter into a plea agreement for illegal concurrent sentences, but the parties can be given the benefit of their bargain by refashioning the sentences to legal consecutive sentences whose aggregate term is identical to the sentence under the plea agreement, the remedy is to remand for resentencing in accordance with the plea agreement and applicable statutes, rather than to vacate the plea. **People v. Donelson**, 2013 IL 113603.

Defendant pled guilty to four counts of criminal sexual assault and one count of aggravated criminal sexual assault in return for concurrent sentences of 24 years for aggravated criminal sexual assault, 15 years each on three counts of criminal sexual assault, and a consecutive term of nine years on the remaining count of criminal sexual assault. By statute, all of the sentences for criminal sexual assault should have run consecutively to each other and consecutively to the sentence for aggravated criminal sexual assault.

Defendant has never asserted that his plea agreement was premised on specific sentences or that he would be deprived of the benefit of his bargain if his sentences were reconfigured to be in line with the applicable statutes. Therefore his plea agreement can be fulfilled by affirming defendant's convictions and remanding for resentencing to consecutive terms totaling 24 years.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Sweeney, 2012 IL App (3d) 100781 (No. 3-10-0781, 3/22/12)

1. Where the trial court enters a sentencing order that is statutorily unauthorized in its entirety, the sentence is void and must be vacated. However, where a trial court with jurisdiction over the parties and the subject matter imposes a sentence in excess of its statutory authority, only the portion of the sentence that exceeds the court's authority is void. In such circumstances, only the void portion of the sentence need be vacated.

2. A trial court lacks authority to accept a plea agreement which includes a sentencing provision that is not authorized by statute. Even if some parts of a plea agreement are authorized, an agreement may not be enforced in part if the unenforceable portion is an essential part of the agreement. In such an instance, the plea must be vacated in its entirety.

3. A six-year sentence for driving with a suspended license was authorized where the defendant was eligible for an extended term and the authorized sentencing range was one to six years. Thus, the six-year sentence was valid.

However, where the record showed that an essential condition of defendant's plea agreement was that the trial court stay the sentence for 30 months, and the trial court lacked authority to enter a stay of that length, the plea agreement was void because it contained an essential element that was unauthorized by Illinois law. The cause was remanded with instructions to allow the defendant to withdraw her guilty plea if she chooses to do so, to conduct a trial if defendant elects to withdraw the plea, or to impose a new sentence if the defendant declines to withdraw her plea.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Trujillo, 2012 IL App (1st) 103212 (No. 1-10-3212, 5/8/12)

A defendant has the right to decide whether to plead guilty. An attorney's failure to disclose a plea offer to the defendant may give rise to a constitutional claim, regardless of whether defendant subsequently received a fair trial.

Defendant filed a *pro se* post-conviction petition supported by his affidavit alleging that defense counsel failed to communicate a plea offer to him, that he would have accepted the offer had he known of it, and that he only learned of the offer from a letter his counsel sent to the ARDC, a copy of which was appended to the petition, in which counsel represented that the State had offered defendant a six-year sentence if he would plead guilty, but defendant rejected the offer.

If counsel had failed to inform defendant of the plea offer, it is arguable that his assistance was deficient. Because defendant alleged that he would have accepted the offer had he been advised of it, he has arguably been prejudiced by counsel's deficient performance if he can establish that the offer was not communicated to him. Therefore, the claim did not lack legal merit.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Young, 2013 IL App (1st) 111733 (No. 1-11-1733, 12/6/13)

In 2004, defendant entered fully negotiated guilty pleas to first degree murder and attempt murder and received negotiated consecutive sentences of 25 and 10 years. In 2011, defendant's post-conviction petition alleging ineffective assistance of trial counsel was denied after a third-stage hearing. On appeal, defendant argued for the first time that his sentences were void because they did not include the mandatory statutory firearm enhancement of 20 years for personally discharging a firearm or 25 years to natural life if great bodily harm resulted from discharging a firearm. Defendant argued that he should be allowed to withdraw his plea and plead anew.

1. Noting a conflict in appellate authority, the Appellate Court found that **People v. White**, 2011 IL 109616, which prohibits the trial court from imposing a sentence which does not include the mandatory firearm enhancements when the allegations of the charge indicate that a firearm was used, announced a new rule of law which is not applied retroactively to convictions which were final before **White** was decided. The court reasoned that prior to **White**, there was confusion in the law concerning whether despite the allegation that a firearm was used, the State could negotiate a plea which did not include the firearm enhancement.

2. Alternatively, the court concluded that defendant was estopped from challenging the sentence because it had been freely negotiated and provided him with a benefit in that he received a far lower sentence than was required under the law. The court also stressed that the State would be disadvantaged at a trial by the passage of time and the possible unavailability of witnesses to testify.

The doctrine of judicial estoppel applies where a party takes inconsistent positions in separate judicial or quasi-judicial proceedings, intended that the trier of fact accept the truth of the facts alleged at the prior hearing, and succeeded in asserting the first position and consequently receiving some benefit. The court acknowledged that Illinois courts have never applied judicial estoppel where criminal defendants entered a fully negotiated plea agreement and then challenged the sentence as too lenient. However, courts from other jurisdictions have recognized that the State is prejudiced under similar circumstances where a guilty plea is vacated years after it was entered, and have estopped defendants from enjoying the benefits of a negotiated plea agreement while challenging its validity.

Here, defendant voluntarily entered a plea calling for negotiated sentences totaling 35

years, and nearly ten years later claimed that the sentences should have been at least 76 years. The court concluded that the doctrine of judicial estoppel applied because the State could not be restored to its original position in that witnesses may have become unavailable for trial. The court also noted that defendant did not allege that any fraud or misrepresentation had occurred in the original plea agreement.

The court concluded:

Defendant has not cited, nor has our research disclosed an Illinois case in which a defendant has been permitted to withdraw his plea entered nearly a decade earlier and some 13 years after the offenses occurred, because the sentence was not harsh enough. It defies logic to suggest that defendant actually wants to serve a longer prison sentence than the improper sentence he received. . . . Rather, defendant . . . is using the improper sentence as a vehicle to withdraw his guilty plea, 10 years after its entry, and go to trial. Defendant's belated challenge could harm the State because it might endure hardship if forced to prosecute the case, given the passage of time and the recollection of witnesses.

The order denying the post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Kate Schwartz, Chicago.)

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§24-4

Unfulfilled Promises

People v. Donelson, 2013 IL 113603 (No. 113603, 3/21/13)

1. The plea-bargaining process is vital to and highly desirable for the criminal justice system. 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. Because an agreement is comparable to an enforceable contract, when interpreting a plea agreement courts apply contract law principles where appropriate.

2. Under general principles of contract law, a mutual mistake by the parties may be rectified where the parties are in actual agreement and their true intent may be discerned. Where the defendant and the State agreed to concurrent sentences of 50, 30, and 30 years, but mandatory consecutive sentences were required under Illinois law, both parties entered the agreement in the mistaken belief that concurrent sentences were permissible. Although concurrent sentences totaling 50 years were not statutorily authorized, the court concluded that the intent of the parties can be satisfied by imposing consecutive terms totaling 50 years, so long as such sentences are within the authorized sentencing ranges for the offenses. The court distinguished this situation from **People v. White**, 2011 IL 109616, where the authorized sentencing ranges would not have allowed the court to construct a sentence that was consistent with the plea agreement.

Because the intent of the parties could be satisfied by restructuring the sentences, the plea agreement was not void although it called for a sentence that was statutorily unauthorized.

3. The court rejected defendant's argument that he had negotiated for specific sentences which included concurrent sentences, and not merely for a sentencing cap. The court concluded

that defendant had two concerns in entering the plea agreement - limiting the number of convictions and setting an upper limit on the prison term he would serve. Those concerns could be satisfied by adjusting the sentences within the authorized ranges. Imposing consecutive sentences also satisfies the State's interests in protecting the convictions it obtained and avoiding the need to retry a 14-year-old case.

The cause was remanded with instructions to reconfigure defendant's sentences to consecutive terms totaling 50 years.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Andrews, 403 Ill.App.3d 654, 936 N.E.2d 648 (4th Dist. 2010)

The Appellate Court finds the dispositive holding of **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), to be that the trial court must inform the defendant that the MSR term will be added to his negotiated sentence, not that the MSR term is part of the negotiated sentence. The defendant prevailed in **Whitfield** only because the court made no reference at all to the MSR term, not because the court failed to inform defendant that the MSR term was part of his negotiated sentence. The statutorily-mandated MSR term cannot be part of a plea negotiation because there is nothing to negotiate. The MSR admonition is not required by Supreme Court Rule 402(b), which directs that the terms of the plea agreement be stated in open court, but by 402(a)(2), which directs the court to advise defendant of the minimum and maximum penalties prescribed by law. **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), does not change this analysis, even though **Morris** also makes reference to defendant's plea agreement.

Applying this analysis, the Appellate Court found no due process violation. The prosecutor accurately stated the plea agreement without reference to the MSR term. The court mentioned as part of its 402(a)(2) admonition that if defendant was convicted and sentenced to prison, there would be a one-year MSR term.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Clark, 2011 IL App (2d) 091116 (No. 2-09-1116, 9/14/11)

The due process clause mandates that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. **Santobello v. New York**, 404 U.S. 257, 262 (1971). Supreme Court Rule 402(b) requires that if a plea is the result of the plea agreement, the agreement must be stated in open court. This requirement prevents misunderstandings as to the terms of an agreement and ensures that the agreement will be visible for examination, deterring future unfounded claims by a defendant that an agreement entered into was not honored. Consistent with this policy, the terms of the agreement as stated in open court control in discerning the parties' understanding of the agreement.

Defendant entered a guilty plea to two separate charges. The second offense was committed 28 days after defendant was released on bond on the first charge. Defendant thereafter remained in custody for 311 days on both charges. The prosecutor stated in open court that the terms of the plea agreement were that defendant would be sentenced to consecutive eight-year terms, and would receive 339 days' credit for time served on the first charge and 311 days' credit on the second charge. No one clarified that by statute defendant would only receive a total credit of 339 days, not 650 days, against his aggregate sentence. **People v. Latona**, 184 Ill.2d 260, 703 N.E.2d 901 (1998).

Defendant filed a motion to withdraw his plea, complaining that he did not receive the credit promised as part of his plea agreement. Contradicting defendant's testimony at the

hearing on the motion, the defendant's attorney testified that he had informed the defendant that the State would not agree to a 650-day sentencing credit. The court denied the motion.

After noting that the trial court had made no specific finding resolving the conflict in the testimony, the Appellate Court concluded that the terms of the plea agreement as stated by the prosecutor at the plea hearing controlled. The court rejected the argument that it was not logical for defendant to expect that he would receive a total of 650 days' credit against his sentence. To allow defendant the benefit of his bargain, the court reduced his eight-year sentence on the second charge by 622 days to approximate the additional 311 days' credit defendant was promised he would receive as a result of his plea.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Cortez, 2012 IL App (1st) 102184 (No. 1-10-2184, mod. op. 8/10/12)

1. A plea agreement is void where an essential part of the agreement is unenforceable or illegal. Whether a provision of a plea agreement is essential is determined by its relative importance in light of the entire agreement.

Where defendant pleaded guilty in return for an agreement for a two-year sentence with 353 days credit for time served, meaning that defendant would not serve additional time in custody for this offense, the provision for sentence credit was an essential part of the plea agreement. Thus, the agreement was void where the trial court lacked authority to grant the contemplated credit because it was for time which defendant had served on an unrelated, consecutive sentence. The court concluded that the cause should be remanded to allow defendant to withdraw his plea if he wished.

2. Defendant did not forfeit the issue although he first raised it some 11 years after the guilty plea, when he appealed the denial of a §2-1401 petition which sought to force the Department of Corrections to implement the trial court's order granting the credit. The court noted that a void sentence can be challenged at any time.

The court also rejected the argument that defendant was estopped from challenging the plea because he received the benefit of the bargain when he obtained the minimum possible sentence. The court found the argument to be "disingenuous" because Illinois law prohibits defendant from receiving the benefit of his bargain - sentence credit for time previously served on an unrelated, consecutive sentence.

3. The court rejected the argument that **People v. White**, 2011 IL 109616, which held that the trial court may not impose an unauthorized sentence even though the parties reached a plea agreement calling for such a sentence, created a new rule that is inapplicable on collateral review. The court concluded that **White** merely applied the longstanding rule that a sentence not authorized by statute is void. (Distinguishing **People v. Avery**, 2012 IL App (1st) 110298 (No. 1-11-0298, 6/21/12) (**White** constitutes a new rule that is not to be applied retroactively)).

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

People v. Dodds, 2014 IL App (1st) 122268 (No. 1-12-2268, 2/27/14)

1. The court accepted the State's concession that a defendant who has completed his probation sentence and is ineligible to file a post-conviction petition may raise an ineffective assistance of counsel argument by way of a §2-1401 petition. The court stressed that defendant had no other avenue to raise his claim that his plea was involuntary due to counsel's erroneous advice concerning the sex offender registration requirements that would result from a guilty plea to possession of child pornography.

2. Although sex offender registration is merely a collateral consequence of a guilty plea,

it is a mandatory consequence which carries stigmatizing and far-reaching consequences into every aspect of the registrant's life. The court concluded that under the rationale of **Padilla v. Kentucky**, 559 U.S. 356 (2010), which held that defense counsel must advise defendants of the possible risk of deportation resulting from a guilty plea, counsel has an affirmative duty to advise a guilty plea defendant concerning the possibility that he will be required to register as a sex offender.

The court also noted that even before **Padilla**, giving erroneous advice concerning a collateral consequence of a plea was treated differently than the failure to give advice at all. Here, counsel erroneously advised defendant that his guilty plea to child pornography would result in a requirement that he register as a sex offender for 10 years. After that 10-year-period had passed, defendant learned that in fact he would be required to register for life.

Because defense counsel was ineffective in advising defendant of the sex offender registration consequences of his guilty plea, the plea was involuntary. The plea and conviction were vacated and the cause remanded for further proceedings. The court ordered that the additional proceedings be conducted by a different judge, and reminded the parties that retrial might be difficult in light of their inability to obtain a record of the original proceedings.

People v. Hudson, 2012 IL App (2d) 100484 (No. 2-10-0484, 1/27/12)

Noting a conflict in Illinois authority, the Appellate Court rejected the argument that a plea agreement is void if it calls for a longer sentence than is statutorily authorized (rejecting **People v. Gregory**, 379 Ill.App.3d 414, 883 N.E.2d 762 (4th Dist. 2008)).

Due process entitles a defendant to the benefit of his bargain in a plea agreement. There are two possible remedies when a defendant does not receive the benefit of the bargain - either the promise must be fulfilled, or the defendant must be given the opportunity to withdraw the plea. Where a plea agreement calls for a sentence that is longer than that statutorily authorized, the sentence can be reduced to that which is statutorily authorized. Under such circumstances, the defendant is afforded a better bargain than he negotiated, because he serves a lower sentence than that to which he agreed.

The court acknowledged that where a plea agreement provides for a sentence less severe than is legally possible, due process may require that defendant be allowed to withdraw his plea. Where the plea agreement requires a sentence which is longer than statutorily authorized, however, due process is satisfied if the defendant is given a windfall by being placed in a better position than the agreement contemplated.

Defendant's five-year-sentence for aggravated DUI was reduced to three years.
(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. McDermott, 2014 IL App (4th) 120655 (Nos. 4-12-0655 & 4-12-0664, 6/10/14)

Defendant was convicted in five counties of charges relating to the fraudulent buying and selling of motor vehicles. He was sentenced to imprisonment.

Subsequently, defendant pleaded guilty in Champaign County to aggravated battery. The prosecutor set forth the terms of the plea agreement in open court and stated that defendant would receive 222 days sentencing credit. Defendant asked the trial court to clarify that he would receive 222 days credit, and the court did so.

In McLean County, defendant agreed to plead guilty to several counts relating to odometer fraud and unlawful altering of title documents, in exchange for a sentence of five years imprisonment. The plea agreement stated that defendant would receive credit for 233 days. Defendant asked the trial court to clarify that he would receive 233 days credit against the five-year sentence, which was to be served consecutively to the sentences for convictions

in two other counties. The trial court clarified that defendant would receive the credit.

Defendant subsequently filed post-conviction petitions seeking to obtain the sentencing credits involved in the Champaign and McLean County cases. He claimed that DOC assumed that the credits had already been given on defendant's sentences from other counties, and that giving double credit would violate Illinois law. Defendant's post-conviction petitions were dismissed as frivolous and patently without merit.

1. Where a specified amount of sentence credit is included in the terms of a plea agreement, defendant is entitled to that credit even if **People v. Latona**, 184 Ill. 2d 260, 703 N.E.2d 901 (1998), which holds that a defendant may not earn two sentence credits for a single day of custody, is violated. **People v. Clark**, 2011 IL App (2d) 091116; **People v Lenoir**, 2013 IL App (1st) 113615. Similarly, a defendant who agrees to forgo sentencing credit as part of a plea agreement may not subsequently seek to obtain such credit. **People v. Williams**, 384 Ill. App. 3d 415, 892 N.E.2d 129 (4th Dist. 2008). In other words, when a defendant enters a negotiated plea of guilty in exchange for a specified sentence credit, both the State and the defendant are bound by the agreement. To deny credit that is an essential part of the plea agreement would violate the due process right to receive the benefit of one's plea bargain.

2. Because the record clearly shows that the plea agreements included specified amounts of sentence credit, and defendant was not advised that those credits could not be given under Illinois law, the agreed-upon credits must be given. The court acknowledged that had defendant persisted in his pleas after being advised that Illinois law prohibited him from receiving the specified credits, the record would likely show that the credits were not essential conditions of the pleas. In that case, defendant would not be entitled to the credits.

Here, however, the credits were clearly essential conditions of the plea agreements. Thus, defendant was entitled to receive them.

3. Where a defendant does not receive the benefit of a plea bargain, either the unfulfilled promise must be implemented or the defendant must be given an opportunity to withdraw his plea. Because defendant clearly asserted that he did not want to withdraw the negotiated pleas and the State conceded that reducing defendant's sentences would closely approximate the terms of the original plea agreements, reducing the sentences was an appropriate remedy. The court reversed the orders dismissing the post-conviction petitions and remanded the causes with instructions to reduce the sentences.

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

People v. Smith, 406 Ill.App.3d 879, 941 N.E.2d 975 (1st Dist. 2010)

Supreme Court Rule 402(d) prohibits a court from initiating plea discussions, but also contemplates the court's limited participation in negotiations, allowing the court to indicate its concurrence in a plea agreement reached by the parties. To show that a court's participation in plea negotiations rendered a guilty plea involuntary, the defendant must demonstrate that the court departed from its judicial function and participated in the negotiation process to the extent that improper influence was exerted on the defendant to plead guilty, or that defendant reasonably believed that he was no longer able to receive a fair and impartial trial so he must plead guilty and accept the sentence approved by the court. A court's improper involvement in a plea agreement does not render a conviction obtained pursuant to that agreement void.

Before trial began, the court participated in a conference with the defense and the prosecution pursuant to Supreme Court Rule 402(d)(2). Defendant did not plead guilty, but proceeded to trial. After the State had presented most of its case, defendant asked if he could accept the court's offer of a 32-year sentence that had resulted from the conference. The court

accepted the defendant's plea of guilty and imposed a 32-year sentence, but failed to admonish defendant at the plea hearing of the applicable three-year MSR term.

Defendant filed a motion to vacate plea on the ground that the court had failed to admonish defendant of the MSR term. Defendant asked that he be allowed to vacate his plea rather than that his sentence be reduced by three years. The State responded that there had been no "traditional negotiated plea" between the parties, but an offer from the court, and that the proper remedy was to reduce the defendant's sentence to give him the benefit of the bargain. The court reduced defendant's sentence, indicating that the defendant had asked for the court's offer of 32 years and that the plea had not been negotiated with the State.

On appeal, defendant argued that his plea was involuntary and his conviction void because the court had no authority to negotiate a guilty plea.

1. Not only did the defendant forfeit any error arising from the court's participation in the plea agreement by failing to include the error in his post-plea motion, but defendant cannot complain because he invited the error. To allow a defendant to use the exact action he procured in the trial court to obtain a reversal on appeal would offend every notion of fair play and encourage duplicitous conduct. Defendant asked for the Rule 402 conference and then asked the court to enter judgment based on the offer derived from the conference. He cannot complain that the court erred in granting his requests.

2. Defendant's plea is not involuntary. The record does not support defendant's argument that he negotiated his plea with the court rather than the State.

In asking the court for a 402 conference prior to trial, defense counsel represented that there had been informal talks with the State regarding "maybe resolving the matter." Even though defense counsel asked the court to reinstate its offer of 32 years when defendant sought to plead guilty during trial, and the court stated that it would reinstate the offer it had made before trial, this language does not unequivocally show that it was the trial court that first suggested the 32-year sentence, rather than that the court merely consented to the parties' agreement to a 32-year sentence. The State's reference to there not being a traditional negotiated plea could refer only to the unusual circumstance of defendant asking the court to reinstate the offer in the midst of trial. The State's suggestion that the court reduce the defendant's sentence to give the defendant of his bargain was an acknowledgment that an agreement did exist.

If the defendant had truly entered an open plea, defendant would not have been entitled to any relief because his sentence plus the MSR term was less than the maximum term that the court admonished him that he could receive for the offense. The trial court did provide defendant with post-plea admonitions in accordance with Supreme Court Rule 605(b), which applies to open pleas of guilty, rather than Supreme Court Rule 605(c), which applies to negotiated pleas (and limits defendant to a motion to vacate plea rather than a motion to reduce sentence as a possible post-plea remedy). However, that circumstance is not controlling of whether the plea was open or negotiated.

3. To determine the appropriate remedy where the defendant has not received the benefit of his bargain due to the court's failure to inform him that a MSR term will be added to his negotiated sentence, the court must consider not only the defendant's preference, but whether permitting the defendant to withdraw his plea based on the absence of a MSR admonition would be unduly prejudicial to the prosecution.

The trial court indicated that it would have allowed defendant to withdraw his plea if he had pled guilty before his trial began. The State had already presented witnesses in support of its case when the defendant asked to plead guilty. The State expended resources to present a significant portion of its case. Even though the witnesses may still be available or the State

may be able to use a transcript of the testimony it did present at a new trial, such evidence would be a poor substitute for live testimony presented by witnesses with fresh memories. The defendant twice changed his mind about whether to plead guilty, and there is no guarantee that he will not change it a third time. Therefore the court did not err in finding that reducing defendant's sentence was a more appropriate remedy than allowing him to vacate his plea.

(Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

People v. Stone, 2013 IL App (1st) 111344 (No. 1-11-1344, 3/29/13)

Where due to mutual mistake, the parties enter into a plea agreement for illegal concurrent sentences, but the parties can be given the benefit of their bargain by refashioning the sentences to legal consecutive sentences whose aggregate term is identical to the sentence under the plea agreement, the remedy is to remand for resentencing in accordance with the plea agreement and applicable statutes, rather than to vacate the plea. **People v. Donelson**, 2013 IL 113603.

Defendant pled guilty to four counts of criminal sexual assault and one count of aggravated criminal sexual assault in return for concurrent sentences of 24 years for aggravated criminal sexual assault, 15 years each on three counts of criminal sexual assault, and a consecutive term of nine years on the remaining count of criminal sexual assault. By statute, all of the sentences for criminal sexual assault should have run consecutively to each other and consecutively to the sentence for aggravated criminal sexual assault.

Defendant has never asserted that his plea agreement was premised on specific sentences or that he would be deprived of the benefit of his bargain if his sentences were reconfigured to be in line with the applicable statutes. Therefore his plea agreement can be fulfilled by affirming defendant's convictions and remanding for resentencing to consecutive terms totaling 24 years.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Strom, 2012 IL App (3d) 100198 (No. 3-10-0198, 1/5/12)

When the parties enter into a plea agreement that is unauthorized by statute, the entire plea agreement is void because the defendant was not properly admonished with regard to the possible penalties that he might face. **People v. White**, 2011 IL 109616. The proper remedy when the parties enter into an unauthorized agreement is either to fulfill the promise or provide the defendant the opportunity to withdraw his plea.

Defendant entered into a negotiated plea of guilty to one count of criminal sexual assault for a four-year term of imprisonment followed by two years of MSR. The DOC unilaterally increased his MSR term to three years, apparently to comply with 730 ILCS 5/5-8-1-(d)(4), which requires that the MSR term "range from a minimum of 3 years to a maximum of natural life."

Because the two-year MSR term was unauthorized by statute, the entire plea agreement is void. The court concluded that it could not modify the agreement to a three-year MSR term to allow defendant the benefit of his bargain.

Lytton, J., concurred in part and dissented in part. The entire plea agreement is not void as in **White** because, unlike in **White** where the sentence did not conform to statutory requirements and defendant was not properly admonished regarding possible punishment, defendant here was "properly admonished regarding his 17-year sentence and that a mandatory term of MSR applied." On remand, defendant should have the option of either withdrawing his plea or allowing the court to modify his sentence.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Sweeney, 2012 IL App (3d) 100781 (No. 3-10-0781, 3/22/12)

1. Where the trial court enters a sentencing order that is statutorily unauthorized in its entirety, the sentence is void and must be vacated. However, where a trial court with jurisdiction over the parties and the subject matter imposes a sentence in excess of its statutory authority, only the portion of the sentence that exceeds the court's authority is void. In such circumstances, only the void portion of the sentence need be vacated.

2. A trial court lacks authority to accept a plea agreement which includes a sentencing provision that is not authorized by statute. Even if some parts of a plea agreement are authorized, an agreement may not be enforced in part if the unenforceable portion is an essential part of the agreement. In such an instance, the plea must be vacated in its entirety.

3. A six-year sentence for driving with a suspended license was authorized where the defendant was eligible for an extended term and the authorized sentencing range was one to six years. Thus, the six-year sentence was valid.

However, where the record showed that an essential condition of defendant's plea agreement was that the trial court stay the sentence for 30 months, and the trial court lacked authority to enter a stay of that length, the plea agreement was void because it contained an essential element that was unauthorized by Illinois law. The cause was remanded with instructions to allow the defendant to withdraw her guilty plea if she chooses to do so, to conduct a trial if defendant elects to withdraw the plea, or to impose a new sentence if the defendant declines to withdraw her plea.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

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§24-5

Voluntary Pleas

People v. Hughes, 2012 IL 112817 (No. 112817, 11/29/12)

1. Jurisdiction stems from the Illinois Constitution, which assigns original jurisdiction to the circuit court in all "justiciable matters" except where the Supreme Court has original and exclusive jurisdiction. The court rejected the argument that the circuit court lacked jurisdiction to accept a guilty plea on a count on which a *nolle prosequi* order had been entered on the State's motion and which had not been refiled or reinstated.

To *nolle prosequi* a charge means simply that the State indicates an unwillingness to prosecute. Once the charge is *nol prossed*, the proceedings are terminated with respect to that particular charge, but the defendant is not acquitted. If a *nolle prosequi* is entered before jeopardy attaches, the State may re prosecute the defendant subject to other relevant statutory or constitutional defenses and so long as there is no harassment, bad faith, or fundamental unfairness.

2. Because jeopardy had not yet attached, the State's termination of the criminal prosecution by a *nolle prosequi* gave the State the right to either file a new charge or ask to vacate the dismissal and reinstate the original charge. The failure to do either did not deprive the trial court of jurisdiction, however, because an aggravated criminal sexual abuse indictment is a "justiciable matter" involving an offense created by the Criminal Code. Thus, even if the indictment was legally defective due to the *nolle prosequi*, the trial court had jurisdiction over the cause and could accept the guilty plea.

3. The court rejected the argument that defendant's plea was involuntary because he

was not aware that the Attorney General could use the guilty plea as a basis to file a sexually dangerous person's petition. Due process principles provide that a guilty plea is knowing and voluntary only if the defendant has been advised of the "direct consequences" of the plea. A "direct consequence" is one which "has a definite, immediate and largely automatic effect on the range of the defendant's sentence."

By contrast, the trial court need not advise the defendant of the "collateral consequences" of a guilty plea. A "collateral consequence" is one which the circuit court has no authority to impose and which results from a discretionary action by an agency that is outside the trial court's control. Whether a consequence of a guilty plea is direct or collateral is a question of law which is reviewed *de novo*.

The court concluded that the possibility of commitment under the Sexually Violent Person's Commitment Act is merely a collateral consequence of a guilty plea, because it does not follow directly from the fact of a conviction and requires an petition by a prosecuting authority. Thus, a person who is convicted of a predicate sexual offense may or may not become the subject of a sexually violent person's petition, depending on action by an entity that is outside the trial court's control. Because a sexually violent person's proceeding is merely a collateral consequence of a plea, the trial court need not advise the defendant of the possibility of such a proceeding before accepting a guilty plea.

The court concluded, however, that in order to render effective assistance of counsel, defense counsel must inform a defendant who pleads guilty to a sexually violent offense that he will be subject to evaluation for possible commitment under the Sexually Violent Persons Act.

4. In dissent, Justices Freeman and Burke found that unless the State took steps to reinstate the *nol prossed* charge, there was no "justiciable matter" on which a guilty plea could have been entered.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Dodds, 2014 IL App (1st) 122268 (No. 1-12-2268, 2/27/14)

1. The court accepted the State's concession that a defendant who has completed his probation sentence and is ineligible to file a post-conviction petition may raise an ineffective assistance of counsel argument by way of a §2-1401 petition. The court stressed that defendant had no other avenue to raise his claim that his plea was involuntary due to counsel's erroneous advice concerning the sex offender registration requirements that would result from a guilty plea to possession of child pornography.

2. Although sex offender registration is merely a collateral consequence of a guilty plea, it is a mandatory consequence which carries stigmatizing and far-reaching consequences into every aspect of the registrant's life. The court concluded that under the rationale of **Padilla v. Kentucky**, 559 U.S. 356 (2010), which held that defense counsel must advise defendants of the possible risk of deportation resulting from a guilty plea, counsel has an affirmative duty to advise a guilty plea defendant concerning the possibility that he will be required to register as a sex offender.

The court also noted that even before **Padilla**, giving erroneous advice concerning a collateral consequence of a plea was treated differently than the failure to give advice at all. Here, counsel erroneously advised defendant that his guilty plea to child pornography would result in a requirement that he register as a sex offender for 10 years. After that 10-year-period had passed, defendant learned that in fact he would be required to register for life.

Because defense counsel was ineffective in advising defendant of the sex offender registration consequences of his guilty plea, the plea was involuntary. The plea and conviction

were vacated and the cause remanded for further proceedings. The court ordered that the additional proceedings be conducted by a different judge, and reminded the parties that retrial might be difficult in light of their inability to obtain a record of the original proceedings.

People v. Edmonson, 408 Ill.App.3d 880, 946 N.E.2d 997 (2d Dist. 2011)

A guilty plea is involuntary due to defense counsel's erroneous advice where the misadvice amounts to ineffective assistance of counsel. To establish that counsel was ineffective, defendant must show that: (1) counsel's performance was objectively unreasonable; and (2) there is a reasonable probability that, absent counsel's error, defendant would not have pleaded guilty but would have insisted on going to trial.

Defendant pleaded guilty with the State's agreement to a sentencing cap of 20 years. Both defense counsel and defendant mischaracterized this agreement on the record as an open plea, both defense counsel and the court misadvised defendant that he could move to reconsider the sentence prior to an appeal, and defendant did move to reconsider his sentence prior to appealing. The Appellate Court remanded due to the absence of a 604(d) certificate and with directions that defendant be admonished that his only option was to move to withdraw his plea because his plea was negotiated. On remand, defendant moved to withdraw his plea on the ground that he would not have entered the plea had counsel advised him that he would not have the right to challenge his sentence.

As defendant was misinformed by the court and defense counsel that he could challenge his sentence after pleading guilty, and that misinformation was central to his decision to plead guilty, defendant was prejudiced and the plea was involuntary. Defendant need not establish that his sentence was excessive to establish prejudice.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Hubbard, 2012 IL App (2d) 101158 (No. 2-10-1158, 1/9/12)

1. A judgment is void only when it is entered by a court lacking jurisdiction. There are three elements of jurisdiction: (1) personal jurisdiction; (2) subject-matter jurisdiction; and (3) the power to render the particular judgment or sentence. A court does not lose jurisdiction because it makes a mistake in determining either the facts, the law, or both.

Judgments entered in violation of due process are not void. Therefore, a guilty plea that is involuntary because the court misadvised defendant of the sentencing range is not void.

2. The United States Supreme Court in **Boykin v. Alabama**, 395 U.S. 238 (1969), characterized an involuntary guilty plea as void, and the Illinois Supreme Court adopted that language in **People v. Williams**, 188 Ill.2d 365, 721 N.E.2d 539 (1999). But in cases where the voidness of a judgment has been specifically at issue, the Illinois Supreme Court has consistently held that a judgment is void only where the court lacks jurisdiction. Therefore, reliance on federal cases and **Williams** for the proposition that an involuntary guilty plea is void is misplaced.

Because defendant's guilty plea was not void and therefore not subject to attack at any time, the court properly found that defendant's §2-1401 petition challenging his guilty plea as involuntary was untimely.

People v. Hughes, 2011 IL App (2d) 090992 (No. 2-09-0992, 7/19/11)

1. Defendant's guilty plea was not void although the count to which he pled had been *nolle prossed* by the prosecution some six years earlier, when the State sought to have defendant declared sexually dangerous. Although the trial court has no jurisdiction over a dismissed charge and the State is generally required to file a new charging instrument in

order to reinstate a prosecution, under the revestment doctrine litigants may revest a court which has general jurisdiction with both personal and subject matter jurisdiction.

To revest jurisdiction, the parties must actively participate without objection in proceedings which are inconsistent with the merits of the prior judgment. Revestment depends not on the consent of the parties, but on their active participation in certain proceedings.

2. The court concluded that the revestment doctrine applied where the parties reached an agreement by which the trial court was to vacate its previous dismissal of the charges, defendant was to plead guilty to one count and receive a 14-year-sentence, and the State was to withdraw the petition under which defendant had been adjudicated sexually dangerous. By presenting the agreement, the parties clearly participated in proceedings that were inconsistent with the prior dismissal of the charges.

3. Defendant's plea was not involuntary although two weeks after entering a plea agreement by which the State withdrew a sexually-dangerous-person petition, the State filed a sexually-violent-person petition. At the hearing on his motion to withdraw the plea, defendant stated that he believed his guilty plea would dispose of the matter entirely. He also stated that he would not have entered a plea had he been aware that he could be subjected to additional proceedings. In addition, defense counsel testified that he and defendant did not discuss the possibility that the State would file a sexually-violent-person petition.

Generally, for a plea to be voluntary and intelligent, the defendant must be fully aware of the direct consequences of entering the plea. However, lack of knowledge concerning collateral consequences of a plea are irrelevant to voluntariness. Direct consequences are those that are definite and immediate and which flow automatically from the plea. Direct consequences are those which may be imposed by the trial judge.

Collateral consequences, by contrast, are beyond the control of the trial judge and do not affect the length of the sentence. Collateral consequences may be known at the time of the plea, but do not follow the plea with certainty and result from action of the prosecutor or some other entity beyond the trial court's control.

Whether a sexually-violent-person petition is filed is not a "definite, immediate, or automatic consequence of a guilty plea." Instead, sexually-violent-person proceedings depend on the State initiating the adjudicatory process by filing a petition. Thus, sexually-violent person proceedings are a collateral consequence and do not affect the voluntariness of a plea.

4. The court held that its conclusion was not affected by **Padilla v. Kentucky**, 559 U.S. ___, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), which rejected the "collateral - direct" distinction concerning defense counsel's duty to advise a guilty plea defendant of the immigration consequences of a plea. In **Padilla**, the U.S. Supreme Court "expressly disavowed that it was considering whether" the "collateral - direct" distinction is ever appropriate. **Padilla** held only that because deportation is a "particularly severe penalty" that is nearly "automatic" for a broad class of offenders, the right to effective assistance of counsel requires disclosure of the likely immigration consequences of a guilty plea.

The court also noted that several factors relied upon by **Padilla** - that prevailing professional norms require advice concerning the possibility of deportation, that many clients may be more concerned about avoiding deportation than avoiding a prison sentence, and that some guilty pleas almost always result in deportation - are inapplicable to sexually-violent-person proceedings. The court also found that it is uncertain whether the Supreme Court intends to extend **Padilla** to situations other than deportation. Finally, the court noted that the record showed that at least some conversation concerning sexually-violent-person proceedings had transpired between defendant and defense counsel.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. McKinney, 2012 IL App (1st) 103364 (No. 1-10-3364, 8/8/12)

1. The Veterans Court Act (730 ILCS 167/1) establishes a veterans court and corresponding programs which allow a veteran who is charged with a crime to obtain dismissal of the charges, termination of his sentence, or discharge from further proceedings in exchange for completing a program which may include substance abuse, mental health, or other treatment. Admission to a veterans court program requires the agreement of the prosecutor and the defendant, as well as the approval of the veterans court. A defendant is ineligible for the veterans court program if he is charged with a crime of violence, is unwilling to participate in the program, has committed a crime of violence within the past ten years (excluding time of incarceration), or has previously completed or been discharged from such a program.

2. Under the plain language of the Veterans Court Act, a defendant is not required to be eligible for probation in order to participate in a veterans court program. The court rejected the State's argument that legislative history indicates that the General Assembly intended to allow only veterans who are eligible for supervision, conditional discharge, or probation to participate in veterans court programs. Because the plain language of the statute is clear and unambiguous, the court found that reliance on the legislative debates would be improper. The court also noted that the debates themselves are ambiguous about the legislature's intent.

3. The court rejected the State's argument that because veterans court programs are a form of supervision or probation, a defendant who is barred from probation, supervision, or periodic imprisonment under the Unified Code of Corrections is precluded from participating in veterans court programs. The court found that the Veterans Court Act provides an independent basis for probation and conditional discharge which does not rely on the requirements of the Unified Code of Corrections. Thus, as a Class 2 offender who was being sentenced as a Class X offender due to prior convictions, defendant was eligible for the veterans court program although he would not have been eligible for probation had he been sentenced under the Unified Code of Corrections.

4. The court declined to reach the State's argument that even if the defendant was eligible for veterans court, his motion to withdraw his guilty plea was properly denied because he is not a viable candidate for the program. Because defense counsel and the trial judge gave defendant erroneous information concerning his eligibility for veterans court, defendant entered the guilty plea in the mistaken belief that he was ineligible for the program. Furthermore, although the Veterans Court Act requires the prosecutor's agreement and the approval of the veterans court for admission to the program, the parties' mistaken belief concerning defendant's eligibility meant that none of the parties seriously considered whether veterans court was an appropriate disposition. Under these circumstances, "while it is entirely possible that defendant would not have been able to obtain the agreement of the prosecutor or the approval of the court to be admitted into a veterans court program, it is clear from the record that defendant never had the opportunity to explore such a possibility."

The court also noted that the record showed that defendant suffered from drug abuse problems, and that under the Act defendant was entitled to have the benefit of an eligibility screening and assessment before the appropriateness of veterans court programs were determined.

Because the defendant entered his guilty plea in the mistaken belief that he was ineligible for veterans court, the trial court abused its discretion by denying the motion to withdraw the plea. The trial court's ruling was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Smith, 406 Ill.App.3d 879, 941 N.E.2d 975 (1st Dist. 2010)

Supreme Court Rule 402(d) prohibits a court from initiating plea discussions, but also contemplates the court's limited participation in negotiations, allowing the court to indicate its concurrence in a plea agreement reached by the parties. To show that a court's participation in plea negotiations rendered a guilty plea involuntary, the defendant must demonstrate that the court departed from its judicial function and participated in the negotiation process to the extent that improper influence was exerted on the defendant to plead guilty, or that defendant reasonably believed that he was no longer able to receive a fair and impartial trial so he must plead guilty and accept the sentence approved by the court. A court's improper involvement in a plea agreement does not render a conviction obtained pursuant to that agreement void.

Before trial began, the court participated in a conference with the defense and the prosecution pursuant to Supreme Court Rule 402(d)(2). Defendant did not plead guilty, but proceeded to trial. After the State had presented most of its case, defendant asked if he could accept the court's offer of a 32-year sentence that had resulted from the conference. The court accepted the defendant's plea of guilty and imposed a 32-year sentence, but failed to admonish defendant at the plea hearing of the applicable three-year MSR term.

Defendant filed a motion to vacate plea on the ground that the court had failed to admonish defendant of the MSR term. Defendant asked that he be allowed to vacate his plea rather than that his sentence be reduced by three years. The State responded that there had been no "traditional negotiated plea" between the parties, but an offer from the court, and that the proper remedy was to reduce the defendant's sentence to give him the benefit of the bargain. The court reduced defendant's sentence, indicating that the defendant had asked for the court's offer of 32 years and that the plea had not been negotiated with the State.

On appeal, defendant argued that his plea was involuntary and his conviction void because the court had no authority to negotiate a guilty plea.

1. Not only did the defendant forfeit any error arising from the court's participation in the plea agreement by failing to include the error in his post-plea motion, but defendant cannot complain because he invited the error. To allow a defendant to use the exact action he procured in the trial court to obtain a reversal on appeal would offend every notion of fair play and encourage duplicitous conduct. Defendant asked for the Rule 402 conference and then asked the court to enter judgment based on the offer derived from the conference. He cannot complain that the court erred in granting his requests.

2. Defendant's plea is not involuntary. The record does not support defendant's argument that he negotiated his plea with the court rather than the State.

In asking the court for a 402 conference prior to trial, defense counsel represented that there had been informal talks with the State regarding "maybe resolving the matter." Even though defense counsel asked the court to reinstate its offer of 32 years when defendant sought to plead guilty during trial, and the court stated that it would reinstate the offer it had made before trial, this language does not unequivocally show that it was the trial court that first suggested the 32-year sentence, rather than that the court merely consented to the parties' agreement to a 32-year sentence. The State's reference to there not being a traditional negotiated plea could refer only to the unusual circumstance of defendant asking the court to reinstate the offer in the midst of trial. The State's suggestion that the court reduce the defendant's sentence to give the defendant of his bargain was an acknowledgment that an agreement did exist.

If the defendant had truly entered an open plea, defendant would not have been entitled to any relief because his sentence plus the MSR term was less than the maximum

term that the court admonished him that he could receive for the offense. The trial court did provide defendant with post-plea admonitions in accordance with Supreme Court Rule 605(b), which applies to open pleas of guilty, rather than Supreme Court Rule 605(c), which applies to negotiated pleas (and limits defendant to a motion to vacate plea rather than a motion to reduce sentence as a possible post-plea remedy). However, that circumstance is not controlling of whether the plea was open or negotiated.

3. To determine the appropriate remedy where the defendant has not received the benefit of his bargain due to the court's failure to inform him that a MSR term will be added to his negotiated sentence, the court must consider not only the defendant's preference, but whether permitting the defendant to withdraw his plea based on the absence of a MSR admonition would be unduly prejudicial to the prosecution.

The trial court indicated that it would have allowed defendant to withdraw his plea if he had pled guilty before his trial began. The State had already presented witnesses in support of its case when the defendant asked to plead guilty. The State expended resources to present a significant portion of its case. Even though the witnesses may still be available or the State may be able to use a transcript of the testimony it did present at a new trial, such evidence would be a poor substitute for live testimony presented by witnesses with fresh memories. The defendant twice changed his mind about whether to plead guilty, and there is no guarantee that he will not change it a third time. Therefore the court did not err in finding that reducing defendant's sentence was a more appropriate remedy than allowing him to vacate his plea.

(Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

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§24-6 Admonishments

§24-6(a) Generally

People v. Delvillar, 235 Ill.2d 507, ___ N.E.2d ___ (2009) (No. 106909, 12/17/09)

1. 725 ILCS 5/113-8, which requires the trial court to admonish a guilty plea defendant of the possibility of immigration consequences before accepting a plea to a felony or a misdemeanor, requires such an admonishment in every case, whether or not the defendant indicates that he is a U.S. citizen. However, the failure to give the statutory admonishment concerning the immigration consequences of a plea does not necessarily require that a motion to withdraw the plea be granted. Instead, the failure to admonish concerning a potential immigration consequence is one factor to be considered by the court when determining whether a guilty plea was made voluntarily and intelligently.

2. To afford the defendant an opportunity to enter a voluntary plea, the trial court must provide information concerning the direct consequences of the plea. Direct consequences are those which affect the sentence and other punishment which the trial court may impose. Collateral consequences are consequences which are beyond the trial court's authority to control. Admonishments concerning collateral consequences, including immigration consequences, are not required for a voluntary plea.

Although §113-8 provides that defendants are to be advised of one collateral consequence – the potential immigration consequences of the plea – the failure to give such

an admonishment does not affect the constitutional voluntariness of the plea. Thus, unless real justice has been denied or the defendant has been prejudiced, a plea is not rendered involuntary because the trial court failed to give an admonishment concerning immigration consequences.

Because the defendant failed to demonstrate that he was subject to any potential immigration penalty or that he would not have pleaded guilty had he been admonished of any potential consequences, he was not prejudiced by the omission of the statutorily-required admonishment. The court also noted that defendant informed the court at the plea hearing that he was an American citizen, appeared to have no trouble understanding the court's admonishments in English, and made no attempt to prove that he was not a citizen. Thus, he failed to carry his burden of showing that he suffered prejudice as a result in the trial court's failure to admonish concerning immigration consequences.

Because the trial court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea, the order denying the motion was affirmed.

People v. Dominguez, 2012 IL 111336 (No. 111336, 4/19/12)

Supreme Court Rule 605(c) provides admonitions to be given by the trial judge to a defendant who has been sentenced on a guilty plea. The rule specifically states that the trial court "shall advise the defendant" of six specific admonitions. Here, the trial court misstated two of the six admonitions and omitted any reference to a third.

The court concluded that under the circumstances, the admonishments "substantially complied" with Rule 605(c).

1. The failure to give the admonitions verbatim is not reversible error so long as the trial court "substantially complies" with Rule 605(c) by imparting the essence of the matters involved in the rule. "Substantial compliance" occurs if the court adequately informs the defendant what he must do to preserve the right to appeal his guilty plea or sentence.

2. As a matter of first impression, the court held that written admonishments are not adequate substitutes for oral admonishments. However, where the written admonishments are acknowledged in open court and it is ascertained that the defendant is aware of and understands them, the written admonishments may supplement the oral admonishments required under the rule. Thus, when there is a question whether oral admonishments substantially complied with Rule 605(c), written admonishments which the court and the defendant discussed in open court may be relevant to determining whether the defendant was substantially advised in accordance with Rule 605(c).

3. Rule 605(c)(2) requires that the trial court inform the defendant that to take an appeal, he must within 30 days file a written motion asking to have the judgment vacated and the guilty plea withdrawn. Although it was "unfortunate" that the trial court misstated the admonishment by telling defendant that he had "to return to the courtroom" within 30 days to file post-plea motions, the court found that the oral admonishment, when combined with written admonishments that given to the defendant, substantially informed defendant of the requirement that he file a motion to withdraw his plea before seeking to appeal.

4. Rule 605(c)(5) requires that the defendant be informed that if he or she is indigent, a transcript will be provided and counsel appointed to assist with the preparation of the post-plea motions. Although the trial judge's oral admonishments erroneously gave the impression that defendant could receive a transcript and the assistance of counsel only after a motion to withdraw the plea had been denied, the court concluded that the admonitions "reflect[ed] that a court-appointed attorney would be available for the defendant." Thus, the admonitions substantially complied with the rule. The court also noted the written admonitions clearly

indicated that counsel could be appointed to help defendant prepare the post-plea motions.

5. The court acknowledged that the trial court completely failed to mention the admonishment required under Rule 604(c)(4) - that if the plea was vacated the State could reinstate all charges dismissed under the negotiated plea agreement. Despite the complete absence of any oral admonition, the court found substantial compliance with the rule because defendant acknowledged receiving written admonitions which complied with the rule.

6. In dissent, Justices Burke, Kilbride and Freeman found that the trial court failed to substantially comply with Rule 605 where three of the six required admonishments were erroneous or completely absent. The dissenters also stated that Rule 605 should be amended to require the trial judge to simply read Rule 605 to guilty plea defendants rather than attempting to restate the rule in his or her own words.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Hughes, 2012 IL 112817 (No. 112817, 11/29/12)

1. Jurisdiction stems from the Illinois Constitution, which assigns original jurisdiction to the circuit court in all “justiciable matters” except where the Supreme Court has original and exclusive jurisdiction. The court rejected the argument that the circuit court lacked jurisdiction to accept a guilty plea on a count on which a *nolle prosequi* order had been entered on the State’s motion and which had not been refiled or reinstated.

To *nolle prosequi* a charge means simply that the State indicates an unwillingness to prosecute. Once the charge is *nol prossed*, the proceedings are terminated with respect to that particular charge, but the defendant is not acquitted. If a *nolle prosequi* is entered before jeopardy attaches, the State may re prosecute the defendant subject to other relevant statutory or constitutional defenses and so long as there is no harassment, bad faith, or fundamental unfairness.

2. Because jeopardy had not yet attached, the State’s termination of the criminal prosecution by a *nolle prosequi* gave the State the right to either file a new charge or ask to vacate the dismissal and reinstate the original charge. The failure to do either did not deprive the trial court of jurisdiction, however, because an aggravated criminal sexual abuse indictment is a “justiciable matter” involving an offense created by the Criminal Code. Thus, even if the indictment was legally defective due to the *nolle prosequi*, the trial court had jurisdiction over the cause and could accept the guilty plea.

3. The court rejected the argument that defendant’s plea was involuntary because he was not aware that the Attorney General could use the guilty plea as a basis to file a sexually dangerous person’s petition. Due process principles provide that a guilty plea is knowing and voluntary only if the defendant has been advised of the “direct consequences” of the plea. A “direct consequence” is one which “has a definite, immediate and largely automatic effect on the range of the defendant’s sentence.”

By contrast, the trial court need not advise the defendant of the “collateral consequences” of a guilty plea. A “collateral consequence” is one which the circuit court has no authority to impose and which results from a discretionary action by an agency that is outside the trial court’s control. Whether a consequence of a guilty plea is direct or collateral is a question of law which is reviewed *de novo*.

The court concluded that the possibility of commitment under the Sexually Violent Person’s Commitment Act is merely a collateral consequence of a guilty plea, because it does not follow directly from the fact of a conviction and requires an petition by a prosecuting authority. Thus, a person who is convicted of a predicate sexual offense may or may not become the subject of a sexually violent person’s petition, depending on action by an entity

that is outside the trial court's control. Because a sexually violent person's proceeding is merely a collateral consequence of a plea, the trial court need not advise the defendant of the possibility of such a proceeding before accepting a guilty plea.

The court concluded, however, that in order to render effective assistance of counsel, defense counsel must inform a defendant who pleads guilty to a sexually violent offense that he will be subject to evaluation for possible commitment under the Sexually Violent Persons Act.

4. In dissent, Justices Freeman and Burke found that unless the State took steps to reinstate the *nol prossed* charge, there was no "justiciable matter" on which a guilty plea could have been entered.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Carr, 407 Ill.App.3d 513, 944 N.E.2d 859 (2d Dist. 2011)

Although the trial court did not inform the defendant before his guilty plea that he would be required to serve 85% of the sentence for aggravated kidnapping, the court concluded that good time provisions constitute a collateral consequence of a plea and need not be explained before the plea is entered.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Fredericks, 2014 IL App (1st) 122122 (No. 1-12-2122, 6/26/14)

In 2012, defendant entered a guilty plea to one count of possession of methamphetamine and was sentenced to two years probation. As a result of a 1999 conviction for attempted aggravated criminal sexual abuse, the plea required defendant to register as a sex offender for life.

The trial court did not advise defendant of the lifetime registration requirement before it accepted the guilty plea on the possession offense. Defendant had completed the 10-year registration period for the 1999 conviction before the possession offense occurred.

1. In order to satisfy the due process requirement that guilty pleas must be entered knowingly and voluntarily, the trial court must inform the defendant of the direct consequences of a guilty plea before the plea is accepted. Direct consequences are those which affect the sentence and other punishment which the court may impose. However, the trial court need not advise a guilty plea defendant of collateral consequences of the plea.

The court concluded that a requirement to register as a sex offender is merely a collateral consequence of the plea. Therefore, due process does not require that a guilty plea defendant be admonished that he will be required to register as a sex offender.

The court acknowledged that in **Padilla v. Kentucky**, 559 U.S. 356 (2010), the Supreme Court held that the Sixth Amendment right to the effective assistance of counsel requires defense counsel to advise a client of the immigration consequences of a guilty plea. The Illinois Supreme Court has extended **Padilla** to an attorney's failure to inform a client that a guilty plea can lead to involuntary commitment as a sexually violent person. **People v. Hughes**, 2012 IL 112817.

Here, however, defendant contended not that his attorney rendered ineffective assistance, but that due process was violated by the trial court's failure to provide admonishments that he would be required to register as a sex offender for the rest of his life. Whether or not counsel had a duty to advise defendant of the registration requirement, the trial court had no such duty before it could accept a guilty plea.

2. 730 ILCS 150/5-7 requires that a defendant who is to be released on probation or conditional discharge and who is subject to a sex offender registration requirement must be

advised of that requirement. In addition, 730 ILCS 150/5 requires that the trial court provide written notice of the registration requirement to an offender who is to be released on probation. Although defendant was sentenced to probation on his guilty plea, the statutory notice was not provided.

The Appellate Court concluded that the failure to comply with the notice requirements of the Registration Act did not provide a basis for defendant to withdraw the plea. The purpose of §§5 & 5-7 is to prevent a defendant from inadvertently violating probation because he or she lacks knowledge of the registration requirement. The notification requirements are directory rather than mandatory, however, and do not prevent the trial court from accepting a guilty plea.

The trial court's order denying defendant's motion to withdraw his guilty plea was affirmed.

People v. Greco, 2014 IL App (1st) 112582 (No. 1-11-2582, 5/12/14)

Under 725 ILCS 5/113-8, the trial court is required to admonish a defendant about the immigration consequences of his guilty plea. The statutory provision, however, is directory, not mandatory, because no specific consequence results from noncompliance with the statute. A defendant is thus not automatically entitled to withdraw his plea where the court fails to give the proper admonitions. And since immigration consequences are collateral, the failure to admonish does not violate due process or affect the constitutional voluntariness of a guilty plea.

The Court rejected defendant's argument that following **Padilla v. Kentucky**, 559 U.S. 356 (2010) (where the Supreme Court held that counsel is deficient if he does not inform defendant that a guilty plea may have immigration consequences), immigration consequences should no longer be viewed as collateral, and hence trial courts should be constitutionally required to admonish defendants about the immigration consequences of guilty pleas. The holding in **Padilla** was purposefully narrow and only applied to the duties of counsel. It did not apply to the trial court. Accordingly, the trial court's failure to admonish defendant about the immigration consequences of his plea was not an error of constitutional magnitude. Defendant's post-conviction petition was properly dismissed for failing to state a constitutional claim.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Guzman, 2014 IL App (3d) 090464 (Nos. 3-09-0464 & 3-10-0802, 1/23/14)

1. 725 ILCS 5/113-8 provides that before accepting a guilty plea, the trial court "shall" admonish the defendant that if he or she is not a U.S. citizen, the conviction may have consequences in terms of his or her immigration status. The court concluded that under **People v. Delvillar**, 235 IL 2d 507, 922 N.E.2d 330 (2009) the failure to give the §113-8 admonishment concerns only a collateral consequence of a plea and does not raise questions concerning the voluntariness of the plea.

2. In **Delvillar**, the Illinois Supreme Court found that the failure to admonish under §113-8 requires reversal where real justice has been denied or the defendant has been prejudiced. A defendant shows prejudice by demonstrating that he was subjected to potential immigration penalties or that he would not have entered a guilty plea had he been admonished that a conviction might affect his immigration status.

Here, defendant failed to show that he was prejudiced by the absence of a §113-8 admonishment where his motion to withdraw his plea merely stated that he wanted to withdraw his plea, without asserting that he was subject to immigration penalties or that he

would have pleaded not guilty had the admonishment been given. Under these circumstances, the trial court did not abuse its discretion by denying leave to withdraw the plea.

3. In a specially concurring opinion, Justice Holdridge acknowledged that under **Delvillar**, immigration concerns are collateral consequences of a guilty plea. However, Justice Holdridge believed that **Delvillar** did not survive the United States Supreme Court's decision in **Padilla v. Kentucky**, 559 U.S. 356 (2010), which held that defense counsel must advise a guilty plea defendant of the risk of adverse immigration consequences resulting from a criminal conviction. Justice Holdridge also found that the trial court's failure to give the §113-8 admonishment renders a guilty plea involuntary.

4. In a dissenting opinion, Justice McDade stated that only the Illinois Supreme Court can determine whether **Delvillar** remains good law in light of **Padilla**.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Jones, 2013 IL App (4th) 120300 (No. 4-12-0300, 7/26/13)

1. Supreme Court Rule 605(c) requires that upon entry of a negotiated guilty plea, the trial court must admonish the defendant concerning several points, including that: (1) the defendant has a right to appeal, (2) before appealing the defendant must file a motion to withdraw the guilty plea, (3) if the guilty plea is withdrawn the judgment will be vacated, a trial date set, and any dismissed charges reinstated, (4) if the defendant is indigent a copy of the transcript will be provided and counsel appointed, and (5) claims not raised in the motion to withdraw the plea will be waived.

The record did not contain a transcript of the trial court's admonishments after defendant entered a guilty plea to domestic battery. However, a bystanders' report indicated that the trial court informed defendant that she could appeal by filing a notice of appeal within 30 days, without stating that she was required to file a motion to withdraw the plea. Although the bystanders' report indicated that the trial court was in the habit of admonishing guilty plea defendants of the requirement to file a motion to withdraw the plea, the court noted that at best the trial court gave inconsistent admonishments concerning the right to appeal.

Because it would be a violation of due process to dismiss the appeal due to the failure to file a motion to withdraw the plea where the trial court failed to admonish defendant of that requirement, the cause was remanded for the trial court to give proper admonishments and to allow defendant an opportunity to file a motion to withdraw the plea.

2. Although the written negotiated guilty plea specified that defendant was required to file a motion to withdraw the plea, written admonishments may not substitute for the oral admonishments required by Rule 605(c). Written admonishments may supplement oral admonitions only if the written admonishments are acknowledged in open court and the trial court ascertains that the defendant was aware of the admonishments and understood them. Because the certified bystanders' report indicated that the trial court did not address the contents of the plea agreement in open court or ascertain that defendant understood the written agreement, that agreement cannot be used to determine whether defendant was sufficiently admonished under Rule 605(c).

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Perry, 2014 IL App (1st) 112584 (No. 1-12-2584, 11/26/14)

1. Supreme Court Rule 605(c) requires the trial court to admonish a defendant who has entered a negotiated guilty plea that: (1) he has the right to appeal, (2) before taking an appeal he must file a written motion within 30 days asking to have the judgment vacated and for leave to withdraw the plea, (3) if the motion is allowed the plea and sentence will be vacated

and a trial date set, (4) any charges that were dismissed as part of the plea agreement may be reinstated, (5) if defendant is indigent a copy of the transcript will be provided and counsel will be appointed to assist the defendant in preparing the motions, and (6) any issue not raised in the motion to withdraw the plea will be waived. The trial court need not use the exact language of Rule 605(c) so long as it conveys the substance of the rule.

Here, the trial court's admonishments were inadequate. First, the admonishments did not deal at all with two of the requirements of Rule 605(c) - informing defendant that if his plea was withdrawn dismissed charges could be reinstated and that issues not raised in the motion to withdraw the plea would be waived. Second, some of the remaining admonishments were unclear. For example, the trial court told defendant that he had 30 days to file an appeal rather than that he was required to file a motion to withdraw the plea, but also referred to what would happen if it granted or denied "the motion." Because the admonishments lacked the specificity necessary to resolve any ambiguity, they were insufficient to impart the information required under Rule 605(c).

2. Once a guilty plea defendant expresses an interest in challenging his plea, the trial court has an affirmative duty to ascertain whether the defendant desires counsel to assist in preparing and presenting the postplea motions. Rule 604(d); **People v. Griffin**, 305 Ill. App. 3d 326, 713 N.E.2d 662 (2nd Dist. 1999). Where a guilty plea defendant who had not been properly admonished under Rule 605(c) filed several "notification of motions," and when asked by the trial court if he wanted to withdraw his plea responded that he did because he had "ineffective assistance of counsel," there was a sufficient indication of defendant's desire to challenge his plea to trigger the court's affirmative duty to offer the appointment of counsel.

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§24-6(b) **Nature of Charge**

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§24-6(c) **Rights to Plead Not Guilty, Go to Trial, and Confront Witnesses**

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§24-6(d) **Possible Sentence**

People v. Guerrero, 2012 IL 112020 (No. 112020, 2/17/12)

Defendant pleaded guilty to first degree murder in return for a negotiated 50-year prison sentence. The trial court failed to advise defendant that he would be required to serve three years of mandatory supervised release after the imprisonment ended. Furthermore, the written judgment order did not include any reference to mandatory supervised release. Defendant failed to raise the admonishment issue in his first post-conviction petition, but 12

years later filed for leave to file a successive post-conviction petition raising the issue.

Defendant claimed that he first learned that he would have to serve an MSR period in 2005 or 2006, when he spoke to Ronald Whitfield, the defendant in **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005). In **Whitfield**, the court found that a reduction of a negotiated prison term was justified where the trial court failed to admonish a guilty plea defendant of the MSR requirement. In **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), however, the court held that the **Whitfield** rule applies prospectively only to convictions which were not yet finalized on December 20, 2005, the day on which **Whitfield** was announced.

At a hearing on the motion for leave to file a successive petition, defendant testified that he knew that he would have to serve parole after his prison term was finished. Defendant testified that he first learned about parole when he was transferred from juvenile to adult DOC, which he estimated was one or two years after he filed his initial post-conviction petition. The trial court denied leave to file a subsequent post-conviction petition.

1. A successive post-conviction petition may be filed only with leave of the court. (725 ILCS 5/122-1(f)). Leave to file may be granted only if the petitioner demonstrates “cause” for failing to bring the claim in the initial post-conviction petition and “prejudice” resulting from that failure.

2. The Supreme Court concluded that defendant could not show “cause” for failing to raise the trial court’s failure to admonish in his initial post-conviction petition. The court noted that according to defendant’s testimony, he knew about parole when he arrived in adult DOC. Although defendant claimed that this was after his first post-conviction proceeding, the record showed that he was an inmate at an adult institution when he filed a motion to extend the time for filing his first post-conviction petition.

Furthermore, the trial court’s finding that there was not “cause” for failing to raise the issue in the initial proceeding was subject to the “manifest weight of the evidence” standard of review. The trial court’s finding was not against the manifest weight of the evidence; the failure of a post-conviction petitioner (or his counsel) to recognize the factual or legal basis of a claim does not constitute “cause.”

Second, although **Whitfield** granted relief on the failure to admonish issue, the claim was not a new one. Instead, similar claims had been raised unsuccessfully for some 30 years before **Whitfield** was decided. A lack of precedent for a particular position does not constitute “cause” for failing to raise the issue; even where the law is unfavorable, an issue must be raised to preserve it for review.

3. The court also noted that even had defendant shown “cause” and “prejudice” and been allowed to file a subsequent petition, a reduction in sentence would have been inappropriate where the defendant claimed that his plea was not entered knowingly and voluntarily. A reduction in sentence was ordered in **Whitfield** because, once the MSR term was added to the imposed sentence, the defendant did not receive the benefit of his bargain. Where a plea was not entered voluntarily, however, the appropriate remedy is to allow the defendant to withdraw his plea rather than to reduce the sentence.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Morris & Holborow, 236 Ill.2d 345, 925 N.E.2d 1069 (2010)

1. Under **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), due process is violated where a defendant is not advised that a mandatory supervised release term will be added to the sentence negotiated under a plea agreement. The court concluded that **Whitfield** created a “new” rule for purposes of retroactivity analysis. (See **APPEAL**, §2-6(e)).

Because the **Whitfield** holding satisfied neither of the two exceptions to the rule barring application of “new” rules in collateral proceedings, the **Whitfield** court erred by announcing a rule that should not have been applied in that case. Because the new rule was improperly adopted, it will not be applied in post-conviction cases where the conviction became final before the date of the **Whitfield** opinion - December 20, 2005.

2. The court clarified that when giving guilty plea admonishments concerning mandatory supervised release, the trial court should explicitly link the MSR term to the negotiated sentence to which the defendant is agreeing. Because the purpose of admonishments are to advise defendants of the actual terms of the bargain he has made with the State, an admonishment which uses the term “MSR” without “putting it in some relevant context could not serve to advise the defendant of the consequences of his guilty plea and cannot aid the defendant in making an informed decision about his case.”

Furthermore, such an admonishment should be given both at the plea hearing and at sentencing, and a reference to the MSR requirement should be placed in the written judgment.

The orders denying post-conviction relief were affirmed.

(Defendant Morris was represented by Assistant Defender Rebecca Levy, Chicago.)

(Defendant Holborow was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Snyder, 2011 IL 111382 (No. 111382, 12/1/11)

Supreme Court Rule 402 requires that the court admonish defendant regarding the minimum and maximum sentence prescribed by law before accepting defendant’s guilty plea. Where the admonition is defective but has no relevance to any bargain that defendant struck with the State in exchange for his plea, the appropriate remedy is to allow defendant the opportunity to vacate the plea rather than to vacate the portion of the sentence that does not conform to the admonition. Allowing defendant a fresh opportunity to decide whether to plead guilty, with full knowledge of the possible consequences, adequately protects his rights and avoids awarding a windfall due to the trial court’s error. It also provides both the parties and the trial court an incentive to ensure adequate admonishments.

Defendant entered a partially-negotiated plea of guilty, where some of the charges against her were dropped in exchange for her plea to the remaining charges. There was no agreement as to her sentence. The court ordered defendant to pay restitution but had failed to admonish her before accepting her plea that she could be ordered to pay restitution. Defendant nonetheless received the full benefit of her bargain with the State. Therefore the only remedy available to her was withdrawal of the plea, rather vacatur of the restitution order.

People v. Andrews, 403 Ill.App.3d 654, 936 N.E.2d 648 (4th Dist. 2010)

The Appellate Court finds the dispositive holding of **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), to be that the trial court must inform the defendant that the MSR term will be added to his negotiated sentence, not that the MSR term is part of the negotiated sentence. The defendant prevailed in **Whitfield** only because the court made no reference at all to the MSR term, not because the court failed to inform defendant that the MSR term was part of his negotiated sentence. The statutorily-mandated MSR term cannot be part of a plea negotiation because there is nothing to negotiate. The MSR admonition is not required by Supreme Court Rule 402(b), which directs that the terms of the plea agreement be stated in open court, but by 402(a)(2), which directs the court to advise defendant of the minimum and maximum penalties prescribed by law. **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069

(2010), does not change this analysis, even though **Morris** also makes reference to defendant's plea agreement.

Applying this analysis, the Appellate Court found no due process violation. The prosecutor accurately stated the plea agreement without reference to the MSR term. The court mentioned as part of its 402(a)(2) admonition that if defendant was convicted and sentenced to prison, there would be a one-year MSR term.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Burns, 405 Ill.App.3d 40, 933 N.E.2d 1208 (2d Dist. 2010)

1. In **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), the Illinois Supreme Court held that whether an admonition regarding mandatory supervised release (MSR) substantially complies with Rule 402 is a fact-specific inquiry that focuses on whether an ordinary person in defendant's place would reasonably understand that MSR will be added to the actual sentence agreed upon in exchange for the guilty plea.

The court advised defendant at the plea hearing that "a conviction of these offenses could result in you being sentenced to the Illinois Department of Corrections for a period of time from 6 to 30 years; the extended term is 30 to 60 years. There's a potential fine of up to \$25,000, with a period of three years mandatory supervised release." This admonition was insufficient because it did not link MSR to the actual sentences defendant would receive and did not convey unconditionally that MSR would be added to the agreed-upon sentences.

2. Defendant's plea bargain was for concurrent 21-year sentences to charges of armed robbery and home invasion. This was the minimum term of imprisonment for each offense because the court was required to impose a 15-year add-on to each Class X sentence. 720 ILCS 5/18-2(a)(2) and 5/12-11(a)(3). Because the court was not authorized to reduce those sentences below that minimum, the only remedy available to defendant for the faulty MSR admonition was vacation of his plea.

The Appellate Court reversed the first-stage dismissal of the post-conviction petition and remanded to afford the defendant the opportunity to vacate his plea if he so elects.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

People v. Chavez, 2013 IL App (4th) 120259 (No. 4-12-0259, 9/16/13)

Supreme Court Rule 402(a) requires the court to admonish a defendant of the "minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." Substantial, not literal, compliance with this rule is required. An imperfect admonition does not require reversal unless real justice has been denied or prejudice results.

Defendant entered an open plea to two Class X felonies. The court informed defendant they were punishable by a minimum term of six years and a maximum penalty of 30 years. When the prosecution informed the court that it would request discretionary consecutive sentences and that it believed defense counsel had "informed his client," the court explained to the defendant that it could sentence him to concurrent or consecutive terms. The court explained by example that if it sentenced defendant to six-year terms, they could run at the same time, in which case it would be a single six-year sentence. Or the court could order that the sentences run consecutively. "So again, if it were six-year terms, it would be six and six or a 12-year total term or any other term that could be imposed." The defendant stated he understood and had no questions. The court sentenced defendant to consecutive terms of 20 and 30 years, for a total of 50 years.

The Appellate Court held that the admonitions were sufficient to inform the defendant

of the maximum penalty to which he could be subjected, even though the court had not explained that any consecutive sentences could add up to an aggregate sentence greater than the maximum penalty of 30 years. The court advised the defendant of the sentencing range for Class X felonies, the difference between concurrent and consecutive sentences and how consecutive sentences work. “While a perfect admonishment might state the maximum aggregate sentence in years,” perfection is not required, only substantial compliance.

The Appellate Court affirmed the denial of defendant’s motion to withdraw his plea. (Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

People v. Davis, 403 Ill.App.3d 461, 934 N.E.2d 550 (1st Dist. 2010)

Noting a conflict in appellate authority, the Appellate Court held that **People v. Whitfield** was not violated where the trial court admonished defendant at the plea hearing that he would be required to serve a term of mandatory supervised release, but failed to mention MSR at sentencing. (Affirming **People v. Marshall**, 381 Ill.App.3d 724, 886 N.E.2d 1106 (1st Dist. 2008)). The court stated that under **Whitfield**, a “constitutional violation occurs only when there is absolutely no mention to a defendant, before he actually pleads guilty, that he must serve an MSR term in addition to the agreed-upon sentence that he will receive in exchange for his plea of guilty.”

Because defendant knew before he entered the guilty plea that he would be sentenced to the penitentiary, and was told during the plea hearing that persons sentenced to the penitentiary must serve MSR, he was placed on notice that he would have to serve an MSR term in addition to the penitentiary sentence. The court acknowledged, however, that “[t]he better practice would incorporate the mandatory supervised release admonition when the specific sentencing is announced,” and that “the written sentencing judgment should also include the term of mandatory supervised release.”

The summary dismissal of defendant’s post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Dorsey, 404 Ill.App.3d 829, 942 N.E.2d 535 (4th Dist. 2010)

Defendants must be advised that a term of mandatory supervised release will be added to the actual sentence or sentencing range agreed upon in return for a plea of guilty. **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010).

In the context of advising defendant of the maximum penalties he faced independent of the plea agreement, the court stated, “If you’re sent to prison there’s a period of MSR of three years.” Defendant filed a post-conviction petition complaining that the court had failed to advise him that any sentence he received based on his plea agreement included an MSR term. The Appellate Court affirmed the first-stage dismissal of the petition, but the Supreme Court remanded for reconsideration in light of **Morris**.

The Appellate Court noted that post-**Morris**, the districts are split on whether a general admonition that the defendant must serve an MSR term if he is sentenced to a term of imprisonment is sufficient to inform a defendant that his agreed-upon sentence or sentencing range includes an MSR term. The First, Fourth and Fifth (in *dicta*) Districts find such admonition sufficient to put the defendant on notice that he will serve an MSR term, while the Second District rejects that view because the admonition does not convey unconditionally that the MSR term will be added to the negotiated sentence or sentencing range.

The Appellate Court concurred with the Second District that an admonition such as that given to the defendant links the MSR term only to the statutory sentencing range or

maximum penalties, and defendant could reasonably believe that the MSR term would apply to him only if he did not plead guilty under the negotiated plea agreement.

Without explaining its reasoning, the court held both that: (1) defendant's petition did state the gist of a **Whitfield** claim, as clarified by **Morris**, because the trial court failed to admonish him that an MSR term would apply to any sentence imposed within the agreed-upon sentencing range; and (2) did not state the gist of a claim because, as it had previously held in **People v. Andrews**, ___ Ill.App.3d ___, ___ N.E.2d ___, 2010 WL 3450057 (4th Dist. 2010), the trial court did mention MSR during the guilty plea admonitions.

The court affirmed the trial court's order dismissing the petition.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Guerrero, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0972, 5/18/11)

1. A defendant does not have a constitutional right to plea bargain. If the State chooses to bargain, however, there is a right to effective assistance of counsel during the negotiations. Providing effective assistance of counsel during plea negotiations includes accurately informing the accused concerning the direct consequences of accepting or rejecting a plea offer, including the maximum and minimum sentences that could be imposed if the defendant is convicted of the charged offenses.

The right to the effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial.

2. Although counsel acted unreasonably where he did not realize that defendant was subject to mandatory consecutive terms and advised that defendant would likely get probation if convicted, defendant could not show prejudice where there the State had not offered a plea agreement and showed no interest in conducting negotiations. In the absence of any reason to believe that plea negotiations would have occurred had defendant asked, there was no reasonable probability that the outcome would have been different had counsel given accurate information.

3. The trial court has no obligation to inform the defendant of possible sentences except in guilty plea situations, where the defendant must make a knowing and voluntary waiver of the right to trial. Where the trial court has no obligation to inform the defendant of the possible sentences, due process is not violated if the trial court elects to advise defendant of the penalties but gives erroneous advice.

People v. Hunter, 2011 IL App (1st) 093023 (No. 1-09-3023, 8/31/11)

Under Supreme Court Rule 402, the trial court may not accept a guilty plea without admonishing the defendant concerning several points, including the maximum and minimum sentences which apply to the conviction. In **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), the Supreme Court held that due process and Supreme Court Rule 402 are violated if the trial court accepts a guilty plea without informing the defendant that he will be subject to a term of mandatory supervised release once his prison term is completed.

The Appellate Court concluded that the trial court substantially complied with Rule 402, and satisfied due process requirements, where it advised defendant before his plea that the offense carried a two-year period of mandatory supervised release, even though the judge did not mention the MSR term a few minutes later when imposing the negotiated sentence. Although **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), held that the "better practice" would be to incorporate the MSR admonition in the announcement of sentence, the Appellate Court concluded that such express linkage is not required so long as the defendant

was advised before he pleaded guilty that he would be required to serve MSR.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Johnson, 392 Ill.App.3d 897, 910 N.E.2d 677 (1st Dist. 2009)

Defendant's attempt to litigate a **Whitfield** claim in a successive post-conviction petition was rejected because he could not meet the "cause and prejudice test. (See **COLLATERAL REMEDIES**, §9-1(i)(2)).

(Defendant was represented by Assistant Defender David Harris, Chicago.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Serrano, 392 Ill.App.3d 1011, 912 N.E.2d 325 (1st Dist. 2009)

1. Under **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), due process is violated where a defendant pleads guilty in exchange for a specific sentence, but receives a more onerous sentence due to the mandatory supervised release requirement. Noting a conflict in appellate authority, the court found that the trial court's admonitions are insufficient where the defendant is told he will serve a period of mandatory supervised release, but is not informed of the specific length of MSR that will be required. "[I]nforming the defendant that he will have to serve MSR without specifying the length of the term does not fulfill the court's duty under Supreme Court Rule 402(a)(2) to admonish him concerning the sentence to be imposed."

2. The court rejected the State's argument that although the trial court failed to advise defendant that he would be required to serve a three-year MSR term for attempt first degree murder, the sentence should be reduced by only two years because defendant was properly advised that he would serve a one year period of MSR for an unrelated controlled substance offense. An admonishment concerning the consequences of pleading guilty to one crime cannot serve as an admonishment of the consequences of pleading to a separate crime which carries a different statutory MSR period.

3. The court rejected the State's argument that the defendant could not raise a **Whitfield** claim in a §2-1401 petition. (See **COLLATERAL REMEDIES**, §9-2(a)).

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Snyder, 403 Ill.App.3d 637, 935 N.E.2d 137 (3d Dist. 2010)

Defendant entered a plea of guilty where there was no agreement regarding the sentence she would receive. The court did not admonish her about the possibility of restitution, but then ordered defendant to pay restitution when it imposed sentence. Relying on **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), the Appellate Court vacated the restitution order because of the defective admonition.

People v. Thomas, 402 Ill.App.3d 1129, 932 N.E.2d 658 (5th Dist. 2010)

In **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), the Supreme Court held that **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), does not apply retroactively to convictions which became final before December 20, 2005, the date on which **Whitfield** was announced. Here, the court held that the conviction in defendant's case became final on November 15, 2005, when consecutive sentences were entered on a guilty plea which had been entered a week earlier.

Although a timely motion directed at the plea or to reconsider the sentence would have delayed entry of a final judgment, a letter which the defendant wrote to the judge did not constitute such a motion. Because the letter merely pointed out that under the plea agreement

the sentences were to run concurrently, it was the equivalent of a motion to correct the mittimus. Correcting the mittimus is merely a ministerial act which does not toll the entry of a final judgement.

Because defendant's conviction was final before December 20, 2005, the **Whitfield** rule did not apply to this case.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Wigod, 406 Ill.App.3d 66, 940 N.E.2d 202 (1st Dist. 2010)

1. Supreme Court Rule 402(a)(2) provides that a court shall not accept a plea of guilty without addressing defendant in open court, informing him of and determining that he understands the minimum and maximum sentences prescribed by law.

The court admonished defendant, who entered a blind plea to a charge of failure to support (750 ILCS 16/15(a)(4)) that the offense was a Class 4 felony, probationable, and punishable by a minimum term of imprisonment of one year and a maximum of three years, with one year of mandatory supervised release. The court did not advise defendant that the court was also required by statute to order restitution in the amount of the total unpaid support obligation at the time of sentencing, or that defendant could be fined. The court sentenced defendant to a term of probation and ordered restitution as required by statute. Because defendant could reasonably conclude based on the court's admonitions that his decision to plead guilty would subject him to a sentence of probation or imprisonment in lieu of having to pay the arrearage on his support obligation, defendant's plea was not made with knowledge of its consequences.

2. A claim of error not contained in a post-plea motion is not forfeited if the error is clear and obvious and so serious that the defendant was denied a substantial right. A defendant who is denied his due process right to be properly and fully admonished prior to entry of a guilty plea has been denied a substantial right. Also, defendant's failure to object to the erroneous admonishment can be excused because Supreme Court Rule 402 places the obligation on the court to admonish the defendant regarding the consequences of his plea. Therefore, the court's neglect to advise defendant that restitution would be a consequence of his plea was not forfeited even though not preserved by defendant's post-plea motion.

3. The circuit court also erred in denying defendant's *pro se* post-plea motion without defendant being present or represented by counsel. Supreme Court Rule 604(d) requires the court to determine whether a defendant who files a post-plea motion is represented by counsel, and if indigent, desires that counsel be appointed. Because the court acted without defendant being present, it could not ascertain if defendant was indigent or desired counsel.

The court vacated the circuit court's judgment and allowed defendant to withdraw his plea and plead anew.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Williams, 2012 IL App (2d) 110559 (No. 2-11-0559, 11/20/12)

1. Before a guilty plea can be accepted, Supreme Court Rule 402(a) requires that the defendant be admonished concerning the nature of the charge, the minimum and maximum sentences, the right to plead guilty or not guilty, and the rights that will be waived by a guilty plea. The purpose of such admonishments is to ensure that the defendant understands his plea, the rights he will waive by pleading guilty, and the consequences of his action. The failure to give proper admonishments does not necessarily establish grounds for reversing the judgment or vacating the plea, however. Instead, the defendant is required to establish that real justice was denied or that he suffered prejudice.

2. Where the trial court's Rule 402 admonishments informed defendant that he was eligible for T.A.S.C. probation, but in fact due to his prior record defendant was ineligible for the T.A.S.C. program, defendant was entitled to withdraw his plea only if he could establish that he was prejudiced by the erroneous admonishment. Defendant did not make an adequate showing of prejudice where he failed to claim that he would not have pleaded guilty had he known he was ineligible for T.A.S.C., and stated only that accurate admonishments would have allowed him to "more accurately [consider] the sentencing paradigm and [determine whether] his potential sentencing range was great enough that it would be more advantageous to elect to stand trial." The court concluded that without a more specific claim of prejudice, defendant was not entitled to withdraw his plea.

The trial court's order denying leave to withdraw the guilty plea was affirmed.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The Appellate Court concluded that the trial judge's admonishment was in error and prejudiced defendant.

1. Several statutes arguably applied to the maximum sentence. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a person convicted of a second or subsequent offense under the Controlled Substances Act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

2. The Appellate Court found that the above statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

3. The court concluded that where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. Because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

4. Although the parties agreed to a sentencing cap that was less than the 30-year maximum sentence which actually applied, defendant was prejudiced by the trial court's erroneous admonishments that the maximum sentence was 60 years. The court noted that defendant alleged that he had relied on the faulty admonishments in deciding to accept the

plea bargain. In addition, when defendant accepted the sentencing cap of 25 years, he believed that he faced a maximum of 60 years. Had defendant realized that he had negotiated a reduction in the maximum sentence of only five years instead of 35, he might not have been willing to accept the plea agreement. Under these circumstances, prejudice was established.

The trial court's denial of defendant's motion to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

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§24-7

Factual Basis

People v. Garza, 2014 IL App (4th) 120882 (Nos. 4-12-0082 & 4-13-0090, 1/28/14)

The firearm enhancement statute, 730 ILCS 5/5-8-1(a)(1)(d), provides for three different levels of sentencing enhancement based on the use of a firearm during the commission of an offense: (1) 15 additional years of imprisonment for being armed with a firearm; (2) 20 years for personally discharging a firearm; and (3) 25 years to natural life for personally discharging a firearm that proximately caused bodily harm, permanent disability, permanent disfigurement, or death.

In **People v White**, 2011 IL 109616, the Illinois Supreme Court held that where the factual basis for defendant's guilty plea showed that a firearm had been used in the commission of the offense, the trial court was required to impose the appropriate mandatory firearm enhancement in sentencing defendant, and the failure to do so made the sentence and the guilty plea based on that sentence void.

Here, defendant entered a negotiated guilty plea to first degree murder in exchange for a 35-year sentence that included a 15-year firearm enhancement. The charge alleged that defendant, or one for whose conduct he was legally responsible, shot and killed the victim in the course of an armed robbery and while armed with a firearm. The factual basis established the following: (1) several witnesses saw an unidentified man take money from the victim and shoot him multiple times; (2) other witnesses saw defendant in a vehicle near the scene in possession of a firearm; (3) they saw defendant exit the vehicle and shots were immediately fired; and (4) when police arrested defendant they recovered a firearm that matched the shell casings found at the scene.

On appeal, defendant argued that his sentence was void because it did not include the 25-to-life mandatory enhancement for personally discharging a firearm that caused death. According to defendant, under **White** the 25-to-life enhancement is triggered if the charging instrument and factual basis "would allow a trier of fact to reasonably infer" that defendant personally discharged a firearm that caused death.

The Appellate Court rejected such a broad reading of **White**. Instead, **White** requires the factual basis to explicitly include the facts triggering the sentencing enhancement. The factual basis should be read for what it states, not for what a hypothetical trier of fact might reasonably infer. Here, the factual basis did not expressly establish that defendant personally discharged the firearm and thus the sentence was not void for failing to include the 25-to-life enhancement.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

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§24-8

Motion to Vacate Plea or Reconsider Sentence; Appeal

§24-8(a)

Generally

People v. Dominguez, 2012 IL 111336 (No. 111336, 4/19/12)

Supreme Court Rule 605(c) provides admonitions to be given by the trial judge to a defendant who has been sentenced on a guilty plea. The rule specifically states that the trial court “shall advise the defendant” of six specific admonitions. Here, the trial court misstated two of the six admonitions and omitted any reference to a third.

The court concluded that under the circumstances, the admonishments “substantially complied” with Rule 605(c).

1. The failure to give the admonitions verbatim is not reversible error so long as the trial court “substantially complies” with Rule 605(c) by imparting the essence of the matters involved in the rule. “Substantial compliance” occurs if the court adequately informs the defendant what he must do to preserve the right to appeal his guilty plea or sentence.

2. As a matter of first impression, the court held that written admonishments are not adequate substitutes for oral admonishments. However, where the written admonishments are acknowledged in open court and it is ascertained that the defendant is aware of and understands them, the written admonishments may supplement the oral admonishments required under the rule. Thus, when there is a question whether oral admonishments substantially complied with Rule 605(c), written admonishments which the court and the defendant discussed in open court may be relevant to determining whether the defendant was substantially advised in accordance with Rule 605(c).

3. Rule 605(c)(2) requires that the trial court inform the defendant that to take an appeal, he must within 30 days file a written motion asking to have the judgment vacated and the guilty plea withdrawn. Although it was “unfortunate” that the trial court misstated the admonishment by telling defendant that he had “to return to the courtroom” within 30 days to file post-plea motions, the court found that the oral admonishment, when combined with written admonishments that given to the defendant, substantially informed defendant of the requirement that he file a motion to withdraw his plea before seeking to appeal.

4. Rule 605(c)(5) requires that the defendant be informed that if he or she is indigent, a transcript will be provided and counsel appointed to assist with the preparation of the post-plea motions. Although the trial judge’s oral admonishments erroneously gave the impression that defendant could receive a transcript and the assistance of counsel only after a motion to withdraw the plea had been denied, the court concluded that the admonitions “reflect[ed] that a court-appointed attorney would be available for the defendant.” Thus, the admonitions substantially complied with the rule. The court also noted the written admonitions clearly indicated that counsel could be appointed to help defendant prepare the post-plea motions.

5. The court acknowledged that the trial court completely failed to mention the admonishment required under Rule 604(c)(4) - that if the plea was vacated the State could reinstate all charges dismissed under the negotiated plea agreement. Despite the complete absence of any oral admonition, the court found substantial compliance with the rule because defendant acknowledged receiving written admonitions which complied with the rule.

6. In dissent, Justices Burke, Kilbride and Freeman found that the trial court failed to

substantially comply with Rule 605 where three of the six required admonishments were erroneous or completely absent. The dissenters also stated that Rule 605 should be amended to require the trial judge to simply read Rule 605 to guilty plea defendants rather than attempting to restate the rule in his or her own words.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People ex rel. Alvarez v. Skryd, 241 Ill.2d 34, 944 N.E.2d 347 (2011)

No appeal may be taken from a judgment entered on a plea of guilty unless the defendant files in the circuit court within 30 days of sentencing an appropriate post-plea motion. Supreme Court Rule 604(d). As a general rule, where defendant fails to file such a motion, the Appellate Court must dismiss the appeal. The 30-day requirement of Rule 604(d) incorporates the general limitation that a circuit court loses jurisdiction to vacate or modify its judgment 30 days after entry of judgment.

An admonition exception to this rule exists where the circuit court fails to admonish defendant regarding his right to appeal as required by Supreme Court Rule 605. Dismissal of an appeal based on defendant's failure to file the motion required by Rule 604(d) violates due process where the court fails to comply with Rule 605 because defendant has not been informed that the filing of the motion was necessary. In such circumstances, the appeal is not dismissed. Rather, the reviewing court must remand the cause to the circuit court for proper admonishments and strict compliance with Rule 604(d).

This admonition exception is for the Appellate Court to apply after the defendant files a notice of appeal from a guilty plea without first complying with Rule 604(d). The admonition exception does not restore jurisdiction to the circuit court after 30 days from entry of judgment. While the absence of admonitions is erroneous, the error does not render the judgment of the circuit court void, as to allow the defendant to raise the issue at any time.

Defendant pled guilty to misdemeanor possession of cannabis. The court did not admonish defendant regarding his appeal rights. Twelve years later, defendant moved to vacate his plea. The admonition exception did not allow defendant to file an untimely motion where he had not filed a timely notice of appeal. The circuit court's jurisdiction over defendant's plea of guilty and conviction lapsed after 30 days and the court had no authority to address the merits of defendant's motion.

The Supreme Court awarded the State a writ of *mandamus*, and ordered the circuit court to rescind its order granting the defendant's motion and enter an order dismissing defendant's motion for lack of jurisdiction.

People v. Albers, 2013 IL App (2d) 111103 (No. 2-11-1103, 6/28/13)

Under Supreme Court Rule 604(d), a defendant who enters a negotiated plea which includes a sentencing cap implicitly agrees not to challenge any sentence which is less than the cap. Thus, the defendant is not allowed to challenge just his sentence, but must file a motion to withdraw the guilty plea and vacate the judgment.

Where defendant pleaded guilty pursuant to a negotiated plea involving the dismissal of other charges and a ten-year-sentencing cap, and then moved to reconsider the sentence, it would have been improper to remand the cause due to defense counsel's failure to comply with the Rule 604(d) requirement that he certify that he consulted with defendant, examined court documents, and amended the *pro se* motion. The court rejected the reasoning of **People v. Neal**, 403 Ill. App.3d 757, 936 N.E.2d 726 (4th Dist. 2010), which held that a remand is required where counsel's certification was inadequate even where the defendant entered a negotiated plea and filed only a motion to reconsider the sentence. Here, the court found that

because defendant failed to file a motion to withdraw his plea, it had no option but to dismiss the appeal.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Brexton, 405 Ill.App.3d 989, 939 N.E.2d 1076 (2d Dist. 2010)

1. Under **Blackledge v. Perry**, 417 U.S. 21 (1974), due process is not violated by the mere fact that the sentence is increased upon retrial after a successful appeal. Instead, due process prohibits only an increased sentence that appears to have been motivated by a realistic likelihood of vindictiveness. Under **People v. Walker**, 84 Ill.2d 512, 419 N.E.2d 1167 (1981), there is a presumption of vindictiveness where, in the absence of new evidence or changed circumstances, the prosecutor brings additional, more serious charges after a defendant invokes a right to which the law entitles him. The State must rebut the presumption by presenting objective facts showing that the decision to bring the more serious charges was not motivated by vindictiveness.

2. The prosecution failed to rebut the presumption that it acted vindictively by adding a new burglary charge after defendant successfully sought to withdraw his plea to one count of retail theft. In a jury trial, defendant was convicted of the new burglary charge and of the original counts of retail theft.

The court noted that the burglary charge was based on the same act of shoplifting as the retail theft count, and that the State was aware of the facts supporting both charges when it elected to charge only retail theft. The court also rejected several arguments by the State to show that the decision to add the burglary charge was not vindictive.

First, although the prosecutor claimed that he had agreed to dismiss an unrelated retail theft charge in return for the plea in this case, the State did not attempt to reinstate the unrelated charge, as it would have been entitled to do if defendant had sought to withdraw a negotiated plea. Instead, it added a more serious charge which stemmed from the incident for which defendant pleaded guilty.

Second, the prosecutor claimed to have been contemplating whether to add the burglary charge when defendant entered the guilty plea. However, he did not claim to have communicated that possibility to defendant or defense counsel before the plea was entered. To the contrary, the defense was informed of the possibility of a burglary charge only after the case was remanded, when the prosecutor sent a letter to defense counsel stating that a burglary charge would be considered if defendant was successful in withdrawing his plea.

Third, a lack of vindictiveness was not suggested by the fact that the State dismissed a second, less serious retail theft charge when defendant pleaded guilty. The trial court noted at the time of the plea that the one-act, one-crime doctrine precluded convictions on more than one count, and that defendant was entering what was in effect a blind plea. Even had the State dismissed the lesser count as part of a plea agreement, however, its remedy would have been to reinstate the dismissed count rather than to add a more serious charge carrying a higher sentence.

The court stressed that the State did not claim that new evidence or changed circumstances justified the more serious charge. Instead, the only change was that defendant had withdrawn his plea. Because the State failed to rebut the presumption of vindictiveness, defendant's burglary conviction was vacated and the cause remanded for sentencing on retail theft.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Buckner, 2013 IL App (2d) 130083 (No. 2-13-0083, 9/24/13)

Defendant agreed to plead guilty to three counts in exchange for the State's agreement to nolle three other counts. There was no agreement with respect to the sentence. Defendant filed no motion to withdraw her plea, but filed a motion to reconsider her sentence contending that two of the counts to which she pleaded guilty should merge under the one-act, one-crime doctrine.

Generally, a defendant who pleads guilty must file a motion to withdraw his guilty plea if he seeks to challenge his conviction. Where a defendant agrees to plead guilty to certain charges and the State agrees to drop the remaining charges, the defendant forfeits any consideration of a claim that two of the counts to which he pleaded guilty should merge under the one-act, one-crime rule, where he fails to file a motion to withdraw his guilty plea raising this issue. There is no plain error review. To do so would allow the defendant to receive the full benefit of his bargain under the plea agreement, while later avoiding his own obligation by unilaterally reducing the convictions to which he had agreed.

Defendant could not challenge the convictions to which she pleaded guilty where she filed no motion to withdraw the plea. She could not seek to vacate one of her convictions by filing a motion to reconsider sentence.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Burns, 405 Ill.App.3d 40, 933 N.E.2d 1208 (2d Dist. 2010)

1. In **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), the Illinois Supreme Court held that whether an admonition regarding mandatory supervised release (MSR) substantially complies with Rule 402 is a fact-specific inquiry that focuses on whether an ordinary person in defendant's place would reasonably understand that MSR will be added to the actual sentence agreed upon in exchange for the guilty plea.

The court advised defendant at the plea hearing that "a conviction of these offenses could result in you being sentenced to the Illinois Department of Corrections for a period of time from 6 to 30 years; the extended term is 30 to 60 years. There's a potential fine of up to \$25,000, with a period of three years mandatory supervised release." This admonition was insufficient because it did not link MSR to the actual sentences defendant would receive and did not convey unconditionally that MSR would be added to the agreed-upon sentences.

2. Defendant's plea bargain was for concurrent 21-year sentences to charges of armed robbery and home invasion. This was the minimum term of imprisonment for each offense because the court was required to impose a 15-year add-on to each Class X sentence. 720 ILCS 5/18-2(a)(2) and 5/12-11(a)(3). Because the court was not authorized to reduce those sentences below that minimum, the only remedy available to defendant for the faulty MSR admonition was vacation of his plea.

The Appellate Court reversed the first-stage dismissal of the post-conviction petition and remanded to afford the defendant the opportunity to vacate his plea if he so elects.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

People v. Feldman, 409 Ill.App.3d 1124, 948 N.E.2d 1094 (5th Dist. 2011)

Leave to withdraw a guilty plea should be granted only to correct a manifest injustice under the facts involved, such as if it appears that (1) the plea was entered on a misapprehension of the facts or the law, (2) there is a doubt as to the guilt of the accused, (3) the accused has a meritorious defense, or (4) the ends of justice will be better served by submitting the case to a jury. The trial court's decision to deny a motion to withdraw plea will be disturbed only if it constitutes an abuse of discretion.

A plea of guilty is an admission of every fact alleged in the indictment as long as each

fact admitted is an ingredient of the offense charged. A judicial admission is binding upon the party making it and may not be controverted by other evidence. If the fact admitted to is a concrete fact within the peculiar knowledge of the individual who admits it, an opposing party is entitled to hold the individual to the fact, and the individual may not have the benefit of other evidence that might tend to falsify the admission unless the court finds that the individual has provided a reasonable explanation of it due to mistake.

Defendant pled guilty to a charge of possession of a controlled substance. As part of the factual basis, the State recited that defendant did not have a prescription for any of the substances recovered by the police. The court asked both defense counsel and defendant if they objected to the factual basis and both responded they did not. Defendant later moved to withdraw his plea, asserting that he had a prescription for the pills found in his possession and he only pled guilty to obtain his release from jail.

The court refused to allow defendant to “deliberately mislead the court by stipulating to facts that he now claims are not true and that he now wishes to attempt to controvert,” finding defendant was stopped from contesting that he had no valid prescription by his judicial admission, which operated as a waiver of proof of that fact.

Even if defendant was not bound by “the facts to which he had knowingly and willfully stipulated,” the court concluded that defendant produced insufficient evidence to support the withdrawal of his plea. Although eight months elapsed from the date of defendant’s arrest to the date of the ruling on the motion to reconsider, defendant had not produced a copy of a valid prescription or any verified information from a physician showing he had a valid prescription. The documents defendant did offer—a workers’ compensation report purportedly written by a physician alluding to his being given a prescription, and a purported expense report from a pharmacy showing defendant had prescriptions for the drugs filled—did not provide substantial evidence that defendant had a valid prescription.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. Gooch, 2014 IL App (5th) 120161 (No. 5-12-0161, 9/3/14)

A defendant who is convicted pursuant to a negotiated guilty plea may not challenge his sentence by filing a motion to reconsider, and must instead file a motion to withdraw the plea. Supreme Court Rule 604(d). The court concluded that a “negotiated” plea is one in which the parties reach an agreement concerning sentencing. In other words, where there is no agreement as to sentence but the parties agree that some charges will be dismissed in exchange for the plea, the plea is not “negotiated” for purposes of Rule 604(d).

The court rejected the argument that sentencing considerations are involved in a plea whenever the State loses the ability to obtain sentences on dismissed charges. The court distinguished **People v. Diaz**, 192 Ill.2d 211, 735 N.E.2d 605 (2000), in which the plea agreement specified that the State agreed not to seek consecutive or extended term sentencing, and held that a “plea bargain that is silent as to sentencing is equivalent to an open plea.”

Because defendant agreed to plead guilty to one count of criminal sexual assault in exchange for the dismissal of two counts of predatory criminal sexual assault, and there was no agreement concerning sentencing, the plea was not negotiated. Therefore, defendant could challenge the sentence by filing a motion to reconsider the sentence and was not required to move to withdraw the plea.

People v. Hampton, 2011 IL App (4th) 100219 (No. 4-10-0219, 9/29/11)

Supreme Court Rule 606(b) contemplates that a defendant may file only one post-judgment motion directed against the final judgment. Successive motions raising issues that

were previously raised are not permitted and unnecessarily extend the time for appeal. A *pro se* motion for sentence modification is not properly before the trial court if it is filed while the defendant is represented by counsel.

Here, the trial court did not err by failing to consider the merits of defendant's *pro se* motion arguing that error had occurred at the sentencing hearing. Defendant's *pro se* motion was improper because it was filed after the court denied his counsel's motion to reconsider sentence, defendant filed a notice of appeal, and counsel was appointed on appeal. The court acknowledged, however, that a different result might have been required had defendant's motion raised an ineffective assistance of counsel claim.

The motion for a remand for the trial court to consider the merits of defendant's *pro se* motion was denied.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Herrera, 2012 IL App (2d) 110009 (No. 2-11-0009, 6/1/12)

1. Under Supreme Court Rule 604(d), an attorney who represents a defendant on either a motion to reconsider the sentence imposed on a non-negotiated guilty plea or a motion to withdraw the guilty plea must file a certificate stating that he or she has: (1) consulted with the defendant by mail or in person to ascertain the defendant's contentions of error in the sentence or the entry of the guilty plea, (2) examined the trial court file and the report of proceedings of the guilty plea, and (3) made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Rule 604(d) requires strict compliance. The remedy for failing to strictly comply with the rule is a remand to allow the defendant to file a new motion to withdraw the guilty plea or reconsider the sentence, and to allow the court to conduct a hearing on that motion.

2. Where the attorney who filed the motion to reconsider the sentence became a judge before there was a hearing on the motion, the attorney who took over the representation, and who appeared at the hearing on the motion, was obligated to file a proper certificate on her own. Where the second attorney's certificate was inadequate, it is irrelevant whether the first attorney's certificate would have been sufficient had that attorney remained in the case.

The court rejected the argument that inadequacies in the second attorney's certificate could be cured by that attorney's on-the-record statements concerning actions which she took in the defendant's behalf. "We shall not waste judicial resources by scouring through the record to determine whether an attorney actually complied with the rule. . . . Unless the record undermines the certificate . . . the only thing we consider in determining compliance with Rule 604(d) is the certificate itself."

Here, the certificate of the attorney who represented defendant at the hearing was inadequate because counsel failed to allege that she had consulted with the defendant concerning any claims of error concerning the entry of the guilty plea (rather than merely claims concerning the sentence) or that she had made amendments to the motion necessary to adequately present the claims. Thus, remand was required so defendant could file a new motion and obtain a hearing on that motion.

3. Noting that the Appellate Court is "inundated" with cases lacking strict compliance with Rule 604(d) or where the attorney's certificate is ambiguous, the court stated:

While this court has said that strict compliance does not mean that counsel must recite "word for word" the verbiage of the rule . . . we now admonish attorneys that a "word for word" recitation is a better practice. We urge trial courts to be vigilant in ensuring compliance. Trial courts possess the power and duty to examine

certificates, and they should reject those that do not comply, with instructions for counsel to file another certificate if need be, in accordance with the requirements of the rule. . . . We add that the State also has an obligation to examine a certificate and bring any noncompliance to the trial court's attention.

(Defendant was represented by Supervisor Josette Skelnik, Elgin.)

People v. Jones, 2013 IL App (4th) 120300 (No. 4-12-0300, 7/26/13)

1. Supreme Court Rule 605(c) requires that upon entry of a negotiated guilty plea, the trial court must admonish the defendant concerning several points, including that: (1) the defendant has a right to appeal, (2) before appealing the defendant must file a motion to withdraw the guilty plea, (3) if the guilty plea is withdrawn the judgment will be vacated, a trial date set, and any dismissed charges reinstated, (4) if the defendant is indigent a copy of the transcript will be provided and counsel appointed, and (5) claims not raised in the motion to withdraw the plea will be waived.

The record did not contain a transcript of the trial court's admonishments after defendant entered a guilty plea to domestic battery. However, a bystanders' report indicated that the trial court informed defendant that she could appeal by filing a notice of appeal within 30 days, without stating that she was required to file a motion to withdraw the plea. Although the bystanders' report indicated that the trial court was in the habit of admonishing guilty plea defendants of the requirement to file a motion to withdraw the plea, the court noted that at best the trial court gave inconsistent admonishments concerning the right to appeal.

Because it would be a violation of due process to dismiss the appeal due to the failure to file a motion to withdraw the plea where the trial court failed to admonish defendant of that requirement, the cause was remanded for the trial court to give proper admonishments and to allow defendant an opportunity to file a motion to withdraw the plea.

2. Although the written negotiated guilty plea specified that defendant was required to file a motion to withdraw the plea, written admonishments may not substitute for the oral admonishments required by Rule 605(c). Written admonishments may supplement oral admonishments only if the written admonishments are acknowledged in open court and the trial court ascertains that the defendant was aware of the admonishments and understood them. Because the certified bystanders' report indicated that the trial court did not address the contents of the plea agreement in open court or ascertain that defendant understood the written agreement, that agreement cannot be used to determine whether defendant was sufficiently admonished under Rule 605(c).

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Jordan, 2013 IL App (2d) 120106 (No. 2-12-0106, 6/28/13)

When a guilty plea defendant moves to reconsider the sentence or withdraw the plea, defense counsel must file a certificate stating that he or she has consulted with the defendant "to ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty," examined the trial court file and report of proceedings of the guilty plea, and made any amendments to the *pro se* motion that are necessary for adequate presentation of any defects in "those proceedings." (S.Ct. Rule 604(d)). The purpose of strictly complying with Rule 604(d) is to safeguard a defendant's right to a direct appeal.

The court concluded that where the defendant entered a non-negotiated plea and therefore could file a motion to withdraw the plea, a motion to reconsider the sentence, or both, the purpose of the rule could not be accomplished if counsel was required to inquire only about

defendant's contentions of error concerning either "the sentence *or* the entry of the plea of guilty." Instead, the disjunctive "or" must be read as requiring counsel to ascertain defendant's contentions of error concerning both the sentence and the plea. Reading "or" to mean that counsel need inquire only about either the guilty plea or the sentence creates an unacceptable risk that viable contentions will be forfeited without the defendant's knowledge or intent.

The court added that even where the defendant files a *pro se* motion challenging only the sentence, counsel must consult with defendant concerning possible errors relating to the plea itself:

The defendant might simply be unaware of the range of viable attacks on his plea. . . . Or, ironically, he might have interpreted too strictly the trial court's admonishments under . . . Rule 605(b)(2) [and] believed that he could file only one motion or the other. . . . With the right to a direct appeal at stake, counsel should not merely assume that the defendant has knowingly challenged only his sentence; rather, he should consult with the defendant to confirm that assumption, or to dispel it.

Where defendant entered a non-negotiated plea and could therefore file a motion to reconsider the sentence, a motion to withdraw the plea, or both, defense counsel's certificate was inadequate where it stated only that counsel had consulted with defendant to ascertain any contentions of error "in the imposition of a sentence." The trial court's order denying defendant's motion to reconsider his sentence was vacated, and the cause was remanded so counsel could file a valid Rule 604(d) certificate, defendant could file new post-plea motions if he wished, and the trial court could conduct a new post-plea hearing.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Marquez, 2012 IL App (2d) 110475 (No. 2-11-0475, 9/14/12)

1. A motion to withdraw a guilty plea is untimely under Supreme Court Rule 604(d) if it is filed before sentencing. The court concluded that a Rule 604(d) certificate which was filed in connection with a premature motion does not satisfy the certificate requirement of the rule. (Overruling **People v. Sawyer**, 258 Ill. App. 3d 174, 630 N.E.2d 1294 (2d Dist. 1994)).

In overruling **Sawyer**, the court noted that even with a negotiated plea, where the issues which can be raised are limited and the defendant is not allowed to challenge only his sentence, issues relevant to the motion to withdraw might not occur until sentencing. Under Rule 604(d), counsel is required to certify that he or she has made any amendments to the motion that are necessary to present defendant's contentions. The court found that if counsel filed the certificate before sentencing, it would be impossible to make a truthful certification concerning issues which arise at sentencing.

2. Before he was sentenced, defendant filed a motion to withdraw his negotiated plea. After he was sentenced, defendant filed a motion to reconsider the trial court's denial of that motion. The trial court treated the motion to reconsider as a renewal of the untimely motion to withdraw the plea.

The court concluded that under these circumstances, defense counsel was required to file a new Rule 604(d) certificate. Because counsel failed to file a new certificate, the cause was remanded so that counsel could file a new certificate, defendant could file a new motion if he wished, and a new hearing could be held.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. McCreary, 393 Ill.App.3d 402, 915 N.E.2d 745 (2d Dist. 2009)

Rejecting the reasoning of **People v. Jolly**, 357 Ill.App.3d 884, 830 N.E.2d 860 (4th Dist. 2005), the court concluded that a defendant who pleads guilty to a controlled substances offense which results in the imposition of a “street value” fine may challenge the propriety of that fine on appeal, even where no challenge was raised in the post-plea motion. “We see no reason why, when it comes to reviewing an unpreserved claim that a street-value fine was improperly imposed, a defendant who pleaded guilty should be treated any differently than a defendant who was found guilty following a trial.” The court added that Supreme Court Rule 615(a) does not make the plain error rule inapplicable to persons who plead guilty.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Merriweather, 2013 IL App (1st) 113789 (1-11-3789, 10/15/13)

1. Defendant argued that because the 30-day period following a guilty plea is a “critical stage” of the criminal process during which the defendant has a constitutional right to counsel, the trial court must appoint counsel when a defendant who pleaded guilty files any *pro se* document requesting the appointment of counsel. Defendant entered a negotiated guilty plea, and subsequently filed a *pro se* notice of appeal without filing a motion to withdraw the plea. Supreme Court Rule 604(d) requires that a defendant who wishes to appeal from a negotiated guilty plea must first file a motion to withdraw the plea. Under Rule 604(d), if the defendant is indigent counsel is to be appointed upon the filing of the motion to withdraw the plea.

The court rejected the argument, noting that defendant was represented by counsel at both his guilty plea and sentencing and properly admonished by the trial court concerning the requirement that he move to withdraw his plea. The court stated that under Rule 604(d), filing a motion to withdraw a negotiated plea is a “condition precedent” to taking an appeal and triggers the right to counsel on appeal.

2. The court also rejected the argument that constitutional questions would be raised concerning Supreme Court Rule 606(a), which governs the perfection of appeals, unless counsel is appointed whenever a *pro se* guilty plea defendant files a notice of appeal. Defendant argued that Rule 606(a) permits a defendant to file a *pro se* notice of appeal without filing a motion to withdraw the plea, and that a defendant might unintentionally waive his right to an appeal because he does not have the assistance of counsel in filing a motion to withdraw the plea and perfecting the appeal.

The court acknowledged that Rule 606(a) permits a defendant to file a *pro se* notice of appeal. However, without fully explaining its holding, the court found that a guilty plea defendant who defaults on the Rule 604(d) requirement to file a motion to withdraw the plea is not constitutionally entitled to the appointment of counsel for appeal. The court also noted that although defendant’s direct appeal must be dismissed due to the failure to comply with Rule 604(d), defendant is not barred from raising constitutional claims in post-conviction proceedings.

(Defendant was represented by Assistant Defender Ginger Leigh Odom, Chicago.)

People v. Monson, 2012 IL App (3d) 100868 (No. 3-10-0868, 6/20/12)

Generally, a defendant who pleads guilty in exchange for a cap on the length of her sentence may not challenge a sentence imposed within that cap without first filing a motion to withdraw the plea. However, a defendant does not have to move to withdraw her plea if she challenges her sentence on the ground that it was imposed without statutory authority. A sentence that does not conform to the statutory authority is void.

Defendant pled guilty in exchange for a sentencing cap. She received probation and was ordered to serve a jail term of 180 days without good-conduct credit. Because the court

had no authority to deny that credit to defendant as provided by 730 ILCS 130/3, defendant properly filed a motion to reconsider sentence and was not required to file a motion to withdraw her plea. The absence of a 604(d) certificate was of no consequence because a court can correct a void sentence at any time.

The Appellate Court directed the clerk to amend the mittimus to reflect that defendant was entitled to good-conduct credit.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Neal, 403 Ill.App.3d 757, 936 N.E.2d 726 (4 th Dist. 2010)

1. Supreme Court Rule 604(d) requires that after representing a defendant on a motion challenging a guilty plea or the sentence imposed on the plea, defense counsel must file a certificate stating that he or she has: (1) consulted with the defendant to ascertain any contentions of error, (2) examined the trial court file, (3) examined the report of proceedings of the guilty plea, and (4) made any amendments to the motion necessary for adequate presentation of any issues arising from the proceedings. Strict compliance with Rule 604(d) is required.

Generally, only the certificate is considered in determining whether Rule 604(d) has been satisfied. However, the record may be considered to the extent that it undermines the certificate.

2. After representing defendant on a motion to reconsider the sentence, counsel filed a certificate stating that he met in person with the defendant “and discussed the issues raised in the motion to reconsider sentence.” The certificate also stated that counsel examined “all relevant documents regarding the defendant’s sentencing including, but not limited to the transcript of the sentencing hearing and the presentence investigation.”

The court found that the certificate was insufficient because it failed to show that counsel consulted with defendant about any contentions of error concerning the plea itself, or that counsel examined the transcript of the guilty plea proceeding. The court also noted that the transcript of the sentencing hearing was not prepared for some three months after the certificate was filed, rebutting counsel’s claim to have examined the transcript.

The cause was remanded for strict compliance with Rule 604(d), including the appointment of counsel, a new motion to challenge the plea or sentence, a new hearing, and a new Rule 604(d) certificate.

3. The court rejected the State’s argument that defendant could not challenge the sentence imposed on a partially negotiated guilty plea, noting that the trial court addressed the motion on the merits.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Perry, 2014 IL App (1st) 112584 (No. 1-12-2584, 11/26/14)

1. Supreme Court Rule 605(c) requires the trial court to admonish a defendant who has entered a negotiated guilty plea that: (1) he has the right to appeal, (2) before taking an appeal he must file a written motion within 30 days asking to have the judgment vacated and for leave to withdraw the plea, (3) if the motion is allowed the plea and sentence will be vacated and a trial date set, (4) any charges that were dismissed as part of the plea agreement may be reinstated, (5) if defendant is indigent a copy of the transcript will be provided and counsel will be appointed to assist the defendant in preparing the motions, and (6) any issue not raised in the motion to withdraw the plea will be waived. The trial court need not use the exact language of Rule 605(c) so long as it conveys the substance of the rule.

Here, the trial court’s admonishments were inadequate. First, the admonishments did

not deal at all with two of the requirements of Rule 605(c) - informing defendant that if his plea was withdrawn dismissed charges could be reinstated and that issues not raised in the motion to withdraw the plea would be waived. Second, some of the remaining admonishments were unclear. For example, the trial court told defendant that he had 30 days to file an appeal rather than that he was required to file a motion to withdraw the plea, but also referred to what would happen if it granted or denied "the motion." Because the admonishments lacked the specificity necessary to resolve any ambiguity, they were insufficient to impart the information required under Rule 605(c).

2. Once a guilty plea defendant expresses an interest in challenging his plea, the trial court has an affirmative duty to ascertain whether the defendant desires counsel to assist in preparing and presenting the postplea motions. Rule 604(d); **People v. Griffin**, 305 Ill. App. 3d 326, 713 N.E.2d 662 (2nd Dist. 1999). Where a guilty plea defendant who had not been properly admonished under Rule 605(c) filed several "notification of motions," and when asked by the trial court if he wanted to withdraw his plea responded that he did because he had "ineffective assistance of counsel," there was a sufficient indication of defendant's desire to challenge his plea to trigger the court's affirmative duty to offer the appointment of counsel.

People v. Smith, 406 Ill.App.3d 879, 941 N.E.2d 975 (1st Dist. 2010)

Supreme Court Rule 402(d) prohibits a court from initiating plea discussions, but also contemplates the court's limited participation in negotiations, allowing the court to indicate its concurrence in a plea agreement reached by the parties. To show that a court's participation in plea negotiations rendered a guilty plea involuntary, the defendant must demonstrate that the court departed from its judicial function and participated in the negotiation process to the extent that improper influence was exerted on the defendant to plead guilty, or that defendant reasonably believed that he was no longer able to receive a fair and impartial trial so he must plead guilty and accept the sentence approved by the court. A court's improper involvement in a plea agreement does not render a conviction obtained pursuant to that agreement void.

Before trial began, the court participated in a conference with the defense and the prosecution pursuant to Supreme Court Rule 402(d)(2). Defendant did not plead guilty, but proceeded to trial. After the State had presented most of its case, defendant asked if he could accept the court's offer of a 32-year sentence that had resulted from the conference. The court accepted the defendant's plea of guilty and imposed a 32-year sentence, but failed to admonish defendant at the plea hearing of the applicable three-year MSR term.

Defendant filed a motion to vacate plea on the ground that the court had failed to admonish defendant of the MSR term. Defendant asked that he be allowed to vacate his plea rather than that his sentence be reduced by three years. The State responded that there had been no "traditional negotiated plea" between the parties, but an offer from the court, and that the proper remedy was to reduce the defendant's sentence to give him the benefit of the bargain. The court reduced defendant's sentence, indicating that the defendant had asked for the court's offer of 32 years and that the plea had not been negotiated with the State.

On appeal, defendant argued that his plea was involuntary and his conviction void because the court had no authority to negotiate a guilty plea.

1. Not only did the defendant forfeit any error arising from the court's participation in the plea agreement by failing to include the error in his post-plea motion, but defendant cannot complain because he invited the error. To allow a defendant to use the exact action he procured in the trial court to obtain a reversal on appeal would offend every notion of fair play and encourage duplicitous conduct. Defendant asked for the Rule 402 conference and then

asked the court to enter judgment based on the offer derived from the conference. He cannot complain that the court erred in granting his requests.

2. Defendant's plea is not involuntary. The record does not support defendant's argument that he negotiated his plea with the court rather than the State.

In asking the court for a 402 conference prior to trial, defense counsel represented that there had been informal talks with the State regarding "maybe resolving the matter." Even though defense counsel asked the court to reinstate its offer of 32 years when defendant sought to plead guilty during trial, and the court stated that it would reinstate the offer it had made before trial, this language does not unequivocally show that it was the trial court that first suggested the 32-year sentence, rather than that the court merely consented to the parties' agreement to a 32-year sentence. The State's reference to there not being a traditional negotiated plea could refer only to the unusual circumstance of defendant asking the court to reinstate the offer in the midst of trial. The State's suggestion that the court reduce the defendant's sentence to give the defendant of his bargain was an acknowledgment that an agreement did exist.

If the defendant had truly entered an open plea, defendant would not have been entitled to any relief because his sentence plus the MSR term was less than the maximum term that the court admonished him that he could receive for the offense. The trial court did provide defendant with post-plea admonitions in accordance with Supreme Court Rule 605(b), which applies to open pleas of guilty, rather than Supreme Court Rule 605(c), which applies to negotiated pleas (and limits defendant to a motion to vacate plea rather than a motion to reduce sentence as a possible post-plea remedy). However, that circumstance is not controlling of whether the plea was open or negotiated.

3. To determine the appropriate remedy where the defendant has not received the benefit of his bargain due to the court's failure to inform him that a MSR term will be added to his negotiated sentence, the court must consider not only the defendant's preference, but whether permitting the defendant to withdraw his plea based on the absence of a MSR admonition would be unduly prejudicial to the prosecution.

The trial court indicated that it would have allowed defendant to withdraw his plea if he had pled guilty before his trial began. The State had already presented witnesses in support of its case when the defendant asked to plead guilty. The State expended resources to present a significant portion of its case. Even though the witnesses may still be available or the State may be able to use a transcript of the testimony it did present at a new trial, such evidence would be a poor substitute for live testimony presented by witnesses with fresh memories. The defendant twice changed his mind about whether to plead guilty, and there is no guarantee that he will not change it a third time. Therefore the court did not err in finding that reducing defendant's sentence was a more appropriate remedy than allowing him to vacate his plea.

(Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

People v. Smith, 2011 IL App (4th) 100430 (No. 4-10-0430, 10/11/11)

A court will consider an incarcerated defendant's postplea motion to be timely filed if the defendant placed it in the prison mail system within the requisite 30-day period for filing of a postplea motion, regardless of the date on which it was received or file-stamped.

Defendant was sentenced on July 31, 2009, and his postplea motion was due on Monday, August 31, 2009. It was file-stamped on September 2, 2009. An affidavit of service and proof of service showing timely mailing from the prison accompanied the postplea motion. The affidavit was not notarized.

Applying **People v. Tlatenchi**, 391 Ill.App.3d 705, 909 N.E.2d 198 (2009), the

Appellate Court concluded that when a defendant relies on the date of mailing as the date of filing for a postplea motion, proof of mailing must be as provided by Supreme Court Rule 12(b)(3). That rule requires that service by a non-attorney be proved by an affidavit attesting to the time and place of mailing, the complete address appearing on the envelope, and the fact that proper postage was prepaid. The affidavit must be sworn to before an authorized person to be considered an affidavit. Verification pursuant to 735 ILCS 5/1-109 is not a substitute for the affidavit required by Rule 12(b)(3).

The court declined to follow **People v. Hansen**, 2011 IL App (2d) 081226, which concluded that it was unreasonable to refuse to allow proof of mailing by an inmate into the prison mail system other than by Rule 12(b)(3).

Because defendant's proof of mailing was not notarized, it was insufficient to establish timely mailing. The trial court was divested of subject-matter jurisdiction to consider the untimely postplea motion after 30 days, and therefore the trial court's order disposing of the postplea motion was void. The appeal was dismissed because a "void order does not cloak the appellate court with jurisdiction to consider the merits of an appeal."

Cook, J., dissented. Unlike **Tlatenchi**, the State did not raise the issue of the sufficiency of the proof of mailing in the circuit court and in fact agreed that the motion was timely. Rule 12(a)(3) does not impose a jurisdictional requirement as to the notarization of affidavits of service. Therefore the State is bound by its waiver and the court should address the case on its merits.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Tapia, 2014 IL App (2d) 111314 (No. 2-11-1314, 1/9/14)

Defendant entered a negotiated guilty plea in exchange for the State's recommendation of a sentencing cap. At the sentencing hearing, the trial court relied upon incorrect information in the pre-sentence investigation report (PSI) which listed a prior conviction from Georgia as a felony rather than a misdemeanor. Defendant did not object to the court's actions, and filed no post-judgment motions or direct appeal.

Defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to correct the misinformation about the Georgia conviction. At a third-stage evidentiary hearing, the State introduced trial counsel's affidavit which stated that he reviewed the PSI with defendant and defendant never indicated that the description of the Georgia conviction as a felony was inaccurate. Defendant filed an affidavit stating that he did not receive a copy of the PSI until the day of sentencing when trial counsel asked him to quickly look it over. Defendant looked it over but did not notice any errors because he did not understand all the legalese. The circuit court denied the petition and defendant appealed.

The Appellate Court held that defendant forfeited his claim of ineffective assistance by failing to file any post-judgment motions or raise the claim on direct appeal. Ordinarily, forfeiture bars a post-conviction claim that could have been, but was not, raised on direct appeal. Here, support for the claim existed and it could have been raised in a post-judgment motion or on direct appeal. The record shows that defendant reviewed the PSI. Defendant also knew that his Georgia conviction was a misdemeanor. A defendant has the obligation to notify the sentencing court of any inaccuracies in the PSI. By failing to object to the misinformation in the PSI or the court's reliance upon that misinformation, defendant failed to preserve the issue.

Although defendant entered a partially negotiated plea, and thus could not have moved to reconsider his sentence on the sole ground of excessiveness, his claim is not that his sentence was excessive, but rather that due to counsel's ineffectiveness the trial court

considered inaccurate information in imposing his sentence. Such claim could have been raised in a post-judgment motion and on direct appeal.

People v. Trussel, 397 Ill.App.3d 913, 931 N.E.2d 266 (4th Dist. 2010)

1. Under Supreme Court Rule 604(d), a conviction entered by a guilty plea may be appealed only if the defendant, within 30 days of the date on which the sentence was imposed, files a motion to reconsider the sentence or to vacate the plea. Once the motion is filed, the trial court must determine whether the defendant is represented by counsel or wants to have counsel appointed.

2. Where the defendant mailed a letter to the circuit clerk's office stating that he wanted to appeal because he felt trial counsel had been ineffective, the clerk erred by treating the document as a notice of appeal rather than a motion to reconsider the sentence or withdraw the plea. Because of the strict waiver requirements of Rule 604(d), which provides that issues not raised in the motion to reconsider the sentence or withdraw the plea are forfeited for appeal, fundamental fairness requires that the defendant be afforded a full opportunity to explain his allegations and to have the assistance of counsel in preparing a formal motion.

The cause was summarily remanded with directions to strike the notice of appeal, treat the defendant's letter as a *pro se* post-conviction motion, and appoint counsel.

(Defendant was represented by Assistant Defender Karen Munoz, Springfield.)

People v. Villafuerte-Medrano, 2012 IL App (2d) 110773 (No. 2-11-0773, 12/19/12)

1. An order is "void" if entered by a court which lacks jurisdiction or which exceeds its jurisdiction by entering an order beyond its inherent power. An order is void only where jurisdiction is lacking. By contrast, an order erroneously entered by a court which has jurisdiction is merely "voidable." Once jurisdiction is acquired, it is not lost because the court makes a mistake in determining the facts, the law, or both.

2. Where the court has subject matter and personal jurisdiction, it is not divested of jurisdiction because it accepts a guilty plea which violates double jeopardy. Thus, a conviction based on such a plea is voidable rather than void. To raise a double jeopardy challenge to such a plea, the defendant is required to file a timely motion to withdraw the plea. Otherwise, the entry of the guilty plea waives the double jeopardy challenge.

3. The court acknowledged that under federal constitutional law, a guilty plea does not waive a double jeopardy challenge where the double jeopardy violation can be established on the face of the charge. The court concluded that even in that case, however, the defendant must preserve the issue on appeal. In other words, a court may not review a double jeopardy claim that has not been preserved for appeal.

Here, the conviction based on defendant's guilty plea was voidable rather than void. Because defendant failed to file a timely motion to withdraw the plea, the court could not consider the claim that the conviction violated double jeopardy.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Weaver, 2013 IL App (3rd) 130054 (No. 3-13-0054, 12/19/13)

1. A guilty plea forfeits all non-jurisdictional defenses or defects. By contrast, a stipulated bench trial allows a defendant to enjoy the advantages of a guilty plea while avoiding the forfeiture rule concerning an issue which he seeks to raise on appeal.

Courts recognize two types of stipulated bench trials. First, the defendant may stipulate to the evidence but not to his or her guilt. Second, the defendant may stipulate to the

sufficiency of the State's evidence to convict. Either type of stipulated bench trial allows the parties to enjoy the benefits and conveniences of a guilty plea while preserving certain issues, such as those raised in a motion to quash or suppress evidence.

2. A stipulated bench trial is tantamount to a guilty plea if the State presents its entire case by stipulation and the defendant fails to preserve a defense, or if the defendant concedes by stipulation that the evidence is sufficient to support a guilty verdict. If a stipulated bench trial is tantamount to a guilty plea, Supreme Court Rule 402 admonishments must be given. Rule 402 admonishments inform guilty plea defendants of several matters, including the nature of the charge, the minimum and maximum sentences, the right to plead not guilty, and the consequences of a guilty plea.

3. Even where a stipulated bench trial is tantamount to a guilty plea for the purpose of requiring Rule 402 admonishments, it is a stipulated bench trial rather than a guilty plea. Therefore, the defendant is not required to file a motion to withdraw the plea before taking an appeal. Instead, an appeal is commenced by filing a notice of appeal.

The court rejected the State's argument that a defendant who was convicted after a stipulated bench trial, and who stipulated that if the matter went to trial there would be sufficient evidence to support a guilty verdict, was required to file a motion to withdraw a guilty plea before appealing the issues raised in a pretrial motion to suppress.

People v. Wigod, 406 Ill.App.3d 66, 940 N.E.2d 202 (1st Dist. 2010)

1. Supreme Court Rule 402(a)(2) provides that a court shall not accept a plea of guilty without addressing defendant in open court, informing him of and determining that he understands the minimum and maximum sentences prescribed by law.

The court admonished defendant, who entered a blind plea to a charge of failure to support (750 ILCS 16/15(a)(4)) that the offense was a Class 4 felony, probationable, and punishable by a minimum term of imprisonment of one year and a maximum of three years, with one year of mandatory supervised release. The court did not advise defendant that the court was also required by statute to order restitution in the amount of the total unpaid support obligation at the time of sentencing, or that defendant could be fined. The court sentenced defendant to a term of probation and ordered restitution as required by statute. Because defendant could reasonably conclude based on the court's admonitions that his decision to plead guilty would subject him to a sentence of probation or imprisonment in lieu of having to pay the arrearage on his support obligation, defendant's plea was not made with knowledge of its consequences.

2. A claim of error not contained in a post-plea motion is not forfeited if the error is clear and obvious and so serious that the defendant was denied a substantial right. A defendant who is denied his due process right to be properly and fully admonished prior to entry of a guilty plea has been denied a substantial right. Also, defendant's failure to object to the erroneous admonishment can be excused because Supreme Court Rule 402 places the obligation on the court to admonish the defendant regarding the consequences of his plea. Therefore, the court's neglect to advise defendant that restitution would be a consequence of his plea was not forfeited even though not preserved by defendant's post-plea motion.

3. The circuit court also erred in denying defendant's *pro se* post-plea motion without defendant being present or represented by counsel. Supreme Court Rule 604(d) requires the court to determine whether a defendant who files a post-plea motion is represented by counsel, and if indigent, desires that counsel be appointed. Because the court acted without defendant being present, it could not ascertain if defendant was indigent or desired counsel.

The court vacated the circuit court's judgment and allowed defendant to withdraw his

plea and plead anew.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

[Top](#)

§24-8(b)

Procedure on Motion

§24-8(b)(1)

Generally

People v. Buchanan, 2013 IL App (2d) 120447 (No. 2-12-0447, 4/25/13)

Defendant made a post-plea claim that counsel who represented him at his guilty plea was ineffective, after counsel had filed a written motion to withdraw the plea. The court properly allowed defendant to proceed *pro se* on his ineffectiveness allegations, but did not treat his request to proceed *pro se* as a complete waiver of his right to counsel on the post-plea motion. After conducting a **Krankel** hearing on defendant's allegations of ineffectiveness and determining that the claims were without merit, the trial court denied the post-plea motion.

Upon determining that the *pro se* claims had no merit, the trial court should have clearly informed defendant that he was not entitled to conflict counsel and, rather than denying the post-plea motion, should have allowed counsel to argue the remaining claims or obtained a waiver of counsel from the defendant before ruling on the post-plea motion.

The cause was remanded for further proceedings on the post-plea motion. Because the court appointed new counsel for defendant on another matter after denying the post-plea motion, that counsel or other new counsel may represent the defendant on remand. That counsel must file a new Rule 604(d) certificate, and counsel is free to file an amended motion to withdraw plea.

(Defendant was represented by Assistant Defender Kathleen Weck, Chicago.)

People v. Cloyd, 397 Ill.App.3d 1084, 931 N.E.2d 261 (4th Dist. 2010)

Under Supreme Court Rule 604(d), a defense attorney who represents a guilty plea defendant on a motion to withdraw a plea or reconsider a sentence must file a certificate indicating that he or she has: (1) consulted with the defendant by mail or in person to ascertain any contentions of error, (2) examined the trial court file and report of proceedings of the plea of guilty, and (3) made any amendments to the motion necessary for adequate presentation of any issues. The court stressed that counsel has a duty to examine the report of proceedings even if he or she was counsel of record for the defendant and was present when the plea was entered. The court rejected the argument that to avoid the cost of preparing a transcript, an attorney who represented the defendant at the guilty plea may dispense with reviewing the guilty plea report of proceedings.

The cause was remanded to the trial court for the appointment of counsel, the filing of a new motion to withdraw the guilty plea or reconsider the sentence, a new hearing on the motion, and strict compliance with the terms of Rule 604(d).

(Defendant was represented by Assistant Defender Karen Munoz, Springfield.)

People v. Dean, 2012 IL App (2d) 110505 (No. 2-11-0505, 9/7/12)

When defendant has set forth a colorable claim of ineffective assistance of counsel, new

counsel should be appointed before a hearing is conducted on that claim. New counsel is not automatically required merely because defendant presents a *pro se* post-trial claim that counsel was ineffective, however. The trial court must first examine the factual basis for the claim. If the defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue the defendant's claim of ineffective assistance. If the court concludes that the defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim.

Defense counsel filed a motion to vacate defendant's guilty plea that included an allegation that the plea was induced by his attorney's unwillingness to try to the case and that he was never informed that a jury could return a verdict finding him guilty only of second-degree murder. Before denying the motion, the court questioned defense counsel about these allegations, had a discussion with the defendant, relied on its own recollection of the proceedings, and reviewed the transcript of the plea proceedings.

The Appellate Court concluded that a *per se* conflict of interest did not exist merely because the motion to vacate plea raised a question about the defense attorney's competence. Because the trial court sufficiently inquired into the factual basis for the allegations in the motion before denying the motion, no error occurred.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Gabrys, 2013 IL App (3d) 110912 (No. 3-11-0912, 11/14/13)

1. The court is not required to automatically appoint new counsel when defendant makes a post-trial claim of ineffective assistance of counsel. The court is only required to examine the factual basis of defendant's claim. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the post-trial motion. If the allegations show possible neglect of the case, new counsel should be appointed. This rule applies in the post-plea context as well.

The court made an adequate inquiry into defendant's post-plea allegations of ineffective assistance of counsel. Defendant alleged that he had a defense. Defense counsel explained that the name and phone number defendant gave him turned up no one. Defendant alleged that defense counsel did not meet with him prior to the plea. Defense counsel explained that she did not recall if she had told defendant if she would meet with him prior to the trial date, but she had met with the defendant a number of times. The court did not abuse its discretion in finding that the allegations lacked merit and denying the motion to withdraw the guilty plea.

2. Supreme Court Rule 604(d) requires that defense counsel file with the trial court a certificate stating that counsel has consulted with defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Defense counsel must strictly comply with Rule 604(d). Whether the certificate requirement has been complied with is a question of law reviewed *de novo*.

Strict compliance means that the certificate must be filed in the trial court, rather than on appeal, and that the filing must precede or be simultaneous with the hearing in the trial court. The Appellate Court rejected the position taken by the Appellate Courts in **People v. Travis**, 301 Ill. App. 3d 624, 704 N.E.2d 426 (5th Dist. 1998), and **People v. Grace**, 365 Ill. App. 3d 508, 849 N.E.2d 1090 (4th Dist. 2006), that filing the certificate in the circuit court after post-plea motions were heard and denied or after the notice of appeal was filed, is sufficient. Allowing defense counsel to file the certificate after the post-plea hearing fails to ensure that the trial court, in considering defendant's post-plea motion, is apprised that

defense counsel has reviewed the proceedings with the defendant and prepared necessary amendments to the motion. Nor can the failure to strictly comply with Rule 604(d) ever be harmless.

Because defense counsel did not file the 604(d) certificate until four days after the filing of the notice of appeal, the Appellate Court remanded for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new post-plea motion, if counsel concludes that a motion is necessary; and (3) a new motion hearing.

(Defendant was represented by Assistant Defender Benjamin Wolowski, Chicago.)

People v. Hampton, 2011 IL App (4th) 100219 (No. 4-10-0219, 9/29/11)

Supreme Court Rule 606(b) contemplates that a defendant may file only one post-judgment motion directed against the final judgment. Successive motions raising issues that were previously raised are not permitted and unnecessarily extend the time for appeal. A *pro se* motion for sentence modification is not properly before the trial court if it is filed while the defendant is represented by counsel.

Here, the trial court did not err by failing to consider the merits of defendant's *pro se* motion arguing that error had occurred at the sentencing hearing. Defendant's *pro se* motion was improper because it was filed after the court denied his counsel's motion to reconsider sentence, defendant filed a notice of appeal, and counsel was appointed on appeal. The court acknowledged, however, that a different result might have been required had defendant's motion raised an ineffective assistance of counsel claim.

The motion for a remand for the trial court to consider the merits of defendant's *pro se* motion was denied.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Herrera, 2012 IL App (2d) 110009 (No. 2-11-0009, 6/1/12)

1. Under Supreme Court Rule 604(d), an attorney who represents a defendant on either a motion to reconsider the sentence imposed on a non-negotiated guilty plea or a motion to withdraw the guilty plea must file a certificate stating that he or she has: (1) consulted with the defendant by mail or in person to ascertain the defendant's contentions of error in the sentence or the entry of the guilty plea, (2) examined the trial court file and the report of proceedings of the guilty plea, and (3) made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Rule 604(d) requires strict compliance. The remedy for failing to strictly comply with the rule is a remand to allow the defendant to file a new motion to withdraw the guilty plea or reconsider the sentence, and to allow the court to conduct a hearing on that motion.

2. Where the attorney who filed the motion to reconsider the sentence became a judge before there was a hearing on the motion, the attorney who took over the representation, and who appeared at the hearing on the motion, was obligated to file a proper certificate on her own. Where the second attorney's certificate was inadequate, it is irrelevant whether the first attorney's certificate would have been sufficient had that attorney remained in the case.

The court rejected the argument that inadequacies in the second attorney's certificate could be cured by that attorney's on-the-record statements concerning actions which she took in the defendant's behalf. "We shall not waste judicial resources by scouring through the record to determine whether an attorney actually complied with the rule. . . . Unless the record undermines the certificate . . . the only thing we consider in determining compliance with Rule 604(d) is the certificate itself."

Here, the certificate of the attorney who represented defendant at the hearing was

inadequate because counsel failed to allege that she had consulted with the defendant concerning any claims of error concerning the entry of the guilty plea (rather than merely claims concerning the sentence) or that she had made amendments to the motion necessary to adequately present the claims. Thus, remand was required so defendant could file a new motion and obtain a hearing on that motion.

3. Noting that the Appellate Court is “inundated” with cases lacking strict compliance with Rule 604(d) or where the attorney’s certificate is ambiguous, the court stated:

While this court has said that strict compliance does not mean that counsel must recite “word for word” the verbiage of the rule . . . we now admonish attorneys that a “word for word” recitation is a better practice. We urge trial courts to be vigilant in ensuring compliance. Trial courts possess the power and duty to examine certificates, and they should reject those that do not comply, with instructions for counsel to file another certificate if need be, in accordance with the requirements of the rule. . . . We add that the State also has an obligation to examine a certificate and bring any noncompliance to the trial court’s attention.

(Defendant was represented by Supervisor Josette Skelnik, Elgin.)

People v. Little, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2011) (No. 4-09-0787, 6/30/11)

At the hearing on defendant’s motion to reconsider his sentence following a guilty plea, defense counsel filed a Rule 604(d) certificate stating that he had reviewed the transcript of the guilty plea and sentencing hearings. On appeal, defendant argued that defense counsel could not have read the guilty plea proceedings because the court reporter did not certify those proceedings until approximately two months after the certificate was filed.

The Appellate Court rejected the argument that the Rule 604(d) certificate was inadequate, finding that preparation of the transcripts cannot be equated with the court reporter’s certification of those transcripts. The certification process is required under Supreme Court Rule 608(b), which pertains to the record on appeal, and does not indicate whether transcripts were prepared at an earlier date and made available to the parties.

The court distinguished **People v. Holford**, 233 Ill.App.3d 12, 598 N.E.2d 420 (4th Dist. 1992), **People v. Hayes**, 195 Ill.App. 3d 957, 553 N.E.2d 30 (5th Dist. 1990), and **People v. Turner**, 403 Ill.App.3d 753, 936 N.E.2d 700 (4th Dist. 2010), finding that in each case there were indications in the record that the transcripts in question had not been prepared when defense counsel filed a Rule 604(d) certificate.

(Defendant was represented by Assistant Defender Amber Gray, Springfield.)

People v. Maxwell, 2013 IL App (4th) 111042 (No. 4-11-1042, 1/23/13)

Supreme Court Rule 604(d) provides that a post-plea motion “shall be heard promptly.” This rule provides an opportunity for fact finding when the witnesses are available and memories are fresh and to allow a court to immediately correct any errors that may have produced a guilty plea. But unlike a post-conviction proceeding, there is no threshold pleading requirement that a defendant must meet to obtain a hearing. The hearing must be meaningful and defendant must be given an opportunity to argue the merits of the motion.

The trial court denied defendant’s second motion to withdraw her guilty plea without a hearing. Neither party contested defendant’s ability to bring a second motion. Because the trial court denied the defendant her right to a hearing, the Appellate Court reversed and remanded for further proceedings in strict compliance with Rule 604(d).

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Neal, 403 Ill.App.3d 757, 936 N.E.2d 726 (4th Dist. 2010)

1. Supreme Court Rule 604(d) requires that after representing a defendant on a motion challenging a guilty plea or the sentence imposed on the plea, defense counsel must file a certificate stating that he or she has: (1) consulted with the defendant to ascertain any contentions of error, (2) examined the trial court file, (3) examined the report of proceedings of the guilty plea, and (4) made any amendments to the motion necessary for adequate presentation of any issues arising from the proceedings. Strict compliance with Rule 604(d) is required.

Generally, only the certificate is considered in determining whether Rule 604(d) has been satisfied. However, the record may be considered to the extent that it undermines the certificate.

2. After representing defendant on a motion to reconsider the sentence, counsel filed a certificate stating that he met in person with the defendant “and discussed the issues raised in the motion to reconsider sentence.” The certificate also stated that counsel examined “all relevant documents regarding the defendant’s sentencing including, but not limited to the transcript of the sentencing hearing and the presentence investigation.”

The court found that the certificate was insufficient because it failed to show that counsel consulted with defendant about any contentions of error concerning the plea itself, or that counsel examined the transcript of the guilty plea proceeding. The court also noted that the transcript of the sentencing hearing was not prepared for some three months after the certificate was filed, rebutting counsel’s claim to have examined the transcript.

The cause was remanded for strict compliance with Rule 604(d), including the appointment of counsel, a new motion to challenge the plea or sentence, a new hearing, and a new Rule 604(d) certificate.

3. The court rejected the State’s argument that defendant could not challenge the sentence imposed on a partially negotiated guilty plea, noting that the trial court addressed the motion on the merits.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Wigod, 406 Ill.App.3d 66, 940 N.E.2d 202 (1st Dist. 2010)

1. Supreme Court Rule 402(a)(2) provides that a court shall not accept a plea of guilty without addressing defendant in open court, informing him of and determining that he understands the minimum and maximum sentences prescribed by law.

The court admonished defendant, who entered a blind plea to a charge of failure to support (750 ILCS 16/15(a)(4)) that the offense was a Class 4 felony, probationable, and punishable by a minimum term of imprisonment of one year and a maximum of three years, with one year of mandatory supervised release. The court did not advise defendant that the court was also required by statute to order restitution in the amount of the total unpaid support obligation at the time of sentencing, or that defendant could be fined. The court sentenced defendant to a term of probation and ordered restitution as required by statute. Because defendant could reasonably conclude based on the court’s admonitions that his decision to plead guilty would subject him to a sentence of probation or imprisonment in lieu of having to pay the arrearage on his support obligation, defendant’s plea was not made with knowledge of its consequences.

2. A claim of error not contained in a post-plea motion is not forfeited if the error is

clear and obvious and so serious that the defendant was denied a substantial right. A defendant who is denied his due process right to be properly and fully admonished prior to entry of a guilty plea has been denied a substantial right. Also, defendant's failure to object to the erroneous admonishment can be excused because Supreme Court Rule 402 places the obligation on the court to admonish the defendant regarding the consequences of his plea. Therefore, the court's neglect to advise defendant that restitution would be a consequence of his plea was not forfeited even though not preserved by defendant's post-plea motion.

3. The circuit court also erred in denying defendant's *pro se* post-plea motion without defendant being present or represented by counsel. Supreme Court Rule 604(d) requires the court to determine whether a defendant who files a post-plea motion is represented by counsel, and if indigent, desires that counsel be appointed. Because the court acted without defendant being present, it could not ascertain if defendant was indigent or desired counsel.

The court vacated the circuit court's judgment and allowed defendant to withdraw his plea and plead anew.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

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§24-8(b)(2)

Counsel's Failure to File Certificate

People v. Lindsay, 239 Ill.2d 522, 942 N.E.2d 1268 (2011)

Under Supreme Court Rule 604(d), an attorney who represents an indigent defendant on a motion to withdraw a guilty plea and/or reconsider the sentence must file a certificate stating that he or she has consulted with the defendant to ascertain contentions of error, examined the trial court file and report of proceedings of the plea, and made any amendments to the motion that are necessary to adequately present defendant's contentions of error.

Resolving a conflict in appellate authority, the Supreme Court held that where the cause is remanded due to defense counsel's failure to file a Rule 604(d) certificate, a new motion to withdraw the guilty plea or reconsider the sentence is required only if counsel concludes that the original motion is insufficient to adequately present the defendant's contentions.

The Appellate Court erred by finding that a new motion is necessarily required whenever the cause is remanded due to counsel's failure to file a Rule 604(d) certificate.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

People v. Tousignant, 2014 IL 115329 (No. 115329, 2/21/14)

Supreme Court Rule 604(d) requires the attorney for a defendant who has filed a post-judgment motion in the trial court challenging his guilty plea and/or sentence to file a certificate stating that he has consulted with the defendant "to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty." Ill. S. Ct. R. 604(d).

Although the consultation requirement is stated in the disjunctive, a literal reading of the word "or" would frustrate the purposes of the rule. Instead, the rule should be read to require that counsel certify that he has consulted with the defendant to ascertain his contentions of error in both the sentence and the guilty plea.

The same principles that govern the interpretation of statutes govern the interpretation of Supreme Court rules. The goal is to ascertain and give effect to the intention of the rule's drafters. While the word "or" is generally disjunctive, it will not be given its literal meaning

where to do so would frustrate the drafter's intent. In those circumstances, "or" will be considered to mean "and."

The primary purpose of Rule 604(d) is to ensure that all improprieties relating to the guilty plea are brought to the trial court's attention before an appeal is taken. The rule's certificate requirement therefore is meant to ensure that counsel has considered all relevant bases for withdrawing the guilty plea or reconsidering the sentence. A disjunctive reading of the consultation requirement would block this goal since it would not ensure that all errors were brought to the trial court's attention. A conjunctive reading, by contrast, would require counsel to consult with defendant about errors in both the sentence and the guilty plea, which would make it more likely that all relevant claims were presented to the trial court. This is so regardless of whether defendant's postplea motion attacks only the plea or the sentence.

Counsel's certificate in this case stated that he consulted with defendant only about his contentions of error in the sentence imposed. Counsel's certificate thus did not strictly comply with the rule. The cause was remanded for filing of a new postplea motion (if defendant wishes), a new hearing on the motion, and strict compliance with Rule 604(d).

(Defendant was represented by Assistant Defender Nancy Vincent, Springfield.)

In re H.L., 2014 IL App (2d) 140486 (No. 2-14-0486, 10/22/14)

Supreme Court Rule 604(d) requires that an attorney who represents a defendant on a motion to reconsider a sentence or withdraw a guilty plea must file a certificate stating that he or she has consulted with the defendant, examined the court file and report of proceedings, and made any necessary amendments to the motion. Under **People v. Shirley**, 181 Ill. 2d 359, 692 N.E. 2d 1189 (1998), the certificate is to be filed in the trial court at or before the hearing on the motion to withdraw the plea or reconsider the sentence. If the certificate is not timely filed, the appropriate remedy is a remand to afford the defendant another opportunity to be heard on the Rule 604(d) motion.

The court rejected Appellate Court precedent holding that an attorney may comply with Rule 604(d) by filing the certificate after the hearing is completed (rejecting **People v. Grace**, 365 Ill. App. 3d 508, 849 N.E.2d 1090 (4th Dist. 2006); **People v. Travis**, 301 Ill. App. 3d 624, 704 N.E.2d 426 (5th Dist. 1998)).

Because counsel filed the Rule 604(d) certificate three weeks after the hearing on the motion to reconsider the sentence, the cause was remanded for the timely filing of a new certificate, an opportunity for the respondent to file a new Rule 604(d) motion if desired, and a new hearing on the motion.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Albers, 2013 IL App (2d) 111103 (No. 2-11-1103, 6/28/13)

Under Supreme Court Rule 604(d), a defendant who enters a negotiated plea which includes a sentencing cap implicitly agrees not to challenge any sentence which is less than the cap. Thus, the defendant is not allowed to challenge just his sentence, but must file a motion to withdraw the guilty plea and vacate the judgment.

Where defendant pleaded guilty pursuant to a negotiated plea involving the dismissal of other charges and a ten-year-sentencing cap, and then moved to reconsider the sentence, it would have been improper to remand the cause due to defense counsel's failure to comply with the Rule 604(d) requirement that he certify that he consulted with defendant, examined court documents, and amended the *pro se* motion. The court rejected the reasoning of **People v. Neal**, 403 Ill. App.3d 757, 936 N.E.2d 726 (4th Dist. 2010), which held that a remand is required where counsel's certification was inadequate even where the defendant entered a

negotiated plea and filed only a motion to reconsider the sentence. Here, the court found that because defendant failed to file a motion to withdraw his plea, it had no option but to dismiss the appeal.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Cloyd, 397 Ill.App.3d 1084, 931 N.E.2d 261 (4th Dist. 2010)

Under Supreme Court Rule 604(d), a defense attorney who represents a guilty plea defendant on a motion to withdraw a plea or reconsider a sentence must file a certificate indicating that he or she has: (1) consulted with the defendant by mail or in person to ascertain any contentions of error, (2) examined the trial court file and report of proceedings of the plea of guilty, and (3) made any amendments to the motion necessary for adequate presentation of any issues. The court stressed that counsel has a duty to examine the report of proceedings even if he or she was counsel of record for the defendant and was present when the plea was entered. The court rejected the argument that to avoid the cost of preparing a transcript, an attorney who represented the defendant at the guilty plea may dispense with reviewing the guilty plea report of proceedings.

The cause was remanded to the trial court for the appointment of counsel, the filing of a new motion to withdraw the guilty plea or reconsider the sentence, a new hearing on the motion, and strict compliance with the terms of Rule 604(d).

(Defendant was represented by Assistant Defender Karen Munoz, Springfield.)

People v. Cooper, 2011 IL App (4th) 100972 (No. 4-10-0972, 8/24/11)

Supreme Court Rule 604(d) requires that counsel who files a motion to withdraw a guilty plea or reconsider the sentence imposed on a guilty plea must also file a certificate indicating that he or she has: (1) consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, (2) examined the trial court file and report of proceedings of the guilty plea, and (3) made any amendments to the motion necessary for adequate presentation of any defects in the proceedings. The court reiterated precedent that the certificate is required of both appointed and retained counsel.

The court also found that where defense counsel fails to file the certificate by the time of the hearing on the motion to withdraw or reconsider, the appropriate remedy is to grant a continuance to afford counsel a chance to comply with the rule. Here, the trial court erred by striking the motion to reconsider.

The cause was remanded for further proceedings consistent with Rule 604(d).

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Dryden, 2012 IL App (2d) 110646 (No. 2-11-0646, 11/13/12)

Supreme Court Rule 604(d) requires that, when a defendant moves to withdraw a guilty plea or to reconsider a sentence following a guilty plea, "[t]he defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or in the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendment to the motion necessary for adequate presentation of any defects in those proceedings." Strict compliance with the rule is required.

Defense counsel filed a combined motion to withdraw the guilty plea and reconsider the sentence, but filed a 604(d) certificate that stated only that counsel consulted with defendant to ascertain his claim of error in the entry of the guilty plea, and was silent with respect to

consultation regarding the sentence. Because the certificate did not explicitly state that counsel ascertained defendant's contentions of error in the sentence, counsel did not strictly comply with the rule.

Although the rule's consultation requirement is phrased in the disjunctive ("ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty"), in context, it is clear that "or" means "and." It would be absurd to suggest that counsel could choose to consult with defendant about one type of error where counsel moves to both withdraw the plea and reconsider the sentence.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Gabrys, 2013 IL App (3d) 110912 (No. 3-11-0912, 11/14/13)

1. The court is not required to automatically appoint new counsel when defendant makes a post-trial claim of ineffective assistance of counsel. The court is only required to examine the factual basis of defendant's claim. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the post-trial motion. If the allegations show possible neglect of the case, new counsel should be appointed. This rule applies in the post-plea context as well.

The court made an adequate inquiry into defendant's post-plea allegations of ineffective assistance of counsel. Defendant alleged that he had a defense. Defense counsel explained that the name and phone number defendant gave him turned up no one. Defendant alleged that defense counsel did not meet with him prior to the plea. Defense counsel explained that she did not recall if she had told defendant if she would meet with him prior to the trial date, but she had met with the defendant a number of times. The court did not abuse its discretion in finding that the allegations lacked merit and denying the motion to withdraw the guilty plea.

2. Supreme Court Rule 604(d) requires that defense counsel file with the trial court a certificate stating that counsel has consulted with defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Defense counsel must strictly comply with Rule 604(d). Whether the certificate requirement has been complied with is a question of law reviewed *de novo*.

Strict compliance means that the certificate must be filed in the trial court, rather than on appeal, and that the filing must precede or be simultaneous with the hearing in the trial court. The Appellate Court rejected the position taken by the Appellate Courts in **People v. Travis**, 301 Ill. App. 3d 624, 704 N.E.2d 426 (5th Dist. 1998), and **People v. Grace**, 365 Ill. App. 3d 508, 849 N.E.2d 1090 (4th Dist. 2006), that filing the certificate in the circuit court after post-plea motions were heard and denied or after the notice of appeal was filed, is sufficient. Allowing defense counsel to file the certificate after the post-plea hearing fails to ensure that the trial court, in considering defendant's post-plea motion, is apprised that defense counsel has reviewed the proceedings with the defendant and prepared necessary amendments to the motion. Nor can the failure to strictly comply with Rule 604(d) ever be harmless.

Because defense counsel did not file the 604(d) certificate until four days after the filing of the notice of appeal, the Appellate Court remanded for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new post-plea motion, if counsel concludes that a motion is necessary; and (3) a new motion hearing.

(Defendant was represented by Assistant Defender Benjamin Wolowski, Chicago.)

People v. Jordan, 2013 IL App (2d) 120106 (No. 2-12-0106, 6/28/13)

When a guilty plea defendant moves to reconsider the sentence or withdraw the plea, defense counsel must file a certificate stating that he or she has consulted with the defendant “to ascertain defendant’s contentions of error in the sentence *or* the entry of the plea of guilty,” examined the trial court file and report of proceedings of the guilty plea, and made any amendments to the *pro se* motion that are necessary for adequate presentation of any defects in “those proceedings.” (S.Ct. Rule 604(d)). The purpose of strictly complying with Rule 604(d) is to safeguard a defendant’s right to a direct appeal.

The court concluded that where the defendant entered a non-negotiated plea and therefore could file a motion to withdraw the plea, a motion to reconsider the sentence, or both, the purpose of the rule could not be accomplished if counsel was required to inquire only about defendant’s contentions of error concerning either “the sentence *or* the entry of the plea of guilty.” Instead, the disjunctive “or” must be read as requiring counsel to ascertain defendant’s contentions of error concerning both the sentence and the plea. Reading “or” to mean that counsel need inquire only about either the guilty plea or the sentence creates an unacceptable risk that viable contentions will be forfeited without the defendant’s knowledge or intent.

The court added that even where the defendant files a *pro se* motion challenging only the sentence, counsel must consult with defendant concerning possible errors relating to the plea itself:

The defendant might simply be unaware of the range of viable attacks on his plea. . . . Or, ironically, he might have interpreted too strictly the trial court’s admonishments under . . . Rule 605(b)(2) [and] believed that he could file only one motion or the other. . . . With the right to a direct appeal at stake, counsel should not merely assume that the defendant has knowingly challenged only his sentence; rather, he should consult with the defendant to confirm that assumption, or to dispel it.

Where defendant entered a non-negotiated plea and could therefore file a motion to reconsider the sentence, a motion to withdraw the plea, or both, defense counsel’s certificate was inadequate where it stated only that counsel had consulted with defendant to ascertain any contentions of error “in the imposition of a sentence.” The trial court’s order denying defendant’s motion to reconsider his sentence was vacated, and the cause was remanded so counsel could file a valid Rule 604(d) certificate, defendant could file new post-plea motions if he wished, and the trial court could conduct a new post-plea hearing.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Little, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2011) (No. 4-09-0787, 6/30/11)

At the hearing on defendant’s motion to reconsider his sentence following a guilty plea, defense counsel filed a Rule 604(d) certificate stating that he had reviewed the transcript of the guilty plea and sentencing hearings. On appeal, defendant argued that defense counsel could not have read the guilty plea proceedings because the court reporter did not certify those proceedings until approximately two months after the certificate was filed.

The Appellate Court rejected the argument that the Rule 604(d) certificate was inadequate, finding that preparation of the transcripts cannot be equated with the court reporter’s certification of those transcripts. The certification process is required under Supreme Court Rule 608(b), which pertains to the record on appeal, and does not indicate whether transcripts were prepared at an earlier date and made available to the parties.

The court distinguished **People v. Holford**, 233 Ill.App.3d 12, 598 N.E.2d 420 (4th

Dist. 1992), **People v. Hayes**, 195 Ill.App. 3d 957, 553 N.E.2d 30 (5th Dist. 1990), and **People v. Turner**, 403 Ill.App.3d 753, 936 N.E.2d 700 (4th Dist. 2010), finding that in each case there were indications in the record that the transcripts in question had not been prepared when defense counsel filed a Rule 604(d) certificate.

(Defendant was represented by Assistant Defender Amber Gray, Springfield.)

People v. Marquez, 2012 IL App (2d) 110475 (No. 2-11-0475, 9/14/12)

1. A motion to withdraw a guilty plea is untimely under Supreme Court Rule 604(d) if it is filed before sentencing. The court concluded that a Rule 604(d) certificate which was filed in connection with a premature motion does not satisfy the certificate requirement of the rule. (Overruling **People v. Sawyer**, 258 Ill. App. 3d 174, 630 N.E.2d 1294 (2d Dist. 1994)).

In overruling **Sawyer**, the court noted that even with a negotiated plea, where the issues which can be raised are limited and the defendant is not allowed to challenge only his sentence, issues relevant to the motion to withdraw might not occur until sentencing. Under Rule 604(d), counsel is required to certify that he or she has made any amendments to the motion that are necessary to present defendant's contentions. The court found that if counsel filed the certificate before sentencing, it would be impossible to make a truthful certification concerning issues which arise at sentencing.

2. Before he was sentenced, defendant filed a motion to withdraw his negotiated plea. After he was sentenced, defendant filed a motion to reconsider the trial court's denial of that motion. The trial court treated the motion to reconsider as a renewal of the untimely motion to withdraw the plea.

The court concluded that under these circumstances, defense counsel was required to file a new Rule 604(d) certificate. Because counsel failed to file a new certificate, the cause was remanded so that counsel could file a new certificate, defendant could file a new motion if he wished, and a new hearing could be held.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Mineau, 2014 IL App (2d) 110666-B (No. 2-11-0666, mod. op. 9/29/14)

1. Supreme Court Rule 604(d) requires that when a defendant moves to withdraw a guilty plea or to reconsider a sentence following a guilty plea, "[t]he defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or in the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendment to the motion necessary for adequate presentation of any defects in those proceedings." Strict compliance with the rule is required.

Nothing in the rule's plain language requires each attorney to file a certificate when a defendant is simultaneously represented by multiple attorneys from the same office. At the time an amended post-plea motion and a 604(d) certificate were filed, defendant's public defender said that the case was being reassigned to a new public defender. However, the original attorney appeared with the new attorney at the hearing on the motion and filed the notice of appeal. Although the new public defender questioned defendant at the hearing and argued on his behalf, it could be assumed that the first attorney discussed the case with new counsel. Under these circumstances, the new attorney was not required to file a second 604(d) certificate.

2. Furthermore, no error occurred where the certificate stated that counsel consulted with defendant "by mail and/or in person." There is no requirement that counsel state precisely how he or she consulted with the defendant, and the certificate complied with the

literal language of Rule 604(d).

3. Similarly, no error occurred where the certificate adopted the text of the rule by stating that counsel consulted with defendant “to ascertain defendant’s contentions of error in the sentence *or* the entry of the plea of guilty.” The court refused to read the certificate to mean that counsel limited her consultation to one type of error or the other, noting that counsel’s motion sought both to withdraw the plea and in the alternative challenge the sentence.

Furthermore, under **People v. Tousignant**, 2014 IL 115329, “or” is to be read as “and” for purposes of Rule 604(d). “Given that ‘or’ in the rule means ‘and,’ counsel’s certificate here literally complies.”

In a concurring opinion, Justice Jorgensen asserted that in light of **Tousignant**, the better practice would be for counsel to use the word “and” in Rule 604 (d) certificates instead of following the rule verbatim.

(Defendant was represented by Panel Attorney Dev Parikh.)

People v. Monson, 2012 IL App (3d) 100868 (No. 3-10-0868, 6/20/12)

Generally, a defendant who pleads guilty in exchange for a cap on the length of her sentence may not challenge a sentence imposed within that cap without first filing a motion to withdraw the plea. However, a defendant does not have to move to withdraw her plea if she challenges her sentence on the ground that it was imposed without statutory authority. A sentence that does not conform to the statutory authority is void.

Defendant pled guilty in exchange for a sentencing cap. She received probation and was ordered to serve a jail term of 180 days without good-conduct credit. Because the court had no authority to deny that credit to defendant as provided by 730 ILCS 130/3, defendant properly filed a motion to reconsider sentence and was not required to file a motion to withdraw her plea. The absence of a 604(d) certificate was of no consequence because a court can correct a void sentence at any time.

The Appellate Court directed the clerk to amend the mittimus to reflect that defendant was entitled to good-conduct credit.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Morton, 404 Ill.App.3d 294, 936 N.E.2d 179, 2010 WL 3768102 (5th Dist. 2010)

Noting a conflict in Appellate Court authority, the court concluded that when a cause is remanded because trial counsel failed to file a Rule 604(d) certificate after representing the defendant in a motion to reduce sentence, a new motion to reconsider the sentence or withdraw the guilty plea is required only if necessary to adequately present issues arising from the plea or sentencing. The court rejected **People v. Oliver**, 276 Ill.App.3d 929, 659 N.E.2d 435 (2d Dist. 1995), which concluded that under Supreme Court precedent a new motion is required in every case.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. Neal, 403 Ill.App.3d 757, 936 N.E.2d 726 (4th Dist. 2010)

1. Supreme Court Rule 604(d) requires that after representing a defendant on a motion challenging a guilty plea or the sentence imposed on the plea, defense counsel must file a certificate stating that he or she has: (1) consulted with the defendant to ascertain any contentions of error, (2) examined the trial court file, (3) examined the report of proceedings of the guilty plea, and (4) made any amendments to the motion necessary for adequate presentation of any issues arising from the proceedings. Strict compliance with Rule 604(d)

is required.

Generally, only the certificate is considered in determining whether Rule 604(d) has been satisfied. However, the record may be considered to the extent that it undermines the certificate.

2. After representing defendant on a motion to reconsider the sentence, counsel filed a certificate stating that he met in person with the defendant “and discussed the issues raised in the motion to reconsider sentence.” The certificate also stated that counsel examined “all relevant documents regarding the defendant’s sentencing including, but not limited to the transcript of the sentencing hearing and the presentence investigation.”

The court found that the certificate was insufficient because it failed to show that counsel consulted with defendant about any contentions of error concerning the plea itself, or that counsel examined the transcript of the guilty plea proceeding. The court also noted that the transcript of the sentencing hearing was not prepared for some three months after the certificate was filed, rebutting counsel’s claim to have examined the transcript.

The cause was remanded for strict compliance with Rule 604(d), including the appointment of counsel, a new motion to challenge the plea or sentence, a new hearing, and a new Rule 604(d) certificate.

3. The court rejected the State’s argument that defendant could not challenge the sentence imposed on a partially negotiated guilty plea, noting that the trial court addressed the motion on the merits.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Richard, 2012 IL App (5th) 100302 (No. 5-10-0302, 6/7/12)

Supreme Court Rule 604(d) requires that post-plea counsel file a certificate stating that counsel “has consulted with the defendant either by mail or in person to ascertain defendant’s contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.”

Counsel must strictly comply with Rule 604(d). While the language of the rule need not be recited verbatim in the certificate, some indication must be presented that counsel performed the duties required under the rule. A reviewing court cannot simply assume or infer compliance because any issue not raised in the post-plea motion is waived.

Defense counsel’s certification that he ascertained defendant’s “contentions of deprivation of constitutional rights” did not satisfy the rule’s requirement that he ascertain “defendant’s contentions of error in the sentence or the entry of the plea of guilty.” The rule does not limit defendant’s contentions of error to those that impact his constitutional rights. While all of the claims of error raised by defendant have a constitutional basis, it is not clear that counsel first ascertained defendant’s claims of error, and then determined that all of those claims had constitutional bases.

The court remanded for compliance with the certification requirement of Rule 604(d).
(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. Turner, 403 Ill.App.3d 753, 936 N.E.2d 700 , 2010 WL 3450077 (4th Dist. 2010)

Supreme Court Rule 604(d) requires that counsel in any post-plea proceeding file a certificate stating that he has consulted by defendant by mail or in person to ascertain his contentions of error in the sentence or the entry of the guilty plea, examined the trial court file and the report of proceedings of the guilty plea, and made any amendments to the post-plea

motion necessary for adequate presentation of any defects in those proceedings.

After defendant pleaded guilty, defense counsel filed a motion to reconsider sentence. Seven days later, the court reporter prepared and dated the transcript of the guilty plea proceedings. The following day, the court conducted a hearing on the motion to reconsider. The court acknowledged counsel's 604(d) certificate, which was not dated or file stamped, and failed to state that counsel had made any amendments to the motion to reconsider necessary for adequate presentation of any defects in the proceedings.

The Appellate Court remanded the case for further proceedings due to the inadequacy of the certificate. Because counsel filed the motion to reconsider before the transcript was prepared, he was required to certify that he had made any necessary amendments to the motion.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

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§24-9

Guilty Plea as Waiver of Errors

People v. Kaye, 2013 IL App (4th) 120028 (No. 4-12-0028, 5/6/13)

A trial court lacks jurisdiction to convict a defendant based upon actions that do not constitute a criminal offense. A guilty plea must confess some punishable offense to form the basis of a sentence. The effect of a plea of guilty is a record admission of whatever is well alleged in the indictment. If the charge is insufficient, the plea confesses nothing.

Defendant pleaded guilty to a charge that he failed to register his employment change as a sex offender where he failed to report that he was no longer employed. The Sex Offender Registration Act requires sex offenders to report a change in the place of employment, but not a loss of employment. The Appellate Court vacated defendant's conviction as void because his guilty plea was based on actions not constituting a criminal offense.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. Knight, 405 Ill.App.3d 461, 937 N.E.2d 789 (3d Dist. 2010)

A freestanding claim of actual innocence is cognizable in post-conviction proceedings following a conviction resulting from a guilty plea when the defendant can show that the plea was not knowing or voluntary.

Defendant's petition stated a cognizable claim of actual innocence despite his plea of guilty because it alleged that defendant pleaded guilty despite his innocence because of his fear of what gang members would do to him if he did not accept responsibility for the murder.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Mueller, 2013 IL App (5th) 120566 (No. 5-12-0566, 12/26/13)

1. A guilty plea waives all non-jurisdictional defenses or defects. However, a stipulated bench trial avoids the waiver rule while allowing the parties to proceed with the benefits and conveniences of the guilty plea procedure. There is a subtle difference between a stipulated bench trial and a guilty plea.

Where the State's entire case is presented by stipulation and the defendant does not preserve or present a defense, or where the stipulation includes an agreement that the

evidence is sufficient to convict, the stipulation is tantamount to a guilty plea whether or not a defense is preserved. By contrast, if the stipulated bench trial includes a stipulation to the State's evidence but not to the legal conclusions to be drawn from the evidence, it is not tantamount to a guilty plea.

The court found that if a stipulated bench trial is tantamount to a guilty plea, all non-jurisdictional issues are waived including those which the parties sought to preserve by utilizing the stipulated bench trial procedure. Although in this case the parties thought they were conducting a stipulated bench trial, and the trial court stated several times that the purpose of the procedure was to preserve issues for appeal, by stipulating that the evidence was sufficient to convict the parties transformed the stipulated bench trial into a guilty plea which waived all non-jurisdictional issues.

The court stated:

To eliminate any misunderstanding in a stipulated bench trial, the trial court should elicit from the accused that he is presenting and preserving a defense and that he is not stipulating that the evidence is sufficient to convict, because failure to establish either of these factors renders a would-be stipulated bench trial tantamount to a guilty plea. . . . If the wrong language is used in a stipulated bench trial, the trial becomes tantamount to a guilty plea and the very issue sought to be preserved is foreclosed. . . .

This is precisely what happened in the instant case.

Compare, **People v. Weaver**, 2013 IL App (3d) 130054 (if a stipulated bench trial is tantamount to a guilty plea, the trial court is required to give Supreme Court Rule 402 admonishments; even where a stipulated bench trial is tantamount to a guilty plea, however, it is a stipulated bench trial rather than a guilty plea, and the defendant need not file a motion to withdraw the plea in order to appeal.)

People v. Villafuerte-Medrano, 2012 IL App (2d) 110773 (No. 2-11-0773, 12/19/12)

1. An order is "void" if entered by a court which lacks jurisdiction or which exceeds its jurisdiction by entering an order beyond its inherent power. An order is void only where jurisdiction is lacking. By contrast, an order erroneously entered by a court which has jurisdiction is merely "voidable." Once jurisdiction is acquired, it is not lost because the court makes a mistake in determining the facts, the law, or both.

2. Where the court has subject matter and personal jurisdiction, it is not divested of jurisdiction because it accepts a guilty plea which violates double jeopardy. Thus, a conviction based on such a plea is voidable rather than void. To raise a double jeopardy challenge to such a plea, the defendant is required to file a timely motion to withdraw the plea. Otherwise, the entry of the guilty plea waives the double jeopardy challenge.

3. The court acknowledged that under federal constitutional law, a guilty plea does not waive a double jeopardy challenge where the double jeopardy violation can be established on the face of the charge. The court concluded that even in that case, however, the defendant must preserve the issue on appeal. In other words, a court may not review a double jeopardy claim that has not been preserved for appeal.

Here, the conviction based on defendant's guilty plea was voidable rather than void. Because defendant failed to file a timely motion to withdraw the plea, the court could not consider the claim that the conviction violated double jeopardy.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

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§24-10

Stipulated Bench Trial

People v. Mueller, 2013 IL App (5th) 120566 (No. 5-12-0566, 12/26/13)

1. A guilty plea waives all non-jurisdictional defenses or defects. However, a stipulated bench trial avoids the waiver rule while allowing the parties to proceed with the benefits and conveniences of the guilty plea procedure. There is a subtle difference between a stipulated bench trial and a guilty plea.

Where the State's entire case is presented by stipulation and the defendant does not preserve or present a defense, or where the stipulation includes an agreement that the evidence is sufficient to convict, the stipulation is tantamount to a guilty plea whether or not a defense is preserved. By contrast, if the stipulated bench trial includes a stipulation to the State's evidence but not to the legal conclusions to be drawn from the evidence, it is not tantamount to a guilty plea.

The court found that if a stipulated bench trial is tantamount to a guilty plea, all non-jurisdictional issues are waived including those which the parties sought to preserve by utilizing the stipulated bench trial procedure. Although in this case the parties thought they were conducting a stipulated bench trial, and the trial court stated several times that the purpose of the procedure was to preserve issues for appeal, by stipulating that the evidence was sufficient to convict the parties transformed the stipulated bench trial into a guilty plea which waived all non-jurisdictional issues.

The court stated:

To eliminate any misunderstanding in a stipulated bench trial, the trial court should elicit from the accused that he is presenting and preserving a defense and that he is not stipulating that the evidence is sufficient to convict, because failure to establish either of these factors renders a would-be stipulated bench trial tantamount to a guilty plea. . . . If the wrong language is used in a stipulated bench trial, the trial becomes tantamount to a guilty plea and the very issue sought to be preserved is foreclosed. . . .

This is precisely what happened in the instant case.

Compare, **People v. Weaver**, 2013 IL App (3d) 130054 (if a stipulated bench trial is tantamount to a guilty plea, the trial court is required to give Supreme Court Rule 402 admonishments; even where a stipulated bench trial is tantamount to a guilty plea, however, it is a stipulated bench trial rather than a guilty plea, and the defendant need not file a motion to withdraw the plea in order to appeal.)

People v. Weaver, 2013 IL App (3rd) 130054 (No. 3-13-0054, 12/19/13)

1. A guilty plea forfeits all non-jurisdictional defenses or defects. By contrast, a stipulated bench trial allows a defendant to enjoy the advantages of a guilty plea while avoiding the forfeiture rule concerning an issue which he seeks to raise on appeal.

Courts recognize two types of stipulated bench trials. First, the defendant may stipulate to the evidence but not to his or her guilt. Second, the defendant may stipulate to the sufficiency of the State's evidence to convict. Either type of stipulated bench trial allows the parties to enjoy the benefits and conveniences of a guilty plea while preserving certain issues, such as those raised in a motion to quash or suppress evidence.

2. A stipulated bench trial is tantamount to a guilty plea if the State presents its entire case by stipulation and the defendant fails to preserve a defense, or if the defendant concedes by stipulation that the evidence is sufficient to support a guilty verdict. If a stipulated bench trial is tantamount to a guilty plea, Supreme Court Rule 402 admonishments must be given. Rule 402 admonishments inform guilty plea defendants of several matters, including the nature of the charge, the minimum and maximum sentences, the right to plead not guilty, and the consequences of a guilty plea.

3. Even where a stipulated bench trial is tantamount to a guilty plea for the purpose of requiring Rule 402 admonishments, it is a stipulated bench trial rather than a guilty plea. Therefore, the defendant is not required to file a motion to withdraw the plea before taking an appeal. Instead, an appeal is commenced by filing a notice of appeal.

The court rejected the State's argument that a defendant who was convicted after a stipulated bench trial, and who stipulated that if the matter went to trial there would be sufficient evidence to support a guilty verdict, was required to file a motion to withdraw a guilty plea before appealing the issues raised in a pretrial motion to suppress.

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§24-11
Juvenile Proceedings

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