No. 128186

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FORPETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

CAROLINE E. BOURLAND
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
10/12/2022 10:00 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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NATURE OF THE CASE

Petitioner-Appellant Andre Hilliard appeals from the first-stage summary dismissal of his initial petition for post-conviction relief.

An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUE PRESENTED FOR REVIEW

Andre Hilliard was only 18 years old, with a traumatic background but no prior criminal history, on the date of the attempt murder in this case, for which he received a mandatory 25-year firearm enhancement to his discretionary 15-year sentence. Where multiple districts of the appellate court have found mandatory enhancements unconstitutional as applied to certain juvenile offenders, and courts have also determined late adolescents may rely on the Post-Conviction Hearing Act to demonstrate why adult sentencing statutes are unconstitutional as applied to them, did the circuit court err in summarily dismissing Andre's post-conviction petition at the first stage of proceedings, in which he argued that the mandatory 25-year enhancement violates the proportionate penalties clause of the Illinois Constitution as applied to him?

STATEMENT OF FACTS

Based on events alleged to have occurred on August 6, 2013, the State charged 18-year-old Andre Hilliard with the attempt murder of Devaul Killingsworth and aggravated battery with a firearm. (C. 9, 18-24; R. 265) A jury found Andre guilty on both charges, and also determined he personally discharged a firearm which proximately caused great bodily harm. (R. 422) Specifically, Killingsworth suffered damage to his arm. (R. 272-74) The trial court merged the aggravated battery count into Andre's conviction for attempt murder, and sentenced him to 15 years in prison, along with a mandatory 25-year firearm add-on, for a total of 40 years' imprisonment, to be served at 85%. (C. 57; R. 465) On direct appeal, Andre argued, *inter alia*, that the mandatory firearm enhancement was unconstitutional as applied to him. *People v. Hilliard*, 2017 IL App (1st) 142951-U. (C. 66-85) While otherwise affirming Andre's conviction and sentence, the appellate court took "no position" on his constitutional claim, finding "the factual development necessary for review of defendant's claim is best suited for the trial court." *Id*. at ¶42. (C. 79-80) The court also stated Andre was not "foreclosed from presenting his as-applied claims in the trial court." *Id*. (C. 80) Andre subsequently filed an initial post-conviction petition, arguing again that the mandatory 25-year enhancement is unconstitutional as applied to him, given his young age and other mitigating factors. (C. 90-99, 110-14) The petition was summarily dismissed by the circuit court at the first stage of proceedings, and that order was affirmed on appeal. *People v. Hilliard*, 2021 IL App (1st) 200112.

Trial Evidence

At Andre's jury trial, Killingsworth testified that on August 5, 2013, he visited Altgeld Gardens, in Chicago, to see his grandchildren and their mother, Tracy Chatman. (R. 263-64) At approximately 12:45 a.m. on August 6, 2013, he stood outside Chatman's front door and talked with her next-door neighbors, Janeen and Kreston. (R. 265) When Janeen and Kreston went back inside, Killingsworth turned to go back inside Chatman's house. (R. 266) As he

did so, he heard something behind him. He turned and saw "Dre" running in his direction, holding a gun. (R. 266) Killingsworth had known Dre a few months, as Dre was dating Chatman. (R. 268) Killingsworth and Dre had only spoken a few words to each other and did not get along. (R. 268-69) On the night of the charged events, Dre fired two to five shots in Killingsworth's direction. (R. 269-70) Killingsworth put his arm up to shield himself and ran to a grassy area, where he fell to the ground. (R. 271) During the events, Killingsworth was shot in the arm. (R. 272)

An ambulance transported Killingsworth to the hospital. (R. 272) While in the hospital, Killingsworth identified Andre as the shooter from a photo array. (R. 276-78, 335-36) Killingsworth had surgery to repair two breaks in his arm and remained in the hospital for two days. (R. 273-74, 308) At the time of Andre's trial in June of 2014, Killingsworth still had bullet fragments, plates, and rods in his arm. He was not able to use his arm in the same manner as he could prior to the shooting. (R. 273-74)

On September 19, 2013, police arrested Andre. (R. 352) Subsequently, Killingsworth identified Andre as the shooter in a physical lineup. (R. 339-42)

Fitness Hearing

Prior to jury selection, Andre had an emotional outburst and indicated he did not wish to be present for trial. (R. 109-11) He moved to the bullpen and listened to his trial over an intercom. (R. 114)

Following the jury's guilty verdict, the trial court requested that Forensic Clinical Services examine Andre's fitness. (SEC C. 160) Dr. Nishad Nadkarni interviewed Andre on three occasions, but could not render an opinion on fitness due to Andre's refusal to cooperate. (SEC C. 160-66; R. 444, 449, 452) Dr. Nadkarni believed Andre was malingering certain psychotic symptoms and did not have any serious mental disease or cognitive impairments that would preclude him from understanding the charges or from assisting counsel, if he chose to do so.

(SEC. C. 160-66) Following a fitness hearing, the trial court found Andre fit for post-trial motions and sentencing. (R. 460)

Among the documents reviewed by Dr. Nadkarni were medical records describing Andre's hospitalization in Hartgrove Hospital in July and October of 2009, when Andre was 14 years old. (SEC. C. 183; R. 444) The records show that, in July of 2009, Andre was admitted and remained for two weeks due to agitation, hostility, and breaking a window. He felt very depressed and cried frequently when he was mad. (SEC. C. 350) His father was a drug dealer, who had been picking on him and was very aggressive toward him. (SEC. C. 350) His mother previously hit him with a belt, but that behavior stopped. (SEC. C. 351) Andre had been involved in a lot of fights at school; he was treated for mental health issues in 2004 and 2005; and he had been involved with a gang "since [he] was born," due to his family circumstances and the neighborhood in which he was raised. (SEC. C. 350, 419) The hospital discharged Andre with a provisional diagnosis of recurrent/moderate major depression. His doctor also noted chronic psychosocial and environmental problems. (SEC C. 350) The staff prescribed Andre Celexa and Abilify. (SEC C. 351)

On October 5, 2009, Andre was re-admitted to Hartgrove Hospital, due to severe aggression, fighting with family members, and homicidal ideation. (SEC. C. 183) At the time of admission, Andre presented poor hygiene. (SEC. C. 184) He had not complied with his treatment recommendations following his prior discharge. (SEC C. 247) His mother reported he had been leaving home without authorization, had crying spells and low motivation, and was non-compliant with directions in the home. (SEC C. 184-85) A "major stressor" was that his father had recently disowned him and wanted a paternity test. (SEC. C. 185) The staff reported Andre had limited insight. (SEC. C. 185) He was given Seroquel, and was calm and cooperative by the time of his release. (SEC. C. 185)

Sentencing

Prior to Andre's sentencing hearing, a pre-sentencing investigation report ("PSI") was prepared. (SEC C. 142-45) The report disclosed that his parents never married and that he never had much of a relationship with his father. (SEC. C. 144) He reported his childhood as normal and denied any history of family abuse, substance abuse, or gang involvement. (SEC C. 144-45) The probation officer was not able to verify any of this information because Andre could not provide his mother's contact information. (SEC. C. 144) Andre reported that he suffered from mental illness, but did not wish to discuss his illness with the officer. (SEC C. 145) He graduated elementary school, but did not attend high school. He received social security, but did not know why. (SEC C. 144)

The probation officer noted problems in interviewing Andre. On his first two attempts, Andre would not leave his cell to participate. Once Andre finally met with the officer, he declined to answer most questions, and offered "yes" or "no" answers to almost all the questions he did answer. (SEC C. 159)

At Andre's sentencing hearing on August 18, 2014, neither party presented evidence in aggravation or mitigation. The State requested a sentence above the minimum, relying on the facts of the case and the evidence that Killingsworth was permanently disabled. The State also highlighted how Andre had refused to participate in his trial. (R. 461-62)

Defense counsel noted that Andre was currently 19 years old and had no criminal history. He was close with his mother and siblings, and enjoyed the types of activities that "typically teenagers do enjoy to engage in." Counsel requested the minimum sentence. (R. 463-64) Andre declined to offer a statement in allocution. (R. 464)

The trial court imposed sentence as follows:

> All right. First off Mr. Hilliard has a constitutional [ ] right not to be present at his trial so that doesn't go against him in any way. That's his prerogative.

> He was asked 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 [*sic*] provisions in mitigation and also [t]he evidence presented at the aggravation and [ ] 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?
>
> [STATE'S ATTORNEY]: 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. (R. 464-66)

Defense counsel's motion to reconsider sentence was denied. (R. 467)

Direct Appeal

On direct appeal, Andre argued the trial court erred in failing to give *Prim* instructions to the jury and court abused its discretion at sentencing, and that the mandatory firearm enhancement was unconstitutional as applied to him. The appellate court rejected the first two arguments, affirming Andre's conviction and sentence. *People v. Hilliard*, 2017 IL App (1st) 142951-U, ¶¶20-38, 43-58. Citing *People v. Thompson*, 2015 IL 118151, the court declined to consider Andre's challenge to the enhancement, stating "[W]e are no better suited here to decide defendant's as-applied challenge than was our supreme court in *Thompson*." The court noted further that Andre was "not forever foreclosed from presenting his as-applied claims in the trial court" *Id*. ¶¶40-42.

Post-Conviction Petition

On September 19, 2019, Andre filed his first *pro se* post-conviction petition, the subject

of the present appeal, alleging that the mandatory 25-year firearm enhancement was unconstitutional as applied to him under the United States and Illinois constitutions. (C. 88-105) He asserted that his cognitive abilities at the time of this offense placed him within those of someone 16 to 17 years old. (C. 92) He also indicated he did not exercise sound judgment or decision-making on the night of the offense, but was guided by impulse. (C. 94) He argued it shocked the moral compass of society to require the 25-year enhancement, when he had only been alive eight months longer than a 17-year-old at the time of the offense. (C. 97) Andre also cited his troubling relationship with his father and noted he had not been enrolled in school since fifth grade. (C. 98) He also advanced his rehabilitative potential, where he was never a gang member and was close with his mom and siblings. (C. 99)

On December 5, 2019, the circuit court issued a written order summarily dismissing Andre's post-conviction petition. (C. 110-14) It found: (1) Andre was over 18 at the time of the shooting; (2) he did not receive the harshest sentence possible; and (3) the new statute making firearm enhancements discretionary applies only to juveniles. (C. 113)

On appeal, Andre argued the court erred in summarily dismissing the petition because it set forth an arguable claim that the mandatory 25-year firearm enhancement was unconstitutional as applied to him under the proportionate penalties clause. The appellate court rejected that claim. It held, in a published opinion, that Andre could not seek sentencing relief under the proportionate penalties clause because his aggregate 40-year sentence was not a *de facto* life sentence. *People v. Hilliard*, 2021 IL App (1st) 200112, ¶31. The court cited various eighth amendment decisions from the United States Supreme Court, including *Miller v. Alabama*, 567 U.S. 460 (2012), and held that "[n]othing in *Miller* can be read to suggest simply that mandatory sentences imposed on juvenile offenders violate the eighth amendment." *Id.* The

court also found no similar "suggestion" arose from this Court's decisions in *People v. Thompson*, 2015 IL 118151, or *People v. Harris*, 2018 IL 121932. *Id.*

The appellate court acknowledged *People v. Leon Miller*, 202 Ill. 2d 328 (2002), which found unconstitutional a particular statute as applied to a defendant under the proportionate penalties clause of the Illinois Constitution. *Hilliard*, 2021 IL App (1st) 200112, ¶33. The court further acknowledged that several appellate court decisions had applied *Leon Miller* to find the application of a mandatory firearm enhancement statute unconstitutional as applied to a juvenile offender, even though it resulted in a sentence less than what constitutes a *de facto* life sentence for eighth amendment purposes. *Id.* ¶¶33-37, 46-47, *citing People v. Aikens*, 2016 IL App (1st) 133578, ¶¶37-38, *People v. Barnes*, 2018 IL App (5th) 140378, and *People v. Womack*, 2020 IL App (3d) 170208. However, the court "decline[d] to follow" or "disagree[d]" with these appellate court decisions. *Hilliard*, 2021 IL App (1st) 200112, ¶¶46-47. It held that since Andre did not receive the "most severe penalty possible," he had not stated the gist of a constitutional claim. *Id.* ¶50.

The appellate court denied Andre's petition for rehearing, and this Court granted Andre leave to appeal.

ARGUMENT

Andre Hilliard, an 18-year-old first-time offender, pled the gist of an arguable claim at the first stage of post-conviction proceedings that the mandatory 25-year firearm enhancement attached to his 15-year sentence for attempt murder is unconstitutional as applied to him under the proportionate penalties clause of the Illinois Constitution.

Andre Hilliard argued in his initial post-conviction petition that the mandatory 25-year firearm enhancement attached to his 15-year sentence for attempt murder–which resulted in an aggregate 40-year sentence, served at 85% time–was unconstitutional as applied to him because it deprived the sentencing court of the ability to consider how Andre was only 18 years old at the time of the offense, and other mitigating facts, before being forced to more than double the discretionary sentence it imposed. (C. 88-105) Andre's claim has arguable legal merit where various Illinois courts have found mandatory firearm enhancements unconstitutional as applied to certain youthful offenders and have also allowed late adolescents to rely on the Post-Conviction Hearing Act ("the Act") to develop as-applied challenges to adult sentencing statutes, in accordance with evolving standards of decency. Andre's claim is also arguable under the facts, because substantial mitigating evidence exists to argue that he was immature at the time of this offense and suffering from many of the circumstances that have led courts to treat juveniles differently from adults. Thus, Andre's claim met the low threshold necessary to survive first-stage proceedings.

When considering Andre's petition below, the appellate court agreed that case law supported his claim. *See People v. Hilliard*, 2021 IL App (1st) 200112, ¶¶32-40, 46-48. Nevertheless, the court affirmed the summary dismissal of his petition, finding the cases Andre relied on to be wrongly decided and concluded he could have only made a proportionate penalties challenge if he received a *de facto* life sentence. *Id.* ¶¶46-47, 50. The appellate court's analysis runs afoul of this Court's precedent on the standards applicable at first-stage post-conviction

proceedings and on the proportionate penalties clause. Thus, this Court should reverse the summary dismissal of that petition and remand for second-stage proceedings.

A. The low pleading standards at the first stage of proceedings.

Under the Act, criminal defendants may challenge their conviction or sentence on grounds of constitutional violations through a three-stage process. 725 ILCS 5/122-1 *et seq.* (2019). At the first stage, the circuit court independently reviews the petition to determine if it is frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001); 725 ILCS 5/122-2.1(a). If the court does not dismiss the petition, it advances to the second stage, where counsel is appointed, the State may file a motion to dismiss or an answer to the petition, and the court determines if the petitioner has made a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶35. At the third stage, an evidentiary hearing is held, allowing the parties to develop the record and the court to determine if the defendant has proven a constitutional violation occurred. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006).

Andre's *pro se* petition was dismissed at the first stage. In *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009), this Court emphasized the low pleading standard at this stage, stating "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." A petition lacking an arguable basis in law or fact "is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. at 16. An indisputably meritless legal theory is one which is "completely contradicted by the record;" a fanciful factual allegation is one that is "fantastic or delusional." *Id*. at 16-17.

Whether the petitioner will be able to prevail on his claim is an inappropriate consideration at the first stage; instead, the question is whether the petition is "arguable" on its merits. *Hodges*,

234 Ill. 2d at 22-23. Courts must take the allegations of the petition as true and construe them liberally in the defendant's favor. *People v. Allen*, 2015 IL 113135, ¶41, *citing Edwards*, 197 Ill. 2d at 244. *See also Hodges*, 234 Ill. 2d at 21 (courts must review *pro se* petitions "with a lenient eye, allowing borderline cases to proceed") (internal quotations and citation omitted).

Review of a first-stage summary dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

B. Andre's claim is not indisputably meritless under the law.

Andre alleged that the mandatory 25-year firearm enhancement attached to his discretionary 15-year sentence for attempt murder was unconstitutional as applied to him under the eighth amendment of the U.S. Constitution and the proportionate penalties clause of the Illinois Constitution, because it did not give the trial court discretion to consider his young age or rehabilitative potential before imposing the enhancement. (C. 88-105) Andre's proportionate penalties clause claim is arguable under the law, where: (1) multiple districts of the appellate court have found mandatory firearm enhancements unconstitutional as applied to a juvenile offender, which is arguably consistent with evolving standards of decency; and (2) this Court and the appellate court have held that late adolescents, like Andre, may rely on the Act to seek relief from adult sentencing statutes, which is also arguably consistent with evolving standards of decency.[1]

1. Legal authority supports that a 25-year mandatory enhancement may be unconstitutional as applied to youthful offenders.

Andre was convicted of attempt murder, which carries a sentencing range of between six and 30 years in prison, but also requires a 15-year add-on when the defendant was armed

[1] Andre does not advance his eighth amendment claim here. *See People v. Harris*, 2018 IL 121932, ¶58 (for eighth amendment purposes, "the age of 18 is the legal line separating adults from juveniles").

with a firearm during the offense, 20 years when the defendant personally discharged a firearm, and 25 years to life when the defendant personally discharged a firearm that proximately caused great bodily harm, permanent disability or disfigurement, or death. *See* 720 ILCS 5/8-4(c)(1) (2013); 730 ILCS 5/5-4.5-25(a) (2013). At sentencing, the trial court imposed sentence as follows: "On the merged Count 3 [attempt murder] I'm going to sentence Mr. Hilliard to 15 years in the Illinois Department of Corrections, 3 years mandatory supervised release." (R. 465) The court then asked if 25 years was the minimum sentence that could be imposed on "the proven allegation of personally discharging a firearm that proximately caused bodily harm to a person . . ." (R. 465) When the State answered affirmatively, the court said, "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." (R. 465-66) Thus, while the court used discretion to choose the sentence for Andre's attempt murder conviction, it was not permitted to consider Andre's youth or other mitigating factors before being forced to more than double Andre's 15-year sentence by imposing the mandatory 25-year firearm enhancement upon him as well.[2]

Andre's claim that the mandatory firearm enhancement violates the proportionate penalties clause as applied to him is not indisputably meritless. Article I, section 11, of the Illinois Constitution contains two limitations on penalties, *i.e.*, they must be determined "according to the seriousness of the offense" and (2) "with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. The first clause is referred to as the "proportionate penalties clause," a reference to language contained in earlier state constitutions that "[a]ll penalties shall be proportioned to the nature of the offense." Ill. Const. 1870, art. II, §11; Ill.

[2] Under the Truth-in-Sentencing statute, Andre is eligible to receive 4.5 days of good conduct credit each month he is imprisoned. *See* 730 ILCS 5/3-6-3(a)(2)(ii) (2013). Thus, he could be eligible for release after serving 34 years of his sentence.

Const. 1848, art. XIII, §14; Ill. Const. 1818, art. VIII, §14. *People v. Clemons*, 2012 IL 107821, ¶37. The proportionate penalties clause may be violated: (1) if the penalty is cruel, degrading, or "so wholly disproportionate to the offense committed as to shock the moral sense of the community"; or (2) when identical offenses are given separate sentences. *People v. Sharpe*, 216 Ill. 2d 481, 506-07, 519 (2005) (internal quotations and citation omitted). Under the first test, which is applicable here, 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." *People v. Leon Miller*, 202 Ill. 2d 328, 340 (2002). Our Constitution also requires that statutes "'consider the goals of restoring an offender to useful citizenship . . .'" *Id.* at 338, *quoting People v. Taylor*, 102 Ill. 2d 201, 206 (1984).

a. Three districts of the Appellate Court have applied this Court's precedent to find mandatory firearm enhancements unconstitutional as applied to youthful offenders.

In *Leon Miller*, 202 Ill. 2d 328, 330-32, this Court found a mandatory sentencing statute unconstitutional as applied to a 15-year-old convicted of multiple murders under a theory of accountability, which required life in prison. While affirming the facial validity of the multiple murder statute, this Court held that legislative power "is not without limitation; the penalty must satisfy constitutional constrictions." This Court did not define "what kind of punishment constitutes 'cruel,' 'degrading,' or 'so wholly disproportioned to the offense as to shock the moral sense of the community,'" because "as our society evolves, so too does our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Id.* at 339, *citing Trop v. Dulles*, 356 U.S. 86, 101 (1958). Thus, an as-applied challenge is case-specific and considers the gravity of the defendant's offense in connection with the severity of the statutorily mandated sentence within the community's evolving standard of decency. *Leon*

Miller, 202 Ill. 2d at 340. Applying that analysis, Leon Miller's mandatory life sentence shocked the moral sense of the community, where it precluded the sentencer from "consider[ing] the actual facts of the crime, including the defendant's age at the time of the crime or his or her individual level of culpability." *Id.* at 340-41. Specifically, he had little time to contemplate his decision to participate in the incident, acted as a lookout, and never handled a gun, but received the same sentence as the shooter. *Id.* at 341.

Subsequently, multiple districts of the appellate court have applied the analysis in *Leon Miller* to find statutes requiring mandatory firearm enhancements unconstitutional as applied to particular juvenile offenders. First, in *People v. Gipson*, 2015 IL App (1st) 122451, ¶24, a juvenile was convicted of two counts of attempt murder and sentenced to 52 years in prison, which included six-year terms for each offense, along with a mandatory 20-year firearm add-on for each conviction. The defendant was a principal offender, and his "serious" actions in shooting two men left "severe" injuries. *Id.* ¶73. However, other factors mitigated his culpability, including his age; his "questionable" mental health; the fact that he did not kill anyone; and the absence of any proof that he was irredeemable. *Id.* ¶¶73-77. Thus, the appellate court reversed the defendant's sentence and ordered the trial court to impose appropriate Class X sentences for both counts of attempt murder, "without regard to the mandatory enhancement." *Id.* ¶78.

The appellate court has reached similar results regarding enhancements leading to sentences short of *de facto* life. For example, in *People v. Aikens*, 2016 IL App (1st) 133578, ¶1, the 17-year-old defendant was found guilty as the principal of two counts of attempt murder of a peace officer and sentenced to concurrent terms of 20 years in prison, with an additional 20-year firearm enhancement, for a total of 40 years' imprisonment at 85%. *Id.* ¶28. The appellate court held the mandatory firearm enhancement shocked the conscience of the community and

violated the proportionate penalties clause as applied to the defendant, because it did not allow the trial court to consider that he was young and had no criminal history, or his troubling social history. *Id.* ¶37. The court also considered "the evolving standards for juvenile offenders in this state," including "recent changes that have been made in the way that juveniles are tried and sentenced." *Id*. ¶38. Specifically, effective January 1, 2017, the legislature had passed 730 ILCS 5/5-4.5-105, which rendered firearm enhancements discretionary for juvenile offenders. *Aikens*, 2016 IL App (1st) 133478, ¶38. Thus, the court vacated the defendant's 40-year sentence and remanded for re-sentencing, where the trial court would have discretion on whether to impose the enhancement. *Id*.

In *People v. Barnes*, 2018 IL App (5th) 140378, ¶¶3-4, 27, the Fifth District similarly held that a mandatory 15-year firearm enhancement, which resulted in a 22-year sentence for a 17-year-old convicted of armed robbery, was unconstitutional as applied. Relying on *Gipson* and *Aikens*, the court noted that "the moral compass is changing with regard to juveniles in the justice system." *Id*. ¶26. Thus, while the appellate court acknowledged the trial court had been given discretion to determine what sentence to impose for the underlying robbery, and imposed a sentence one year over the minimum, "the mandatory 15-year firearm enhancement, in effect, required the court to impose a sentence that failed to account for defendant's [lack of] criminal history and rehabilitative potential." *Id.* Thus that enhancement violated "our community's evolving standard of decency." *Id.* ¶¶26-29.

Likewise, in *People v. Womack*, 2020 IL App (3d) 170208, the Third District granted a juvenile offender leave to file a successive post-conviction petition in which he challenged a 20-year firearm enhancement to his 18-year sentence for attempt murder, even though 18 years was not the minimum. *Womack* noted the recent case law demonstrating that imposing

mandatory firearm enhancements on juveniles "no longer reflects Illinois's evolving standards of decency." *Id.* ¶15. While his underlying 18-year sentence for attempt murder was discretionary, "the juvenile status of defendant at the time of the offense and the circumstance[s] surrounding the incident should have some relevance in determining whether to impose the 20-year firearm enhancement." *Id.* ¶17. Thus, the court remanded for second-stage proceedings, "to allow for the requisite factual development" of that claim. *Id.* ¶22.

In short, three districts of the appellate court have found mandatory firearm enhancements unconstitutional as applied to youthful offenders, even when the enhancements did not result in a *de facto* life sentence, and even when the sentence imposed for the underlying offense was discretionary and above the minimum. These decisions show Andre's similar claim that the mandatory 25-year firearm enhancement attached to his discretionary 15-year sentence for attempt murder is unconstitutional as applied to him is not indisputably meritless. *See Hodges*, 234 Ill. 2d at 16.

b. Illinois no longer mandates firearm enhancements on juveniles, and society now recognizes that the legislative purpose of the mandatory enhancements–deterrence–is not a compelling reason to impose a mandatory enhancement on youth.

Proportionate penalties clause analysis considers the defendant's mandatory sentence in light of evolving standards of decency. *Leon Miller*, 202 Ill. 2d at 339. "'[T]he "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." ' " *Graham v. Florida*, 560 U.S. 48, 62 (2010), *quoting Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (*quoting Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). In that regard, effective January 1, 2017, trial courts in Illinois now have discretion to choose whether to impose a firearm enhancement on defendants under 18 at the time of the offense. 730 ILCS

5/5-4.5-105(b). This law represents the current moral compass of our community and demonstrates that society no longer deems it acceptable to mandate this enhanced penalty in every case involving a youthful offender.

Indeed, when the mandatory firearm enhancements were first enacted (through Public Act 91-0404, Senate Bill 1112) (1999)), the legislature passed the law to "send a very strong message that we will not tolerate the use or possession of a firearm when committing a crime . . ." IL Sen. Tran. 91st Gen. Assemb. Reg. Sess., 27th Leg. Day, March 25, 1999, pp. 285-86 (statement of Sen. Dillard) When asked for the legislative intent of the bill, Senator Dillard explained, "[t]he purpose behind the sentence enhancements in Senate Bill 1112 for the use of a firearm in the commission of specified serious felonies is to *deter* the use of firearms in the commission of these violent and serious crimes." *Id*. (emphasis added); *see also* IL House Tran,. 91st Gen. Assemb., 50th Leg. Day, May 13, 1999 (statement of Rep. Turner) (". . . the purpose behind the sentence enhancements in Senate Bill 1112 as amended, is to deter the use of firearms in the commission of criminal offenses."). Thus, the purpose of the enhancements was deterrence. However, evolving standards of decency have shown deterrence has little purpose in justifying harsh sentences imposed on youth. *See People v. Haynie*, 2020 IL App (1st) 172511, ¶34; *People v. Morris*, 2017 IL App (1st) 141117, ¶33; and *Miller v. Alabama*, 567 U.S. 460, 472 (2012) ("Nor can deterrence work in this context, because the same characteristics that render juveniles less culpable than adults–their immaturity, recklessness, and impetuosity–make them less likely to consider potential punishment.") (internal quotations and citations omitted).

The legislative history also reveals that Illinois's mandatory firearm enhancement statutes were modeled after a similar penalty scheme in place in California in the 1990s. *See* IL Sen. Tran. 91st Gen. Assemb. Reg. Sess., 27th Leg. Day, March 25, 1999, pp. 285-86 (statement

of Sen. Dillard). Notably, California no longer makes firearm enhancements mandatory; trial courts now have discretion to strike enhancements for *both* juveniles and adults. *See* CAL PENAL CODE §§12022.3 (eff. Jan. 1, 2022),12022.5(a),(c) (eff. Jan. 1, 2018). Thus, the model on which Illinois's enhancements were based now makes enhancements discretionary for *any* offender, reflecting the trend away from harsh mandatory enhancements like at issue here.

Arkansas, Idaho, Indiana, Louisiana, New Hampshire, New York, Oregon, Vermont, and Wisconsin also make firearm enhancements discretionary, at least for an offender's first offense.[3] *See* AR CODE §§16-90-120(a), 16-90-121 (eff. 2019); ID CODE §19-2520 (2022); IN CODE §§35-50-2.11, 35-50-2-13 (eff. 2022); LA CODE CRIM. PRO. art. 893.3 (eff. 2019); NH REV. STAT. 651:2(II-b) (eff. 2017); NY PENAL L. §§265.08, 265.09 (eff. 2013); OR REV. STAT. §161.610 (eff. 2020); 13 V.S.A. §4005 (eff. 2012); WI STAT. §939.63 (2022). South Carolina similarly leaves it up to the court's discretion whether to impose an enhancement consecutively or concurrently to the sentence for the underlying offense. *See* SC CODE §16-23-490 (eff. 2010). Kansas also provides the court with discretion to impose a firearm enhancement in a case like this one, *i.e.*, attempt murder, only requiring firearm enhancements for drug crimes. *See* KS STAT. §21-6804(h) (eff. July 1, 2022). Hawaii, West Virginia, and Wyoming do not provide *minimum* sentences for the use of a firearm during an offense, only a maximum penalty. *See* HI REV. STAT. §706-660.1(1) (2022); WV CODE §61-7-15a (eff. 2016); WY. STAT. §6-8-101(a) (2022). Kentucky similarly requires that a felony committed with a firearm be penalized one class more severely, but still allows a discretionary sentence within that elevated class. *See* KY REV. STAT. §218A.992 (eff. 2012). Finally, though Montana and Washington have mandatory enhancements, both provide exceptions for juveniles. *See* MT CODE §§46-18-221,

[3]A chart describing the firearm enhancement statutes among the states has been included in the appendix of this brief.

46-18-222 (2022); WA REV. CODE §9.94A.533(3) (eff. 2020); *State v. Houston-Sconiers*, 391 P.3d 409, 416-22 (Wash. 2017) (rejecting all prior decisions that interpreted firearm enhancements as mandatory for juveniles).

Among the states with mandatory minimum firearm enhancements, those mandatory minimum penalties are far less severe than in Illinois. Alaska, Connecticut, Delaware, Georgia, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Virginia only require a minimum of between one and six years for a defendant's first conviction. *See* AK STAT. §12.55.125 (eff. 2019); CT. GEN. STAT. §§53-202j, 202k (1993); 11 DE CODE §1447A (eff. 2019); GA CODE §16-11-106 (2022); IA CODE §902.7 (2022); 17-A ME REV. STAT. §1604 (2022); MD CRIM. LAW CODE §§4-204 (eff. 2014), 4-306 (eff. 2018); MA GEN. L. CH. 265 §18(b) (eff. 2014); MI COMP. L. §750.227b (eff. 2015); MN STAT. §609.11 (eff. 2021); MS CODE §97-37-37 (eff. 2007); MO REV. STAT. §571.015 (eff. 2020); NE CODE §§28-1205 (eff. 2009), 28-105 (eff. 2019); NV REV. STAT. §193.163 (eff. 2007); NM STAT. §31-18-16 (2022); ND CENTURY CODE §12.1-32-02.1 (eff. 2019); OHIO REV. CODE §2929.14 (2022); OK STAT. §§21-1287, 21-1287.1 (eff. 2021); 24 PA. ADMIN. CODE §§303.10, 303-17 (2022); SD COD. STAT. §22-14-12 (2022); TN CODE §39-17-1324 (eff. 2021); VERN. TEX. CODE ANN., PENAL CODE §§12.34 (2009), 12.35 (2017); UT CODE §76-3-203.8 (eff. May 4, 2022); and VA CODE §18.2-53.1 (2022).[4] Likewise, Alabama only requires a minimum enhancement of 10 years. *See* AL CODE §§13A-5-6(a) (eff. 2019), 13A-12-231(16) (eff. 2018).

[4] The enhancement raises to eight years in Connecticut if an assault weapon is used, CT. GEN. STAT. §§53-202j, 202k (1993); and to 10 years in Massachusetts when a machine gun is involved. MA GEN. L. CH. 265 §18(b) (eff. 2014). Pennsylvania employs a points-based matrix to allow for adjustments to the minimum required firearm enhancement, based on additional factors. 24 PA. ADMIN. CODE §§303.10, 303-17.

Colorado and New Jersey have penalty systems that require the defendant receive at least the midpoint of the ordinary sentencing range for the underlying offense, or an enhancement around the same range. *See* CO REV. STAT. §18-1.3-406 (eff. 2018); NJ REV. STAT. §2C:43-6 (eff. 2013). Likewise, the federal firearm enhancement statute requires a five-year enhancement for possession of a firearm, seven years for brandishing a firearm, and 10 years for discharge, with stricter penalties for assault weapons and machine guns. 18 U.S.C.A. 924(c)(1)(A) (eff. June 25, 2022).

Only *two* states–Florida and Rhode Island–have a firearm enhancement scheme similar to Illinois. *See* FL STAT. §775.087 (eff. 2019) (increasing class of felony by one grade for use of a firearm; and requiring minimum 10-year sentence for possession of firearm during offense, 20 years for discharge of firearm, and 25 years for discharge causing death or great bodily harm); RI STAT. 11-47-3.2 (2022) (requiring consecutive 10-year sentence for first offense, 20 years for discharge causing injury to someone other than a police officer, or a life sentence (with discretionary parole) if officer is injured or if discharge resulted in death or permanent incapacity of another person). Thus, only two other states in the country mandate a firearm enhancement similar to what Andre received in this case.

While Andre is not making a facial attack on Illinois's firearm enhancement scheme, these statutes arguably show the evolving standards of decency in the punishment of crimes involving a firearm in this country (*see Graham*, 560 U.S. at 621), and support the Illinois cases finding Illinois's harsh mandatory enhancements unconstitutional as applied to certain juveniles, as well as Andre's claim that the public would be shocked that the trial court was required to impose a 25-year enhancement on him, even though–as will be explained in Part C, *infra*–he was an immature 18-year-old first time offender.

2. Andre's claim is arguable due to his status as a late adolescent.

The cases cited in the prior section involved as-applied challenges made by offenders legally classified as juveniles. On the date of the charged offense, August 6, 2013, Andre was eight months past that line: he turned 18 on December 5, 2012, and was thus classified as a "late adolescent." (SEC C. 142) *See* Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* (Jan. 2022), p.7 (defining late adolescents as those aged 18 to 21).[5] However, this distinction did not render Andre's claim frivolous. To the contrary, additional decisions and legislative changes regarding the sentencing of late adolescents further support Andre's claim, and arguably show he should be given a chance to demonstrate through further proceedings that his firearm enhancement is unconstitutional as applied to him.

a. As-applied challenges may be raised by adults.

Initially, this Court has never limited as-applied challenges under the proportionate penalties clause to juveniles. To the contrary, in *Leon Miller*, 202 Ill. 2d at 336, this Court cited *People v. Morris*, 136 Ill. 2d 157, 159-60 (1990), as instructive authority. In *Morris*, an adult defendant was convicted of possession of an altered temporary registration permit, a Class 2 felony carrying a range of three to seven years' imprisonment. *Id.* at 160. After reviewing the statute in relation to the facts of the defendant's crime, this Court found the application of the statute unconstitutional as applied to him. *Id.* at 163-68. Notably, *Morris* did not make any findings that the statute was unconstitutional because it failed to account for the defendant's youth. *See also People v. Fuller*, 187 Ill. 2d 1 (1999) (addressing as-applied challenge to false report of vehicle theft statute, raised by woman who filed false report against her ex-husband).

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[5] Available at https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence (last visited Sept. 10, 2022).

Accordingly, there are no age limitations on who may raise an as-applied challenge to a statute under the proportionate penalties clause.

b. Andre has additional support for his as-applied challenge due to his status as a late adolescent offender.

Andre also has a special foothold in the law because of his young age, 18, at the time of this offense. This Court, the appellate court, and the Illinois legislature have each promulgated case law or legislation to support that late adolescent offenders may also possess sentencing protection traditionally available only to juveniles. That law is further supported by recent decisions in other states, as well as recent studies on the brains of late adolescents.

i. Illinois decisions and statutes.

First, three opinions from this Court support Andre's ability to develop his claim through further post-conviction proceedings. In *People v. Thompson*, 2015 IL 118151, ¶¶1-4, a 19-year-old defendant challenged–on appeal of a petition for relief from judgment–the mandatory life sentence he received after he killed his father and another woman. The defendant raised a facial challenge to the multiple murder statute, as well as an as-applied challenge. *Id.* ¶17. To support his as-applied challenge, he relied "exclusively on the 'evolving science' on juvenile maturity and brain development that formed the basis of the *Miller* [*v. Alabama*] decision to ban mandatory natural life sentences for minors." *Id.* ¶38. On appeal, this Court rejected the defendant's attempt to bring this claim for the first time on appeal. *Id.* ¶46. However, rather than foreclosing his claim due to his age, it directed him to the Post-Conviction Hearing Act, indicating his constitutional claims could be raised therein, and he could develop a specific record and offer factual support on how the science underlying *Miller v. Alabama* applied to him as a 19-year-old offender. *Id.* ¶38.

This Court issued similar decisions in *Harris*, 2018 IL 121932, and *People v. House*,

2021 IL 125124. *See Harris*, 2018 IL 121932, ¶¶1, 17-48 (reversing decision of appellate court finding minimum 76-year sentence unconstitutional as applied to 18-year-old offender, since challenge was raised for first time on direct appeal; claim should instead be brought in post-conviction proceedings); *House*, 2021 IL 125124, ¶¶9-12 (appellate court prematurely found 19-year-old's life sentence for murder unconstitutional as applied to him at second stage of proceedings; remanded for new second-stage proceedings). Thus, in *Thompson*, *Harris*, and *House*, this Court either encouraged or allowed late adolescents, like Andre, to develop proportionate penalties challenges to mandatory sentencing statutes under the Act.[6]

Further legal support for Andre's claim comes from appellate court decisions that have relied on *Thompson* and *Harris* to advance juvenile-based sentencing claims from late adolescents under the Act. *See, e.g., People v. Ruiz*, 2020 IL App (1st) 163145, ¶¶32-40 (defendant who committed murder at age 18 granted leave to file a successive post-conviction petition challenging his 40-year sentence); *People v. Johnson*, 2020 IL App (1st) 171362, ¶¶13-31 (same for 19-year-old defendant who received life sentence); *People v. Minniefield*, 2020 IL App (1st) 170541, ¶¶37-49 (same for 18-year-old defendant with 50-year sentence); *People v. Bland*, 2020 IL App (3d) 170705, ¶14 (same for 19-year-old who received consecutive 28- and 43-year sentences).

Notably, in *People v. Savage*, 2020 IL App (1st) 173135, ¶¶67-80, the appellate court extended this law to a defendant who was at least 21 years old at the time of the offense.[7] The court began by asserting–as a matter of law–that "Illinois law treats adults under 21 years of

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[6] This Court granted leave to appeal to address whether two 19-year-old offenders demonstrated cause and prejudice to challenge their sentences in successive post-conviction petitions, in the consolidated appeal of *People v. Moore*, No. 126461, and *People v. Williams*, No. 126932 (leave to appeal allowed, and cases consolidated, on Nov. 24, 2021).

[7] The decision at times references the defendant as having been 22 (*see Savage*, 2022 IL App (1st) 173135, ¶59), and other times indicates he was 21. *Id.* at ¶67.

age differently than adults." *Id.* ¶67. Specifically, the court noted that Illinois offers parole to defendants under 21 at the time of the offense, which the legislature entitled the "youthful offender parole" statute. *Id.* ¶68, *quoting* 730 ILCS 5/3-3-9(a)(1.5) (2018). The court noted further that, when urging passage of that bill, House Majority Leader Barbara Flynn Currie "argued that under-21-year-olds are 'young people' who 'do not always have good judgment.'" *Savage*, 2020 IL App (1st) 173135, ¶68, *quoting* 100th Ill. Gen. Assem. House Proceedings, Nov. 28, 2018, at 48-49 (statements of Rep. Currie). *Savage* further noted that the Juvenile Court Act of 1987 defined a "Minor" as "a person under the age of 21 years subject to this Act." *Savage*, 2020 IL App (1st) 173135, ¶68, *quoting* 705 ILCS 405/1-3(2) (2018)).[8] The court also cited other ways Illinois treats under 21-year-olds differently than adults, such as:

> prohibiting sales to them of alcohol (235 ILCS 5/6-16(a)(i) (West 2018)), cigarettes (720 ILCS 675/1 (West Supp. 2019)), and wagering tickets (230 ILCS 10/18(b)(1) (West 2018)); prohibiting their gun ownership without parental permission (430 ILCS 65/4(a)(2)(i) (West 2018)); and limiting Class X sentencing for recidivist offenders to those offenders "over the age of 21 years" (730 ILCS 5/5-4.5-95(b) (West 2018)). *See also People v. Mosley*, 2015 IL 115872, ¶36, 392 Ill.Dec. 588, 33 N.E.3d 137 (a ban on handgun possession by " 'minors' " under 21 does not violate the second amendment); 760 ILCS 20/2(1) (West 2018) (Illinois Uniform Transfers to Minors Act defines an adult as one "21 years of age" or older).

Savage, 2020 IL App (1st) 173135, ¶69.

As *Savage* noted, a recent legislative change allowing for late adolescents under 21 to apply for parole shows an evolving understanding of their reduced culpability, as well as their greater capacity for reform. *See Graham*, 560 U.S. at 62 (general consensus of community is typically reflected in legislature). Specifically, under 730 ILCS 5/5-4.5-115(b), any person

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[8] This definition mirrors the manner in which Illinois historically distinguished between juvenile and adult offenders. *See People ex rel. Bradley v. Superintendent, etc., of Illinois State Reformatory*, 148 Ill. 413 (1894) (upholding a statute that penalized young adults between the ages of 16 and 21 years old differently from adults 21 years old or older).

under 21 at the time of offense, sentenced on or after June 1, 2019, is eligible for parole after serving 20 years for most murder convictions or for aggravated criminal sexual assault, or after serving 10 years for all other offenses, except predatory criminal sexual assault of a child.

When debating this bill (Senate Amendment #1 to House Bill 531, P.A. 100-1182), Representative Parkhurst noted that Illinois did not allow anyone under 25 to rent a car, which stemmed from insurance company research showing young adults lack judgment and are irresponsible. Similar research conducted in the field of juvenile justice now also confirmed the brain is not fully developed until age 25. *See* 100th Ill. Gen. Assem. House Proceedings, 150th Legislative Day Nov. 28, 2018, at p. 50. When asked why age 21 was being used, rather than 18, Majority Leader Currie said the bill was intended to go "a little further than what the Supreme Court required," specifically to include 18, 19, and 20-year-olds, so "they also have the opportunity to go back into the civilized world." *Id*. at p. 54. She explained, "[W]e did that because, as I say, . . . all the brain research shows, that even people as old as 21 and 22 are often impulsive, often engage in risky behavior," leaving "no question that people under the age of 21 fit that description." *Id*. Representative McDermed, a Sentencing Policy Advisory Commission appointee, asserted further that "these long sentences don't do anything to det[e]r crime or to reduce recidivism." *Id*. at p. 61.

Thus, these debates show a deliberate effort from the Illinois legislature to offer greater sentencing protection in Illinois for individuals under the age of 21 than the U.S. Supreme Court established in its own eighth amendment jurisprudence, specifically based on its recognition that late adolescents under 21 possess similar traits that render juveniles less culpable than older adults. Though the legislature chose to render this legislation prospective in application only, the change in the way that Illinois now treats late adolescent offenders still reflects the

evolving standards of decency in Illinois regarding their culpability, and thus provides additional support for Andre's claim. *See Aikens*, 2016 IL App (1st) 133578, ¶38 ("While the[] provisions [making firearm enhancements discretionary to juvenile offenders] do not apply retroactively, they are indicative of a changing moral compass in our society when it comes to trying and sentencing juveniles as adults.").

ii. Recent decisions in other states and scientific studies on the brain development of late adolescents.

The evolving standards of decency regarding the diminished culpability of late adolescent offenders are arguably shown further through recent decisions in other states. For example, the Michigan Supreme Court held in *People v. Parks*, No. 162086, __ N.W.2d __, 2022 WL 3008548 (July 28, 2022), that the Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized statutory sentencing procedure as juveniles. The Court explained that Michigan's cruel or unusual punishment clause was broader than the eighth amendment, because–like Illinois's proportionate penalties clause–it was "informed by 'evolving standards of decency that mark the progress of a maturing society'" and "requires that sentencing decisions be proportional." *Id.* at *9-10. *Cf. Leon Miller*, 202 Ill. 2d at 339 (proportionate penalties clause analysis considers evolving standards of decency).

The Court determined that a "clear consensus" existed from "a multitude of reliable studies on adolescent brain and behavioral development" in the years following *Miller* "that late adolescence–which includes the age of 18–is a key stage of development characterized by significant brain, behavioral, and psychological change," which "shares key hallmarks of adolescence." *Parks*, 2022 WL 3008548, *13. This science showed: (1) late adolescents are hampered in their ability to make decisions and exercise self-control (*id.*, *citing* National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing*

Opportunity for All Youth (Washington, DC: The National Academies Press, 2019), pp. 37, 51-52); (2) late adolescence is characterized by impulsivity, recklessness, and risk-taking (*Parks*, 2022 WL 3008548, *13, *citing* Willoughby et al., *Examining the Link Between Adolescent Brain Development and Risk Taking from a Social-Developmental Perspective*, 83 Brain & Cognition 315, 315-20 (2013)); (3) the prefrontal cortex is not fully developed until age 25 (*Parks*, 2022 WL 3008548, *13, citing *The Promise of Adolescence: Realizing Opportunity for All Youth*, p. 51, and Arain et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 449-50, 453-54 (2013)); and (4) late adolescents are less fixed in their traits and more susceptible to change as they age. *Parks*, 2022 WL 3008548, *14, *citing* Aoki, Romeo, & Smith, *Adolescence as a Critical Period for Developmental Plasticity*, 1654 Brain Res. 85, 85 (2017), and Tanner & Barnett, *The Emergency of "Emerging Adulthood": The New Life Stage Between Adolescence and Young Adulthood*, in *Handbook of Youth and Young Adulthood: New Perspectives and Agendas* (New York: Routledge, 2009), pp. 39-42.

In *Matter of Monschke*, 482 P.3d 305, 306, 356-26 (Wash. 2021), the Washington Supreme Court also found mandatory life sentences for 18-to-20-year olds convicted of aggravated murder violated the state constitution. The Court explained that "[m]odern social science, our precedent, and a long line of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood." *Id.* Thus, Washington courts must now determine which individual defendants merited leniency, and must exercise discretion before imposing a life sentence on an 18-, 19-, or 20-year-old offender. *Id.* at 329.

Similarly, in *Commonwealth v. Watt*, 146 N.E.3d 414, 419, 426-27 (Mass. 2020), an 18-year-old homicide offender argued his mandatory life sentence was unconstitutional because the same developmental traits that exist for those under the age of 18 apply to those between

18 and 22 years old. Addressing that argument, the Court noted that, over the past six years, it had repeatedly declined to make the extension requested by the defendant. *Watt*, 146 N.E.3d at 428. Yet the Court acknowledged further that "research in this area has progressed" and now showed that certain brain functions were not likely to be fully matured until around age 22. Thus, the Court concluded it was now "time for [the Court] to revisit the boundary between defendants" who were 17 and 18 years old, remanding the cause for a record on the issue. *Id.*

Neurological and social studies offer even more support for Andre's claim. These studies show, *inter alia*, not only that late adolescents engage in the same risky behavior as juveniles, but that risky behaviors actually "peak" in late adolescence. *See White Paper*, *supra*, p. 11, *citing* Willoughby et al, *supra*, and Stone, A., et al, *Review of Risk and Protective Factors of Substance Use and Problem Use in Emerging Adulthood*, 37 Addictive Behav. 747, 747-75 (2012). *See also White Paper*, supra p. 38 (violent crime peaks at ages 17-19 and decreases in the early twenties). These studies also demonstrate late adolescents are highly sensitive, which can interfere with self-control and renders them susceptible to emotionally driven decisions, impulsive behavior, and poor judgment. *See White Paper*, *supra*, p. 13, *citing* Steinberg, L., *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Development Rev. 78 (2008), and Dienke Bos et al, *Distinct and Similar Patterns of Emotional Development in Adolescents and Young Adults*, 62 Development Psychobiology 591 (2000). Late adolescents are also unable to separate themselves from disadvantaged homes or turbulent neighborhoods, which has "significant consequences for behavior, brain development, and future life outcomes." *See* White Paper, *supra*, p. 22, citing De Marco, A. & Berzin, S., *The Influence of Family Economic Status on Home-Leaving Patterns During Emerging Adulthood*, 89 Families in Society 208, 208-18 (2008). The studies also show, however, that late adolescents are highly amenable

to rehabilitation and can be reformed, particularly when they receive positive feedback. *See White Paper*, *supra*, pp. 36-37, *citing* Insel C. et al, *Development of Corticostriatal Connectivity Constrains Goal-Directed Behavior During Adolescence*, 8 Nature Comm. 1 (2017); and Wouter can den Bos et al., *Striatum-Medial Prefrontal Cortex Connectivity Predicts Developmental Changes in Reinforcement Learning*, 22 Cerebral Cortex 1247 (2012).

In short, various legal sources regarding mandatory firearm enhancements and late adolescents combine to support Andre's claim and to allow a non-frivolous argument that his mandatory 25-year firearm enhancement is unconstitutional as applied to him. Thus, at this early stage, where post-convictions petitions are reviewed with leniency and may only be dismissed if they are frivolous, Andre's legal claim is not indisputably meritless, and was sufficient to survive first-stage review. *See Hodges*, 234 Ill. 2d at 16-18.

C. Andre's claim is not frivolous under the facts.

Not only is Andre's claim arguable under the law, but his factual claim is also not fantastic or delusional because the record contains arguable evidence of his immaturity and other mitigating factors. First, the record contains medical records documenting hospitalizations at Hartgrove Hospital, where Andre stayed for two separate two-week periods of time in July and October of 2009, when he was 14 years old. (SEC C. 183; R. 444) Among other things, these records show Andre suffered a difficult childhood. When he was first admitted in July of 2009, his father–a drug dealer–had been picking on him and was very aggressive toward him. (SEC. C. 350) When Andre was admitted again in October of 2009, his father had disowned him and wanted a paternity test, which the staff reported as a "major stressor" in Andre's life. (SEC. C. 183-85) *See* 730 ILCS 5/5-4.5-105(a) (3) (2017) (trial courts now consider "any history of parental neglect, physical abuse, or other childhood trauma" when sentencing juvenile and

determining whether to apply firearm enhancement).

Next, in Andre's post-conviction petition, he denied being an official member of a gang. (C. 99) However, when he was hospitalized in 2014, he noted that, due to his family circumstances and the neighborhood in which he grew up, he had been involved with the Gangster Disciplines in at least some capacity "since [he] was born." (SEC. C. 419) At the second stage of proceedings, appointed post-conviction counsel can flesh out the full extent of Andre's gang involvement, and assess whether any involvement impacted his actions here. However, at this early stage of proceedings, even the fact that Andre was *surrounded* by gangs was arguably mitigating. After all, at the time of these events, Andre was only 18, the average age of a high school senior. Among the primary reasons why the U.S. Supreme Court determined children are less culpable than adults is because they have limited 'control over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 567 U.S. at 471, *quoting Roper v. Simmons*, 543 U.S. 551, 569 (2005). *See also* White Paper, *supra*, p. 22 (late adolescents in impoverished environments also unable to separate themselves from disadvantaged homes and turbulent neighborhoods). Here, Andre's youth was flanked by negative influences, with his drug-dealing father on one side and neighborhood gang activity on the other. Moreover, while Andre was apparently alone at the time of this offense, the adverse influences surrounding him still arguably affected his development and criminal behavior. *See Miller*, 567 U.S. at 472 ("numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency").

Another striking fact the trial court should have been permitted to consider before imposing the firearm enhancement is the fact that Andre never attended high school. (C. 98, 144) At the most basic level, Andre's lack of education and absence from the structured setting of a

school during his teen years arguably supports his continued immaturity at age 18. This fact also arguably demonstrates the absence of a stable home life during his teenage years, including the absence of a positive adult role model who ensured he went to school. *See People v. Lusby*, 2020 IL 124046, ¶89 (Neville, J., dissenting) (evidence that defendant's siblings had criminal history was "evidence that indicates a dysfunctional home environment, which is a recognized mitigating factor against imposing a *de facto* life sentence on a juvenile offender").

The records from Hartgrove Hospital also show Andre suffered mental health issues. When he was first hospitalized in July of 2009, he felt very depressed and cried frequently. (SEC. C. 350) He had been involved in fights and treated in 2004 and 2005 for mental health issues. (SEC. C. 350) Hartgrove staff gave Andre a provisional diagnosis of recurrent/moderate major depression, noted chronic psychosocial and environmental problems, and prescribed Celexa and Abilify. (SEC C. 350-51) However, Andre returned in October of 2009, at which time he had been "chronic[ally] noncomplian[t]" with his treatment protocol and presented with poor hygiene. (SEC. C. 184) The fact that Andre did not comply with his treatment protocol and presented with poor hygiene raises further concerns about his home environment, where his parents bore responsibility for making sure he took his medication and engaged in other treatment recommended by his doctors.

Andre's mental health problems were also arguably mitigating in their own right. *See Savage*, 2020 IL App (1st) 173135, ¶¶67-80 (21- or 22-year-old defendant stated arguable claim that *de facto* life sentence was unconstitutional was because he had mental health issues and drug addiction, which arguably affected his maturity). During Andre's second hospitalization, he was prescribed Seroquel. In stark contrast to how he presented when admitted, when on Seroquel, he became calm and cooperative. (SEC. C. 185) The doctors thus prescribed Andre

with continued use upon discharge. (SEC C. 186)

Andre's improvement during his second hospitalization arguably shows he performs well when surrounded by a positive support system and prescribed the proper medication. However, following his second hospitalization, he was released back into the same home in which he had previously failed to stick to his treatment plan. Though the record contains no information on Andre's mental health at the time of this offense, it is at least arguably likely that Andre again stopped taking his medication, since he had done so in the past. In fact, when Dr. Nadkarni testified that, when he asked Andre whether he was taking any medications in jail, Andre said "they" said he should, but he refused. (R. 445)

To be sure, Dr. Nadkarni opined that Andre had no serious mental illness that impacted his fitness. (SEC. C. 160-66) However, Andre's fitness for trial does not defeat an arguable claim that he may not have been taking the proper medication for a disorder that affected his mood and behavior at the time of his offense. *See* 730 ILCS 5/5-5-3.1(a)(16) (2013) (trial court "shall" consider in mitigation whether defendant was suffering from mental illness that may have affected his behavior at the time of the offense, even if defendant's illness was insufficient to establish defense of insanity); *Gipson*, 2015 IL App (1st) 122451, ¶74 (application of mandatory firearm to juvenile shocked moral sense of the community in large part because defendant was "clearly not at his peak mental efficiency when the shooting occurred," and because record suggested his mental health had "improved in the more recent past, at least to some degree").

Additional evidence arguably reflecting Andre's immaturity was shown in his courtroom behavior. On the first day of jury selection, Andre had an emotional outburst and chose to sit through trial in the bullpen. (R. 109-11, 114) The probation officer who prepared Andre's PSI after trial also reported Andre was "uneasy" and "unsettled" with the interview process.

(SEC. C. 145-46) He refused to be interviewed on multiple occasions; and when he finally agreed, he did not answer most questions or gave "yes" or "no" answers. (SEC. C. 145-46) When determining whether to impose a firearm enhancement on a juvenile, trial courts must now consider the degree to which he was able to meaningfully participate in his defense. *See* 730 ILCS 5/5-4.5-105(a)(7). This mandate reflects the recognition from the U.S. Supreme Court that young offenders are often unable to "deal with police officers or prosecutors," and may also lack the capacity "to assist his own attorneys." *Miller*, 567 U.S. at 477-78. "Juveniles mistrust adults" and often see the criminal justice system "as part of the adult world a rebellious youth rejects . . ." *Graham*, 560 U.S. at 78. Thus, the fact that Andre did not cooperate during trial, and indeed worked against his own interest by refusing to be present and by not being forthcoming about the mitigating aspects of his life to the probation officer, further arguably demonstrates his immaturity at the time of trial, and one year earlier during these events.

Regarding the circumstances of this offense, the trial evidence showed that Andre was dating the mother of the grandchildren of the victim, Devaul Killingsworth, and that Andre and Killingsworth did not get along, even though they had only spoken a few words to each other. (R. 268-69) The record also shows that, for reasons unknown, Andre came from nowhere and fired shots in Killingsworth's direction on August 6, 2013. (R. 269-71) In his post-conviction petition, Andre explained he was guided by impulse and that his decision-making did not involve sound judgment. (C. 94) Nothing rebuts that assertion or indicates any prior level of planning. *See Allen*, 2015 IL 113135, ¶41 (at first stage of proceedings, all allegations in petition not positively rebutted by record must be taken as true); 730 ILCS 5/5-4.5-105(a)(6) (absence of prior planning from defendant is now a mitigating factor that must be considered before imposing a firearm enhancement on a juvenile). Andre's impulsive behavior is yet more evidence

to support an argument that his brain was still developing at the time of the offense.

Another compelling factor that the court was not permitted to consider before imposing the mandatory 25-year enhancement is the fact that Andre had absolutely no juvenile or adult criminal history prior to this offense. (SEC. C. 144) *See Aikens*, 2016 IL App (1st) 133578, ¶37 (relying heavily on the absence of any prior criminal history to find a mandatory firearm enhancement violated proportionate penalties clause); *Barnes*, 2018 IL App (5th) 140378, ¶25 (same). The absence of any criminal history is remarkable given Andre's troubling social history and his problems in dealing with his aggression and anger. It is also arguable evidence of Andre's rehabilitative potential, further demonstrated by the positive changes he made when properly medicated at Hartgrove Hospital, and by the fact that his mother and siblings continue to support him. (C. 99; SEC C. 185) Even children who commit "heinous crimes" are capable of change. *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016); s*ee also Parks*, 2022 WL 3008548, *14 (citing studies to support that developing brain of late adolescents also renders them more susceptible to change).Yet the mandatory 25-year firearm enhancement created a 40-year sentence that can only hinder Andre's rehabilitative potential, allowing his release at a time when his mother may no longer be living and his chances of finding meaningful employment greatly reduced. *See People v. Kosanovich*, 69 Ill. App. 3d 748, 752 (1st Dist. 1979) ("long periods of confinement have little, if any, value in a rehabilitative strategy").

Finally, proportionate penalties clause analysis also considers the gravity of the defendant's offense. *Leon Miller*, 202 Ill. 2d at 340. In this case, the trial court chose 15 years for Andre's offense of attempt murder, so the 25-year firearm enhancement punished Andre specifically for his discharge of a firearm during that offense, which proximately caused bodily harm. While there is no dispute that Andre's discharge of a firearm was serious and caused bodily harm–which

continued to impact Killingsworth at the time of Andre's trial one year later–Killingsworth only suffered wounds to his arm; he was not shot anywhere else. (R. 465-66) *Cf. Gipson* 2015 IL App (1st) 122451, ¶73 (mandatory 20-year firearm enhancements for juvenile convicted of two counts of attempt murder with a firearm were unconstitutional as applied to defendant, even though he inflicted "severe" injuries on two men). Yet the mandatory 25-year firearm enhancement imposed on Andre is the same minimum penalty required if he had inflicted near-fatal, or even fatal, wounds on Killingsworth. *See* 720 ILCS 5/8-4(c)(1)(D). The trial court also considered the relevant factors in aggravation when fashioning Andre's sentence for attempt murder (R. 464-65), including that Andre's conduct caused serious harm. *See* 730 ILCS 5/5-5-3.2(a)(1) (2013). Thus, the fact that the trial court was not given any discretion to decide whether the fact that this harm came from a firearm also justified the 25-year enhancement is arguably shocking to the community and disproportionate to the gravity of this offense, particularly since this was Andre's first offense. (SEC. C. 144)

Nothing in the record renders Andre's claim fanciful under the facts. To the contrary, the record confirms the trial court could not consider a number of compelling factors in mitigation before attaching the mandatory 25-year firearm enhancement to Andre's sentence. (R. 464-66) *See Hodges*, 234 Ill. 2d at 16-21.

D. The appellate court incorrectly applied the procedure governing first-stage *pro se* post-conviction petitions as well as substantive Illinois law addressing the proportionate penalties clause.

Despite the law and facts cited above, the appellate court found Andre's claim legally frivolous. Specifically, the court focused on how, even with the mandatory enhancement, Andre received an aggregate 40-year sentence. *Hilliard*, 2021 IL App (1st) 200112, ¶¶22, 40, 50. The court held that since Andre's sentence "did not equate to a *de facto* life sentence, it did

not qualify for *Miller* type protections." *Id.* ¶¶39-40. For the same reason, the court determined that *Aikens*, 2016 IL App (1st) 133578, *Barnes*, 2018 IL App (5th) 140378, and *Womack,* 2020 IL App (3d) 170208, were wrongly decided. *Hilliard*, 2021 IL App (1st) 200112. ¶¶34, 39. *See also People v. Nichols*, 2021 IL App (2d) 190659, ¶25 (stating in *dicta* that *Aikens* and *Barnes* were "questionable" following *Buffer*, since defendants did not receive life sentences). This reasoning should be rejected by this Court, where: (1) a court's disagreement with case law supporting a petitioner's claim is not a valid procedural reason for summary dismissal; (2) the court's substantive finding that only defendants with the most severe sentences may raise proportionate penalties challenges to sentencing statutes is incorrect and will create unjust results in Illinois.

1. The appellate court's disagreement with existing precedent was not a valid basis for summary dismissal.

First, neither the appellate court's disagreement with the cases supporting Andre's claim, nor even a split in appellate court authority on this law, was a valid basis to dismiss this claim at the first stage of proceedings. As noted in Part A, *supra*, a petition may only be summarily dismissed if it is "patently without merit," meaning it has "*no* arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 12; 725 ILCS 5/122-2.1 (emphasis added). Two recent appellate court decisions are instructive.

First, in *People v. Zumot*, 2021 IL App (1st) 191743, ¶¶1-2, the First District addressed a first-stage petition in which a 19-year-old challenged his 45-year sentence as having been imposed without a consideration of his youth. The circuit court dismissed the petition because the defendant was the principal offender, which the court found to "operate[] as a bar" to his claim. *Id.* ¶37. On appeal, the court acknowledged "a case-law split has emerged on whether a defendant's degree of culpability, including participation as principal, can preclude him or

her from raising an as-applied, youth-based proportionate penalties challenge." *Id.* ¶38 (collecting cases). However, it also found the split could not justify summary dismissal of the *pro se* petition. It held, "despite the State's disagreement with th[e] holdings [of cases allowing principal offenders to challenge their sentences,] the existence of [those] cases . . . precludes a finding that [Defendant's] status as a principal offender categorically prevents him from stating the gist of an as-applied, youth-based proportionate penalties claim." *Id.* ¶39. Thus, his petition should have advanced to the second stage of proceedings. *Id.* ¶¶39-44.

The Fourth District reached a similar conclusion in *People v. Chambers*, 2021 IL App (4th) 190151. There, the court found the State made reasonable arguments addressing problems in an 18-year-old offender's post-conviction challenge to his sentence. *Id.* ¶¶79-80. Yet the court also determined the State's points served merely as "arguments . . . made in favor of summary dismissal." *Id.* ¶81. The court noted further, "[b]ut arguments can be made against the summary dismissal too." *Id.* Specifically, the defendant cited decisions that conflicted with the State's cases and supported his claim. *Id.* The court thus held:

> In the extremely undemanding first stage of the postconviction proceeding, Chambers has a foothold in appellate court case law. All that we require of a *pro se* petition is that it be arguable [citation], and to call the *pro se* petition in this case not arguable, we would have to call some decisions by the appellate court ... not arguable–which, of course, would be untenable. *Id.* ¶81.

The opinions in *Zumot* and *Chambers* find support in this Court's precedent. For example, in *Hodges*, 234 Ill. 2d at 11-12, this Court found Illinois Supreme Court Rule 137–which authorizes sanctions for frivolous suits or pleadings–relevant in defining "frivolous" in the Act as well, noting that a frivolous pleading under Rule 137 is one "without *any* basis in law." *Id.* at 12 (emphasis added). Under that definition, if some case law exists to support a post-conviction claim, it is not without *any* legal basis and cannot be frivolous.

People v. Cathey, 2012 IL 111746, is also instructive. In *Cathey*, the defendant argued in his *pro se* post-conviction petition that he received ineffective assistance on direct appeal because counsel did not argue that the trial court erred by delaying ruling on the admissibility of his prior convictions in impeachment until he testified, in violation of *People v. Patrick*, 223 Ill. 2d 95 (2009). *Id.* ¶¶1, 19. The circuit court summarily dismissed the petition, and the appellate court affirmed, finding the claim frivolous because *Patrick* was not decided until after the defendant's direct appeal. *Cathey*, 2012 IL 111746, ¶25. This Court, however, found the appellate court's analysis "misplaced." *Id.* ¶26. It noted that while *Patrick* was not decided until after the defendant's direct appeal, several appellate decisions had addressed the issue during the time of the defendant's trial and appeal. *Id.* ¶28. Authority from other jurisdictions, which were cited in *Patrick*, had also found error in not ruling on the admissibility of a defendant's prior conviction until after the defendant testified. *Id.* Further, appellate counsel had notice of the issue because trial counsel argued in the trial court that the timing of the court's decision was important. *Id.* ¶27. Given these factors, it was "at least arguable" that appellate counsel's failure to challenge the delayed ruling was deficient. *Id.* ¶29.

Cases interpreting the federal *in forma pauperis* statute further support *Zumot* and *Chambers*. *See Hodges*, 234 Ill. 2d at 12 (noting that the Act was patterned after federal *in forma pauperis* statute and finding cases interpreting federal statute instructive); *People v. Sanders*, 238 Ill. 2d 391, 417-18 (2010) (Freeman, J., concurring) (this Court has "traditionally relied upon federal case law in interpreting and applying the Act"). The frivolous standard for *in forma pauperis* complaints "requires that a court . . . assess an *in forma pauperis* complaint from an objective standpoint in order to determine whether the claim is based on an indisputably meritless legal theory or clearly baseless factual contention." *Deutsch v. United States*, 67

F.3d 1080, 1086-87 (3d Cir. 1995). *Accord Bieregu v. Ashcroft*, 259 F.Supp. 342, 346 (Dist. Ct. N.J. 2003). An objective analysis of a *pro se* claim would focus on whether case law exists to support that claim, not the court's own subjective beliefs about that law. Otherwise, as occurred here, a defendant's ability to develop his *pro se* claim will depend upon which court happens to review his petition and create disparate treatment for defendants in Illinois.

The Eleventh Circuit Court of Appeals decision in *Weeks v. Jones*, 100 F.3d 124 (11th Cir. 1996), is instructive. There, the petitioner challenged his death sentence on the grounds of his mental incompetence. *Id.* at 125-26. On appeal, the court held, *inter alia*, that, per *Neitzke v. Williams*, 490 U.S. 319 (1989), an indigent litigant's claims are only "frivolous" when they lack an arguable basis in law or fact. *Weeks*, 100 F.3d at 127. Weeks's petition had an arguable basis in fact because his mental health history was documented in the record. *Id.* at 128. He also based his legal claim by citing a plurality opinion from the U.S. Supreme Court. *Id.* While other circuits had since adopted different legal definitions of mental competency to be executed, that issue had not yet been decided by the Eleventh Circuit when the petitioner filed his petition. *Id.* Thus, since there existed at least *some* case law to support his claim, it was not frivolous. *Id. See also Corgain v. Miller*, 708 F.2d 1241 (7th Cir. 1983) ("an action is frivolous only if the petitioner can make *no* rational argument in law or facts to support his claim for relief," even if claim may ultimately prove unmeritorious) (emphasis added); *Ragan v. Cox*, 305 F.2d 58, 59-60 (10th Cir. 1962) (issues raised by petitioner were not frivolous, since he made a rational argument on law and facts, and trial court wrongly dismissed the petition based on its own belief that claims were without merit); *Briggs v. Women in Need, Inc.*, 819 F.Supp. 119, 125 (E.D. N.Y. 2011) (citing Second Circuit decisions to state courts reviewing complaints filed *in forma pauperis* must "interpret them as raising the strongest arguments they suggest,"

and grant when reading "gives any indication that a valid claim might be stated").

Thus, in *Weeks*, the petitioner's claim was non-frivolous, even though numerous decisions from other courts had rejected similar claims, since he was able to cite one opinion that supported his claim that had not yet been rejected by the Eleventh Circuit. Here, cases from *three different* districts of the Appellate Court supported Andre's petition, including one case from the First District, the same district that had jurisdiction over Andre's petition. *See Aikens*, 2016 IL App (1st) 133578, ¶38. Moreover, only this Court–not the First District of the Appellate Court–has the power to overrule decisions from other districts and panels of the appellate court. *In re Marriage of Gutman*, 232 Ill. 2d 145, 149-50 (2008). Thus, while the appellate court's arbitrary rejection of these three cases joined *dicta* from another court (*Nichols*, 2021 IL App (2d) 190659) to create a split in appellate court authority on whether youthful offenders who did not receive a life sentence may challenge a mandatory sentencing enhancement, it did not overrule the cases supporting Andre's claim. Given that authority in good standing, Andre's legal claim was sufficient to withstand first-stage post-conviction review. *See Hodges*, 234 Ill. 2d at 11-13.

2. The appellate court erroneously limited as-applied challenges under the proportionate penalties clause to *de facto* life sentences.

The appellate court also erred substantively by limiting as-applied challenges under the proportionate penalties clause to defendants who received *de facto* life sentences. Throughout its opinion, the court repeatedly asserted that Andre was seeking "*Miller* protections," *i.e.*, relying on the U.S. Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, to challenge the 25-year firearm enhancement. *Hilliard*, 2021 IL App (1st) 200112, ¶¶28-50. The court concluded this type of "as-applied constitutional challenge is rooted in a line of cases providing heightened protections for juvenile defendants in sentencing under the eighth amendment of the United States Constitution, which prohibits cruel and unusual punishment." *Id.* ¶21 (*citing*

Roper, 543 U.S. 551, *Graham*, 560 U.S. 48, and *Miller*, 567 U.S. at 479). The court incorrectly believed the proportionate penalties clause was only relevant insofar as *Thompson*, 2015 IL 118151, and *Harris*, 2018 IL 121932, extended *Miller v. Alabama* to young adults. *See Hilliard*, 2021 IL App (1st) 200112, ¶¶25, 37. Under the court's confused reasoning, since *Miller v. Alabama* only covers *de juris* or *de facto* life sentences, Andre could not rely on the proportionate penalties clause to challenge his mandatory enhancement because he did not receive the "most severe penalty possible." *Id.* ¶50. Andre's claim was rooted in *Leon Miller*, not *Miller v. Alabama*; and the proportionate penalties clause has never been limited only to the harshest penalties in Illinois.

a. The appellate court's holding is inconsistent with this Court's precedent.

The plain language of the proportionate penalties clause indicates that "*[a]ll* 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. I, §11 (emphasis added). Thus, *all* penalties in Illinois must comply with this constitutional mandate; not just the most severe sentences. Indeed, this mandate applies not just to criminal statutes, but to sentences as well. *See, e.g., People v. St. Pierre*, 146 Ill. 2d 494, 513 (1992) (criminal sentences in Illinois must be proportionate to seriousness of crime and give adequate consideration to rehabilitative potential of defendant); *People v. Geiger*, 2012 IL 113181, ¶¶20-32 (20-year sentence for contempt manifestly disproportionate to defendant's actions); *People v. Maggette*, 195 Ill. 2d 336, 354-55 (2001) (10-year sentence for residential burglary manifestly disproportionate to nature of offense).

While eighth amendment case law on the sentencing of young offenders has been limited to life sentences, the Illinois Constitution affords broader sentencing protection. *Gipson*, 2015 IL App (1st) 122451, ¶¶69-78; *see Clemons*, 2012 IL 107821, ¶¶36, 38-41 (eighth amendment

and proportionate penalties clause "are not mirror images" and the latter provides greater protections). In *Leon Miller*, 202 Ill. 2d 328, this Court held in 2002–a full decade before *Miller v. Alabama* in 2012, and three years before *Roper* in 2005–that mandatory sentencing schemes may be unconstitutional as applied to a youthful offender under the proportionate penalties clause, when "the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *Id.* at 338. Thus, *Leon Miller* does not depend on eighth amendment law, and the proportionate penalties clause is not limited by the precedent of the U.S Supreme Court interpreting the eighth amendment. *See People v. Davis*, 2014 IL 115595, ¶¶45 ("in *Leon Miller*, this court expressly recognized the special status of juveniles offenders prior to *Roper*, *Graham*, and *Miller*").

Moreover, while *Leon Miller* addressed a mandatory life sentence, sentences short of that severe penalty have also been addressed under the proportionate penalties clause. For example, the first time this Court utilized the proportionate penalties clause to assess whether a sentencing statute shocked the moral sense of the community appears to have been in *People ex rel. Bradley v. Superintendent, etc., of Illinois State Reformatory*, 148 Ill. 413 (1894). In *Bradley*, this Court addressed a statute penalizing the commission of a burglary by young adults, aged 16 to 21, to 20 years in the Illinois State Reformatory, with discretion for the Reformatory to terminate the sentence earlier. *Id.* at 417-21. This Court reasoned, "[w]hen the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel or unusual or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment, not known to the common law, or is a degrading punishment which had become obsolete in the state prior to the adoption of its constitution, or is so wholly

disproportioned to the offense committed as to shock the moral sense of the community." *Id.* at 421-22, *citing In re Bayard*, 25 Hun 546 (Sup. Ct. N.Y., Nov. Term, 1881). Applying that analysis, this Court found the mandatory imprisonment in the Reformatory of defendants under 21 for burglary did not shock the moral sense of the community, where adults convicted of the same offense were imprisoned in the penitentiary "and to solitary confinement or hard labor therein." *Bradley*, 148 Ill. at 422-24. Since the Reformatory was required to reform younger offenders, including making arrangements for employment upon release, the penalty adequately reflected "the law of nature, as well as in the law that governs society" to have a "marked distinction between persons of mature age and those who are minors," and did not violate the proportionate penalties clause. *Id.*

Bradley does not include as any part of a proportionate penalties clause analysis whether the defendant received a life sentence, or even require the sentence to be severe. It held instead that a criminal statute may be unconstitutional when the punishment is cruel or degrading, or shocks the moral sense of the community. *See also People v. Munziato*, 24 Ill. 2d 432, 437 (1962) ("courts have jurisdiction to interfere with legislation . . . where the penalty shocks the conscience of reasonable men or shocks the moral sense of the community") (citations omitted). Certainly, sentences short of a *de juris* or *de facto* life sentence can shock the moral sense of the community when applied to a particular defendant.

Indeed, this Court reached that very conclusion in *Morris*, 136 Ill. 2d 157, when addressing a statute that provided for a mandatory minimum *three-year* sentence for the alteration of a temporary registration permit. *Id.* at 159-68. In so analyzing, this Court found the statute had been enacted, in part, to punish "chop shop" operations, which generally involved the possession of stolen motor vehicles. *Id.* at 164-65. By contrast, the defendant in *Morris* had altered his

own temporary registration permit and did not deprive another person of their vehicle. *Id.* at 167. Thus, the application of the statute to impose a Class 2 conviction and sentence on him was unconstitutional. *Id.* at 168.

This Court has also addressed other statutes requiring mandatory penalties of less than natural life under the proportionate penalties clause. *See, e.g., Fuller*, 187 Ill. 2d at 3-4 (1999) (as-applied challenge to statute mandating Class 2 penalty for filing a false report of vehicle theft); *People v. Simmons*, 145 Ill. 2d 264, 270-72 (1991) (challenge to $500 minimum fine for operation of an uninsured motor vehicle). Though this Court found the statutes in those cases were constitutional, it did not uphold the statutes because they did not mandate a severe sentence. Instead, the Court addressed each case on its own facts to find the specific penalty proportional. *See Fuller*, 187 Ill. 2d at 12-15 (Class 2 penalty for filing a false police report was proportionate because conduct could subject innocent person to being erroneously accused of serious crime); *Simmons*, 145 Ill. 2d at 270-72 ($500 minimum fine for operation of an uninsured motor vehicle did not shock moral sense of community, because legislature could determine, "in a time of escalating medical costs and expenses to repair automobiles and property damage," that offense was sufficiently serious to require such fine).

b. Limiting proportionate penalties clause challenges to only the most severe penalties in Illinois offers more sentencing protection to more culpable offenders and less protection to less culpable offenders.

Only allowing offenders who receive the most severe penalties in Illinois raise as-applied challenges to mandatory sentencing statutes also creates absurd and unjust results. *Cf. People v. Pullen*, 192 Ill. 2d 36, 42 (2000) (when interpreting statute, courts must presume legislature did not intend absurd or unjust result). In *Leon Miller*, this Court explained that even though the legislature has discretion to *prescribe* mandatory sentences, the "power to *impose* sentences

is not without limitation," and the judiciary always has a duty make sure criminal penalties "satisfy constitutional constrictions." 202 Ill. 2d at 336 (emphasis added). When as-applied challenges are only available to those who receive the "most severe penalty possible" (*see Hilliard*, 2021 IL App (1st) 200112, ¶50), less culpable offenders like Andre have no apparent recourse, short of a difficult facial attack, to challenge a mandatory sentencing statute, while more culpable offenders do have that option.

For example, here, the appellate court would have considered Andre's claim if he received an aggregate sentence greater than 40 years. Yet, had Andre received a sentence greater than 40 years, that would have been the result of the court imposing a harsher discretionary sentence for the underlying sentence of attempt murder than the 15 years chosen by the court. The court, in turn, would have only imposed a harsher discretionary sentence on Andre if it determined his offense or background warranted a harsher sentence than 15 years. Thus, under the appellate court's unsound logic, the more aggravating the crime or offender, the better ground he has to seek redress from a mandatory sentencing statute.

The appellate court's position is equally absurd when considered more broadly. Under *Buffer*, 40 years is the maximum sentence that may be imposed, even on juveniles convicted of *murder*, unless the offender is among the rarest of juveniles who cannot achieve rehabilitation. *See People v. Buffer*, 2019 IL 122327, ¶¶41-42. However, Andre–along with the defendants in *Womack*, *Barnes*, and *Aikens*–were all convicted of crimes that did not result in death. *See Hilliard*, 2021 IL App (1st) 200112, ¶1; *Womack*, 2020 IL App (3d) 170208, ¶1 (attempt murder); *Barnes*, 2018 IL App (5th) 140378, ¶1 (armed robbery); and *Aikens*, 2016 IL App (1st) 133578, ¶1 (attempt murder of a peace officer). The U.S . Supreme Court has repeatedly asserted–when addressing juvenile and adult defendants–that non-homicide crimes "may be devastating in

their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' they cannot be compared to murder in their 'severity and irrevocability.'" *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008), *quoting Coker v. Georgia*, 433 U.S. 584, 598 (1977); *accord Graham*, 560 U.S. at 69. Thus, again, by limiting as-applied proportionate penalties clause challenges only to defendants who received a life sentence, the appellate court has created an unjust result of precluding *less* culpable offenders from constitutional relief in Illinois.

This result is even more shocking in light of recent legislation noted previously in this brief, which now makes 18-, 19-, and 20-year-olds who committed the *same* offense as Andre, but were sentenced on or after June 1, 2019, eligible for parole after 10 years. *See* 730 ILCS 5/5-4.5-115(b). In fact, even late adolescents who have *killed* someone have the possibility of obtaining release after 20 years, when Andre has *no* opportunity for parole himself. *Id*. Thus, it is arguably unconstitutional that the moral sense of the community would be shocked that not only does Andre lack the same ability to try to demonstrate rehabilitation after 10 or 20 years, but he was not allowed even at *sentencing* to show why a mandatory 25-year firearm enhancement should not apply to him. *See Aikens*, 2016 IL App (1st) 133578, ¶38 (firearm enhancement to juvenile was particularly shocking in light of new amendment making firearm enhancement discretionary for juveniles).

c. The appellate court's limitation subverts the purpose of the proportionate penalties clause in requiring criminal statutes in Illinois to comport to evolving standards of decency.

Finally, limiting the proportionate penalties clause only to statutes that mandate the most severe sentence will defeat its purpose of ensuring that Illinois statutes conform to evolving standards of decency. *See Leon Miller*, 202 Ill. 2d at 338-39. For example, the Model Penal Code currently proposes that sentencing courts *always* have "authority to impose a sentence

that deviates from any mandatory-minimum term of imprisonment under state law," when sentencing juveniles or adults. *See* Model Penal Code: Sentencing § 6.11A(f) & cmt. F, at 36, 43 (Am. Law. Inst., Tentative Draft No. 2, 2011).

Courts are also beginning to find the same, at least when it comes to youth. In *State v. Lyle*, 854 N.W.2d 378, 380 (Iowa 2014), the Iowa Supreme Court determined that the Iowa Constitution did not permit any statutory scheme that mandated a juvenile offender serve a minimum amount of time in prison. *Id*. at 383. The Court explained–like *Leon Miller*, 202 Ill. 2d at 338-39–that the concept of cruel and unusual punishment is not "'static,'" but considers "'evolving standards of decency that mark the progress of a maturing society.'" *Lyle*, 854 N.W. 2d at 384, *quoting Trop*, 356 U.S. at 1010. 806. While no national consensus yet existed to preclude any mandatory minimum sentence for juveniles, the "shift" in the treatment of juveniles still gave rise to that claim, particularly where the U.S. Supreme Court had "emphasized that nothing it has said [about youth] is 'crime-specific.'" *Lyle*, 854 N.W.2d at 384, 398-99, *quoting Miller*, 567 U.S. at 473. The Court explained, "[t]he constitutional analysis is not about excusing juvenile behavior, but imposing punishment in a way that is consistent with our understanding of humanity today." *Lyle*, 854 N.W.2d at 398. It reasoned, "[W]e think most parents would be stunned to learn this state had a sentencing schema for juvenile offenders that required courts to imprison all youthful offenders for conduct that constituted a forcible felony without looking behind the label of the crime into the details of the particular offense and the individual circumstances of the child. . . ." *Id.* at 400-01.

Likewise, in *State v. Comer*, 266 A.3d 374, 369 (N.J. 2022), two juveniles convicted of murder argued their mandatory 30-year sentences were unconstitutional. Like *Lyle*, the Supreme Court of New Jersey acknowledged that U.S. Supreme Court precedent on the sentencing of

juveniles involved lengthier sentences, but also found the Court's "pronouncements about juveniles resonate more broadly," where the Court had noted "time and again" that "children are different." *Id.* at 394. The *Comer* Court observed that 13 states and the District of Columbia currently had statutes that allow juveniles to be considered for release *before* 30 years. *Id.*at 392-93, 396 (citing state statutes). Thus, to "remedy the concerns defendants raise and save the statute from constitutional infirmity," the Court permitted all juveniles in New Jersey to petition for a review of their sentence after 20 years. *Id. See also Houston-Sconiers*, 391 P.3d at 416-22 (finding 26- and 31-year sentences imposed as a result of mandatory firearm enhancements unconstitutional and holding that "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of *any* juvenile defendant") (emphasis added).

Indeed, as of 2018, approximately 1,300 juveniles' life sentences had been altered following *Miller*, including homicide offenders, and the median sentence nationwide for those offenders was 25 years before parole or release eligibility. Campaign for the Fair Sent'g of Youth, *Montgomery Momentum: Two Years of Progress Sentence Montgomery v. Louisiana*, p. 4 (2018).[9] This *average* sentence is exactly the same term of years Andre received as a mandatory *enhancement* to his discretionary 15-year sentence for a non-homicide offense.

To be clear, Andre is not contending that *all* mandatory minimum sentences for juveniles or late adolescents are unconstitutional. He is simply requesting that *individual* offenders in Illinois continue to be permitted to make as-applied challenges to their sentences, even when they did not receive the most severe penalty possible under the law, and to rely on evolving

[9] Available at https://cfsy.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf (last visited Sept. 6, 2022).

standards of decency to do so. If Illinois's proportionate penalties clause is only available to those who receive the most severe sentences, Illinois will not be able to evolve with continued progress in society. *Cf. People v. Patterson*, 2014 IL 115102, ¶177 (Theis, J., dissenting) ("Our state, home of the country's first juvenile court and once a leader in juvenile justice reform, should not be a place where we boast of locking up juveniles and throwing away the key. Illinois should be a place where youth matters, and we work to tailor punishment to fit the offense and the offender, as required by our federal and state constitutions."). Moreover, the trend toward more lenient sentencing of young offenders in this country–as shown by the cases in this section and by those extending sentencing relief to late adolescent offenders (*see* Part B(2)(b), *supra*)–supports Andre's claim that the mandatory 25-year enhancement imposed on him for an offense that did not result in death is inconsistent with evolving standards of decency, given his youth and circumstances.

For all these reasons, this Court should reject the appellate court's holding that only defendants who receive the most severe sentences in Illinois may challenge mandatory sentencing statutes under the proportionate penalties clause.

E. Conclusion

At the first stage, the pleading requirements for Andre's *pro se* post-conviction petition were extremely low. He needed only make a non-frivolous claim that was arguable under the law and the facts. His claim that the mandatory 25-year firearm enhancement attached to his discretionary 15-year sentence for attempt murder is unconstitutional as applied to him easily meets that standard, where it is supported by case law and the record. Thus, this Court should reverse the first-stage dismissal of Andre's petition and remand for second-stage proceedings.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Andre Hilliard respectfully requests that this Court reverse the summary dismissal of his post-conviction petition and remand for second-stage proceedings with the appointment of counsel.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

CAROLINE E. BOURLAND
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us
COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the 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, is 50 pages.

s/Caroline E. Bourland
CAROLINE E. BOURLAND
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Andre Hilliard No. 128186

State	Firearm Enhancement	Statutory Citation
Alabama	Increases the minimum sentence from 10 to 20 years for "Class A" felonies, to 10 years for most other offenses, and requires a five-year enhancement when underlying offense is for drug trafficking.	AL CODE §13A-5-6(a) (eff. 2019), §13A-12-231(16) (eff. 2018)
Alaska	Increases the sentencing range for first-time Class A offenders from four-to-seven years to seven-to-11 years when defendant possessed certain described weapons, and increases the sentencing range by five years when firearm is possessed during certain sex crimes involving victims over the age of 13.	AK STAT §12.55.125 (eff. 2019)
Arizona	Creates a distinct offense for with different classifications for crimes involving possession or use of weapons, ranging from misdemeanors to felonies.	AZ REV STAT §13-3102 (eff. 2019)
Arkansas	Providing discretion to sentence a defendant to additional time in prison for use of firearm during felony offense, not to exceed 15 years; and requiring a 10-year enhancement for defendant's conviction of a second felony involving a firearm.	AR CODE §§16-90-120(a), 16-90-121 (eff. 2019)
California	Providing for an additional consecutive sentence of 3, 4, or 10 years for the personal use of a firearm during a felony, unless a firearm is an element of the offense; and providing trial courts with discretion to strike or dismiss the enhancement at the time of sentencing.	CAL PENAL CODE §12202.5 (eff. 12022.5)
Colorado	Requires that a defendant convicted of any offense deemed a "crime of violence," which includes offenses in which a deadly weapon was involved, to receive at least the midpoint of the ordinary sentencing range for that offense.	CO REV. STAT. §18-1.3-406 (eff. 2018)
Connecticut	Requiring a five-year enhancement for use or representation of a firearm during certain felonies, and an eight-year enhancement for the use or representation of an assault weapon during offense.	CT GEN. STAT. §§53-202j, 202k (1993)
Delaware	Punishing the possession of a firearm during a felony as its own offense, which requires a	11 DE CODE §1447A (eff. 2019)

State	Firearm Enhancement	Statutory Citation
	minimum three-year consecutive sentence for the first offense, and a minimum five-year consecutive sentence if the offenders has at leasttwo prior felonies in his background.	
Florida	Increases the sentence class of a felony by one grade for the use of a firearm, and requires a minimum 10-year sentence for possession of a firearm during an offense, a 20-sentence for discharge, and 25 years for discharge causing death or great bodily harm.	FL STAT §775.087 (eff. 2019)
Georgia	Requiring a consecutive five-year sentence for possession of firearm or knife during offense, and requiring a consecutive 10-year sentence for second or subsequent offense.	GA CODE §16-11-106
Hawaii	Requires a firearm enhancement not to exceed 15 years for second-degree or attempt murder, up to 10 years for a Class A felony, up to five years for a Class B felony, and up to three years for a Cass C felony.	HI REV. STAT. §706-660.1(1) (2022)
Idaho	Extending the maximum penalty for the underlying offense by 15 years when person displayed, used, threatened, or attempted to use a firearm or other deadly weapon during offense.	ID CODE §19-2520 (2022)
Indiana	Providing discretion to impose an additional term of between five and 20 years for knowing or intentional use of a firearm during an offense.	IN CODE §§35-50-2.11, 35-50-2-13 (eff. 2022)
Iowa	Adding a five-year penalty for the use of a dangerous weapon during a forcible felony.	IA CODE §902.7
Kansas	For most offenses, a presumptive sentence of imprisonment should be imposed when a firearm is used to commit a "person felony," but providing courts with discretion to impose a sentence other than prison. A six- or 18-month enhancement is required for drug crimes.	KS STAT. §21-6804(h) (eff. July 1, 2022), §6805

State	Firearm Enhancement	Statutory Citation
Kentucky	The possession of a firearm during a felony requires that the conviction be penalized one class more severely than the penalty provision ordinarily applicable to the offense.	KY REV. STAT. §218A.992 (eff. 2012)
Louisiana	Providing for mandatory minimum sentences for underlying offenses in which a firearm is used or displayed of two years, five years, 10 years, and 15 years, unless trial court determines that sentence imposed under these conditions would be excessive.	LA CODE CRIM. PRO. art. 893.3 (eff. 2019)
Maine	Adding an enhancement of one year, two years, or four years for use of a firearm during offense, depending on class of offense.	17-A ME REV. STAT. §1604
Maryland	Creating separate offenses for use of a firearm and use of an assault weapon during offense, which carries a sentence of between five and 20 years, and for which a second violation involving an assault weapon requires a sentence of between 10 and 20 years.	MD CRIM. LAW CODE §§4-204 (eff. 2014), 4-306) (eff. 2018)
Massachusetts	Requiring an enhancement of five years for first offense involving possession of firearm during commission of felony, or 10 years for a machine gun; and increasing the penalty to 20 years and 25 years, respectively for second or subsequent offenses.	MA GEN. L. CH. 265 §18 (b) (eff. 2014)
Michigan	Treats possession of a firearm during a felony as a separate offense, and requires a punishment of two years for first violation, five years for second violation, and 10 years for third or subsequent convictions.	MI COMP L 750.227b (eff. 2015)
Minnesota	Requiring a minimum three-year sentence for first offense involving possession or use of firearm during a felony, and a minimum five-year sentence for subsequent violations involving a firearm. (Ordinarily, all prison sentences are without minimum terms, unless the sentence was life in prison.)	MN STAT. §609.11 (eff. 2021)

State	Firearm Enhancement	Statutory Citation
Mississippi	Requiring a five-year enhancement for use or display of a firearm during a felony, and a 10-year enhancement for a second violation.	MS CODE §97-37-37 (eff. 2007)
Missouri	Requiring an enhancement between three and 15 years for commission of a felony with a deadly weapon, between five and 15 years if the person was unlawfully possessing the firearm, between five and 30 years for a second ordinary or for a second violation, and a sentence of between 15 and 30 years for a second violation involving unlawful possession of a firearm, a minimum 10-year sentence for a third violation, and a minimum 15-year sentence for a third violation involving illegal possession.	MO REV. STAT. 571.015 (eff. 2020)
Montana	Mandatory two-to-10-year enhancement for the use of a gun by an adult during an offense, or four-to-20-years for a subsequent offense.	MT CODE §§46-18-221, 46-18-222 (2022).
Nebraska	Treating the possession of a firearm during a felony as a Class II felony, which mandates a consecutive sentence of between one and 50 years in prison; and the use of a firearm during a felony as a Class IC felony, which carries a sentencing range of between five and 50 years imprisonment.	NE CODE §28-1205 (eff. 2009); NE CODE §28-105 (eff. 2019)
Nevada	Court must impose an additional penalty of between one and 20 years for use of a firearm, which term of years may be decided by court, but penalty for firearm enhancement cannot exceed penalty for underlying offense.	NV REV. STAT. 193.163 (eff. 2007)
New Hampshire	Requires an enhancement for an offender's second or subsequent offense for the felonious use of a firearm.	NH REV. STAT. 651:2(II-b) (eff. 2017)
New Jersey	Requiring a firearm enhancement at least equal to half of the term imposed by the court for the underlying sentence, or 3.5 years or 1.5 years (depending on the class of the offense), whichever is greater.	NJ REV. STAT. §2C: 43-6 (eff. 2013)
New Mexico	Mandating an increase in sentence of one, three, or five years for firearm, depending on use of firearm and type of offense.	NM STAT. §31-18-16

State	Firearm Enhancement	Statutory Citation
New York	Making use of firearm during an certain crimes either a class C or class B felony, depending on underlying offense, and requiring a five-year consecutive sentence for Class B convictions for using a firearm, unless court finds consecutive sentence would be unduly harsh and that not imposing the enhancement would not create a danger to the public or deprecate the seriousness of the crime	NY PENAL L. §§265.08, 265.09 (eff. 2013)
North Carolina	There does not appear to be any firearm enhancement statute. The use of a gun is treated as an element of the offense in certain offenses, like "First-Degree Forcible Rape."	Example: NC STAT. §14-27-23 (eff. 2017).
North Dakota	Requiring a minimum two or four-year sentence when defendant possessed a firearm is used during offense, depending on class of underlying crime.	ND CENTURY CODE §12.1-32-02.1 (eff. 2019)
Ohio	Mandating a six-year enhancement for possession of an automatic or silenced firearm during offense, or nine years for a subsequent offense; three years for display of other types of firearms during offense, or 54 months for a subsequent offense; one year for possession of a standard firearm, or 18 months for a subsequent offense; a five year penalty for discharging a firearm from a motor vehicle during a felony that caused or attempted to cause death or physical harm, or 90 months for a subsequent offense; and seven years for discharge toward a peace officer, or 10.5 years for second offense.	OHIO REV. CODE §2929.14
Oklahoma	Treating possession of a firearm and other weapons during felony as a district offense, which carries a two-to-10 year sentencing range for first offense, and a 10-to-30-year range for subsequent offenses. Discharge during a crime of violence requires a minimum 10-year sentence, but may be served concurrently to underlying sentence	OK STAT. §§21-1287, 21-1287.1 (eff. 2021)
Oregon	Requiring an enhancement for an offender's second or subsequent offense for the felonious use of a firearm.	OR REV. STAT. §161.610 (eff. 2020)

State	Firearm Enhancement	Statutory Citation
Pennsylvania	Providing a points-based matrix for the possession or use of a deadly weapon, which excludes persons under the age of 18 convicted of murder, and which typically recommends three to nine months for both the minimum and maximum authorized sentence for possession of a deadly weapon, and six to 18 months for the minimum and maximum authorized sentence for the use of a deadly weapon, with adjustments to be made for additional factors explained in the matrix.	24 PA. ADMIN. CODE §§303.10, 303-17
Rhode Island	Creating an offense for use of a firearm when committing or attempting to commit a crime of violence, and requiring a consecutive 10-year sentence for first offense (unless firearm was a machine gun, which requires a 30-year sentence), a 20-year sentence for second offense (or life sentence for a machine gun), and a life sentence for a third conviction. Discharging the firearm requires a 20-year sentence if a person other than a police officer is injured, or a life sentence if a police officer is injured resulted in the death or permanent incapacity of another person. Parole is available for those sentenced to life in prison, unless judge determines life without parole is required.	RI STAT. 11-47-3.2
South Carolina	Requires mandatory firearm enhancements, while leaving it to the discretion of the trial court whether to impose that additional sentence consecutively or concurrently.	SC CODE §16-23-490 (eff. 2010)
South Dakota	Making the commission or attempt to commit a felony while armed with a felony a Class 2 felony for the first conviction, with a minimum consecutive sentence of five years, and the second violation a Class 1 felony, with a minimum 10-year sentence.	SD COD. STAT. §22-14-12
Tennessee	Making the employment of a firearm during the commission or attempt to commit a dangerous felony a Class C felony, requiring a mandatory six-year minimum consecutive sentence for first offense, and a mandatory minimum 10-year sentence if defendant had a prior felony	TN CODE §39-17-1324 (eff. 2021)

State	Firearm Enhancement	Statutory Citation
	conviction.	
Texas	Requiring defendant to be punished for a third-degree felony (which carries a two-to-10-year sentence) for use or exhibition of a deadly weapon during the commission of the offense or during immediate flight from that offense.	VERN. TEX. CODE ANN., PENAL CODE §§12.34 (2009), 12.35 (2017)
Utah	Increasing the minimum term for a felony by one year if a dangerous weapon was used in felony, and requiring an additional constructive five-to-10 year sentence if defendant was previously convicted of another felony in which a dangerous weapon was used.	UT CODE §76-3-203.8 (eff. May 4, 2022)
Vermont	Person who carries dangerous weapon while committing a felony shall be imprisoned "not more than five years or fined not more than $500.00 or both.	13 V.S.A. §4005 (eff. 2012)
Virginia	Creating a felony for the use or attempt to use or display a firearm during certain described offenses or attempts, with a mandatory minimum penalty of a consecutive three-year sentence for a first conviction, or five years for subsequent convictions.	VA CODE §18.2-53.1
Washington	Adding a penalty of five years, three years, or 18 months, depending on underlying offense committed, if offender or accomplice was armed with a firearm during offense; and doubling that penalty when offender has previously been sentenced for deadly weapon enhancements. The enhancements cannot raise the sentencing range beyond the maximum sentence for the base offense, unless defendant is a repeat offender.	WA REV. CODE §9.94A.533(3) (eff. 2020)
West Virginia	Use or presentation of a firearm during an offense must be punished by imprisonment in a state correctional facility for not more than 10 years.	WV CODE §61-7-15a (eff. 2016)
Wisconsin	Poviding discretion to increase sentence for use of firearm during offense by no more than six months for a misdemeanor offense, no more than five years for a felony sentence greater than five years, no more than four years for a felony sentence	WI STAT. §939.63 (2022)

State	Firearm Enhancement	Statutory Citation
	between two and five years, and no more than three years for all other felonies.	
Wyoming	Person who uses a firearm while committing a felony to be imprisoned for not more than 10 years, in addition to the punishment for the underlying felony.	WY STAT. §6-8-101(a) (2022)

INDEX TO THE RECORD

Common Law Record ("C")

Secured Common Law Record ("SEC C.")

Report of Proceedings

2021 IL App (1st) 200112

No. 1-20-0112

Second Division
Opinion Filed December 7, 2021
Modified Upon Denial of Rehearing January 11, 2022

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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

JUSTICE COBBS delivered the judgment of the court, with opinion.
Justices Howse and Lavin concurred in the judgment and opinion.

OPINION

¶ 1 Following a jury trial, defendant-appellant Andre Hilliard was found guilty of attempted murder and aggravated battery with a firearm and sentenced to 15 years in prison plus a mandatory 25-year firearm enhancement, for a total of 40 years' imprisonment. He now appeals from the judgment of the trial court summarily dismissing his *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)). On appeal, he argues that the trial court erred because his petition stated an arguable basis in fact or law where he was 18

years old at the time of the offense and the trial court was unable to consider his youth and attendant characteristics before imposing the mandatory firearm enhancement. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On September 19, 2013, defendant was arrested and charged with attempted murder and aggravated battery with a firearm in connection with the shooting of Devaul Killingsworth in the early hours of August 6, 2013. As relevant to this appeal, the facts adduced at trial are as follows.

¶ 4 At the start of trial, the trial judge stated on the record that defendant was removed from the courtroom because he had threatened people, became belligerent, and started screaming. Instead of shackling and handcuffing defendant, the judge opted to place defendant in a lockup with a microphone placed inside to ensure that defendant could hear the trial proceedings. Defendant was informed that, at any point, he could decide that he wanted to be present in the courtroom.

¶ 5 Killingsworth testified that just before midnight on August 5, 2013, he was visiting Tracy Chatman, the mother of his grandchildren, at the Altgeld Gardens housing complex, located on 132nd Street in Chicago. At around 12:45 a.m., he was standing outside of Chatman's door talking to the neighbors. As he was about to reenter Chatman's home, he heard a noise, turned around, and saw defendant, whom he believed to be Chatman's boyfriend at the time, pointing a gun at him. Defendant, from one or two feet away, fired two to five gunshots at him. Killingsworth was struck in the arm by two bullets as he raised his arm to protect himself. He then ran a few feet into a grassy area and fell down before walking back to Chatman's door. A neighbor came out with a chair for him and told him he had been shot. Eventually, an ambulance arrived and took Killingsworth to the hospital. He had surgery on his arm to remove the bullet and fragments, but

not all could be removed. He testified that he is still unable to use his arm to the same extent as before the shooting. While he was at the hospital, he informed detectives that defendant shot him. From a photograph array, Killingsworth identified defendant. After defendant was arrested, Killingsworth identified him as the shooter from a physical lineup.

¶ 6 Chicago police detective Brian Cunningham testified that on August 6, 2013, he and his partner, Chicago police detective Bryant Casey, were assigned to investigate a shooting at Altgeld Gardens. Cunningham first went to the hospital to assess the status of the victim, Killingsworth. Killingsworth told Cunningham that the shooter was someone named "Andre." Killingsworth identified defendant as the shooter from a photo array. Defendant was arrested on September 19, 2013.

¶ 7 Dr. Tobin Efferen, an attending physician at Mount Sinai Medical Center, testified that he was working on August 6, 2013, when Killingsworth was transferred to Mount Sinai from Roseland Hospital. He testified that Dr. Mason Milburn was also involved in Killingsworth's care at the hospital as the orthopedic surgeon. A review of Killingsworth's X-rays showed that he had broken bones in his left forearm, which required surgery. Dr. Efferen did not see Killingsworth again after surgery, but based on the medical records, he stated that the surgery was successful.

¶ 8 Defendant's motion for a directed verdict as to attempted first degree murder was denied. At this time, defendant was once again asked if he wanted to participate in the trial, which he refused. The defense rested without presenting evidence.

¶ 9 The jury found defendant guilty of attempted first degree murder and aggravated battery with a firearm. The jury also found that, during the commission of the attempted murder, defendant personally discharged a firearm that caused great bodily harm to another person.

¶ 10 After the jury returned the verdict, the trial court requested that Forensic Clinical Services examine defendant's fitness in light of defendant's behavior during the trial. Dr. Nishad Nadkarni interviewed defendant three separate times but ultimately could not render an opinion because defendant refused to cooperate. However, Dr. Nadkarni did opine that he believed defendant was malingering some psychotic symptoms and that he did not have any cognitive impairments or mental illnesses that prevented him from understanding the charges and participating in the trial as necessary. In coming to this conclusion, Dr. Nadkarni had reviewed defendant's records including reports from 2009 at Hargrove Hospital, where defendant was hospitalized briefly for severe behavioral disorder, conduct disorder, aggression, and a history of drug abuse and gang involvement, though these reports did not contain a diagnosis of any major mental illness or cognitive impairment. After the fitness hearing, the trial court found defendant to be fit for posttrial motions and sentencing.

¶ 11 A presentencing investigation report (PSI) was prepared prior to the sentencing hearing, though the probation officer reported that he had difficulty interviewing defendant because defendant refused to participate. The report disclosed that defendant's parents were never married and he did not have a relationship with his father. Defendant only attended school until the fifth grade, and he stated that he suffered from a mental illness.

¶ 12 At the sentencing hearing, neither party introduced any evidence in aggravation or mitigation. The State requested a sentence above the minimum based on evidence that Killingsworth was permanently disabled. Defense counsel noted that defendant was 19 years old at the time of sentencing and had no criminal history. In sentencing defendant, the court merged the offense of aggravated battery with a firearm into the attempted murder count. The court then sentenced defendant to 15 years for attempted murder and the minimum sentence of 25 years for

personally discharging a firearm that proximately caused bodily harm to a person, after considering "the statutory provisions in aggravation, the statutory provisions in mitigation *** and also [the] evidence presented at the aggravation and *** mitigation phase of the sentencing and pre-sentencing investigation." The court did not make any specific statements regarding the statutory factors or any of the evidence presented at the hearing or in the PSI.

¶ 13 On direct appeal, defendant argued, *inter alia*, that the mandatory firearm enhancement was unconstitutional as applied to him in light of his young age at the time of the offense. *People v. Hilliard*, 2017 IL App (1st) 142951-U. This court affirmed defendant's conviction and sentence and, in relation to his constitutional claim, took no position and stated that it was "best suited" for the trial court where the factual record could be developed as necessary. *Id.* ¶ 42. This court denied the petition for rehearing on August 4, 2017, and our supreme court denied defendant's petition for leave to appeal on November 28, 2018.

¶ 14 On September 19, 2019, defendant filed his initial *pro se* postconviction petition, alleging that the mandatory 25-year firearm enhancement was unconstitutional as applied to him under the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). He further asserts that the trial court should have explicitly applied the factors espoused in *Miller v. Alabama*, 567 U.S. 460, 479 (2012), because his cognitive impairments rendered him more similar to a 16- or 17-year-old at the time of the offense and the trial court was unable to consider his youth, rehabilitative potential, lack of criminal history, and lack of gang involvement prior to imposing the firearm enhancement.

¶ 15 On December 5, 2019, the trial court issued a written order summarily dismissing the petition. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant asserts that he has stated the gist of an arguable constitutional claim that the mandatory 25-year firearm enhancement as applied to him violates the proportionate penalties clause of the Illinois Constitution and thus this court should reverse and remand for second stage proceedings under the Act. Specifically, he alleges that he was only 18 years old at the time of the offense and the court was unable to consider his youth and other related factors, including his childhood, lack of education, and lack of gang membership, when adding the enhancement to his sentence.

¶ 18 The Act provides a method for a defendant to collaterally attack a conviction by asserting that it resulted from a "substantial denial" of his constitutional rights. 725 ILCS 5/122-1 (West 2018); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding in a noncapital case has three stages. *Hodges*, 234 Ill. 2d at 10. At the first stage, a petition need only state the "gist" of a constitutional claim (*id.* at 9), and a trial court may summarily dismiss a postconviction petition within 90 days if it "determines the petition is frivolous or is patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2018)).

¶ 19 A petition is frivolous or patently without merit when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12. A petition has no arguable basis in law or fact where it is "based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. Additionally, a defendant's claim is considered frivolous or patently without merit if it is procedurally barred under either the doctrine of *res judicata* or forfeiture. *People v. Blair*, 215 Ill. 2d 427, 445 (2005). Although a defendant's petition is to be liberally construed and need only present a limited amount of detail, that "does not mean that a *pro se* [defendant] is excused from providing any factual detail at all surrounding the alleged constitutional deprivation." *People v.*

Delton, 227 Ill. 2d 247, 254 (2008). We review *de novo* the summary dismissal of a defendant's postconviction petition. *People v. Allen*, 2015 IL 113135, ¶ 19.

¶ 20 As an initial matter, we note that defendant did include a constitutional claim under the proportionate penalties clause on direct appeal. However, at that time, this court did not consider that claim, as we found that it was better pursued in a postconviction petition as our supreme court directed in *People v. Thompson*, 2015 IL 118151, and *People v. Harris*, 2018 IL 121932 (both discussed in greater detail below). For that reason, there is no issue of forfeiture or *res judicata* regarding the instant petition.

¶ 21 Defendant's as-applied constitutional challenge is rooted in a line of cases providing heightened protections for juvenile defendants in sentencing under the eighth amendment of the United States Constitution, which prohibits cruel and unusual punishment. See *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005) (eighth amendment prohibits the death penalty for juveniles who commit murder); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (eighth amendment prohibits mandatory life sentences without parole for juveniles who commit nonhomicide offense); *Miller*, 567 U.S. at 479 (eighth amendment prohibits mandatory life without parole sentences for juvenile offenders convicted of homicide). Specifically, the rationale for the holding in *Miller*, the preeminent case, was that "children are constitutionally different from adults for purposes of sentencing," as they are less mature and more impulsive and vulnerable to peer pressure than adults. *Id*. at 471-74. Clear from this trilogy of cases is that the Court was concerned with the most severe forms of punishment allowed under the Constitution, the death penalty and life without parole.

¶ 22 The Illinois Supreme Court has expanded the *Miller* protections beyond the context of mandatory life sentences to now include juvenile offenders who receive *de facto* life sentences

(*People v. Reyes*, 2016 IL 119271, ¶ 9), which the court later defined as a prison term of *more than* 40 years (*People v. Buffer*, 2019 IL 122327, ¶ 40). Subsequently, in *People v. Holman*, 2017 IL 120655, ¶ 40, our supreme court extended the protections of *Miller*, holding that "[l]ife sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." Thus, a juvenile defendant may be sentenced to life imprisonment without parole only if the trial court first determines that the juvenile defendant's conduct demonstrated "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation."[2] *Id.* ¶ 46. Such a determination should be made after the trial court has considered the *Miller* factors, which include but are not limited to the juvenile defendant's (1) chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) family and home environment; (3) degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) incompetence, including his inability to deal with police officers or prosecutors and his

[1] Recently, in *People v. Dorsey*, 2020 IL 123010, ¶ 49, our supreme court considered the relevance of good-conduct credit in determining whether a 76-year sentence constitutes a *de facto* life sentence as prescribed by the court in *Buffer*. The court held that, because the defendant, who was 14 years old at the time of the offense, could reduce his 76-year sentence to 38 years through good-time credit, the sentence did not offend *Buffer's* 40-year mark. *Id.* ¶ 65. In so doing, the court implicitly reaffirmed that 40 years is the line of demarcation for *de facto* life sentences.

[2] We are aware of the United States Supreme Court's recent decision in *Jones v. Mississippi*, U.S. , , 141 S. Ct. 1307, 1318-19 (2021), holding that sentencing courts are not constitutionally mandated under the eighth amendment to make a finding of "permanent incorrigibility" before sentencing a juvenile defendant to life without parole. The Court also expressly stated, however, that states are not precluded from imposing any sentencing mechanisms they see fit in cases involving juvenile defendants convicted of murder, such as requiring extra factual findings, prohibiting sentences of life without parole for juveniles, or permitting appellate review based in proportionality for life-without-parole sentences. *Id.* at , 141 S. Ct. at 1323. As of the issuance of this decision, our supreme court has addressed *Jones* only in passing, suggesting that the holding of *Holman* in light of *Jones* is "questionable." *Dorsey*, 2021 IL 123010, ¶ 41. Unless and until explicit direction is given in light of *Jones*, we are constrained to follow our current supreme court precedent.

incapacity to assist his own attorneys; and (5) prospects for rehabilitation. *Id.* (citing *Miller*, 567 U.S. at 477-78).

¶ 23 Defendant acknowledges that he does not have a viable eighth amendment claim under *Miller* because he was 18 years old at the time of the offense. See *People v. Franklin*, 2020 IL App (1st) 171628, ¶ 49 ("It is well established that offenders who are 18 years and older cannot raise a facial challenge to their sentences under the eighth amendment and the *Miller* line of cases."). He instead couches his claim as a violation of the proportionate penalties clause of the Illinois Constitution.

¶ 24 The proportionate penalties clause provides that "[a]ll 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. I, § 11. We have held that this clause provides greater protections against excessive punishment than does the eighth amendment. *People v. Fernandez*, 2014 IL App (1st) 120508, ¶ 63; *People v. Minniefield*, 2020 IL App (1st) 170541, ¶ 35; see also *People v. Clemons*, 2012 IL 107821, ¶ 40 (the proportionate-penalties clause "which focuses on the objective of rehabilitation, went beyond the framers' understanding of the eighth amendment and is not synonymous with that provision"). But see *People v. Patterson*, 2014 IL 115102, ¶ 106 (stating that the proportionate penalties clause is "co-extensive with the eighth amendment's cruel and unusual punishment clause"). For more than a century, we have held that, where a defendant's sentence is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community, it violates the proportionate penalties clause. *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 421-22 (1894). The clause requires balancing the goals of retribution and rehabilitation, which necessitates a careful consideration of all the factors in aggravation and mitigation. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). We may

determine whether a sentence shocks the moral sense of the community by considering both objective evidence and the community's changing standard of moral decency. *People v. Hernandez*, 382 Ill. App. 3d 726, 727 (2008).

¶ 25 In two cases on direct appeal, our supreme court has recognized that young adults (those between 18 and 21 years old) may rely on the evolving neuroscience regarding brain development in juveniles and its correlation to maturity underpinning the *Miller* decision in support of an as-applied challenge pursuant to the proportionate penalties clause of the Illinois Constitution. See *Thompson*, 2015 IL 118151, ¶¶ 43-44 (19-year-old defendant sentenced to a term of natural life in prison); *Harris*, 2018 IL 121932, ¶ 48 (defendant, aged 18 years and 3 months, sentenced to 76 years in prison). In *Thompson* and *Harris*, the court opened the door for young adult defendants to demonstrate that their own specific characteristics and circumstances were so like those of a juvenile that imposition of a life sentence, absent the necessary considerations established in *Miller*, would violate the proportionate penalties clause. The court instructed, however, that such claims would best be pursued through postconviction proceedings, as defendant seeks to do here. See *Thompson*, 2015 IL 118151, ¶¶ 43-44; *Harris*, 2018 IL 121932, ¶ 48. Clear from *Thompson* and *Harris* is the viability of *Miller* based claims in postconviction proceedings. Equally clear from *Miller* and its progeny is that such claims must satisfy two initial threshold requirements: the defendant must be (1) either a minor or young adult offender and (2) sentenced to a natural or *de facto* life sentence. *Miller*, 567 U.S. at 479; *Buffer*, 2019 IL 122327, ¶ 27; *Thompson*, 2015 IL 118151, ¶¶ 43-44; *Harris*, 2018 IL 121932, ¶ 48.

¶ 26 Defendant argues that "the proportionate penalties clause may be violated when an emerging adult *** either receives a *de facto* life sentence or *suffers a mandatory adult sentencing penalty*, without the trial court having properly considered the youth of the offender." (Emphasis

added.) Defendant acknowledges that he did not receive a *de facto* life sentence as defined in *Buffer*. He maintains, however, that for purposes of a proportionate penalties claim, whether the sentence is *de facto* life is not a factor. He argues that the proper focus is on the absence of sentencing discretion. At oral argument, defendant entreated this court to "extend" the *Miller* protections, notwithstanding that his sentence was less than *de facto* life, because imposition of mandatory enhancement, without due consideration given to his youth and the attendant characteristics, shocks the moral conscience of the community.

¶ 27 The State seeks to defeat defendant's claim by characterizing his aggregate 40-year sentence as "discretionary," the inference to be drawn being that the court considered any relevant factors. We reject the State's characterization out of hand. Defendant's sentence is clearly composed of two statutorily authorized components. The court's imposition of the mandatory firearm enhancement was done without the exercise of any discretion by the court. To suggest otherwise is simply disingenuous.

¶ 28 To support his claim that a *de facto* life sentence is not required for *Miller* protections to apply, defendant invites our attention to cases decided here in the First District, *People v. Aikens*, 2016 IL App (1st) 133578, and *People v. Ruiz*, 2020 IL App (1st) 163145, as well as to cases from our sister districts, *People v. Barnes*, 2018 IL App (5th) 140378, and *People v. Womack*, 2020 IL App (3d) 170208. Subsequent to the close of briefing, the parties moved for and were granted leave to cite additional authority in support of their respective positions. Specifically, defendant additionally cites our supreme court's recent decision in *People v. House*, 2021 IL 125124, and the State cites *People v. Woods*, 2020 IL App (1st) 163031, and *People v. Nichols*, 2021 IL App (2d) 190659. We will address the additionally cited authorities as we deem relevant or necessary to our analysis and disposition of this appeal. We hasten to add that we are not bound by the

decisions of other districts, divisions, or even different panels of our division of the appellate court (*O'Casek v. Children*'s *Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008)). Even so, we may consider decisions of our sister districts, as well as different divisions of our court, as instructive.

¶ 29 Decisional law following *Miller* continues to evolve. *Miller* itself has become so ingrained in our jurisprudence that mention of the case name alone induces a ready recall of both the procedural and substantive rules borne out of that decision. Given defendant's suggested "novel" approach to resolving the issue before us and notwithstanding our familiarity, a more detailed summary of *Miller* and its holding serves best to explain our disposition here. In *Miller*, the Court considered appeals by "two 14-year-old offenders *** convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment." *Miller*, 567 U.S. at 465. Recalling its earlier decisions in *Roper* and *Graham*, the *Miller* court noted the difference between children and adults for purposes of sentencing decisions and that, "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Id.* at 477. The Court explained that a mandatory sentence precludes consideration of, *inter alia*, the juvenile offender's age and its attendant characteristics. *Id.* The Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id.* at 465. Accordingly, "a judge or jury must have the opportunity

to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489.[3]

¶ 30 Subsequent to the decision in *Miller*, the high court in *Montgomery v. Louisiana* clarified that *Miller* established both a substantive and a procedural requirement. 577 U.S. 190, 136 S. Ct. 718 (2016). *Montgomery* explained that, pursuant to *Miller*, sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption. *Id.* at ___, 136 S. Ct. at 195 (citing *Miller* 567 U.S. at 479, and *Roper*, 543 U.S. at 573). *Miller* rendered life without parole an unconstitutional penalty for a particular class of juvenile defendants whose criminal acts reflect the transient immaturity of youth. *Id.* at ___, 136 S. Ct. at 734. "As a result, *Miller* announced a substantive rule of constitutional law." *Id.* at ___, 136 S. Ct. at 734. *Miller*'s procedural component "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.* at ___, 136 S. Ct. at 734.

¶ 31 Here, defendant seeks to divorce *Miller*'s procedural requirement (consideration of the juvenile offender's age and its attendant characteristics) from its substantive rule (mandatory life without parole for juveniles violates the eighth amendment) and require a hearing notwithstanding the absence of a *de facto* life sentence. Nothing in *Miller* can be read to suggest simply that mandatory sentences imposed on juvenile offenders violate the eighth amendment. Nor does such a suggestion arise from a reading of either *Thompson* or *Harris*. To accept defendant's suggested "novel" application of *Miller* would require us to extract the substantive rule of *Miller* from its

[3] As stated previously, our supreme court in *Reyes* extended the holding in *Miller* to include mandatory *de facto* life sentences (2016 IL 119271, ¶¶ 28-34), later quantified in *Buffer* as a sentence greater than 40 years (2019 IL 122327, ¶ 40).

holding and apply only the supporting procedural requirement. To do so would additionally require that we overlook the holdings in *Thompson* and *Harris*, which rely not only upon *Miller*'s procedural requirement but, more significantly, upon the substantive rule of constitutional law in extending protections to emerging adults. To parse out select portions of *Miller*'s holding would mean that we give *Miller*, at least as we know it, no constitutional law effect. The procedural rule in *Miller* does not replace, but rather gives effect to, *Miller*'s substantive holding. *Id*. at ___, 136 S. Ct. 735. Accordingly, we decline defendant's invitation to extend *Miller* to sentences of less than natural or *de facto* life imprisonment.

¶ 32 Although we believe *Miller* and *Buffer are* controlling, we will nonetheless address the holdings in *Aikens* and other cases relied upon by defendant in support of his claim. In *Aikens*, the defendant, who was 17 years old at the time of the offense, was sentenced to an aggregate prison term of 40 years, which included a mandatory 20-year firearm enhancement. 2016 IL App (1st) 133578, ¶ 1. On direct appeal, the defendant raised both facial and as-applied challenges to various of Illinois's mandatory sentencing schemes under both the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. The defendant argued that the mandatory nature of particular sentencing schemes divested the court of any individualized determinations, as proscribed by *Roper*, *Graham*, and *Miller*. *Id.* ¶ 30. In rejecting the defendant's facial claims, the court noted that in *Miller* the Court stated that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for a juvenile. *Id.* ¶ 31.

¶ 33 The court applied a different analysis in deciding the defendant's as-applied challenge to the mandatory firearm enhancement provision. Relying on our supreme court's decision in *People v. Miller* (*Leon Miller*), 202 Ill. 2d 328, 338 (2002), and this court's decision in *People v. Gipson*,

2015 IL App (1st) 122451, the court found that the challenged sentencing scheme, as applied to the defendant, shocked the evolving standard of moral decency and thus violated the proportionate penalties clause. *Aikens*, 2016 IL App (1st) 133578, ¶ 37. In particular, this court noted that the defendant had no prior criminal history and had a troubling background and that the trial court specifically noted that he lacked discretion and the sentence seemed " 'to be an unimaginable amount of time especially for a teenage child.' " *Id.* Noting the evolving standards for juvenile offenders in Illinois, as evidenced by recent legislative enactments, the court expressed that the legislation was indicative of a changing moral compass in our society as it related to trying and sentencing juveniles as adults. *Id.* ¶ 38. Following the lead in *Gipson*, the court reversed the defendant's sentence and remanded for resentencing, without imposition of the mandatory enhancement. *Id.*

¶ 34 We disagree with *Aikens*, which incidentally, like *Leon Miller* and *Gipson*, was decided before *Buffer* and thus without knowledge of *Buffer*'s 40-year demarcation for *de facto* life sentences. Further, we believe that *Miller*'s "harshest possible penalty" proscription, which the *Aikens* court relied upon in rejecting the defendant's facial challenges, was equally applicable to defeat his as-applied challenges. *Buffer* aside, clearly, the defendant's 40-year sentence was not *Miller*'s "life imprisonment without the possibility of parole."

¶ 35 We note in passing that *Leon Miller* and *Gipson*, which were both limited to their particular facts, are factually distinguishable from *Aikens*. In *Leon Miller*, the 15-year-old defendant agreed to serve as a lookout for two individuals who shot and killed two people. 202 Ill. 2d at 330-31. The sentencing court refused to impose the statutorily-mandated life sentence, found that the statute was unconstitutional as applied to the defendant, and instead imposed a 50-year sentence. *Id.* at

335-36. The defendant's circumstances fit squarely within the *Miller* framework, which is far from the case before us.

¶ 36 In *Gipson*, the defendant was also 15 years of age at the time of the charged offense. *Gipson*, 2015 IL App (1st) 122451, ¶ 4. The record revealed the defendant's mental health, before commission of the offense, was questionable. *Id.* ¶¶ 5-15. Yet, in imposing the mandatory firearm enhancement, the court had no discretion to consider the defendant's individual characteristics. *Id.* ¶¶ 23-24. The defendant was sentenced to an aggregate of 52 years in prison, which, we note, would qualify under *Buffer* as a *de facto* life sentence, implicating both the eighth amendment and the proportionate penalties clause. *Id.*

¶ 37 Even if we could overlook the factual distinctions between *Aikens* and *Leon Miller* and *Gibson*, there is one more significant distinction which goes to the viability of defendant's claim here. Significantly, the decisions in neither *Leon Miller* nor *Gibson* required extension of the evolving neuroscience theories regarding brain development in juveniles as the defendants there were both juveniles. Here, defendant's claim is dependent on *Thompson* and *Harris*, which evolved from *Miller* and serve as the basis upon which *Miller*'s procedural rules may be extended to emerging adults, like defendant.

¶ 38 Defendant argues that, even short of actually finding a statute unconstitutional as applied to an emerging adult, our court has repeatedly found that, under the proportionate penalties clause, an emerging adult who either received a "*de facto* life sentence or suffered mandatory application of a severe adult statute without consideration of his youth can at least proceed to the second stage of post-conviction proceedings." At the second stage, defendant can then argue, with the assistance of counsel, "why the fact their youth was not properly considered at sentencing renders their sentence unconstitutional."

¶ 39 In support of this argument, defendant cites *People v. Ruiz*, 2020 IL App (1st) 163145. In *Ruiz*, the defendant, who was 18 years old at the time of the offense, was found guilty of first degree murder and aggravated discharge of a firearm and sentenced to 40 years' imprisonment, which included a concurrent 15-year mandatory firearm enhancement. *Id.* ¶¶ 1, 16, 18. In seeking leave to file his successive postconviction petition, the defendant challenged his "40-year discretionary sentence" as unconstitutional under the proportionate penalties clause because the trial court failed to consider his age during sentencing. *Id.* ¶ 28. Over strong dissent, this court reversed the trial court's denial of leave to file the petition and remanded for further proceedings to permit the defendant, originally sentenced to 40 years, an opportunity to develop the factual basis in support of his *Miller* claim. *Id.* ¶ 2. Specifically, the *Ruiz* majority held that the defendant stated a claim that, as a matter of law, the successive postconviction requirement of "prejudice has been caused by reason of [his] justified failure to raise a constitutional challenge to his sentence in his initial postconviction petition." *Id.* ¶ 53. The dissent pointed out that, as the defendant's 40-year sentence was not a *de facto* life sentence, *Miller* protections did not apply. *Id.* ¶ 77 (Pierce, J., dissenting). The dissent stated that, because there was no authority to extend to an adult protection not available to any juvenile that did not receive a *de facto* life sentence, the petitioner's *Miller* claims should be dismissed. *Id.*

¶ 40 We decline to follow *Ruiz*. Instead, we agree with the dissent that, because defendant's 40-year sentence did not equate to a *de facto* life sentence, it did not qualify for *Miller* type protections. See *People v. Carrion*, 2020 IL App (1st) 171001, ¶ 35 (disagreeing with *Ruiz* and noting that the defendant in that case "did not even receive a *de facto* life sentence"). Additionally, as the dissent makes clear, given the length of the sentence, even had the defendant been a juvenile, he would not have been entitled to *Miller*-type protections.

¶ 41 Further, the majority in *Ruiz* determined that a 40-year sentence would result in a 15-year-old defendant being released at age 55 and an 18-year-old defendant being released at age 58 and that the statistical predictions for life expectancy should be considered for these age differences and what constitutes a life sentence. *Ruiz*, 2020 IL App (1st) 163145,¶ 44 (majority opinion). Rather than follow the rationale in *Buffer*, the court appeared to adopt an "age of release" standard in determining whether a 40-year sentence should be considered a *de facto* life sentence for young adults. *Id.* ¶¶ 43-45. However, the *Buffer* court expressly considered and rejected arguments that involved statistical data on the number of years that would result in a survivable sentence or that suggested that *Miller* be triggered when a sentence results in a "geriatric release." 2019 IL 122327, ¶¶ 31-33. But see *id.* ¶¶ 53-68 (Burke, J., specially concurring) (stating that "the answer to the question "what constitutes a *de facto* life sentence is essentially a mathematical calculation"). Further, and purely as an aside, we question whether the procedure espoused in *Ruiz* comports with settled procedures regarding satisfaction of the cause-and-prejudice test for purposes of filing a successive postconviction petition.

¶ 42 We believe that the analysis in *People v. Woods*, 2020 IL App (1st) 163031, comports with *Miller* and *Buffer*. In *Woods*, the defendant, who was 17 years old at the time of the offenses, was found guilty of attempted murder and aggravated battery with a firearm and sentenced to 33 years' imprisonment, which included a mandatory 25-year firearm enhancement. *Id.* ¶¶ 23, 25. In his successive postconviction petition, the defendant alleged, *inter alia*, that his sentence violated the proportionate penalties clause, as applied to him, because he was a juvenile when the offenses occurred and the mandatory sentencing enhancement removed discretion from the sentencing court. *Id.* ¶ 30. This court held that because the defendant received neither a mandatory nor a *de facto* life sentence, as defined in *Buffer*, 2019 IL 122327, ¶¶ 57, 63, his challenge failed to

demonstrate prejudice. The court further noted that our supreme court has upheld the constitutionality of mandatory firearm sentencing schemes and stated that there was no indication from the legislature that the application of mandatory firearm enhancements to juveniles shocked our sense of moral decency. *Woods*, 2020 IL App (1st) 163031, ¶ 58 (citing *People v. Sharpe*, 216 Ill. 2d 481, 524-25 (2005)).

¶ 43 The State argues, and we agree, that *Woods* supports its position on appeal. Similar to *Woods*, defendant here has also not received a natural or *de facto* life sentence. As such, his challenge fails to demonstrate a constitutional violation. See also *People v. Wilson*, 2016 IL App (1st) 141500, ¶ 44 (stating that our supreme court "has interpreted *Roper*, *Graham*, and *Miller* to apply 'only in the context of the most severe of all criminal penalties' " (quoting *People v. Patterson*, 2014 IL 115102, ¶ 110)).

¶ 44 Defendant distinguishes *Woods* on the basis that the defendant's offense there occurred near a school and involved the shooting of a police officer and that the defendant was asserting his claim in a successive postconviction petition, as opposed to an initial petition as here. Additionally, defendant points out that the defendant in *Woods* received a 33-year sentence, whereas defendant here received a 40-year sentence, "only *one day less* than what the Court has deemed a *de facto* life sentence for juvenile offenders." For these reasons, defendant argues that *Woods* "does not negate the arguable nature of [his] initial postconviction claim."

¶ 45 We find the facts offered by defendant as distinguishable to be without any meaningful difference, as they do nothing to alter the fact that his sentence was neither the qualifying life sentence proscribed by *Miller* nor the *de facto* life sentence as expressly defined by *Buffer*.

¶ 46 Finally, defendant cites *Barnes*, 2018 IL App (5th) 140378, and *People v. Womack*, 2020 IL App (3d) 170208, both of which were decided by our appellate court in other districts. In

Barnes, the defendant, who was 17 years old at the time of the offense, was sentenced to a total of 37 years' imprisonment, which included a 15-year mandatory firearm enhancement, for armed robbery. 2018 IL App (5th) 140378, ¶ 1. The defendant argued that the mandatory firearm enhancement statute was unconstitutional under the proportionate penalties clause. *Id.* ¶ 16. The Fifth District found the *Aikens* decision to be instructive and held that "the sentencing scheme employed by the trial court, as applied to [the] defendant, violate[d] the proportionate penalties clause of the Illinois Constitution, as it shocks our community's evolving standard of moral decency." *Id.* ¶ 25. For the reasons that we decline to follow *Aikens*, we also decline to follow *Barnes*.

¶ 47 In *Womack*, the defendant was 16 years old at the time of the offense and was sentenced to a total of 38 years' imprisonment, which included a mandatory 20-year firearm enhancement. 2020 IL App (3d) 170208, ¶ 1. In a successive postconviction petition, the defendant alleged that he established cause and prejudice to bring an as-applied claim that the firearm enhancement violated the proportionate penalties clause. *Id.* ¶ 13. Citing *Aikens* and *Barnes*, the majority concluded that the mandatory enhancement as applied to the defendant violated the proportionate penalties clause insofar as the enhancement did not comport with "Illinois's evolving standard of decency" in this case. *Id.* ¶ 15. However, the majority did not address the fact that the defendant's sentence was not a *de facto* life sentence, and, in fact, the majority did not cite *Buffer* at all. We disagree with the majority's conclusion in that respect because, again, it is clear from our supreme court precedent that *Miller* is only applicable where a defendant has received a natural or *de facto* life sentence. *Buffer*, 2019 IL 122327, ¶ 27 (a defendant must show both (1) that he was "subject to a life sentence, mandatory or discretionary, natural or *de facto*," and (2) that "the sentencing court failed to consider youth and its attendant characteristics"); *Holman*, 2017 IL 120655, ¶ 40; *Reyes*, 2016

IL 119271, ¶ 9; see also *Womack*, 2020 IL App (3d) 170208, ¶¶ 30-31 (Schmidt, J., dissenting) (stating that *Miller* should not apply, as the defendant "did not receive a life sentence in any sense"); *People v. Carmichael*, 2021 IL App (1st) 173031-U, ¶ 36 (Hyman, J., concurring) (stating that the 19-year-old defendant's 35-year sentence did not qualify for protections under *Miller* because he did not receive a *de facto* life sentence as it has been defined in *Buffer*).

¶ 48 III. CONCLUSION

¶ 49 To pass first stage muster under the Act, a petitioner must state the gist of a constitutional claim. *Hodges*, 234 Ill. 2d at 9. Here, defendant challenges imposition of the mandatory firearm enhancement provision, absent consideration of the characteristics attendant to youth, as violative of the proportionate penalties clause of the Illinois Constitution. As the United States Supreme Court noted in *Harmelin*, "[t]here can be no serious contention *** that a sentence which is not otherwise cruel or unusual becomes so simply because it is "mandatory.' " *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (citing *Chapman v. United States*, 500 U.S. 453, 467 (1991)). In fact, our supreme court held that the mandatory firearm enhancement does not violate the proportionate penalties clause. See *Sharpe*, 216 Ill. 2d 481; see also *People v. Pace*, 2015 IL App (1st) 110416, ¶ 41. Further, and consistent with the holdings in *Miller* and *Buffer*, only natural or *de facto* life sentences require consideration of youth and its attendant characteristics.

¶ 50 Defendant received an aggregate sentence of 40 years, 25 of which included the mandatory firearm enhancement. As defendant did not receive the most severe penalty possible, the procedural protections under *Miller* were not required. His sentence was not "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *Sharpe*, 216 Ill. 2d at 493. We decline defendant's entreaty to extend the procedural requirements of *Miller* to sentences that do not violate the substantive rule of constitutional law announced therein.

Because defendant has not stated the gist of a constitutional claim, summary dismissal of his first stage petition was proper.

¶ 51 For the reasons stated, we affirm the judgment of the circuit court.

¶ 52 Affirmed.

No. 1-20-0112

Cite as:	*People v. Hilliard*, 2021 IL App (1st) 200112
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 13-CR-19027; the Hon. Vincent Michael Gaughan, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Caroline E. Bourland, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (John E. Nowak, Tasha Kelly, and Gina DiVito, Assistant State's Attorneys, of counsel), for the People.

In The Circuit Court of Cook County
Criminal Division

People of The State of Illinois)
Respondent.) case No. 13 CR 1902 701
)
v.)
Andre Hilliard,) Vincent M. Gaughan
Petitioner.) Presiding Judge

Notice of Appeal

An appeal is taken from the ORDER OR judgment described below.

1.) Court to which appeal is taken: 2650 S. California Criminal Court building - Circuit Court.

2.) Name of appellant and address to notice shall be sent:
Name: Andre Hilliard # m47043
Address: P.O. Box 112, Joliet, IL 60434

3.) Name and address of attorney on appeal
Name: _____
Address: _____
If appellant is indigent and has no attorney, does he want one appointed? Yes

4.) Date of judgment OR ORDER: December 05, 2019

5.) Offense of which convicted: Attempted first degree murder and aggravated discharge of a firearm.

6.) Sentenced: 40 years for attempted first degree murder, 25 years for discharging a firearm.

7.) If appeal is not from a conviction, Nature order appealed from: Post-conviction Petition.

Signed: Andre Hilliard

No. 128186

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Andre Hilliard, Register No. M47043, Joliet Treatment Center, 2848 West McDonough, Joliet, IL 60436

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 October 12, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Kelly Kuhtic
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us