No. 128186

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-20-0112
Respondent-Appellee,	)
	) There on Appeal from the Circuit Court of Cook County, Illinois,
v.	) No. 13 CR 19027
	)
ANDRE HILLIARD,	) The Honorable Vincent M. Gaughan,
Petitioner-Appellant.	) Judge Presiding.

BRIEF AND APPENDIX OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Petitioner appeals the appellate court's judgment affirming the dismissal of his postconviction petition. A11-33.[1] The issue raised on the pleadings is whether the petition was frivolous or patently without merit.

ISSUE PRESENTED

Whether the trial court properly dismissed petitioner's postconviction petition because his claim that applying the mandatory firearm enhancement to him violates article I, section 11 of the Illinois Constitution (the penalties provision) is frivolous or patently without merit.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612, and 615(d). On May 25, 2022, this Court allowed leave to appeal.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Ill. Const., Art. I, § 11

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

720 ILCS 5/8-4 (2013)

Sec. 8-4. Attempt.

(a) Elements of the offense.

A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

* * *

[1] "Pet. Br. __" and "A__" refer to petitioner's brief and appendix; "PA__" to this brief's appendix; and "C__," "SC__," and "R__" to the common law record, secured common law record, and report of proceedings.

(c) Sentence.

* * *

> (D) an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court . . . .

730 ILCS 5/5-4.5-25 (2013)

Sec. 5-4.5-25. CLASS X FELONIES; SENTENCE. For a Class X felony:

(a) TERM. The sentence of imprisonment shall be a determinate sentence of not less than 6 years and not more than 30 years. The sentence of imprisonment for an extended term Class X felony, as provided in Section 5-8-2 (730 ILCS 5/5-8-2), shall be not less than 30 years and not more than 60 years. . . .

STATEMENT OF FACTS

I. Petitioner Is Convicted of Attempted First Degree Murder and Aggravated Battery with a Firearm.

In 2013, at age 18, petitioner shot Devaul Killingsworth. The People charged him with attempted first degree murder and aggravated battery with a firearm, C18-24, and a jury trial commenced in May 2014, R95, 112.

Before jury selection, petitioner was belligerent, made threats, and refused to stay in the courtroom for trial. R105-12. The trial court ensured that petitioner knew he had the right to be present in the courtroom, but petitioner repeatedly opted to listen to the trial from an audio device in lockup. R105-12, 246-47, 252-53, 302-03, 356-60, 363-64, 370, 403-05, 407-11, 416-21.

The evidence at trial, which included a video recording of the crime, established that petitioner shot Killingsworth and caused him great bodily harm. Petitioner had been dating Killingsworth's stepdaughter, Tracy Chapman, and did not get along with Killingsworth. R263-64, 268-69, 299.

One summer night, Killingsworth was visiting his grandchildren at Chapman's apartment, which was in a public housing complex. R263-64. As Killingsworth turned to go into the apartment after talking to neighbors, petitioner ran up, stood within a couple feet of Killingsworth, pointed a gun at him, and began firing. R265-71, 286-88, 290-94. Killingsworth ran, but petitioner followed and continued to fire until Killingsworth had been shot and was on the ground. R270-72, 286-88, 292-93. Petitioner fled and was arrested a month later when he returned on a bus from Minnesota. R298, 349-53. Following the shooting, a surgeon removed as many bullet fragments as possible from Killingsworth's forearm and placed rods and plates to stabilize the two broken bones, but Killingsworth never regained full use of his arm. R272-74, 292, 308-11.

At the scene, police found a live, unfired bullet in a grassy area away from the apartment. R315, 319-21, 327. They also found a spent shell casing from a bullet that had struck and broken the glass window to the apartment's storm door. R314-18, 320-21.

The jury found petitioner guilty of attempted first degree murder and aggravated battery with a firearm, and further found that he personally

discharged the firearm that caused great bodily harm to Killingsworth. SC10-12, 138; R422-25.

II. The Trial Court Receives Evidence of Petitioner's Mental Health and Behavioral Difficulties Before Sentencing.

Prior to sentencing, at defense counsel's request, the trial court referred petitioner for a fitness evaluation and ordered the release of petitioner's prior hospitalization records to the parties. C47; SC105, 136, 160, 178-79; R432, 436-37, 440.

According to the hospitalization records, when he was 14 years old, petitioner engaged in increasingly antisocial and violent behavior: he had out-of-control outbursts at home and school, showed difficulties complying with teacher directives, and abused marijuana. SC181-83, 193, 225-26, 248, 250-51, 350-51, 354, 356, 415, 422. In March 2009, after petitioner committed an aggravated battery, he was placed in a juvenile detention center for two weeks; he received treatment there and was prescribed medication for when he left the center. SC350-51, 356-58, 415. Petitioner did not take the medication as directed and continued to behave in a physically and verbally aggressive manner. SC351, 354, 356. After he broke a window, his mother took him to the hospital. SC351-59.

Petitioner received treatment at the hospital for two weeks in July 2009. SC350. He reported to hospital staff that his father was an aggressive drug dealer who picked on petitioner, SC350; his mother had hit him with a belt when he was nine years old, SC350-51; and his family had financial

issues that resulted in food insecurity, SC476. Petitioner admitted to using marijuana. SC350-51. While at the hospital, petitioner learned strategies to manage his anger and marijuana use, and was provided information about food banks. SC351-52, 379-495. Upon discharge, petitioner was prescribed medication for aggressive behavior and depression, referred to substance abuse programs. SC352-53, 437-38, 497-500.

About three months later, in October 2009, petitioner was again admitted to the hospital. SC181-86. Petitioner had been noncompliant with his medication, and he was having difficulties at school and at home, using marijuana, involved in gangs, feeling depressed, experiencing "homicidal ideation," and physically aggressive toward his mother and others. SC183-84, 197, 222-26, 238-40, 242-44, 247-48. He reported as a major stressor that his father had requested a paternity test and disowned him, SC185, but he also stated that he had a "pretty good" relationship with his father and would rather live with him than his mother, SC247. During petitioner's two-week stay at the hospital, he received medication and individual, group, and family therapy. SC183-85, 257-65, 268-345. Upon discharge, petitioner was prescribed medication for an unspecified mood disorder, and given referrals to therapy and outpatient substance abuse services. SC184-85, 263-64, 324-25.

At the fitness hearing in August 2014, Dr. Nishad Nadkarni testified that he had reviewed petitioner's medical and court records and evaluated

petitioner on three separate occasions during the summer of 2014. R442-44. During the first evaluation, petitioner appeared to be malingering symptoms of a mental illness. R444-46. Nadkarni noted that although petitioner had been hospitalized in 2009 "for severe behavioral disorder, conduct disorder, aggression, assaultiveness [*sic*], and a history of drug abuse and gang involvement," the records showed no evidence of a major mental illness. R446. Considering petitioner's actions during the interview and the medical records, Nadkarni deferred a diagnosis until he had received contemporaneous jail records regarding petitioner's condition. *Id.*

After receiving those additional records and evaluating petitioner a second time, Nadkarni found stronger evidence that petitioner was malingering. R447. For example, in the holding area before the evaluation, petitioner was very active, had a normally toned conversation, and used full facial expressions; but when his name was called for the evaluation, petitioner "began to dramatically and suddenly peer about the room and the area as if he was responding to internal stimuli or hallucinating, [and] started to mumble to himself." R447-48. In addition, during the evaluation, petitioner was uncooperative, refused to respond, and/or provided misleading responses. R448. Nadkarni opined that petitioner was exaggerating his mental impairments but could not reach a conclusion as to fitness due to petitioner's lack of cooperation. R449.

Nadkarni evaluated petitioner a third time in an attempt to reach an opinion as to fitness. R449-50. Petitioner was again uncooperative. R450-51. Nadkarni again concluded that petitioner was malingering mental impairments and could not reach an opinion as to his fitness due to petitioner's lack of cooperation. R451-52, 455, 457-58.

The trial court found petitioner "fit for post-trial motions and/or sentencing." R459-60. The court noted that its conclusion was based on Nadkarni's testimony as well as its "encounters with [petitioner]." R460.

III. The Trial Court Sentences Petitioner to 40 Years in Prison.

After the trial court found petitioner fit, the case proceeded to sentencing. R460-61. Petitioner's aggravated battery with a firearm conviction merged into the attempted murder conviction. R465. His attempted murder conviction required an enhanced sentence of 31 years to life in prison: 6 to 30 years for the attempted murder, plus a firearm enhancement of 25 years to life in prison. 720 ILCS 5/8-4(c)(1)(D) (2013); 730 ILCS 5/5-4.5-25(a) (2013). The sentence would be served at 85%. 730 ILCS 5/3-6-3(a)(2)(ii) (2013); *id.* § 5-4.5-25(j).

At sentencing, the trial court considered a presentence investigation report (PSI), defense counsel's corrections to the PSI, the parties' arguments, the statutory aggravating factors, and both statutory and non-statutory factors in mitigation. R465.

According to the PSI, petitioner twice refused to be interviewed by the probation officer assigned to prepare it. SC145. When petitioner finally agreed to the interview, he appeared to be uneasy, declined to answer most questions, and mostly provided yes or no answers when he did answer. *Id.* The officer notified defense counsel of petitioner's lack of participation. *Id.*

During the interview with the probation officer, petitioner reported that he had a "normal" childhood, maintained close relationships with his mother and three siblings, had no relationship with his father, had no history of physical or emotional abuse, and had no substance abuse history. SC144-45. Petitioner completed the eighth grade, did not attend high school, and had no other educational experiences or goals. SC143-44. He reported that he was receiving social security benefits before his arrest but could not explain why he was receiving benefits or state the amount received. SC144. Petitioner claimed that he suffered from a mental illness but declined to discuss his mental health history. SC145. The PSI reported that petitioner had no juvenile delinquency or criminal history. SC144.

In argument, the prosecutor asked for a prison sentence "well over the minimum" of 31 years based on the seriousness of petitioner's crime. R462. She acknowledged that petitioner was "young" and lacked a criminal history, but argued that petitioner had fired multiple shots at Killingsworth during his unprovoked, "brazen attack," which resulted in permanent damage to Killingsworth's arm. R461-62.

Defense counsel asked for the minimum sentence. R464. In support, he emphasized that petitioner was a 19 year old who enjoyed the same activities as a "typical teenager[]" and had "zero adult criminal history." R463-64. Petitioner declined to make a statement in allocution. R464.

After considering all the evidence and the statutory and non-statutory factors in aggravation and mitigation, the trial court sentenced petitioner to 15 years in prison for attempted first degree murder, plus the minimum 25 years for personally discharging a firearm that proximately caused great bodily harm to Killingsworth. SC168; R465.

Petitioner filed a motion to reconsider the sentence. The motion, in pertinent part, cited the Illinois Constitution's penalties provision and *People v. Williams*, 196 Ill. App. 3d 851 (1st Dist. 1990), and argued that petitioner's sentence was excessive in light of his background and the nature of his offense. SC169. The trial court denied the motion. R467.

IV. The Appellate Court Affirms Petitioner's Conviction and Sentence, and This Court Denies Leave to Appeal.

On appeal, petitioner raised, in relevant part, constitutional challenges to his sentence based on his youth and lack of criminal history, alleging that (1) applying the mandatory firearm enhancement to him was unconstitutional, PA13, ¶ 40; and (2) his 40-year sentence was excessive because it was inconsistent with the objective of the penalties provision to restore an offender to useful citizenship, PA15-16, ¶¶ 44-48.

The appellate court rejected the claims and affirmed petitioner's conviction and sentence. First, it found that petitioner had "forfeited" his challenges to the mandatory firearm enhancement because he did not raise the claims in the trial court, which left them undeveloped for appellate review. PA13-15, ¶¶ 40-42. The court noted, "[Petitioner] is not forever foreclosed from presenting his as-applied claims in the trial court. That said, we take no position on the merits of such claims." PA15, ¶ 42 (internal citation omitted).

Second, the appellate court found that petitioner's 40-year sentence comports with the penalties provision. PA20, ¶ 58. The court acknowledged petitioner's young age but emphasized the seriousness of his offense: he "approached his victim, pointed a loaded gun at him, fired three to five shots at him, and caused him great bodily harm." PA16-17, ¶ 49. The court found this was a "targeted" attack and not an impulsive act, as petitioner argued. PA17, ¶ 52. In addition, the court highlighted that petitioner had offered in mitigation, and the trial court had considered, factors such as petitioner's age, lack of criminal history, and rehabilitative potential. PA18-19, ¶¶ 54, 56. The court noted that petitioner "provided no additional evidence, such as testimony or affidavits in further support of his character or rehabilitative potential" and rejected his reliance on "mitigation 'scientific' evidence concerning the development of the adolescent brain" because he never presented it to the trial court. PA19, ¶ 56. Considering the record before it,

the appellate court concluded that petitioner's "sentence comports with the purpose and spirit of the law and is by no means disproportionate to the nature of the offense." PA20, ¶ 58.

Petitioner raised the same challenges in a petition for leave to appeal (PLA), which this Court denied. *People v. Hilliard*, No. 122634 (Ill. Nov. 28, 2018).

V. Petitioner Reasserts His As-Applied Constitutional Challenges to the Mandatory Firearm Enhancement in a Postconviction Petition, and the Trial Court Dismisses the Petition as Frivolous or Patently Without Merit.

While his PLA was pending, petitioner filed a postconviction petition. PA21-40. He claimed that "the mandatory nature of the [firearm] add-on deprived the trial judge of the ability to consider the fact that he was 18 years old at the time of the offense and had no prior criminal conviction in violation of the Eight[h] Amendment . . . and [the penalties provision]." PA23. And he asked for a new sentencing hearing for a particularized determination of whether the enhancement was appropriate in his case. PA24, 33.

Petitioner observed that, "due to the mandatory nature of the firearm add-on the trial judge was required to sentence petitioner to a minimum prison term of 31-years [*sic*] regardless of [his] youth, non-existent criminal history, and rehabilitative potential." PA23-24. But, petitioner argued, his "youth was critically important" in light of *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that Eighth Amendment bars mandatory life without parole for juvenile homicide offenders), because scientific research cited therein

"showed that youth carries with it a lesser degree of culpability" and "the qualities that distinguish juveniles from adults do not disappear when an individual turn[s] 18." PA25-26. Thus, according to petitioner, his "chronological age placed his cognitive abilities with those of 16-17-year[-olds] which in turn mitigates his culpability." PA25.

Petitioner further asserted that his "decision making on the night of [the offense] was clearly not sound judgment, but guided by impulse," and that he would gain impulse control as he aged. PA27. He noted that his PSI showed his "troubling social history, where he did not have a relationship with his father and had not been enrolled in school since the fifth grade." PA31. He also asserted that he "possessed a number of qualities that give him strong rehabilitation potential, including the fact that he had never been involved in a gang, and his close relationship with his mother and siblings." PA31-32.

In support of his arguments, petitioner cited a January 2004 American Bar Association (ABA) publication, and asserted that "Dr. C. Gur, [an expert neuropsychiatrist], has opined that the evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable."

PA26.[2] He also relied on *People v. Leon Miller*, 202 Ill. 2d 328 (2002); *People v. Wendt*, 163 Ill. 2d 346 (1999); *People v. House*, 2015 IL App (1st) 110580, *vacated and remanded for reconsideration*, No. 122134 (Ill. Nov. 28, 2018); *People v. Aikens*, 2016 IL App (1st) 133578, *PLA allowed*, No. 121558 (Ill. Nov. 28, 2018), *appeal dismissed* (Mar. 19, 2019). PA24-26, 30-31.

Petitioner submitted an affidavit in which he averred, "the facts stated herein support the claims . . . that petitioner's sentence violates the Illinois [C]onstitution as applied to him, because the statute did not allow the trial court to determine whether the enhancement was appropriate in light of petitioner's youth and rehabilitative potential." PA35. His sole exhibit to the petition was an excerpt of the transcript of the sentencing hearing. PA37-40. And he noted in his petition that he requested but could not obtain a copy of his PSI to attach to the petition. PA22.

In December 2019, the trial court denied the petition as frivolous or patently without merit. PA41-45. The trial court explained that petitioner was over age 18 at the time of the shooting and did not receive the harshest possible penalty, and cited a controlling appellate court decision that had

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[2] It appears that petitioner was referring to: *Cruel & Unusual Punishment: The Juvenile Death Penalty, Adolescence, Brain Development & Legal Culpability*, American Bar Association (Jan. 2004), available at https://capitalpunishmentincontext.org/files/resources/juveniles/adolescencecopy.pdf (last accessed Mar. 30, 2023). This article quotes a declaration from Dr. Ruben C. Gur, which was filed in support of the petition for a writ of certiorari in *Patterson v. Texas*, No. 02-6010 (U.S. Aug. 26, 2002).

upheld the mandatory firearm enhancement when applied to a juvenile offender. PA44 (citing *People v. Applewhite*, 2016 IL App (1st) 142330, *PLA denied with supervisory order*, No. 121901 (Ill. Mar. 25, 2020)).[3] The trial court further explained that the General Assembly had recently made the firearm enhancements discretionary for juvenile offenders, but that law was not retroactive and did not apply to petitioner. PA44-45.

VI. The Appellate Court Agrees that Petitioner's Petition Is Frivolous or Patently Without Merit and Affirms the Trial Court's First-Stage Dismissal Order.

On appeal, petitioner argued that there was arguable merit to his claim that the mandatory firearm enhancement violates the penalties provision, A16, ¶ 17, but conceded that he had no "viable eighth amendment claim under *Miller* because he was 18 years old at the time of the offense," A19, ¶ 23.

The appellate court affirmed the dismissal of petitioner's postconviction petition. A11-32. Initially, the court found that, although petitioner had raised his claim on direct appeal, "there [wa]s no issue of forfeiture or *res judicata*" because it "did not consider th[e] claim" on direct appeal and "found that it was better pursued in a postconviction petition as [this] [C]ourt directed in *People v. Thompson*, 2015 IL 118151, and *People v.*

[3] The Court's supervisory order directed the appellate court to vacate its judgment and reconsider in light of *People v. Buffer*, 2019 IL 122327, which held that a sentence of greater than 40 years for a juvenile homicide offender constitutes *de facto* life for purposes of the Eighth Amendment under *Miller*.

Harris, 2018 IL 121932." A17, ¶ 20. But, the court found, petitioner's claim lacked arguable merit because this Court has upheld the constitutionality of the mandatory firearm enhancement, petitioner's mandatory enhancement did not result in a life sentence, and the General Assembly has not suggested that applying the mandatory enhancement to a juvenile offender shocks our community's moral sense. A28-29, ¶¶ 42-43, 45; A31-32, ¶¶ 49-50. The court concluded that petitioner's "sentence was not 'cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community,'" and it declined "to extend the procedural requirements of *Miller* to sentences that do not violate the substantive rule of constitutional law announced therein." A31, ¶ 50 (quoting *People v. Sharpe*, 216 Ill. 2d 481, 493 (2005)).

STANDARD OF REVIEW

This Court reviews *de novo* the trial court's first-stage dismissal of petitioner's postconviction petition. *People v. Knapp*, 2020 IL 124992, ¶ 42.

ARGUMENT

This Court Should Affirm the Trial Court's Judgment Because Petitioner's Postconviction Petition Is Frivolous or Patently Without Merit.

A. To survive first-stage dismissal of his postconviction petition, petitioner must show that his claim has an arguable basis in law or fact.

The Post-Conviction Hearing Act allows a petitioner to file a petition asserting "a substantial denial of his or her rights under the Constitution of

the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1). The petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." *Id.* § 5/122-2. "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." *Id.* § 5/122-3.

A proceeding under the Act "'is not a substitute for, or an addendum to, direct appeal.'" *People v. Veach*, 2017 IL 120649, ¶ 46 (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). Rather, "[t]he purpose of the proceeding is to resolve allegations that constitutional violations occurred at trial, when those allegations have not been, and could not have been, adjudicated previously." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). Thus, "the doctrine of *res judicata* bars issues that were raised and decided on direct appeal, and forfeiture precludes issues that could have been raised but were not." *People v. Dorsey*, 2021 IL 123010, ¶ 31. Moreover, "[t]he failure to raise [an] alleged error at trial constitute[s] a [forfeiture] of the issue both for purposes of direct appeal or postconviction proceedings." *People v. Eastin*, 36 Ill. App. 3d 69, 70 (5th Dist. 1976); *see People v. Roberts*, 75 Ill. 2d 1, 10 (1979) (trial counsel forfeits a defendant's "right to raise certain errors in later proceedings by fail[ing] to object to those errors at trial").

The Act provides three stages of review for postconviction petitions. *People v. Johnson*, 2021 IL 125738, ¶ 24. At the first stage, if the court determines that "the petition is frivolous or is patently without merit, it shall

dismiss the petition." 725 ILCS 5/122-2.1(a)(2). The State is prohibited from providing input to the trial court at the first stage. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the petition survives first-stage review, it moves to the second stage, where a *pro se*, indigent petitioner is appointed counsel, counsel makes any necessary amendments to the petition, and the People file a response. *Johnson*, 2021 IL 125738, ¶ 27. The trial court may dismiss any or all claims at the second stage; those that survive proceed to the third stage for an evidentiary hearing and, ultimately, a ruling on whether the petitioner has established a substantial deprivation of constitutional rights. *Id.*; *People v. Griffin*, 109 Ill. 2d 293, 303 (1985).

At the first stage of review, a petition is frivolous or patently without merit if its claims have no arguable basis in law or in fact. *Johnson*, 2021 IL 125738, ¶ 26 (citing *People v. Hodges*, 234 Ill. 2d 1, 9 (2009)). This "frivolous or patently without merit" standard includes claims that are based on indisputably meritless legal theories or fanciful factual allegations. *Id.*

The "frivolous or patently without merit" standard also includes claims that are legally barred due to forfeiture, waiver, procedural default, *res judicata*, or a lack of standing. *Id.* ¶¶ 48-50; *People v. Blair*, 215 Ill. 2d 427, 446, 450 (2005). The doctrines of *res judicata* and forfeiture are "considerations the trial court must contemplate when determining whether a defendant's petition asserts the gravamen of a constitutional claim — not assertions that must be advanced by the State." *People v. Pellegrini*, 2019 IL

App (3d) 170827, ¶ 47 (citing *Blair*, 215 Ill. 2d at 445); *see Blair*, 215 Ill. 2d at 446 ("we will not direct a judge to ignore the doctrines of waiver, forfeiture, and procedural default where a review of the facts ascertainable from the record clearly demonstrates that the claim could have been raised in the prior proceeding"). And because this Court's review is *de novo*, it may consider whether these doctrines support the trial court's first-stage dismissal of the petition, regardless of whether the People raised the issue below.[4]

As discussed in Section C.1, *infra*, petitioner's claim was forfeited for postconviction review; and, as discussed in Section C.2, *infra*, petitioner's claim was barred by *res judicata*. Accordingly, the Court may affirm the trial court's judgment on either of these grounds. *See Johnson*, 2021 IL 125738, ¶ 28; *Knapp*, 2020 IL 124992, ¶ 42. Even if the Court were to find that neither doctrine bars petitioner's claim, the claim is patently meritless, *see infra*, Section C.3.

B. Petitioner's challenge to the firearm enhancement is properly construed as an as-applied challenge to the mandatory minimum sentence for his attempted first degree murder.

The trial court sentenced petitioner to 40 years for his attempted murder of Killingsworth, which is above the designated minimum of 31 years

[4] Moreover, "[i]t is well established that the appellee may urge any point in support of the judgment on appeal, even though not directly ruled on by the trial court, so long as the factual basis for such point was before the trial court." *Rehfield v. Diocese of Joliet*, 2021 IL 125656, ¶ 31 (cleaned up); *see also People v. Horrell*, 235 Ill. 2d 235, 241 (2009).

for his offense. Petitioner claims that applying one part of the minimum sentence — the 25-year firearm enhancement — violates the penalties provision. But under this Court's precedent, the enhancement does not itself create a separate offense and its application to a particular case may violate the penalties provision only if the resulting sentence that includes the enhancement is wholly disproportionate to the offense committed. Petitioner's challenge to the mandatory minimum firearm enhancement is thus properly construed as an as-applied challenge to the resulting minimum 31-year sentence that the legislature required for his attempted murder.

Article I, section 11 of the Illinois Constitution provides, in relevant part: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." This provision "requires the legislature, in defining crimes and their penalties, to consider the constitutional goals of restoring an offender to useful citizenship and of providing a penalty according to the seriousness of the offense." *People v. Taylor*, 102 Ill. 2d 201, 206 (1984); *accord People v. Clemons*, 2012 IL 107821, ¶ 29.

Aside from an identical elements challenge — which is not at issue here, *see generally Clemons*, 2012 IL 107821, ¶ 30 — the only basis for challenging a mandatory sentencing scheme under the penalties provision is under the "cruel or degrading standard." *People v. Rizzo*, 2016 IL 118599, ¶ 28. A defendant raising such a challenge must overcome the strong

presumption that the mandatory sentence is constitutional, and must "*clearly* establish[ ]" that the sentence is "'so wholly disproportionate to the offense committed as to shock the moral sense of the community.'" *Id.* ¶¶ 28, 36-39, 41, 48 (citation omitted) (emphasis in original). This standard defies precise definition because "as our society evolves, so too do our concepts of elemental decency and fairness which shape the moral sense of the community." *Id.* ¶ 38 (cleaned up).

In determining whether a sentence shocks the moral sense of our community, this Court reviews "'the gravity of the defendant's offense in connection with the severity of the statutorily mandated sentence within our community's evolving standard of decency.'" *Id.* (quoting *People v. Leon Miller*, 202 Ill. 2d 328, 340 (2002)). For an as-applied challenge, the Court also considers the particular offender and whether it shocks the moral sense of the community to apply the designated penalty to him, bearing in mind that the legislature may constitutionally consider the severity of an offense and determine that no set of mitigating circumstances could permit an appropriate punishment of less than the designated minimum sentence. *See Rizzo*, 2016 IL 118599, ¶ 39; *People v. Huddleston*, 212 Ill. 2d 107, 141-45 (2004); *Taylor*, 102 Ill. 2d at 206.

Applying these principles, this Court has upheld the mandatory firearm enhancement against facial constitutional challenges. *See*, *e.g.*, *People v. Morgan*, 203 Ill. 2d 470, 481, 486-89 (2003) (firearm enhancements

for attempted murder are not cruel or degrading and do not violate separation of powers)[5]; *People v. Hill*, 199 Ill. 2d 440, 446-53 (2002) (same for firearm enhancements for home invasion). The Court explained that the "mandatory add-on sentence essentially raises the original sentencing range" for the crime. *Hill*, 199 Ill. 2d at 446-47; *see also People v. Burns*, 2015 IL 117387, ¶ 24 (emphasizing that factors that enhance sentences do not create separate and distinct offenses). For example, the General Assembly "create[d] a mandatory sentencing scheme which increases the penalty for the offense of attempted first degree murder based on the extent to which a firearm is involved in the commission of the offense." *Morgan*, 203 Ill. 2d at 481. Under that scheme, a defendant who acts with "an intent to kill, but do[es] not [cause] death, is subject to sentencing ranges of 21 to 45 years, 26 to 50 years, or 31 years to natural life, depending on whether a firearm was in the defendant's possession, discharged, or the cause of bodily harm." *Id.* The Court explained that "the legislature could have simply chosen to increase directly the original sentencing range to [the enhanced ranges] instead of implementing the add-on scheme," and "f[ound] no substantive difference between that scenario and the legislature's decision to impose the mandatory add-on sentence." *Hill*, 199 Ill. 2d at 447. Thus, the Court

[5] *Morgan* ultimately held that the enhancements violated the penalties provision under a cross-comparison analysis. 203 Ill. 2d at 489-90. This Court abandoned the cross-comparison test and abrogated this part of *Morgan* in *People v. Sharpe*, 216 Ill. 2d 481, 521 (2005).

analyzed whether the heightened sentencing ranges are proportionate to the offenses and held that they are not so severe as to render the firearm enhancement statutes unconstitutional under the cruel or degrading standard. *Id.* at 452-53 (home invasion); *see Morgan*, 203 Ill. 2d at 488-89 (following *Hill* when upholding enhancements for attempted murder); *People v. Sharpe*, 216 Ill. 2d 481, 524 (2005) (following *Morgan* when upholding enhancements for first degree murder).

Similarly, the question here is whether applying the enhanced minimum sentence of 31 years to petitioner's attempted first degree murder is disproportionate. *See, e.g.*, *People v. Sawczenko-Dub*, 345 Ill. App. 3d 522, 532-33 (1st Dist. 2003) (rejecting as-applied challenge to firearm enhancement because resulting "enhanced sentence" was not disproportionate to defendant's offense). In other words, if the mandatory minimum 31-year sentence is proportionate to petitioner's offense, then application of the lesser, 25-year firearm enhancement cannot be disproportionate.

C. Petitioner's as-applied claim is forfeited, barred by *res judicata*, or patently meritless.

1. Petitioner forfeited his claim for postconviction review because he could and should have raised it at sentencing and in a post-sentencing motion.

The legal and factual bases for petitioner's as-applied penalties provision claim — including the extra-record evidence that he cited in his postconviction petition — were available when he was sentenced in August

2014. But he failed to present the claim at sentencing and in a post-sentencing motion, thus forfeiting it for both direct and postconviction review. And because petitioner's claim is forfeited, it is frivolous or patently without merit.

Defendants must raise sentencing issues in the trial court to preserve them for appellate review. *People v. Reed*, 177 Ill. 2d 389, 393-94 (1997); *accord People v. Harvey*, 2018 IL 122325, ¶ 15. Specifically, "[a] defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence." 730 ILCS 5/5-4.5-50(d); *accord* Ill. S. Ct. R. 605(a)(3). This requirement is functionally equivalent to that requiring a defendant to preserve any trial issues for appeal in a post-trial motion, and the two motions serve the same purposes. *Reed*, 177 Ill. 2d at 394; *see People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988). Like a post-trial motion, a post-sentencing motion "allow[s] the trial court the opportunity to review a defendant's contention of sentencing error and save the delay and expense inherent in appeal if they are meritorious." *Reed*, 177 Ill. 2d at 394. And it "focuses the attention of the trial court upon a defendant's alleged errors and gives the appellate court the benefit of the trial court's reasoned judgment on those issues." *Id.* Thus, any issues that a defendant could have raised but did not raise in a post-sentencing motion are forfeited for both direct and postconviction review. *Id.* at 395; *see Blair*, 215 Ill. 2d at 443-44;

Roberts, 75 Ill. 2d at 10; *Eastin*, 36 Ill. App. 3d at 70; *see, also, e.g.*, *Evans*, 186 Ill. 2d at 91-92 (finding issue forfeited for postconviction review where petitioner failed to present available evidence to support it at post-trial proceeding); *People v. Silagy*, 116 Ill. 2d 357, 371 (1987) (same where petitioner failed to raise issue at trial); *People v. Armes*, 37 Ill. 2d 457, 459 (1967) (same); *People v. Goins*, 103 Ill. App. 3d 596, 598-600 (1st Dist. 1981) (same).

It is undisputed that petitioner never presented his claim to the trial court at sentencing and in a post-sentencing motion. PA13-15, ¶¶ 40-42. Because he did not raise the claim to the trial court, he failed to develop an evidentiary record for the claim, give the trial court an opportunity to address it, and provide the appellate court the benefit of the trial court's reasoned judgment on it. PA15, ¶ 42; *Reed*, 177 Ill. 2d at 394. As a result, petitioner forfeited his claim for both direct and postconviction review.

Any argument that petitioner could not have raised his claim when he was sentenced in August 2014 is meritless because both the legal and factual bases for petitioner's claim were known or reasonably available to him then.

First, the penalties provision and the legal standards governing petitioner's as-applied challenge were known at the time of his sentencing in August 2014. Since 1970, the penalties provision has "require[d] that all penalties 'be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.'" *People v.*

Clark, 2023 IL 127273, ¶ 51 (quoting Ill. Const., art. I, § 11). Long before petitioner's sentencing, this Court recognized that a penalty violates the penalties provision if it is "'cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.'" *Id.* (quoting *Leon Miller*, 202 Ill. 2d at 338); *accord People v. Morris*, 136 Ill. 2d 157, 167 (1990). And it was well established that a defendant could raise an as-applied challenge to a particular penalty based on his individual circumstances. *See*, *e.g.*, *Huddleston*, 212 Ill. 2d at 130-32, 141; *Leon Miller*, 202 Ill. 2d at 336-38; *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶¶ 36, 40; *People v. Smolley*, 375 Ill. App. 3d 167, 169-70 (3d Dist. 2007).

Second, the constitutional significance of petitioner's youth was well established at the time he was sentenced. This Court "ha[s] long held that age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance." *People v. Holman*, 2017 IL 120655, ¶ 44 (citing *Leon Miller*, 202 Ill. 2d at 341, *People v. La Pointe*, 88 Ill. 2d 482, 497 (1981), and *People v. McWilliams*, 348 Ill. 333, 336 (1932)). "As far back as 1894, this [C]ourt recognized that '[t]here is in the law of *nature*, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors,'" *i.e.*, persons 16 to 21 years of age; and that "'[t]he habits and characters of the latter are, presumably, to a large extent as yet unformed and unsettled.'" *Clark*, 2023 IL 127273, ¶ 92 (quoting *People ex rel. Bradley v. Ill. State Reformatory*, 148 Ill. 413, 423 (1894)) (emphasis

added); *see Bradley*, 148 Ill. at 421-23. Thus, Illinois law has long accepted "that there was a significant developmental difference not only between minors and adults but also between young adults and older adults." *People v. Haines*, 2021 IL App (4th) 190612, ¶ 51.

"In addition, other Illinois cases have long held that the proportionate penalties clause require[s] the circuit court to take into account the defendant's 'youth' and 'mentality' in fashioning an appropriate sentence." *Clark*, 2023 IL 127273, ¶ 92 (citations omitted). Indeed, well before petitioner's sentencing, courts recognized that "'[t]he balancing of the retributive and rehabilitative purposes of punishment [as required by the proportionate penalties clause] requires careful consideration . . . of the defendant's personal history, including his *age*, demeanor, habits, *mentality*, credibility, criminal history, general moral character, social environment, and education.'" *Id.* (quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1st Dist. 1992)) (alterations and emphasis added by *Clark*); *accord People v. Dukett*, 56 Ill. 2d 432, 452 (1974); *McWilliams*, 348 Ill. at 336. So, just like "with juvenile offenders, Illinois courts were also aware that 'less than mature age can extend into young adulthood — and they have insisted that sentences take into account that reality of human development.'" *Clark*, 2023 IL 127273, ¶ 93 (quoting *Haines*, 2021 IL App (4th) 190612, ¶ 47). In fact, defense counsel highlighted at sentencing that petitioner was a "typical teenager." R464; *see also Clark*, 2023 IL 127273, ¶ 93 (observing that in

1980, appellate court had considered requirements of penalties provision in evaluating defendant's argument that "'restoration becomes more important' when a youthful offender is involved" (quoting *People v. Henderson*, 83 Ill. App. 3d 854, 869-70 (1st Dist. 1980)). Thus, at his August 2014 sentencing, nothing prevented petitioner from claiming based on Illinois law alone that applying the mandatory firearm enhancement to him violates the penalties provision. *See*, *e.g.*, *Haines*, 2021 IL App (4th) 190612, ¶ 49 (young adult offender had essential tools to raise penalties provision challenge to minimum 45-year sentence in 2008); *cf.*, *e.g.*, *Clark*, 2023 IL 127273, ¶¶ 24, 93 (in 2001, 24-year-old had essential tools to argue that discretionary life sentence violated penalties provision due to his young age).

In fact, by the time petitioner was sentenced in August 2014, he had even more "helpful support" than Illinois precedent alone for his youth-based claim. *Dorsey*, 2021 IL 123010, ¶ 74; *see also Clark*, 2023 IL 127273, ¶¶ 67, 91-94; *Haines*, 2021 IL App (4th) 190612, ¶¶ 49-57. The scientific research concerning young adult development upon which his petition relied was available at the time he was sentenced: *Miller v. Alabama*, 567 U.S. 460 (2012), was decided more than two years earlier based in part on such research; the ABA article was published more than a decade earlier; and Dr. Gur had provided his opinion two years before that. Indeed, petitioner observed on direct appeal, PA16-19, ¶¶ 48, 55-56, that, in 2005, Dr. Gur testified on behalf of an 18-year-old offender that brain development,

especially in areas of impulse control, continues until around age 22, making adolescents less culpable for their actions than adults with fully developed brains, *People v. Clark*, 374 Ill. App. 3d 50, 56-57, 71-72, 75 (1st Dist. 2007). Thus, petitioner could have, and should have, raised his claim based upon these scientific sources and Illinois precedent at the time he was sentenced.

Finally, the historical facts upon which petitioner's claim relies — the nature of his offense, his age, and his social, mental health, education, and other personal history — were also known at the time he was sentenced. Petitioner thus could have argued that his actions reflected impulsivity based on his age and the trial evidence. The PSI provided the information he cited in his postconviction petition about his background, including his difficult childhood and lack of adult criminal history. Nadkarni considered and testified about petitioner's mental health and hospitalization records, which were also provided to defense counsel. For all these reasons, petitioner could have raised his as-applied challenge to the mandatory firearm enhancement at sentencing.

To be sure, the appellate court noted on direct appeal "that [petitioner] [wa]s not forever foreclosed from presenting his as-applied claims in the trial court." PA15, ¶ 42. But this meant only that petitioner might have obtained review of those claims through the lens of ineffective assistance of counsel — *i.e.*, by alleging that defense counsel provided ineffective assistance for not raising and developing the claim, including its evidentiary basis, at

sentencing. *See*, *e.g.*, *Clark*, 374 Ill. App. 3d at 52, 56 (defense counsel was ineffective for not presenting available mitigating evidence at sentencing); *see* PA16-19, ¶¶ 48, 55-56 (petitioner's direct appeal argument based on *Clark*); *see also Veach*, 2017 IL 120649, ¶¶ 46-47; *Evans*, 186 Ill. 2d at 94. Yet petitioner did not claim ineffective assistance in his postconviction petition, so any ineffectiveness claim is statutorily waived, 725 ILCS 5/122-3; *see People v. Jones*, 213 Ill. 2d 498, 507 (2004) ("issues not contained in a dismissed postconviction petition cannot be raised for the first time on appeal"),[6] and cannot provide a basis to reach the forfeited as-applied constitutional claim.

The appellate court's conclusion that forfeiture was not an issue on appeal from the dismissal of petitioner's postconviction petition rests on a misapprehension of *People v. Thompson*, 2015 IL 118151, and *People v. Harris*, 2018 IL 121932. *See* A17, ¶ 20; A20, ¶ 25. The appellate court found that these cases "opened the door" for and recognized "the viability of *Miller* based claims [by young adult offenders] in postconviction proceedings." A20,

[6] Petitioner has never alleged an ineffective assistance of counsel claim on postconviction review. Nor could his petition be construed to raise that distinct legal theory, as it does not mention counsel's representation at all. *See, e.g.*, *People v. Petrenko*, 237 Ill. 2d 490, 497-98, 502-03 (2010) (petitioner barred from raising legal issue on appeal based on facts in petition where legal theory was not alleged in petition); *People v. Cole*, 2012 IL App (1st) 102499, ¶¶ 11-16 (rejecting contention that petition's allegation of trial error is sufficient to raise claim that counsel was ineffective for failing to preserve the error); *see also* 725 ILCS 5/122-2 (petition must "clearly set forth the respects in which petitioner's constitutional rights were violated").

¶ 25. But neither case arose under the Post-Conviction Hearing Act, such that the Court's opinions may be read to say anything about whether petitioner forfeited his claim for postconviction review.

To the contrary, *Thompson* merely observed, in holding that a young adult offender could not raise an as-applied penalties provision claim against his mandatory sentence for the first time on appeal from the dismissal of a 735 ILCS 5/2-1401 petition, that the offender "[wa]s not necessarily foreclosed from renewing his as-applied challenge in the circuit court," as the Act "is expressly designed to resolve constitutional issues, including those raised in a successive petition." *Thompson*, 2015 IL 118151, ¶ 44. But *Thompson* "express[ed] no opinion on the merits of any future claim raised by defendant in a new proceeding," *id.*; nor did it hold that defendants may satisfy the Act's requirements for raising such a claim, *see People v. Thomas*, 2017 IL App (1st) 142557, ¶ 43 ("*Thompson* did not 'open the door' for defendants to argue that the reasoning in *Miller* should be extended to young adults over the age of 18.").

Harris also did not answer whether a petitioner may satisfy the Act's requirements when he could have but did not raise an as-applied claim like petitioner's at sentencing. Rather, *Harris* reversed the appellate court's judgment granting relief on an as-applied challenge to a mandatory *de facto* life sentence under the penalties provision because the young adult defendant had not raised the claim at sentencing in the trial court and therefore the

record was insufficient to consider the claim on direct appeal. 2018 IL 121932, ¶¶ 35-48. *Harris* further rejected the defendant's request for a remand to allow him an opportunity to develop his claim in the trial court. *Id.* ¶ 48. Citing *Thompson*, *Harris* again observed that "the defendant was not necessarily foreclosed from raising his as-applied challenge in another proceeding." *Id.* For example, *Harris* explained, the Act "is designed to resolve constitutional issues" and "allows for raising constitutional questions which, by their nature, depend upon facts not found in the record. In *Cherry*, this [C]ourt observed that claims of ineffective assistance of counsel are commonly raised in postconviction proceedings because they often require presentation of evidence not contained in the record." *Id.* (cleaned up) (citing *People v. Cherry*, 2016 IL 118728, ¶ 33). Thus, like *Thompson*, *Harris* did not consider whether the defendant could satisfy the Act's requirements if he later raised the same sentencing claim in a postconviction petition, as petitioner did.

In sum, petitioner forfeited his claim for postconviction review by not raising it at sentencing. Thus, the claim is frivolous or patently without merit, and the trial court properly dismissed the petition.

2. Petitioner's claim is barred by *res judicata*.

Petitioner's claim is frivolous or patently without merit because it is also barred by *res judicata*: the appellate court's conclusion on direct appeal

that his 40-year sentence comports with the penalties provision resolves his present as-applied challenge to the mandatory firearm enhancement.

On direct appeal, the appellate court found that petitioner's 40-year sentence comports with the penalties provision. After it recited the penalties provision and set forth its governing constitutional principles, PA15, ¶¶ 45-46, the court analyzed whether defendant's 40-year sentence was "'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense,'" *id.* ¶ 45, in light of petitioner's youth, lack of criminal history, background, and rehabilitative potential, PA16, ¶ 48; PA19, ¶ 56. After considering the constitutional principles, the nature of petitioner's crime, and his youth and rehabilitative potential, the appellate court concluded that the 40-year sentence for his attempted murder "comports with the spirit and purpose of the law and is by no means disproportionate to the nature of the offense," and declined to reduce petitioner's sentence. PA20, ¶ 58.

Petitioner cannot skirt the *res judicata* effect of the appellate court's holding by reframing this claim as an as-applied challenge to the mandatory sentence enhancement. *See generally People v. Simpson*, 204 Ill. 2d 536, 559 (2001) ("A post-conviction petitioner may not avoid the bar of *res judicata* simply by rephrasing . . . issues previously addressed on direct appeal."). The appellate court's holding necessarily resolved this issue. Specifically, the court's holding — that petitioner's 40-year sentence comports with the

penalties provision because it was determined according to the seriousness of petitioner's crime and with consideration of his rehabilitative potential — necessarily means that the presumptively constitutional minimum sentence of 31 years is not wholly disproportionate to petitioner's attempted murder. The General Assembly considered the severity of petitioner's offense and determined that no set of mitigating circumstances could permit an appropriate punishment of less than the minimum of 31 years. *See Rizzo*, 2016 IL 118599, ¶ 39; *Taylor*, 102 Ill. 2d at 206. The appellate court on direct appeal considered petitioner's mitigating circumstances and found that a sentence longer than the minimum is constitutionally proportionate to petitioner's offense. Thus, it cannot be that "the penalty mandated by the [attempted murder] statute as applied to this [petitioner] is particularly harsh and unconstitutionally disproportionate." *Leon Miller*, 202 Ill. 2d at 341. In other words, the appellate court's finding on direct appeal that petitioner's actual 40-year sentence is constitutional has *res judicata* effect on his claim that applying the mandatory minimum portion of that sentence to him violates the penalties provision.

To be sure, the appellate court on direct appeal did not consider the scientific research petitioner cited in his postconviction petition. PA19, ¶ 56. Putting aside that the reason the court did not consider it was petitioner's failure to present it at sentencing, the cited research merely confirms that young adults are not fully mature, a fact that has been known in Illinois for

over a century, *see supra*, Part C.1, and that the appellate court considered when it found his 40-year sentence proportionate, PA16-20, ¶¶ 48-58. Moreover, petitioner has never produced any evidence showing how the scientific research applies to *his* specific facts and circumstances. *See Harris*, 2018 IL 121932, ¶¶ 45-46. Thus, the general research petitioner cited in his petition at best provided some helpful support for his claim but is insufficient to defeat the *res judicata* effect of the appellate court's decision. *See Clark*, 2023 IL 127273, ¶¶ 45, 67, 91-94; *Dorsey*, 2021 IL 123010, ¶ 74; *Haines*, 2021 IL App (4th) 190612, ¶ 51; *People v. LaPointe*, 2018 IL App (4th) 160903, ¶ 59; *see also, e.g.*, *Simpson*, 204 Ill. 2d at 560 (new evidence of incompetency insufficient to overcome *res judicata* effect of prior decision rejecting competency claim).

3. Petitioner's claim is patently meritless.

a. This Court generally declines to overturn the General Assembly's presumptively constitutional sentencing determinations.

The General Assembly enjoys broad discretion in setting criminal penalties. *Sharpe*, 216 Ill. 2d at 487. "Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order." *Harmelin v. Michigan*, 501 U.S. 957, 996, 998-1000 (1991) (Kennedy, J., concurring in part and concurring in

judgment).[7] The legislature is institutionally better equipped and more capable than the judiciary to answer these difficult questions, identify and remedy the evils confronting our society, gauge the seriousness of various offenses, and fashion sentences accordingly. *Rizzo*, 2016 IL 118599, ¶ 36; *Huddleston*, 212 Ill. 2d at 129-30. In fixing a penalty, the legislature may consider myriad factors, including the degree of harm inflicted, the frequency of the crime, and the high risk of bodily harm associated with it. *People v. Coty*, 2020 IL 123972, ¶ 24. For example, it "may perceive a need to enact a more stringent penalty provision in order to halt an increase in the commission of a particular crime." *Id.* (quoting *Huddleston*, 212 Ill. 2d at 129-30). Given these myriad policy considerations, the General Assembly's judgment "*itself* says something about the general moral ideas of the people," *id.* ¶ 43 (emphasis in original) (cleaned up), and that judgment is presumed constitutional, *id.* ¶ 22. This Court will overrule the General Assembly's judgment as to the appropriate sentence for a particular crime only when the "'the challenged penalty is clearly in excess of the general constitutional limitations on this authority.'" *Id.* ¶ 43 (quoting *Sharpe*, 216 Ill. 2d at 487).

Moreover, the General Assembly's "power to prescribe penalties for defined offenses . . . necessarily includes the authority to prescribe mandatory sentences, even if such sentences restrict the judiciary's discretion

[7] The "controlling opinion" in *Harmelin* is Justice Kennedy's. *Graham v. Florida*, 560 U.S. 48, 59-60 (2010).

in imposing sentences." *Id.* ¶ 24. And nothing in the penalties provision requires the General Assembly to give greater weight or consideration to the possibility of rehabilitating an offender than to the seriousness of the offense. *Id.*; *Rizzo*, 2016 IL 118599, ¶ 39; *Taylor*, 102 Ill. 2d at 206. Instead, consistent with the penalties provision, the General Assembly may consider the severity of an offense and determine that no set of mitigating circumstances could permit an appropriate punishment less than a mandatory minimum. *Rizzo*, 2016 IL 118599, ¶ 39 (discussing *Sharpe*, 216 Ill. 2d at 525); *Huddleston*, 212 Ill. 2d at 129, 145; *People v. Dunigan*, 165 Ill. 2d 235, 244-47 (1995); *Taylor*, 102 Ill. 2d at 206. Thus, the General Assembly presumptively does not violate the penalties provision when it enacts statutes imposing mandatory minimum sentences, even when the minimums are lengthy. *Rizzo*, 2016 IL 118599, ¶ 39 (discussing *Sharpe*, 216 Ill. 2d at 525, and *Taylor*, 102 Ill. 2d at 206); *see Huddleston*, 212 Ill. 2d at 129.

For these reasons, this Court has repeatedly rejected facial and as-applied challenges under the "cruel or degrading" standard to statutes that mandate minimum sentences for adult offenders, including statutes that mandate lifetime imprisonment or lengthen sentences through application of mandatory firearm enhancements or consecutive sentencing provisions. *See Coty*, 2020 IL 123972, ¶¶ 43-44; *Rizzo*, 2016 IL 118599, ¶ 39; *Sharpe*, 216 Ill. 2d at 524-27; *Huddleston*, 212 Ill. 2d at 129-45; *Morgan*, 203 Ill. 2d at 487-89; *Hill*, 199 Ill. 2d at 452-54; *People v. Arna*, 168 Ill. 2d 107, 114 (1995),

abrogated on other grounds, *People v. Castleberry*, 2015 IL 116916, ¶¶ 13, 19; *Dunigan*, 165 Ill. 2d at 244-48; *Taylor*, 102 Ill. 2d at 204-10.

In fact, for serious crimes like petitioner's, this Court has found it cruel or degrading to apply the mandatory minimum penalty to a particular offender in just one case. *See Leon Miller*, 202 Ill. 2d at 340-43. There, the convergence of three statutes — the Juvenile Court Act's automatic transfer statute, the accountability statute, and the multiple-murder sentencing statute — required a life sentence for "a 15-year-old with one minute to contemplate his decision to participate in the incident and [who] stood as a lookout during the shooting, but never handled a gun." *Id.* at 340-41. Upholding the trial court's finding of unconstitutionality, this Court concluded that the mandatory life sentence "grossly distort[ed] the factual realities of the case and d[id] not accurately represent [Miller]'s personal culpability such that it shock[ed] the moral sense of the community" to apply it to him. *Id.* at 341. The Court explained that subjecting Miller — "'the least culpable offender imaginable'" — to "the same sentence applicable to the actual shooter" was "particularly harsh and unconstitutionally disproportionate." *Id.*

Two factors were essential to the Court's holding: (1) Miller was a juvenile; and (2) his degree of participation in the offenses was minimal. *Id.* at 340-43. The Court emphasized that sentencing courts often have discretion to grant leniency to juveniles and to offenders guilty by

accountability. *Id.* at 342. It further explained that a life sentence might be appropriate under the penalties provision for a juvenile offender who actively participated in the planning of a crime that results in multiple murders. *Id.* at 343. But because the 15-year-old was not an active participant, this Court upheld the trial court's ruling that applying the mandatory life sentence to him violated the penalties provision. *Id.* at 341-43.

Cases decided after *Leon Miller* demonstrate that the finding of unconstitutionality there depended on the unique facts and circumstances of that case. *See Huddleston*, 212 Ill. 2d at 130-31. In *Davis*, for example, this Court declined to re-litigate the 14-year-old offender's penalties provision challenge to his mandatory life sentence. 2014 IL 115595, ¶ 45. After finding that the sentence violated the Eighth Amendment, *id.* ¶ 43, the Court reaffirmed that the penalties provision "does not necessarily prohibit a sentence of natural life without parole where a juvenile offender actively participates in the planning of a crime that results in multiple murders," *id.* ¶ 45 (citing *Leon Miller*, 202 Ill. 2d at 341-42); *accord Dorsey*, 2021 IL 123010, ¶¶ 73-74. Accordingly, *Davis* reaffirmed that the penalties provision permits the General Assembly to fix a penalty based on the severity of the offense, and to conclude that some offenses are sufficiently severe that no mitigating factor, including the possibility of rehabilitation for a young offender, warrants less than the minimum sentence.

In his petition and brief, petitioner focuses on the lack of discretion afforded a trial court in imposing the firearm enhancement. *See, e.g.*, PA21-33; Pet. Br. 11, 14, 20. But this Court has never interpreted the Illinois Constitution as categorically requiring individualized sentencing for a particular type of offender or offense. *See Hill*, 199 Ill. 2d at 448-49 (individualized sentencing is matter of public policy for General Assembly, not constitutional requirement); *see, e.g.*, *Davis*, 2014 IL 115595, ¶ 45 (upholding mandatory natural-life sentence for juvenile homicide offender under penalties provision); *Leon Miller*, 202 Ill. 2d at 341-42 (refusing to categorically prohibit mandatory life imprisonment for all juvenile homicide offenders guilty by accountability). To be sure, the Eighth Amendment requires individualized sentencing in circumstances that do not apply to petitioner, *i.e.*, in capital cases and when sentencing juvenile homicide offenders to life in prison. *Coty*, 2020 IL 123972, ¶ 41. But outside these narrow circumstances, a sentence does not become unconstitutionally disproportionate "'simply because it is mandatory.'" *Id.* (quoting *Miller*, 567 U.S. at 480-81) (cleaned up); *see Taylor*, 102 Ill. 2d at 206.

For its part, the appellate court's analysis focused primarily on the fact that petitioner was not sentenced to life without parole, rather comparing the gravity of his offense to the statutory minimum term. A17-24, ¶¶ 21-31. This analysis appears to have been driven by petitioner's framing of the question in terms of *Miller v. Alabama* and request for an extension of *Miller*

under the penalties provision. *See, e.g.*, A20-21, ¶ 26. The appellate court was correct in its conclusion that even if *Miller* could be extended to young adults under the penalties provision, its rule would not prohibit petitioner's sentence. *See* A24-25, ¶ 31. *Miller* prohibits mandatory life sentences for juvenile homicide offenders. *See Clark*, 2023 IL 127273, ¶¶ 54, 71 (summarizing *Miller* and *Jones v. Mississippi*, 141 S. Ct. 1307 (2021)). Applying the same definition of *de facto* life that applies to juvenile offenders, petitioner's mandatory minimum 31-year sentence is not *de facto* life. *See People v. Buffer*, 2019 IL 122327, ¶ 40 (sentence greater than 40 years is *de facto* life for purposes of *Miller*).

But the appellate court's focus on the *Miller* line of cases was misplaced. The penalties provision and its governing standards are well established, and the limit *Miller* places on the General Assembly's authority to mandate life sentences for juvenile offenders does not alter the analysis required under the penalties provision. To the extent the appellate court's decision may be construed as holding that an adult defendant is categorically barred from raising an as-applied penalties provision challenge to a non-life sentence, the People agree with petitioner that the Court has never limited as-applied penalties provision claims in this way. *See* Pet. Br. 21-22, 40-49. As discussed, any offender may challenge a mandatory sentence under the penalties provision; and whether the claim has arguable merit depends on the facts and circumstances of the case, not on whether the sentence amounts

to life without parole, as the appellate court suggested. A17-24, ¶¶ 21-31.[8] Regardless of the flaws in the appellate court's analysis, this Court's review is *de novo* and it may affirm based on a straightforward application of established penalties provision jurisprudence to petitioner's claim. *See Knapp*, 2020 IL 124992, ¶ 42.

b. The mandatory minimum sentence for petitioner's offense comports with the penalties provision.

The legislative judgment here — mandating a minimum 31-year sentence for a young adult who personally discharged a firearm that proximately caused great bodily harm to another — does not shock the moral sense of the community. In sharp contrast to *Leon Miller*, petitioner was not 15 years old when he committed his crime; he was the sole offender, not a passive accomplice influenced by peer pressure; and his mandatory minimum sentence was not life. *See Huddleston*, 212 Ill. 2d at 130-31 (distinguishing *Leon Miller*).

Moreover, even assuming that young adults are not fully mature, as petitioner alleged in his petition, petitioner's is not an exceptional case where the punishment is so harsh that it grossly distorts the factual realities of petitioner's crime and fails to accurately represent his personal culpability.

[8] For these reasons, the few out-of-state decisions cited by petitioner where courts have extended, or are considering extending, *Miller* to life sentences for young adult offenders under their respective state constitutions, Pet. Br. 27-29, are inapposite.

Leon Miller, 202 Ill. 2d at 341. To be sure, petitioner had no prior criminal convictions. But the record shows that he had serious difficulties controlling his violent behavior as a juvenile, those difficulties required juvenile court intervention, and he continued to display difficulties complying with rules at the time of trial.

Moreover, despite the lack of a criminal history, petitioner chose to shoot Killingsworth with the intent to kill him. He was the sole offender; and, as the appellate court found on direct appeal, his actions did not reflect the impulsivity of youth. PA17, ¶ 52 ("[petitioner's] claim that his action was 'impulsive' is clearly refuted by the record," which shows that he "targeted his victim, took aim and shot him"). Rather, he armed himself with a firearm, loaded it, then attacked. He fired multiple times until he had hit Killingsworth and caused him great bodily harm. His shots also broke a window, and he was firing the gun in a public housing complex. In sum, petitioner's brazen, preplanned attack not only caused great bodily harm to Killingsworth but also increased the potential for serious harm to others.

Petitioner's crime exemplifies why the General Assembly required a minimum 31-year sentence for offenders who intentionally try to kill someone with a firearm and cause great bodily harm but not death. As this Court has explained, given "the significant danger posed when a firearm is involved," it is not shocking to our community's conscience to require an additional penalty when an attempted first degree murder is "committed with a weapon

that not only enhances the perpetrator's ability to kill the intended victim, but also increases the risk that grievous harm or death will be inflicted upon bystanders." *Sharpe*, 216 Ill. 2d at 524-25 (citing *Morgan*, 203 Ill. 2d at 488-89, and *Hill*, 199 Ill. 2d at 452-53). The additional penalty was unanimously passed by the General Assembly to combat this "pervasive and enhanced danger," protect society, deter others from using firearms to commit serious felonies, and penalize the illegal use of firearms. *Hill*, 199 Ill. 2d at 457-59; *see Sharpe*, 216 Ill. 2d at 524-25, 531-32. At the same time, by reserving application of the enhancements to "those who commit some of the most serious felonies," the General Assembly determined that the seriousness of those offenses in particular warrants the additional penalty and outweighs the objective of rehabilitating that offender. *Sharpe*, 216 Ill. 2d at 525-26 (rejecting argument that "legislature did not take into account rehabilitative potential when making the[] enhancements applicable to first degree murder"). Accordingly, the General Assembly permissibly placed greater weight on the gravity of petitioner's offense, harm he inflicted, and weapon he used, in fixing the minimum term at 31 years. *See Coty*, 2020 IL 123972, ¶ 24 ("there is no indication in our constitution that the possibility of rehabilitating an offender was to be given greater weight and consideration than the seriousness of the offense in determining a proper penalty" (cleaned up)).

Moreover, the General Assembly recently reaffirmed that petitioner's minimum 31-year sentence reflects our community's moral sense. In 2015, the General Assembly passed a separate sentencing provision for "individuals *under the age of 18* at the time of the commission of an offense," which applies *prospectively* to require courts to consider youth-related mitigating factors when sentencing juveniles and removes the mandatory firearm enhancements for that category of offenders. 730 ILCS 5/5-4.5-105 (eff. Jan. 1, 2016) (capitalization omitted) (emphasis added). Thus, after considering *Miller* and its scientific research, the General Assembly made the considered and deliberate judgment that young adults who commit serious felonies with firearms, and specifically those like petitioner who cause great bodily harm in their attempt to kill someone with a firearm, should still receive the mandatory 25-year firearm enhancement. *See Thomas*, 2017 IL App (1st) 142557, ¶¶ 46-47.

To be sure, in 2019, the General Assembly also enacted a scheme that prospectively provides parole review to certain individuals who were under age 21 at the time of their offenses. 730 ILCS 5/5-4.5-115(b) (2019) (for attempted murder, parole eligibility after serving 10 years); *see also id.* (eff. Jan. 1, 2024). Critically, the General Assembly chose not to apply either the juvenile sentencing scheme or the youthful offender parole scheme retroactively to offenders sentenced before either scheme's effective date, 730 ILCS 5/5-4.5-115(b) (2019); *People v. Hunter*, 2017 IL 121306, ¶ 52, thus

demonstrating that each choice was one of policy and not a judgment that requiring a minimum 31-year sentence for either a juvenile or young adult offender in these circumstances is morally offensive, *see People v. Woods*, 2020 IL App (1st) 163031, ¶ 62 ("there is no indication the General Assembly found that application of mandatory firearm enhancements to juvenile defendants shocked our sense of moral decency" because new provision is not retroactive and still allows application of enhancement to juvenile defendants); *see generally People v. Richardson*, 2015 IL 118255, ¶ 10 (legislature constitutionally permitted to draw "reasonable distinctions between rights as of an earlier time and rights as they may be determined at a later time"). The General Assembly's judgment — made after *Miller* and with consideration of scientific research — shows that our community is not shocked by the mandatory 31-year minimum for petitioner's offense. In sum, petitioner's petition failed to present an arguable claim that applying the mandatory firearm enhancement to him clearly violates the penalties provision. *See Hodges*, 234 Ill. 2d at 15 (first-stage dismissal appropriate where petitioner can prove no set of facts entitling him to relief on legal theory).

c. Petitioner's analysis is flawed.

To show otherwise, petitioner compares his offense and circumstances to juvenile offenders who committed different offenses under different circumstances. Pet. Br. 13-15. But this Court abandoned the cross-

comparison analysis that petitioner's argument employs: "[a] defendant may no longer challenge a penalty under the proportionate penalties clause by comparing it with the penalty for an offense with different elements." *Sharpe*, 216 Ill. 2d at 521. Moreover, an as-applied challenge under the cruel or degrading standard is individualized, asking whether applying the mandatory sentence to a particular offender "grossly distorts the factual realities of the case and does not accurately represent [the] defendant's personal culpability such that it shocks the moral sense of the community." *Leon Miller*, 202 Ill. 2d at 341. Thus, appellate court decisions finding that a facially constitutional mandatory sentence is wholly disproportionate to a specific offender's offense does not imply that all offenders subject to the same mandatory sentence have an arguably meritorious penalties provision claim, as petitioner's argument suggests. *See* Pet. Br. 15.

Indeed, petitioner's cited decisions are easily distinguished, exemplifying why they are insufficient to establish that his claim has arguable merit. *See Woods*, 2020 IL App (1st) 163031, ¶ 63; *People v. Wilson*, 2016 IL App (1st) 141500, ¶ 43. In *People v. Barnes*, the appellate court overturned on direct appeal the juvenile offender's 22-year sentence (7 years for armed robbery, plus 15 years for possessing a firearm), where he possessed an unloaded firearm and caused no physical harm to anyone during his armed robbery, took responsibility for his actions afterwards, and asked for substance abuse treatment at sentencing. 2018 IL App (5th)

140378, ¶¶ 1, 25. In *People v. Aikens*, the appellate court overturned on direct appeal the juvenile offender's minimum 40-year sentence for the attempted murder of a police officer (20 years for the attempt plus 20 years for firing a gun), where he caused no physical harm to anyone, had a particularly troubling social history that included physical and sexual abuse, and apologized for his actions; a mitigation specialist found him to have substantial rehabilitative potential; and the trial court imposed the minimum term. 2016 IL App (1st) 133578, ¶¶ 7-12, 37. And, in *People v. Womack*, the appellate court allowed the juvenile offender leave to file a successive postconviction petition based on his allegation that the 20-year firearm enhancement that applied to his attempted murder violated the penalties provision; the court highlighted the juvenile's crime was an "impulsive" response to a "tense exchange" with the victim, and reflected "reckless decision-making behavior to which young minds are more susceptible." 2020 IL App (3d) 170208, ¶ 17.

In sum, putting aside the correctness of the decisions, they involve juvenile offenders who were in different factual and legal circumstances than petitioner. Notably, in other cases, the appellate court has upheld application of minimum sentences that include the firearm enhancements for both juvenile and young adult offenders. *See*, *e.g.*, *Woods*, 2020 IL App (1st) 163031, ¶¶ 57-60 (juvenile); *Thomas*, 2017 IL App (1st) 142557, ¶¶ 47-48 (young adult); *Wilson*, 2016 IL App (1st) 141500, ¶¶ 41-43 (juvenile);

People v. Hunter, 2016 IL App (1st) 141904, ¶¶ 57-59 (juvenile), *aff'd on other grounds*, 2017 IL 121306.

Petitioner's further citation to changes in firearm enhancement provisions in other States, Pet. Br. 17-20, is misplaced. First, although many of them, including California's, had already been enacted, *see id.*, petitioner alleged nothing in his postconviction petition to suggest that his claim was grounded in other States' enactments, such that they could support a finding that his petition stated a claim of arguable merit, *see People v. Delton*, 227 Ill. 2d 247, 254 (2008) ("affidavits and exhibits which accompany a [postconviction] petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations"). Second, the question under the penalties provision is whether a particular sentence is shocking to *our* community's moral sense. The manner in which other state legislatures have responded to the dangers posed by firearms may inform the analysis, but ultimately, whether and to what extent the Illinois Constitution limits the General Assembly's sentencing authority is a question of Illinois law for this Court. *See generally Rizzo*, 2016 IL 118599, ¶¶ 37-38. Notably, other States approve of sentencing practices, like capital punishment, that the General Assembly does not; and the General Assembly may enact sentencing laws that only a minority of jurisdictions have also approved without violating the penalties provision, *see, e.g.*, *Huddleston*, 212 Ill. 2d at 138-41 (observing that States have

responded differently to the problem of child sex offender recidivism, noting only five States that mandated life, and upholding mandatory life based on seriousness of offense). Finally, many of the changes to other States' laws petitioner cites involve only juvenile offenders, *see* Pet. Br. 15-17; and none of them support a finding that a 31-year sentence for *his* offense, a preplanned murder, where he personally discharged a firearm that caused great bodily harm, is constitutionally excessive.

At bottom, petitioner's claim is that the General Assembly's recent enactments reflect a shift toward treating young adult offenders like juvenile offenders, so it is arguable that the penalties provision clearly requires that he be treated the same as a juvenile offender who commits the same crime today. *See id.* at 16-17, 20-21, 24-26. This Court should reject petitioner's attempt to constitutionalize a matter that has always considered to be a policy judgment for the General Assembly. "'Our constitution empowers the legislature to declare and define criminal conduct and to determine the type and extent of punishment for it'" because "'[t]he legislature, as an institution, is more aware than the courts of the evils confronting our society and, therefore, is more capable of gauging the seriousness of various offenses.'" *People v. Fuller*, 187 Ill. 2d 1, 19 (1999). Indeed, history demonstrates that as our community's needs have changed, the General Assembly has responded by altering sentencing policies and prioritizing different goals of punishment. *See generally* Gregory W. O'Reilly, *Truth-in-Sentencing: Illinois Adds Yet*

Another Layer of Reform to Its Complicated Code of Corrections, 27 Loy. U. Chi. L. J. 985 (1996) (describing Illinois's prior approaches to sentencing).

But the General Assembly's decision to change from one penological approach to another does not by itself render a prior or later approach morally offensive, as petitioner suggests. *See* Pet. Br. 25-26, 46. For example, in 1977, notwithstanding the availability of evidence showing that young adults are not fully mature, *see supra*, Section C.1, the General Assembly "abolish[ed] our previous system of indeterminate sentencing" due to "its dependence on rehabilitation as a sole basis of penal policy, . . . its wide ranges of sentences, and its reliance upon the parole board to determine release dates, [which] had led to excessively disparate and inequitable sentences." *People v. Fern*, 189 Ill. 2d 48, 60 (1999); *see also Payne v. Texas*, 501 U.S. 808, 819-20 (1991). When the General Assembly adopted a new system that increased mandatory minimum sentences, restricted judicial discretion, and ended parole, this Court did not hold that those legislative determinations shocked the moral sense of the community. To the contrary, the Court upheld the General Assembly's authority to consider the dual objectives of the penalties provision and fix minimum sentences — including for young adult offenders — based on the seriousness of the offenses. *See Taylor*, 102 Ill. 2d at 204-08; *supra,* Sections B & C.3.a.

Thus, the General Assembly's more recent enactments favoring discretionary sentences and parole for juvenile and young adult offenders do

not mean that the minimum sentences imposed under the prior system, which the legislature continues to approve of and courts previously found proportionate, violate the penalties provision. To the contrary, "determining the age at which human beings should be held fully responsible for their criminal conduct is" for the General Assembly because it is "ultimately a matter of social policy that rests on the community's moral sense." *Harris*, 2018 IL 121932, ¶ 77 (Burke, J., specially concurring); *see also People v. House*, 2021 IL 125124, ¶¶ 47-58 (Burke, C.J., concurring in part, dissenting in part); *id.* ¶¶ 61, 65-71 (Burke, J., concurring in part, dissenting in part); *Thomas*, 2017 IL App (1st) 142557, ¶ 47. Indeed, the General Assembly is considering the policy issues that petitioner highlights, including whether to the make the firearm enhancements discretionary for young adult offenders and/or to make the youthful offender parole scheme retroactive. *See*, *e.g.*, 103d Ill. Gen. Assem., Senate Bill 2073 & House Bill 1501, 2023 Sess.

In sum, a straightforward application of established penalties provision jurisprudence demonstrates that petitioner's as-applied claim lacks arguable merit. His sentence is not so extreme as to grossly distort the factual reality of petitioner's premeditated attempt to murder Killingsworth with a firearm and shock the moral sense of our community. To the contrary, petitioner's crime fits squarely within the serious conduct, degree of harm, and societal dangers the General Assembly sought to address when it enacted the mandatory firearm enhancement.

CONCLUSION

This Court should affirm the judgment of the appellate court.

March 31, 2023

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 12,538 words.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

APPENDIX

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No. 1-14-2951

Third Division
June 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS. Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 13 CR 19027
ANDRE HILLIARD, Defendant- Appellant.	)	Honorable Vincent M. Gaughan, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

Held: The failure of the trial court to give the jury *Prim* instructions was not plain error. Defendant's disproportionality challenge to the firearm mandatory add-on provision is forfeited. Additionally, the trial court did not abuse its discretion when it sentenced defendant to 40-years in prison.

¶ 1 Following a jury trial, defendant, Andre Hilliard, was convicted of attempted first degree murder and sentenced to a term of 40 years, including a 25-year mandatory firearm sentence enhancement. On appeal, he contends that (1) the trial court coerced a guilty verdict by failing to issue a *Prim* instruction, (2) the addition of a 25-year firearm sentence is

unconstitutionally disproportionate, and (3) his 40-year sentence is excessive considering his youth and lack of prior criminal convictions. We affirm.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with four counts of attempted first-degree murder, one count of aggravated battery and one count of aggravated discharge of a firearm following the shooting of Devaul Killingsworth. Defendant does not challenge the sufficiency of the evidence supporting his conviction, thus, we set forth those facts pertinent to disposition of the issues on appeal.

¶ 4 Trial commenced on June 2, 2014.[1] Killingsworth testified on behalf of the State as follows. On August 5, 2013, he visited his grandchildren and their mother, Tracy Chatman. At approximately 12:45 a.m., after talking to some neighbors outside of Chatman's apartment, Killingsworth proceeded to return to the apartment, when he heard a noise behind him. He turned around and saw defendant approaching him with a gun. To protect himself, Killingsworth lifted his arm and ran to a grassy area near the apartment. Defendant stood approximately one to two feet away from Killingsworth before firing two to five gunshots. Killingsworth was struck twice in the arm before defendant fled the scene.

¶ 5 Shortly thereafter, Killingsworth was taken to the hospital. While there, he spoke with two police officers and identified defendant as the shooter from a photo array. Killingsworth had known defendant for a few months because defendant and Chatman were dating. Killingsworth and defendant encountered each other on his many visits to Chatman's home, but they did not get along. After speaking with the police, Killingsworth had surgery to repair

[1] Defendant was not present in the courtroom for trial. In response to the trial court's repeated invitations and admonishments of his right to confront witnesses and to participate in the proceedings, defendant elected to listen to the proceedings via microphone in the "lock up" room outside of the courtroom.

his arm. Following surgery, he was informed that the surgeon did not remove one of the bullets and he would not have full use of the arm.

¶ 6 Dr. Tobbin Efferen, an emergency room physician treated Killingsworth's gunshot wound. His review of Killingsworth's x-rays revealed that Killingsworth sustained a gunshot wound to his left forearm, and both bones in the forearm were broken. He determined that Killingsworth needed surgery to repair the arm.

¶ 7 Officer Mark Davis testified that on August 6, 2013, he was working as an evidence technician when he was called to the scene of the shooting. He photographed, recovered, and inventoried a spent shell casing, an unfired bullet and a bloody t-shirt. He further testified that the bullets were from a small caliber weapon.

¶ 8 Detective Brian Cunningham testified that on August 6, 2013, he received an assignment to investigate the shooting with his partner, Detective Bryant Casey. The detectives went to the hospital to speak with Killingsworth, who told the detectives that defendant shot him and gave them a general description of defendant. Shortly thereafter, Detective Cunningham went to the scene of the shooting where he spoke to two witnesses. After gathering information from the witnesses, he prepared a photo array that included a picture of defendant. Detective Cunningham showed the photo array to Chatman and to Killingsworth, who identified defendant as the shooter. Detective Cunningham then issued an investigative alert for defendant. Once Detective Cunningham learned that defendant had been arrested, he prepared a line-up that included defendant. Killingsworth viewed the lineup and identified defendant as the person that shot him.

¶ 9 Officer Christopher Maraffino testified that he was part of the fugitive apprehension unit and was made aware of an investigative alert for defendant as the suspect in a shooting. On

September 19, 2013, he received information from defendant's mother that defendant would be returning to Chicago by bus that evening. Officer Maraffino waited for defendant at the bus station where he was then arrested.

¶ 10 At the close of the State's case defendant presented a motion for directed verdict which the trial court denied. The defendant then rested and court was adjourned for the day.

¶ 11 On June 3, 2014, court reconvened. Following closing arguments, the jury was given instructions and retired to the jury room for deliberations. During deliberations, the jury sent several notes to the court, all dated June 3, 2014, and all bearing the signature of the jury foreperson.[2] The record reflects that, prior to responding, the court discussed each note and the proposed response with the parties, as well as sought defendant's position on the same. In each case, the parties agreed with the court's proposed response.

¶ 12 The jury's first note appearing in the record read: "Can we please see: Copy of transcripts from March hearing [,] Copy of transcripts from this trial [,] Video." The trial court responded in two separate writings. The first response read: "So we are all clear, Mr. Devaul Killingsworth did not testify on the March 9 hearing. He testified in Sept. That portion that was introduced at trial is for you (Jury) to determine if it can be used for impeachment evidence. Please use your collective [m]emory. Please continue to deliberate. Thank you!" The second response read: "The transcripts of the March 9 hearing are not evidence in this case. Trial transcripts are not available at this time. Concerning the video, you have received all the evidence on this case. Thank you!"

[2] Neither the common law record nor the report of the proceedings indicate the time at which any of the notes were presented to the court or the time of the court's responses. The written versions of the notes and the court's responses, which are contained in the common law record, are presented here in the order in which they were addressed on the record.

¶ 13 The jury's second note appearing in the record read: "We would like to get the quote that the defense attorney used during the trial that refferenced (sic) the victim's statement during the March 9 hearing. Pertaining to what Devaul saw when he was shot." The court responded, "You have heard all the evidence in this case. Please continue to deliberate. Thank you!"[3]

¶ 14 The jury's third note appearing in the record read: "Do we have to continue to deliberate until we reach a unanimous decision? The court responded: "You must continue to deliberate. Thank you."

¶ 15 Before offering the aforementioned response to the third note, the following colloquy occurred:

"STATE: Judge, the earlier note that was sent out, are we going to address that one where they said they were hung, at that point?

COURT: They're not hung.

STATE: They said 11 to 1. I don't know if I put it on the record that they were hung.

COURT: What did you just do?

STATE: I didn't know if she was taking it down.

COURT: There was another note sent out earlier just giving us the status of where they were. The status was, Dear Judge Guaghan, we're 11 to 1 and cannot get a unanimous decision. What would you like us to do next? So, this letter- or this note will incorporate that too. 'Continue to deliberate. Thank you.'"

[3] An additional note to the court appears in the common law record which is not referenced in the report of proceedings. The note reads: "We would like to make sure we understand this correctly; are we not allowed to use testimony that was given during the March hearing? Even the portion that was introduced during this trial? Specifically when the defense questioned the victim about who shot him." Based upon a review of the record it

The court then admonished the parties as follows: "I want everybody back- if you want to stay, that's great. If you don't, everybody back at 5:00." The record indicates that deliberations then continued.

¶ 16 The final note appearing in the record reads: "Is the transcript from the trial available yet? There is some confusion around various statements made during the trial that we will need clarity to in order to make a unanimous decision. Thank you." The court did not send a written response to the final note, but instead, had the jury brought into the courtroom. The court then advised the jury that the transcripts would not be available to them until the next morning. After further admonishing them concerning the need to avoid discussion of the case, court was adjourned until 9:00 a.m. the next morning.

¶ 17 On the next morning, the court tendered the transcript of the trial proceedings to the jury. The jury found defendant guilty of attempted first degree murder and that he had personally discharged a firearm that caused great bodily harm to the victim. The record is silent on the time at which the jury completed its deliberations. On defense counsel's request, the jury was polled and each juror confirmed their verdict as guilty.

¶ 18 Defendant subsequently filed a motion for judgment notwithstanding the verdict and a motion for new trial, both of which were denied by the court. At sentencing, the State argued that while defendant did not have a criminal history he should receive a sentence above the minimum statutory requirement based on the facts of the case. Defense counsel argued, *inter alia*, that defendant was only 19 at the time of sentencing and had no prior criminal history and thus should receive the minimum sentencing requirement.

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appears that the court's response to the prior note concerning Killingsworth's testimony in a related, but different proceeding, was also responsive to this note.

¶ 19 Defendant was sentenced to 15-years for attempted first degree murder, and an additional 25-years for personally discharging a firearm and causing great bodily harm. The trial court indicated that in determining defendant's sentence it considered both aggravating and mitigating factors. Defendant filed a motion to reconsider sentencing, which was denied. Defendant now appeals.

¶ 20 ANALYSIS

¶ 21 Jury Coercion

¶ 22 Defendant contends that the trial court erred by coercing the jury into returning a verdict. Specifically, he argues that the trial court erred in failing to give *Prim* instructions after the jury indicated that it was deadlocked. As the verdict was coerced, he asserts that his conviction should be reversed and the case remanded for a new trial. Defendant concedes that he did not preserve this claimed error for appeal but urges that we review the error for second prong plain error and in the alternative, as ineffective assistance of counsel.

¶ 23 In response, the State argues that the trial court did not err in failing to give a Prim instruction. Further, the second prong of plain error review does not apply because the trial court's statements to the jury were not coercive and did not interfere with deliberations.

¶ 24 Under the plain-error doctrine a reviewing court may consider unpreserved error when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) citing *Herron*, 215 Ill.2d at 186–87. Under both prongs of the doctrine, the

burden of persuasion remains with defendant. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The first step in a plain error analysis is to determine whether any error occurred at all. *Id*. Thus, we begin our analysis with examination of defendant's substantive claim.

¶ 25 "The integrity of the jury's verdict must be protected from coercion, duress or influence." *People v. Patton*, 105 Ill. App. 3d 892, 894 (1982). If a trial court's supplemental instructions, taken in context and considering all of the circumstances of the case, have the effect of coercing jurors into surrendering views conscientiously held, that court's judgment must be reversed and the cause remanded. *People v. Gregory*, 184 Ill. App. 3d 676, 680-81 (1989) citing *Jenkins v. United States*, 380 U.S. 445 (1965). The length of jury deliberations is a matter which rests within the sound discretion of the trial court and its judgment in this regard will not be disturbed unless it is clearly abused. *People v. Daily*, 41 Ill. 2d 116, 121 (1968).

¶ 26 Defendant argues that when the jury indicated that it was deadlocked and the court instructed them to continue to deliberate, the court's instruction was at odds with the supreme court's holding in *People v. Prim*, 53 Ill. 2d 62 (1972). Pursuant to *Prim*, a court is required to offer an instruction that allows the jury the option of returning no verdict if a consensus cannot be reached. Defendant asserts that here, the court's response coerced the jury into reaching a decision, without the benefit of a *Prim* instruction. Thus, defendant maintains, reversal is required.

¶ 27 The supreme court's intended result in *Prim* was to eliminate supplemental instruction to jurors to "heed the majority" as a means of securing a verdict. *People v. Palmer*, 125 Ill. App. 3d 703, 712 (1984). A "heed the majority" instruction, commonly recognized as an "Allen" charge (see *Allen v. United States*, 164 U.S. 492(1896)) has the effect of urging those

members of the jury who are in the minority to reevaluate their position. *Gregory*, 184 Ill. App. 3d at 681. The decision to give the supplemental Prim instruction to a deadlocked jury rests within the sound discretion of the trial court. *People v. Cowan*, 105 Ill. 2d 324, 328 (1985); *People v. Thompson*, 93 Ill. App. 3d 995, 1008 (1981). In exercising that discretion, the trial court should primarily consider the length of time the jury had deliberated and the complexity of the issues the jury must decide. *Cowan*, 105 Ill. 2d at 328; *Thompson*, 93 Ill. App. 3d at 1008.

¶ 28 Incidentally, the jury's own view of its ability to reach a verdict is only one factor to be considered by the trial court in the exercise of that discretion. *Thompson*, 93 Ill. App. 3d at 1008; *People v. Allen*, 47 Ill. App. 3d 900, 905-906 (1977). Further, the trial court has discretion to have the jury continue its deliberations even if the jury reported that it is deadlocked and will be unable to reach a verdict. *Cowan*, 105 Ill. 2d at 328. The mere failure to give a *Prim* instruction is not reversible error (*Gregory*, 184 Ill. App. 3d at 681), and absent some showing that the court abused its discretion in requiring continued deliberations, we will not find that the jury was coerced. *Daily*, 41 Ill. 2d at 121.

¶ 29 Although no time stamp appears on any of the jury's notes or on the court's responses, we may infer from the substance of the jury's notes that the assertion concerning unanimity occurred sometime after their initial request for the transcripts of the proceedings. It appears from the final note that the jury believed a review of the transcripts would aid in reaching a verdict. Given the jury's request for the transcripts, coupled with their interest in Killingsworth's pre-trial and trial testimony, it appears their deliberations centered on identification evidence, which clearly they believed would be available in the transcripts. Moreover, even a conservative reading of the record reveals that deliberations likely began

mid-morning, following closing statements and jury instructions, and concluded for the day shortly after 5:00 p.m. On the following day, the transcripts were made available and, significantly, no additional questions from the jury were tendered. Further, this was not a complex proceeding. Other than testimony from Killingsworth, the remainder of the testimony involved the police officers' investigative steps and the health care providers' assessment of the victim's injuries. Thus, we believe it was reasonable for the trial court to instruct the jury to continue its deliberations, especially in light of the then unavailable transcripts.

¶ 30 Defendant posits, however, that proof that the jury felt they had no choice but to reach a unanimous decision can be found in their final note requesting the transcripts because they needed clarity in order to make a unanimous decision. We believe just the opposite is a more natural conclusion to be drawn from the request. That the jury believed the then unavailable transcripts were necessary to resolve their impasse supports the court's decision to urge continued deliberation. If anything the final note served as the basis for the trial judge to adjourn court for the evening in anticipation of being able to give to the jury the guidance they sought by honoring the first of their requests, the delivery of the trial transcripts.

¶ 31 Defendant invites our review of *People v. Wilcox*, 407 Ill. App. 3d 151 (2010), as similar to the case at bar. In *Wilcox*, jury deliberations began at 12:40 p.m. on May 9, 2008. *Id* at 163. On that same day, at 3:25 p.m., the trial court received a note from the jury relating that it was "11 to 1" on all propositions. *Id.* at 163. In response, the trial judge sent a note to the jury which stated that "'[w]hen you were sworn in as jurors and placed under oath you pledged to obtain a verdict. Please continue to deliberate and obtain a verdict.'" *Id.* At 4:10 p.m., the jury reached a verdict. *Id.* On appeal, this court found the judge's note to be

coercive because it "indicated that being deadlocked was not an option, that the jurors were required by their oath to obtain a verdict, and that they would be required to deliberate until a verdict was reached." *Id.* at 164. Further, the reviewing court reasoned that although the trial court did not explicitly state that a deadlock was impossible, it gave the impression that the jurors had to reach a verdict in order to satisfy their obligations as juror. *Id*.

¶ 32 We find the judge's supplemental instructions in *Wilcox* to have been far different from those offered by the trial judge in this case. Here, in response to the jury's questions that asked "do we have to continue to deliberate until we reach a unanimous decision," and "we're 11 to 1 and cannot get a unanimous decision. What would you like us to do next?," the court responded, "continue to deliberate." Unlike in *Wilcox,* where the trial court's comments gave the impression that being deadlocked was not permissible, the court in this case did not preclude that as a possibility. The judge's responses here neither heeded the majority nor did they assert that a verdict must be reached. Rather the instructions were simple, neutral and allowed for each juror to reach his or her own verdict. See *People v. McLaurin,* 235 Ill. 2d 478, 491 (2009) (a "trial court has broad discretion when responding to a jury that claims to be deadlocked, although any response should be clear, simple, and not coercive"), *cf., People v. Ferro,* 195 Ill. App. 3d 282, 292-293 (1990) (trial court's supplemental instructions held to be coercive where jury was instructed that if they were not going to be able to reach a verdict, they would be housed in a local motel until they did so); *People v. Robertson*, 92 Ill. App. 3d 806, 809 (1981) (trial court's supplemental instructions held to be coercive where after giving Prim, the court commented to the jury that it did not see any reason why the jury could not arrive at verdicts and further, directed that the jury could not be deadlocked).

¶ 33 Additionally, taking into consideration the length of time the jurors deliberated, we cannot conclude that the court's instructions were coercive. Although the length of the deliberations following a trial court's comments is alone insufficient to determine whether the comments were the primary factor in procuring a verdict, brief deliberations invite an inference of coercion. *Mclaurin*, 235 Ill. 2d at 491. Here deliberations began on the second day of trial and were continued to the following day after the court determined that it could not provide the jury with the trial transcripts. The effort to accommodate the jury does not demonstrate an attempt by the court to hastily reach a verdict.

¶ 34 Further, prior to receiving the note on the jury's status, the jury had requested evidence necessary to assist them in reaching verdict. We agree with the trial court's assessment that the jury was not deadlocked when it provided the status of its deliberations. When the transcripts were not available the judge did not pressure the jury into relying only on the evidence available to them at the time, but instead adjourned the court until they could have what was requested and needed to reach a verdict. The court did not need to issue a *Prim* instruction to a jury that was still deliberating.

¶ 35 A trial court's comments to the jury are improper where, under the totality of the circumstances, the language used interfered with the jury's deliberations and coerced a guilty verdict. *Wilcox*, 407 Ill. App. 3d at163. We find no impropriety either in the trial court's supplemental instructions or in its failure to *sua sponte* give a *Prim* instruction. Considering the totality of the circumstances in this case, we disagree with defendant's assessment that the jury was coerced to render a unanimous decision.

¶ 36 Having determined that no error occurred in the trial court's supplemental instructions to the jury's questions, we conclude that plain error is not available to excuse defendant's forfeiture.

¶ 37 Ineffective Assistance

¶ 38 In his brief, defendant offers as an alternative to plain error review, a review for ineffective assistance of counsel. A court may review an error that has been forfeited when trial counsel's failure to preserve the error results in ineffective assistance of counsel. See *People v. Enoch*, 122 Ill. 2d 176, 201 (1998). Claims of ineffective assistance of counsel are analyzed under a two-pronged test. *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, a defendant must show both, that counsel's performance fell below an objective standard of reasonableness and that there exists a reasonable probability that the substandard performance resulted in prejudice to the defendant. *Strickland*, 466 U.S. at 687. Because we have determined that no error occurred in the trial court's supplemental instructions to the jury, we need not engage in a *Strickland* analysis. Even were we to do so, given our determination that the jury's verdict was not coerced, defendant could not satisfy either prong of the test.

¶ 39 Constitutionality of Sentence

¶ 40 Defendant next contends that the 25 year mandatory firearm add-on is unconstitutionally disproportionate where the mandatory nature of the add-on deprived the judge of the ability to consider the fact that he was 18 years of age at the time of the offense and had no prior criminal convictions. He argues that, in his case, the 25 year firearm add-on is particularly harsh and should not apply. The State responds that defendant has forfeited review of this issue for failing to first raise it in the trial court. In support of its argument that review is

foreclosed, the State cites to *People v. Thompson*, 2015 IL 118151 (2015). In his reply brief, defendant acknowledges that he did not raise the issue in the trial court, but maintains that review here is proper. Noting that *Thompson* addressed forfeiture of the defendant's as-applied claim in the context of dismissal of a section 2-1401 petition, he maintains that *Thompson* is inapposite. Defendant reads *Thompson* too narrowly.

¶ 41 Defendant correctly notes the procedural posture of the *Thompson* defendant's as-applied challenge. However, the *Thompson* court's reasoning in rejecting the claim for review had little to do with the fact that defendant was appealing dismissal of his 2-1401 petition. In its analysis, the court first distinguished between as-applied and on its face constitutional challenges to statutes. *Id.* at ¶ 36. With respect to as-applied challenges, the court noted that such claims typically require some showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party. *Id.* Such matters, the court concluded, require that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review. *Id.* at ¶ 37. The type of factual development necessary to adequately address a defendant's as-applied challenge, the court concluded, is a task best suited for the trial court. See *Id.* at ¶ 38. Because the defendant had failed to present the issue in the trial court, the issue was deemed to have been forfeited. *Id.* at ¶ 39.

¶ 42 As a court of review, we are no better suited here to decide defendant's as-applied challenge than was our supreme court in *Thompson*. Although defendant sets forth, in great detail, information concerning the relevant studies on brain development and offers case law in support of his as-applied claim, as a reviewing court, we have no means by which to weigh this evidence in the context of the facts and circumstances of this case. As in *Thompson*, the factual development necessary for review of defendant's claim is best suited for the trial

court, procedural posture of *Thompson* notwithstanding. We note, as did the court in *Thompson*, however that defendant is not forever foreclosed from presenting his as-applied claims in the trial court. See *Id.* at ¶ 44. That said, we take no position on the merits of such claims. Suffice it to say that here, the matter is forfeited.

¶ 43 Excessive Sentence

¶ 44 Defendant next argues that the 40 year sentence imposed by the trial court was excessive in light of his age and the absence of any prior criminal activity. Accordingly, he requests that this court either reduce his sentence or remand the case for resentencing. The State responds that defendant's sentence, which is within the statutory limits, is proper.

¶ 45 Under Illinois Supreme Court Rule 615(b)(4) a reviewing court may reduce the punishment imposed by the trial court. Ill. S. Ct. R 615(b)(4). However, where a trial court's sentencing determination is within the statutory range for a criminal offense, a reviewing court has the power to disturb the sentence only if the trial court abused its discretion in the sentence it imposed. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). A sentence will be deemed an abuse of discretion where it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010), citing *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 46 The Illinois Constitution mandates the balancing of both retributive and rehabilitative purposes of punishment. Ill. Const. 1970, art. I, § 11; see also *People v. Evans*, 373 Ill. App. 3d 948, 967 (2007). Thus, in sentencing, "the trial court is [] required to consider both the seriousness of the offense and the likelihood of rehabilitating the offender. *Evans*, 373 Ill. App. 3d at 967. However, a defendant's rehabilitative potential is not entitled to greater weight than the seriousness of the offense. *Alexander*, 239 Ill. 2d at 214.

¶ 47 A trial court has the opportunity to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Alexander*, 239 Ill. 2d at 213; see also 730 ILCS 5/5-5-3.1 (eff. Aug 22, 2016). We accord the trial court's sentencing decision great deference because the trial judge, having observed the defendant and the proceedings, is better suited to consider these factors than the reviewing court, which must rely on the cold record. *Alexander*, 239 Ill. 2d at 212–213, citing *People v. Fern*, 189 Ill, 2d 48, 53 (1999). Therefore, we will not substitute our judgment for that of the trial court merely because we might have weighed these factors differently. *Id* at 214.

¶ 48 Defendant argues that the trial court did not sufficiently consider mitigating factors in deciding on his sentence. He contends that the 40-year sentence is excessive in light of his youth and lack of criminal history, both of which evidence his rehabilitative potential. He invites our attention to *People v. Anderson*, 142 Ill. App. 3d 240 (1985), *People v. Maldonado*, 240 Ill. App. 3d 470 (1992), *People v. Brown*, 243 Ill. App. 3d 170 (1993), and *People v. Clark*, 374 Ill. App. 3d 50 (2007)), as an exemplary of cases in which this court reduced the sentences of youthful offenders for the same reasons as he asserts are present here. Thus, we review each in turn.

¶ 49 We begin first with *Anderson.* Notably, the defendants there were both 17 years of age, below the age of majority, at the time the offense was committed. 142 Ill. App. 3d at 241. Further, the offense committed, residential burglary, though serious, pales in comparison to the offenses for which defendant here was convicted. Here, defendant, 18 years of age at the time of the offense, approached his victim, pointed a loaded gun at him, fired three to five shots at him, and caused him great bodily harm. The distinction between the defendants in

Anderson and defendant in this case, we think, is clear. Thus, we need not consider the case further.

¶ 50 *Maldonado*, is equally unavailing. There the 20 year old defendant, who was a father of two children, had completed three years of high school, with no prior felony convictions, was convicted of first-degree murder. 240 Ill. App. 3d 470, 473 (1992). The defendant shot and killed Elizabeth Cooley, who was asleep in the backseat of a car. *Id*. at 474. Outside of the car, defendant and another of the car's passengers had become engaged in a verbal confrontation. *Id*. When the confrontation ended, and as the car was being driven away, the defendant fired between three to seven gunshots at the vehicle, striking Cooley, who later died. *Id.* Defendant was sentenced to the maximum 40 year prison term. *Id.*

¶ 51 On appeal, the defendant argued that given the nature of the offense, the evidence presented at the sentencing hearing, his youth and rehabilitative potential, the 40 year maximum sentence constituted an abuse of discretion. *Id*. at 484. The court reduced the defendant's sentence to 20 years. *Id.* at 486. In so doing, the court cited to cases, for the sake of comparison, in which murders had been either planned executions or were committed for money. *Id.* In such cases, the court noted, the 40 year maximum sentences were justified. *Id.* The court concluded, however, that the circumstances in Maldonado's case did not justify the same outcome. *Id.*

¶ 52 Here, defendant's claim that his action was "impulsive" is clearly refuted by the record. Unlike in *Maldonado*, defendant targeted his victim, took aim and shot him. Further, unlike in *Maldonado*, defendant was not sentenced to the maximum available statutory term of imprisonment. Rather, he was sentenced to 15 years for attempted murder, 15 years below the statutory maximum.

¶ 53 In *Brown*, following a conviction for first-degree murder, the defendant was sentenced to 45 years in prison. 243 Ill. App. 3d. 170, 171 (1993). At the time of the offense the defendant was 20 years old and had no prior criminal history. The reviewing court reduced the defendant's sentence to 30 years. *Id.* at 176. In so doing, the court commented, without more, that "[g]iven that at the time of the offense defendant was 20 years old and lacked any prior criminal history we believe that his rehabilitative potential was not adequately considered." *Id*. at 176.

¶ 54 Unlike in *Brown*, on this record we cannot conclude that the trial court failed to consider any factors in sentencing. In fact, the court is on record as stating that it had taken into consideration "the provisions in aggravation, the statutory provisions in mitigation and the non-stature (sic) provisions in mitigation and also he (sic) evidence presented at the aggravation and met (sic) mitigation phase of the sentencing and pre-sentencing investigation." Given the court's comments, we find defendant's reliance on *Brown* misplaced.

¶ 55 Finally, we consider the facts in *Clark*, 374 Ill. App. 3d 50 (2007). There, the 18 year old defendant was convicted of first degree murder and sentenced to a 44 year sentence. *Id.* at 75. In reducing his sentence, this court expressly noted the following substantial evidence in mitigation, which it believed had been overlooked by the trial court. The court noted that the defendant had "received a GED, and had no prior felony convictions. Defendant presented extensive evidence in both live testimony and affidavits from family members, friends, and experts discussing his rehabilitative potential. Defendant was described as a respectful and polite young man who made a bad decision in joining a gang. Several people disclosed defendant's desire to leave the gang, but his fear of retribution from the gang against himself

and his family kept him from leaving. Defendant offered [] expert testimony [] to illustrate both defendant's atypical behavior for a gang member and the structure and circumstances of Chicago gangs. Dr. Gur testified about generally accepted studies involving the brain development in adolescents. Defendant also offered his own apologies to the victim's family. The trial court dismissed the testimony of Dr. Gur and found [the other expert's testimony] did not offer anything helpful." *Id.* at 75

¶ 56 Here, defendant offered as factors in mitigation, his age**,** activities, familial involvement, his lack of a criminal history and his rehabilitation potential. Unlike in *Clark*, defendant provided no additional evidence, such as testimony or affidavits in further support of his character or rehabilitative potential. And in fact, when invited by the trial court to offer a statement at sentencing, defendant declined. We note in passing defendant's invitation to this court to consider in mitigation "scientific" evidence concerning the development of the adolescent brain. Unlike in *Clark*, however, there is nothing in the record to indicate this same evidence was ever presented to the trial court. Thus, as it was not part of the record below, we may not properly review it here. See *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994).

¶ 57 Having determined that the cases cited to us provide no basis upon which might properly modify defendant's sentence, we proceed with consideration of his final contention on appeal. Defendant argues that during sentencing the trial court failed to mention his lack of criminal history, youth or his rehabilitative potential as mitigating factors. First of all, a trial court need not expressly outline its reasoning for sentencing or explicitly find that the defendant lacks rehabilitative potential. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). Even in the absence of a trial judge's oral comments, we presume that the judge considered

all relevant factors in determining an appropriate sentence. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). Further, the burden rests on defendant to show that the court failed to properly consider factors in mitigation. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). However, as we have previously noted, in this case, the trial court explained the factors it considered in determining defendant's sentence.

¶ 58 It bears noting that the existence of mitigating factors neither mandate imposition of the minimum sentence (*People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006)) nor do they preclude imposition of the maximum sentence (*People v. Pippen*, 324 Ill. App. 3d 649, 652 (2001)). Defendant was convicted of attempted murder, a Class X felony subject to a sentencing range of 6 to 30 years, and a mandatory firearm enhancement of 25 years or up to natural life. 720 ILCS 5/8-4(c)(1)(B), (D). He was sentenced to a total of 40 years - 15 years on the attempted murder conviction charge, 9 years above the minimum, and 25 years on the mandatory firearm enhancement, a term less than natural life. On this record, we find no abuse of discretion. In our view, defendant's sentence comports with the purpose and spirit of the law and is by no means disproportionate to the nature of the offense. Thus, we decline any modification.

¶ 59 CONCLUSION

¶ 60 Based upon our review, we find that the trial court did not coerce the jury into reaching a unanimous verdict of guilty. Defendant's "as-applied" challenge to the constitutionality of the mandatory firearm provision, raised here on appeal for first time, is forfeited. Finally, the trial court did not abuse its discretion in sentencing defendant to 40 years imprisonment. For all of the foregoing reasons, we affirm the judgment and sentence of the trial court.

¶ 61 Affirmed.

In The

Circuit Court Of Cook County

People of The ~~State~~ Of Illinois,) Cir Ct No. 13 CR 19027
Respondent,)
)
-Vs-) Honorable
Andre Hilliard) Vincent M. Gaughen
Petitioner.) Judge Presiding
)

Petition For Post-Conviction Relief

Pursuant to 725 ILCS 5/122-1 Petitioner Andre Hilliard comes before the court and asks that the judgment in Cook County indictment No. 13 CR 19027 be Vacated.

In Support of this Request Petitioner States:

1.) On August 18, 2014, Petitioner was Sentenced by the Honorable Judge Vincent M. Gaughan following a trial by jury for the offense of Attempted first Murder, Aggravated Battery with a firearm in indictment No. 13 CR 19027 and was Sentenced to forty (40) Years.

2.) Petitioner filed a notice of appeal on August 18, 2014. The appeal was docketed in the Illinois Appellate Court as No. 1-14-2951, petitioner's Conviction and Sentence were affirmed by the

Appellate Court on June 28, 2017, on July 18, 2017, Petitioner filed a petition for Rehearing, which the appellate Court denied on August 4, 2017. A petition For Leave To Appeal to the Illinois Supreme Court was filed on August 30, 2017, and denied on November 28, 2018.

3.) Petitioner's Right under the constitution of the United States and the State of Illinois were Substantially denied in that (See claim-I attach).

4.) Petitioner states, that he could not obtain a copy of his pre-Sentence investigation Report to attach with this petition. I have written Several letters to my public defender attorney Requesting for a copy of PSI Report.

5.) Petitioner is without any income or assets with which to procure Counsel. Petitioner, therefore desires that counsel be appointed to Represent him in this proceedin

Andre Hilliard
Andre Hilliard

I Swear that the facts Stated in this petition are true and correct in substance and in fact.

Subscribed And Sworn To Before Me
this 16th day of July, 2019
Karen Marie Rabideau
Notary Public

KAREN MARIE RABIDEAU
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
July 29, 2019

Claim-I

The Addition OF A 25-Year FiReaRM Add-on In Petitioner's case is unconstitutionally DisproportinaTe where The mandatory nature OF The Add-on deprived The TRial Judge OF The Ability To Consider The Fact That He was 18 Years old At The Time OF The offense And Had No pRIOR CRiminal Conviction, In Violation OF The Eight Amendment OF The U.S. Constitution And ARticle I. Section II OF The Illinois Constitution.

Facts In support OF claim:

Petitioner asserted he was 18 years old at the time of the shooting and had no prior conviction, but the trial judge was Required to impose a firearm enchancemt of at least 25 years imprisonment to petitioner's 15-Year Sentence for attempt murder because the jury found that petitioner had personally discharged a firearm proximately causing great bodily harm 720 ILCS 5/8-4 (c)(1)(D)(2013). Thus, due to the mandatory nature of the firearm add-on the trial judge was Required to Sentence petitioner to a minimum prison term of 31-Years Regardless of petitioner's Youth, non-existent criminal history, and Rehabilitation

Potential. As applied to petitioner, the 25-year firearm add-on is particularly harsh and unconstitutionally disproportionate in violation of the Eight Amendment of the United States Constitution and article 1, Section 11 of the Illinois constitution. Petitioner should be granted a new sentencing hearing at which the trial judge can make a particularized determination of whether the 25-year firearm add-on is appropriate in this case.

The Eight Amendment prohibits "cruel and unusual punishment," including sentence that are disproportiona to the offense committed or the status of the offender U.S. const. amends VIII, XIV; miller v. Alabama, 132 S.ct. 2455, 2463 (2012). "The concept of proportionality is central to the Eight Amendment." The Illinois Supreme Court has found the Eight Amendment embodies "the basic principle that criminal punishment should be graduated and proportioned to both the offender and the offense." People v. Davis 2014 IL 115595.

The proportinate penalties clause of the Illinois constitution provides that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. const. 1970, art 1 § 11; Leon miller, 202 Ill. 2d at 338. A court must not only consider Rehabilitation when imposing a sentence,"

it must also make Rehabilitation an objective of the Sentence." People v. Wendt, 163 Ill.2d 346, 353 (1994).

A Statutory provision that eliminates a trial judge's ability to consider mitigating factors may violate the proportionate penalties clause. As applied to petitioner, the mandatory firearm add-on is particularly harsh and unconstitutionally disproportionate. At the time of the shooting petitioner was an 18-year-old with no prior conviction. petitioner's youth was critically important. The United States Supreme Court struck down mandatory natural life Sentence for juveniles as violative of the Eight Amendment, noting that new Scientific and Social Scientific studies showed that youth carries with it a lesser degree of culpability. the qualities that distinguish juveniles from adults do not disappear when an individual turn 18, instead. petitioner chronological age placed his cognitive abilities with those of 16-17-year which in turn mitigates his culpability.

The United States Supreme Court Relied on Scientific and Social scientific Research in Roper, 543 at 572-574; Graham, 560 U.S. at 67-68; and miller, 132 S.Ct. at 2464-2465, when it acknowledged fundamental

differences between the minds of juveniles and adults. That evolving scientific Research Reveals that the frontal lobe, the locus of executive functions such as Reasoning, advanced thought, and impulse control, is the last part of the brain to develop. See Adolescene, Brain Development and legal culpability, American Bar Association Juvenile Justice Center 1-3 (Jan 2004) DR. C. Gur, Director of the Brain Behavior Laboratory at the Neuropsychiatry Section of the University of Pennsylvanis school of medicine, has opined that the evidence now is strong that the brain does not cease to mature until the early 20s in those Relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristi ~~that make people morally culpable~~

Petitioner was not technically a juvenile when he committed the crime. He was 18 years and eight months old. As in House, however, the fact that he was "barely a legal adult and still a teenager" made him less culpable than adults and less deserving of the most severe punishment. House 2015 IL App(1st) 110580. Here, the scientific and social scientific studies and the case law demonstrate that petitioner's youth establishes lesser culpability. Allowing the trial judge to make a

Particularized determination of whether the 25-year firearm add-on should apply to petitioner, who was 18 at the time of the shooting, would be consistent with the scientific Research and case law detail above. At 18 years of age, the part of petitioner's brain governing impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable had not yet fully developed.

Petitioner decision making on the night of August 13, 2013, was clearly not sound judgment, but guided by impulse. It stands to Reason that petitioner grows older and his brain develops more fully into that of an adult, his impulse control and judgment will develop, thus making it unlikely that this offense would Recur, especially considering that petitioner had no criminal histor In House, the court applied the Reasoning of miller to a defendant, who, at 19 years and 2 months of age, was "clearly no longer a juvenile," but was "barely a legal adult and still a teenager. Petitioner was younger than House, his "youthfulness" and attendant characteristic are equally if not more Relevant at Sentencing. House held that in appropriate circumstances" a young

adult especially one who like petitioner, would have been considered a child merely months earlier may successfully Raise an as-applied challenge under the Eight Amendment as interpreted by Miller, OR under the proportionate penalties clause of the Illinois constitution.

As noted above, petitioner was only 18 when the shooting occurred. After Serving 85 percent of his 40-year sentence, petitioner will be 53-years old when he is Release well past the time when the impulsivity he possessed in his teen years will be Replaced with Self-control. If petitioner were Released at a younger age, as he could be without the 25-year add-on, he has a good chance of being Restored to useful citizenship. But, if he Release at age 53, petitioner will have missed many opportunities at Rehabilitation and education, and will have little chance of becoming a producatide member of society.

Petitioner had never been in trouble before, but for some unknown Reason, he impulsively fired a weapon at Deval Killingsworth and was convicted of attempt murder, the crime showed petitioner

" lack of heedless Risk-taking.
Petitioner's lenathy Sentence Reflects the trial court's failure to, OR inability to consider the mitigating quality of his youth and lack of any criminal history.

Petitioner was convicted of attempt murder. he was already Required to be imprisoned for between 6 to 30 years, and to serve that sentence at 85%. See 720 ILCS 5/8-4(c)(1)(2013)(attempt murder is a class X felony); 730 ILCS 5/5-4.5-95(b)(2013)(Sentencing Range for class X felony is 6 to 30 years) and 730 ILCS 5/6-6-3(a)(2)(2013)(prisoner convicted of attempt murde must serve 85% of his sentence). Applying that Sentencing scheme, the trial court determined that 15 years was an appropriate sentence for petitioner's offense. It shocks the moral sense of the community to automatically Require that petitioner serve an additional 25-years on top of that sentence strictly due to petitioner use of a firearm without allowing the trial judge any discretion to determine whether that enchancement, and/or the length of the enchancement. is appropriate.

In People V. Aikens, 2016 IL App (1st) 133578 ¶ 38, the court found that the "changing moral compass" of how society views the sentencing of teenagers is reflected by the fact that, effective January 1, 2016, the legislature no longer makes any firearm enchancement mandatory to individuels under the age of 18. where evolving standards of decency preclude the automatic imposition of a firearm enchancement on 17-year-old defendants, it shocks the moral sense of the community to automatic impose that penality on petitioner, just because he had been alive eight months longer than a 17-year-old, and even though he had never been convicted of any prior criminal offense.

The Record contain sufficient evidence to shows that the automatic imposition of the firearm add-on failed to allow the trial court an opportunity to impose a sentence that would Restore petitioner to useful citizenship (see exhibit-A). Leon miller 202 Ill. 2d at 337-38. petitioner did not kill anyone, and the single victim of his action did not suffer any life threatening

injuries but instead received a single gunshot wound to his arm. While the offense petitioner committed is serious, and the victim suffered permanent injury petitioner's sentence for that offense must still be proportionate both to the nature of that offense and to his own rehabilitation potential.

In Aikens, a mandatory minimum 40-year sentence given to a 17-year-old defendant who was convicted of the attempt murder of two police officers was found to violate the Illinois constitution, both because of the defendant's young age, and due to his lack of criminal history and "troubling social history as explained throughout this petition, petitioner was also very young - less than a year older than the defendant in Aikens - and he also had no prior criminal history. Petitioner's PSI also shows he had a troubling social history, where he did not have a relationship with his father and had not been enrolled in school since the fifth grade. Yet, even aside from his youth and the absence of any criminal history, petitioner also possessed a number of qualities that give him strong rehabilitation potential, including the

fact that he had never been involved in a gang, and his close Relationship with his mother and siblings who live in Wisconsin.

Notably, the events of this case occurred at a public housing complex on the far South Side of Chicago, given a chance at an earlier Release, petitioner will have the opportunity to Reside with his family away from the setting where this crime occurred, where he may be surrounded with a positive Support system of family members who can help him get on track and lead a productive life. Yet, if the automatic 25-year firearm enchancement Remains, petitioner will not be Release from prison until he is at least 52 years old, at which time his support system will likely have waned, and his nealigible employment options will doom him to poverty. Such severe consequences for petitioner's first offense, which did not Result in any life-threatening injuries, Simply fail to account for his Youth and Rehabilitation potential, in Violation of the Illinois constitution.

In short, for the Reasons set forth in this petition, as well as the additional Reasons cited by petitioner, the evidence in the Record shows that the mandatory 25-year firearm automatically add-on to petitioner's Sentence violates the Illinois constitution as applied to him, because the statute did not allow the trial court to determine whether the enchancement was appropriate in light of petitioner's youth and Rehabilitation potential.

Wherefore, Petitioner pray and Request this Honorable court to grant him a new Sentencing hearing at which the 25-year firearm add-on is discretionary

Andre Hilliard
Petitioner:

In The
Circuit Court OF Cook County

People OF The State OF Illinois,) Cir. Ct. No. 13 CR 19087
Respondent,)
)
-VS-)
AndRe Hilliard) Honorable
Petitioner.) Vincent M. Gaughan
) Judge Presiding

Motion To Proceed In Forma Pauperis And To Appoint Counsel

Petitioner, AndRe Hilliard, comes before the court and Respectfully Requests that he be permitted to file the attached Petition for Post-condiction Relief in forma pauperis and to have an attorney appointed to Represent him in this proceeding.

In Support of this Request, Petitioner states:

1.) That he is presently incarcerated in Stateville CORRECTIONAL Center.

2.) That he is without any income OR assets which to the cost of this litigation OR to procure Counsel.

Wherefore, Petitioner prays that he be granted to file and to proceed in forma pauperis in the above Petition for Post-condiction Relief and to have Counsel Appointed to Represent him in this proceeding.

Subscribed And Sworn To Before me
this 16th day of July 2019
Karen Marie Rabideau

Andre Hilliard

State OF Illinois)
County OF Cook) SS
)

AFFIDAVIT

Andre Hilliard, being first duly Sworn on Oath, deposes and Says the following:

Affiant States the facts stated herein Support the claims in Said Post-Conviction Relief Petition, that petitioner's Sentence Violates the Illinois constitution as applied to him, because the Statute did not allow the trial Court to determine whether the enchancement was appropria in light of petitioner's Youth and Rehabilitation potential.

Andre Hilliard
Andre Hilliard

Subscribed And Sworn To
Before me
this 16th day of July 2019.

Karen Marie Rabideau
Notary Public:

KAREN MARIE RABIDEAU
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
July 29, 2019

In The

Circuit Court of Cook County

People of The State of Illinois) 2019AUG 12 AM 8:57 Ct. No. 13CR 19027

Respondent,) CLERK OF CIRCUIT COURT CRIMINAL DIVISION

-VS-) CLERK DOROTHY BROWN

Andre Hilliard) Honorable Vincent M. Gaughan

Petitioner,) Judge Presiding

302 FILED TIME AM PM SEP 19 2019 Dorothy Brown Clerk of the Circuit Court Criminal Division Deputy Clerk Signature

Proof of Service

You are hearby notified that on July 16-19, 2019 I placed the attached Post-conviction Relief Petition and Motion to proceed in forma pauperis in the Stateville prison mail system, to be mailed to the Clerk of the Circuit Court of Cook County.

To: Dorothy Brown
Clerk of the Circuit Court
2650 South California 5th Floor
Chicago, Illinois 60608

To: Kimberly M. Fox
Cook County State Attorney
300 Daley Center
Chicago, Illinois 60602

RECEIVED 2019 AUG 27 PM 12:07 CLERK OF CIRCUIT COURT CRIMINAL DIVISION CLERK DOROTHY BROWN

Andre Hilliard
Andre Hilliard
P.O. Box 112
Joliet, IL 60434

Subscribed And Sworn To
Before Me
this 16th day of July, 2019

Karen Ulane Rabideau
Notary Public

KAREN MARIE RABIDEAU OFFICIAL SEAL Notary Public, State of Illinois My Commission Expires July 29, 2019

PA36

Exhibit A

multiple times during the trial and during closing arguments if he wanted to participate or if he wanted to listen to the proceedings in the lock-up behind the courtroom and he decided that he did not want to be in the courtroom itself, so I'm not considering that at all.

Taking into effect the statutory provisions in aggravation, the statutory provisions in mitigation and the non-stature provisions in mitigation and also he evidence presented at the aggravation and met mitigation phase of the sentencing and pre-sentencing investigation, it's my finding that what's going to happen is Count 6 which is aggravated battery with a firearm is going to merge into Count 3 which is the attempt first degree murder. On the merged Count 3 I'm going to sentence Mr. Hilliard to 15 years in the Illinois Department of Corrections, 3 years mandatory supervised release. On the proven allegation of personally discharging a firearm that proximately caused bodily harm to a person, the minimum on that is 25 years, is that correct, State?

MS. GIANCOLA: Yes, Judge.

THE COURT: And what I'm going to do is

sentence Mr. Hilliard to the minimum on that which will be 25 years consecutive to the merged Count 3.

Mr. Hilliard, you have two rights I have to inform you of, first of all you have a right to have me reconsider your sentence. That means within 30 days you'd have to file a written document stating the reasons why you want me to reconsider your sentence. If you needed the assistance of an attorney to help you prepare that document but you couldn't afford one, I would pay for all the the costs of that attorney; do you understand that?

MR. HILLIARD: Yes, sir.

THE COURT: Did Mr. Hilliard answer.

MR. HILLiARD: Yes, sir.

MR. BARRETT: He said yes, Your Honor.

THE COURT: Thank you. Also you have a right to appeal both the trial and the sentencing and again within 30 days, Mr. Hilliard, you have a right to have an appeal. If you could not afford the appeal, first of all you have to file this written document called a Notice of Appeal within 30 days. If you cannot afford the appeal I would pay for all the costs of your appeal including the

cost of transcripts, filing fees, attorney fees, AND everything; do you understand that?

MR. HILLIARD: Yes, sir.

MR. BARRETT: Your Honor, for the record we did file a motion to reconsider sentence. Tendered a copy to the State. No argument on that motion.

THE COURT: State.

MS. GIANCOLA: Judge, we rest.

THE COURT: Motion to reconsider is denied.

MR. BARRETT: And Your Honor, I have prepared a Notice of Appeal. I will present that to the Court in just one moment.

THE COURT: Mr. Hilliard, do you have any family members here? Anybody here for Mr. Hilliard? If there was, I would let you visit. All right. Thank you.

(Which were all the proceedings had in the above-entitled cause.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Initial Post-Conviction
Plaintiff,	)	
	)	13 CR 1902701
v.	)	
	)	
ANDRE HILLARD,	)	
	)	Hon. Vincent M. Gaughan
Defendant.	)	Judge Presiding

ORDER

Petitioner, Andre Hillard, seeks post-conviction relief from the judgement of conviction entered against him on August 18, 2014. Following a jury trial, petitioner was found guilty of attempted first degree murder 720 ILCS 5/9-1 (720 ILCS 5/8-4) (West 2013) and aggravated discharge of a firearm in violation of 720 ILCS 5/12-3.05(e)(1) (West 2013). Petitioner was sentenced to 40 years for the attempted first degree murder, which included 25 years for the enhanced penalty for personally discharging a firearm. The sentences run consecutively. As grounds for relief, petitioner claims that his 25 year firearm enhancement is unconstitutional because this court failed to consider his age and his record before the sentence.

BACKGROUND AND PROCEDURAL HISTORY

Petitioner's conviction arose following the shooting of Devaul Killingsworth. Petitioner appealed his conviction. *People v. Hillard*, 2017 IL App (1st) 142951-U. On appeal petitioner contended that: (1) the trial court coerced a guilty verdict by failing to

issue a *Primm* instruction, (2) the addition of 25-year firearm sentence is unconstitutionally disproportionate, and (3) his 40-year sentence is excessive considering his youth and lack of prior criminal convictions. The appellate court affirmed the conviction. *Id.* On September 19, 2019, petitioner, *pro se*, filed the instant initial post-conviction petition.

ANALYSIS

The instant petition was filed on September 19, 2019 and is before the court for an initial determination of its legal sufficiency pursuant to Section 2.1 of the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-2.1 (West 2008); *People v. Holliday*, 313 Ill. App. 3d 1046, 1048 (5th Dist. 2000). A post-conviction petition is a collateral attack on a prior conviction, *People v. Simms*, 192 Ill. 2d 348, 359 (2000), and is limited to constitutional issues which were not and could not have been raised on direct appeal. *People v. King*, 192 Ill. 2d 189, 192-93 (2000). Where Petitioner raises non-meritorious claims, the court may summarily dismiss them. *People v. Richardson*, 189 Ill. 2d 401, 408 (2000).

Under the Act, Petitioner enjoys no entitlement to an evidentiary hearing. *People v. Cloutier*, 191 Ill. 2d 392, 397 (2000). In order to obtain a hearing, Petitioner has "to make a substantial showing of a violation of a constitutional right." *People v. Johnson*, 191 Ill. 2d 257, 268 (2000). However, a *pro se* post-conviction petition may be summarily dismissed as frivolous or patently without merit during the first stage of post-conviction review unless the allegations in the petition, taken as true and liberally construed, present the "gist" of a valid constitutional claim. *People v. Edwards*, 197 Ill. 2d

239, 244 (2001). A petition is frivolous and patently without merit where the petition has no arguable basis in either law or fact; *i.e.*, it is based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Hodges*, 234 Ill 2d 1, 23 (2009).

Further, post-conviction proceedings are not a continuation of or an appeal from the original case. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). Therefore, the issues raised on post-conviction review are limited to those that could not be or were not previously raised on direct appeal or in prior post-conviction proceedings. *People v. McNeal*, 194 Ill. 2d 135, 140 (2001).

Petitioner claims that the additional 25-year firearm sentence is unconstitutionally disproportionate. Although petitioner has raised this claim on appeal, the appellate court stated, "Defendant is not forever foreclosed from presenting his as-applied claims in the trial court." *Hillard*, 2017 IL App (1st) 142951-U.

In *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the United States Supreme Court found that the eighth amendment to the United States Constitution "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Following *Miller*, our supreme court has "emphasized that a mandatory sentencing scheme for juveniles prevents the trial court from considering numerous mitigating factors." *People v. Reyes*, 2016 IL 119271, ¶3, (*per curiam*). As a result, our supreme court requires that a sentencing judge "'must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'" *Id* (quoting *Miller*, 567 U.S. at 489). A *de facto* life-without-parole

sentence must "be based on judicial discretion rather than statutory mandates." *Reyes*, 2016 IL 119271, ¶4, 407 Ill. Dec. 452.

In *Reyes*, as in the case at bar, the defendant "had not received an actual life sentence without possibility of parole." *Id* at ¶5. Instead, "the various sentencing statutes to which he was subject had combined in such a way so as to eliminate all judicial discretion and impose on him a mandatory prison term." *Id.* As a result, our supreme court found that the sentence in *Reyes* constituted cruel and unusual punishment, vacated it, and remanded for resentencing, under the new sentencing law for juveniles. *Id.*

Our legislature has enacted a new sentencing law for juveniles, since defendant was sentenced in 2014, that requires a sentencing court to take into account certain mitigating factors and, most importantly for this case, frees the sentencing court from having to impose otherwise mandatory firearm enhancements. *Id* at ¶11. Those enhancements are now a matter of discretion for the sentencing court. *Id.*

Here, petitioner was not a juvenile at the time of the shooting. Petitioner was over the age of 18. Petitioner did not receive the harshest penalty possible. *See People v. Applewhite*, 2016 IL App (1st) 142330. Moreover, section 5-4.5-105 of the Unified Code of Corrections (Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105)) which allows sentencing judges to consider certain factors that distinguish juvenile offenders from adult offenders, and to exercise discretion when deciding to impose a statutory 25 years to life gun enhancement for juvenile offenders. Section 5-4.5-105 only applies to offenses committed "on or after the effective date"—*i.e.*, January 1, 2016. See *People v.*

Hunter, 2016 IL App (1st) 141904, ¶ 44 (holding that section 5-4.5-105 applies prospectively only). Since petitioner committed the offense in August 2013, before the effective date of section 5-4.5-105, the recent change in Illinois' sentencing law does not apply in this case.

CONCLUSION

The court finds that the issue raised and presented by petitioner is frivolous and patently without merit. Accordingly, the petition for post-conviction relief is hereby dismissed. Petitioner's motion for extension of time is denied.

ENTERED: Vincent M Gaughan

Judge Vincent M. Gaughan
Circuit Court of Cook County
Criminal Division

ENTERED
JUDGE VINCENT GAUGHAN-1553
DEC 05 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

DATED: _____

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 31, 2023, the **Brief and Appendix of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email addresses:

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