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.

REPLY BRIEF FOR PETITIONER-APPELLANT

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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 applied to his 15-year sentence for attempt murder is unconstitutional as applied to him under the proportionate penalties clause of the Illinois Constitution.

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

Andre Hilliard–an 18-year-old offender–argued in a *pro se* post-conviction that the mandatory 25-year firearm add-on attached to his 15-year sentence for attempt murder violated the Illinois Constitution, as applied to him. (C. 90) The State tacitly acknowledges the low burden placed upon a *pro se* petitioner at the first stage of proceedings, where a petition may only be dismissed if it is indisputably meritless, *i.e.*, completely contradicted by the record or without an arguable basis in the law. (St. Br. 17) *See People v. Hodges*, 234 Ill. 2d 1, 22-23 (2009). The State nevertheless treats this case as if it were at later stages of post-conviction proceedings and Andre were required to *prove* the mandatory enhancement is unconstitutional as applied to him. *See People v. Edwards*, 197 Ill. 2d 239, 246-47 (2001) (whether defendant has made a "substantial showing of a constitutional violation" is inappropriate at first stage). Ultimately, the State agrees that any offender–juvenile or adult,–with any sentence–life or otherwise–may make an as-applied challenge to a sentencing statute, and that the appellate court here was wrong to find otherwise. (St. Br. 40-41) Yet the State fails to show why Andre's own claim in that regard is fanciful or without an arguable legal basis. Nor do the State's new attempts to show Andre's claim is forfeited or barred by *res judicata* have merit. Thus, this Court should reverse the summary dismissal of Andre's *pro se* petition and remand for second-stage proceedings, including the appointment of counsel.

B. The State's new procedural arguments should be rejected.

The State asks this Court to find Andre's as-applied challenge forfeited because he did not raise that claim at sentencing and did not try to overcome forfeiture by alleging ineffective

assistance of trial counsel in his *pro se* petition, and also to find it barred by *res judicata* because the appellate court rejected an excessive sentence argument raised by Andre on direct appeal. (St. Br. 23-31) Both arguments should be rejected.

First, "[t]he rules of waiver are applicable to the State as well as the defendant in criminal proceedings, and the State may waive an argument that the defendant waived an issue by failing to argue waiver in a timely manner." *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000). When proceeding in the appellate court, the State did not claim forfeiture or *res judicata*, even though it acknowledged both principles generally apply in post-conviction proceedings. (St. App. Br. 6-7) Thus, the State forfeited its ability to claim forfeiture or *res judicata* in this appeal.

Addressing forfeiture on the merits, this Court has repeatedly held that post-conviction petitions provide the proper forum for as-applied challenges, without ever stating they first have to be raised at sentencing. *See People v. Harris*, 2018 IL 121932, ¶48 (rejecting as-applied challenge raised by defendant on direct appeal and stating claim could be raised through Post-Conviction Hearing Act) and *People v. Thompson*, 2015 118151, ¶44 (citing the Act as "expressly designed" to address as-applied proportionate penalties challenge raised by emerging adult); *cf. People v. Clark*, 2023 IL 127273, ¶94 (*Miller* did not provide emerging adult with cause to raise an as-applied proportionate challenge to his sentence in successive petition because it did not "explain why defendant neglected to raise the proportionate penalties clause claim in his *prior postconviction proceedings*") (emphasis added). Indeed, when Andre tried to raise this claim on direct appeal, without alleging ineffective assistance of counsel, the appellate court followed *Thompson*, 2015 IL 118151, and told Andre he could only raise the challenge in a post-conviction petition. *People v. Hilliard*, 2017 IL App (1st) 142951-U, ¶¶40-42. (PA14-15)

The State contends the appellate court's holding "meant only that petitioner might have obtained review of th[is] claim[] through the lens of ineffective assistance of counsel

– , *i.e.*, by alleging that defense counsel provided ineffective assistance for not raising and developing the claim, including its evidentiary basis, at sentencing." (St. Br. 28-29) Yet the decision did not contain any such language or requirement. *Hilliard*, 2017 IL App (1st) 142951-U, ¶¶40-42. As noted above, *Thompson* and *Harris* confirm that no further allegations were necessary to raise the claim in a post-conviction petition.

The State also fails to take into account a key component of as-applied challenges, *vis*, that they are analyzed under *evolving* standards of decency. *People v. Leon Miller*, 202 Ill. 2d 328, 340 (2002). The most objective evidence of evolving standards of decency are the laws passed by the legislature. *Id.* at 340-41. Thus, Andre's claim relies on *current* legislation to illustrate the evolving standards of decency in the treatment of youthful offenders, including that firearm enhancements are now discretionary for juveniles and that young adults under age 21 are now eligible for parole. 730 ILCS 5/5-4.5-105(b) (eff. 2017); 730 ILCS 5/5-4.5-115(b) (eff. 2019). By contrast, Andre was sentenced in 2014. (R. 439) Thus, a finding that his current as-applied challenge has arguable merit is distinct from and stronger than a claim that trial counsel was ineffective in failing to raise that issue in 2014. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made . . . to evaluate the conduct from counsel's perspective at the time.") (emphasis added).

In any event, any perceived failure of Andre to overcome forfeiture by failing to allege ineffective assistance of trial counsel in his *pro se* petition is merely a procedural defect that may easily be cured at the second stage of proceedings. *See People v. Flores*, 153 Ill. 2d 264, 278 (1992); *People v. Addison*, 2023 IL 127119, ¶23. At the first stage, a *pro se* petition is viewed with a liberal eye and assessed for its "substantive virtue rather than its procedural compliance." *People v. Hommerson*, 2014 IL 115638, ¶11. Thus, this Court has repeatedly found error in the summary dismissal of claims based on some sort of procedural defect that

a trained attorney can cure at the second stage. *See People v. Allen*, 2015 IL 113135, ¶37 (failure to notarize supporting affidavit); *Hommerson*, 2014 IL 115638, ¶11 (lack of verification affidavit); *People v. Boclair*, 202 Ill. 2d 89, 101-02 (2002) (failure to explain lack of culpable negligence for untimely filing). Here, the absence of a claim from Andre that his trial attorney was ineffective in failing to challenge the mandatory firearm enhancement as applied to him did not prevent review of the substantive virtue of his petition: both the circuit court and the appellate court understood the nature of his challenge and reviewed that claim on its merits. (C. 110-114); *Hilliard*, 2021 IL App (1st) 200112, ¶¶17-52. *See also People v. Turner*, 187 Ill. 2d 406, 412-13 (1999) (post-conviction counsel must amend petition to overcome forfeiture).

Moreover, the appellate court has recognized that a claim of ineffective assistance may be implied in a *pro se* petition. In *People v. Chrisman*, 2022 IL App (2d) 210530-U, ¶19, the court held that while the "defendant did not directly raise the issue of ineffective assistance of appellate counsel in his petition, [ ] doing so requires a higher level of legal procedural knowledge, whereas a *pro se* defendant is often 'unaware of the precise legal basis for his claim or all the legal elements of that claim.'" *Id.* at ¶28, *quoting Edwards*, 197 Ill. 2d at 245.[1] *Chrisman* has support from *Hodges*, where this Court rejected the defendant's own *pro se* claim that his attorney was ineffective for failing to call a witness who would have supported a theory of self-defense, but also found it arguable that the witness *would* have supported *second-degree murder*, a claim *not* raised by the petitioner. *Hodges*, 234 Ill. 2d at 16, 20. This Court reasoned that "whether defendant's *pro se* petition, which focused on self-defense, could be said to have included allegations regarding unreasonable belief second degree murder – *i.e.*, imperfect self-defense – is at a minimum the type of borderline question which, under liberal construction, should be answered in defendant's favor. *Id.* at 21. *See also Edwards*, 197 Ill.2d

[1] Andre cites to *Chrisman* as persuasive authority under Supreme Court Rule 23(e)(1) (eff. Jan. 1, 2021). A copy of the decision is included in the appendix.

at 245 ("by definition, a 'gist' of a claim is something less than a completely pled or fully stated claim."); *People v. Thomas*, 2014 IL App (2d) 121001, ¶77 (noting this Court has never held that "a petition's legal arguments must be explicit or that claims implied by the factual allegations of a petition are forfeited")

Citing *People v. Cole*, 2012 IL App (1st) 102499, the State contends no claim of ineffective assistance of counsel can be implied from Andre's petition, since it is a "distinct legal theory" from his as-applied challenge. (St. Br. 29) However, if the State correctly argues that Andre can only frame his current as-applied challenge in terms of ineffective assistance of sentencing counsel, then an allegation that counsel was ineffective for failing to make that challenge is not a distinct legal issue, rather, it is only an element necessary to overcome forfeiture. Moreover, *Cole* relied on *People v. Jones*, 213 Ill. 2d 498 (2004). *See* 2012 IL App (1st) 102499, ¶13. This was unreasonable, as *Jones* held only that a defendant who filed a conclusory post-conviction petition only containing the words "effective assistance of counsel" could not claim for the first time on appeal that the circuit court incorrectly admonished him during his guilty plea. 213 Ill. 2d at 502-09. That is different from the mere failure of a defendant to plead a legal element necessary to properly advance his claim. Indeed, *Cole* did *not* cite *Hodges* in its analysis. *See also Martinez v. Ryan*, 566 U.S. 1, 11-12 (2012) (recognizing the difficulty *pro se* petitioners face in raising claims of ineffective assistance of counsel).[2]

The State's *res judicata* argument should also be rejected. *Res judicata* bars re-litigation of claims "actually decided." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302

[2] The State's request for this Court to dismiss Andre's argument because he did not include *four* words in his petition–ineffective assistance of counsel–is further troubling since Andre's attempt to raise this issue on direct appeal was rejected, he followed the appellate court's instruction to raise this claim in a post-conviction petition, and likely cannot raise this issue in a successive post-conviction petition. *See* 725 ILCS 5/122-1(f)(1) (2023). *See also Marino v. Ragen*, 332 U.S. 561, 563-70 (1947) (Rutledge, J., concurring) (criticizing Illinois for dismissing too many constitutional claims on procedural grounds, without a hearing).

(1998); *Clark*, 2023 IL 127273, ¶41. The constitutionality of the 25-year firearm enhancement as applied to Andre was *not* decided on direct appeal; the appellate court expressly declined to consider that argument. *Hilliard*, 2017 IL App (1st) 142951-U, ¶¶39-42. (St. App. PA13-14)

Nor did the appellate court's rejection of Andre's distinct excessive sentence argument implicitly address his as-applied challenge. The appellate court analyzed Andre's excessive sentence challenge by focusing on the discretionary 15-year sentence imposed by the court. *Id*. ¶¶52 (stating that Andre "was sentenced to 15 years for attempted murder, 15 years below the statutory maximum"). (St. App. PA17) The court even contrasted Andre's 15-year sentence to a 40-year sentence at issue in *People v. Maldonado*, 240 Ill. App. 3d 470 (1st Dist. 1992). *See Hilliard*, 2017 IL App (1st) 142951-U, ¶¶50-52. Nothing in the direct appeal decision addressed the constitutionality or proportionality of the mandatory 25-year firearm. Indeed, two of the three justices who presided over this post-conviction appeal below also presided over the direct appeal, and they specifically held that Andre's post-conviction as-applied challenge was *not* barred by *res judicata*. *See Hilliard*, 2021 IL App (1st) 200112, ¶20; *Hilliard*, 2017 IL App (1st) 142951-U (St. Br. App. PA1)

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

The State does not dispute that as-applied constitutional challenges exist in Illinois, that this Court has found statutes unconstitutional as applied to both juvenile and adult defendants, that courts have found mandatory firearm enhancements unconstitutional as applied to particular juvenile offenders, and that courts have also extended juvenile sentencing laws to late adolescent offenders. (Def. Br. 11-29) This case law offers legal support for each element of Andre's claim, showing it has an arguable basis in the law and should advance to second-stage proceedings. *See Hodges*, 234 Ill. 2d at 16. None of the State's arguments support a contrary conclusion.

First, the State relies heavily on the general power of the legislature to pass laws and

to make policy judgments, to contend Andre's challenge has no arguable legal or factual merit. (St. Br. 20-21, 35-37. 38, 40, 41, 42-43, 45, 48-51) Andre has not raised a facial challenge to the firearm enhancement statute or challenged the legislature's authority to enact laws. Yet through this argument, the State seeks to preclude *any* individual from *ever* raising an as-applied challenge to a statute, as this same general legislative power will apply in *every* case. In *Leon Miller*, 202 Ill. 2d at 336-40, this Court explained the distinction between the legislative power to *prescribe* mandatory sentences and the duty of the judiciary to make sure a particular penalty *imposed* on a defendant satisfies constitutional constrictions. As-applied challenges serve a vital function in ensuring the constitutionality of particular criminal sentences, without undermining the general legislative power to set sentencing parameters. Thus, this Court should not preclude as-applied challenges from Illinois jurisprudence on the ground that the legislature alone can make the policy judgments that also come into play with as-applied challenges.

The State also argues that this Court should not focus on the mandatory enhancement, but instead should treat Andre's claim as a "challenge to the resulting minimum 31-year sentence." (St. Br. 19-20) This argument ignores the plain language of the attempt murder statute, where the sentence for attempt murder when the defendant personally discharged a firearm that proximately caused great bodily harm, permanent disability, or permanent dismemberment "is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court[.]" 720 ILCS 5/8-4(c)(1)(D) (2013). The statute does not require a sentence between 31 years to life, but: (1) a sentence in the Class X range; and (2) "add[ing]" an enhancement of 25 years to life. *Id*. *See* Ill. Gen. Assem., House Proceedings, May 13, 1999, 68-69 (statement from Rep. Turner, J.) (stating law would require judge to decide underlying sentence based on offense and then add mandatory enhancement).[3]

[3]The State's citations (St. Br. 21) to cases where this Court referred to the longer sentencing ranges created by the enhancements are not persuasive because this Court also

This two-step sentencing process is exactly what the sentencing court did in this case, which the State does not address. (R. 465-66) *See also Hilliard*, 2021 IL App (1st) 200112, ¶27 (finding Andre's "sentence is clearly composed of two statutorily authorized components" and that "[t]o suggest otherwise is simply disingenuous"). Andre only challenges the mandatory enhancement attached to his sentence, and the State fails in its attempt to transform his narrow claim into a challenge to the *entire* sentence for attempt murder. S*ee People v. Chairez*, 2018 IL 121417, ¶59 (requiring narrow analysis of constitutionality of statutes).

The State also cites *People v. Burns*, 2015 IL 117387, ¶24, to argue that sentencing enhancements do not create "separate and distinct offenses." (St. Br. 21) However, under Andre's argument, all attempt murder sentences constitute the same offense of attempt murder, with the same discretionary sentence range, enhanced by whatever firearm add-on is applicable. By contrast, the State's contention that the sentencing range differs depending on whether and how a gun was used effectively creates different offenses with different penalty ranges.

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

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

The State does not challenge the validity of the appellate court decisions finding mandatory firearm enhancements directly, or arguably, unconstitutional as applied to a particular youthful offender. (Def. Br. 13-16) *See People v. Womack*, 2020 IL App (3d) 170208, ¶¶15-22;

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referred in those cases to the enhancements as "add-ons" or "mandatory enhancements." *See People v. Morgan*, 203 Ill. 2d 470, 482, 484 (2003); *People v. Hill*, 199 Ill. 2d 440, 445-46 (2002); *People v. Sharpe*, 216 Ill. 2d 481, 524 (2005). Indeed, in *People v. Hill*, 199 Ill. 2d 440 (2002), this Court noted specifically that the legislature "*could have* simply chosen to increase directly the original sentencing range of 21 to 45 years *instead of* implementing *the add-on scheme. . .*" *Id*. at 447 (emphases added).

People v. Barnes, 2018 IL App (5th) 140378, ¶¶26-29; *People v. Aikens*, 2016 IL App (1st) 133578, ¶¶37-38; *People v. Gipson*, 2015 IL App (1st) 122451, ¶¶73-78. Instead, it errantly argues that Andre's citation to these cases "compares his offense and circumstances to juvenile offenders who committed different offenses under different circumstances," which results in an improper "cross-comparison analysis." (St. Br. 45-46) A cross-comparison analysis finds a constitutional violation when a statute punishes less serious conduct more severely than more serious conduct. *See Sharpe*, 216 Ill. 2d at 487-88. Here though, Andre cited those cases to show that his own similar as-applied challenge has an arguable basis in the law. (Def. Br. 13-15)

The State also argues these decisions "do[] not imply that all offenders subject to the same mandatory sentence have an arguably meritorious penalties provision claim, as petitioner's argument suggests." (St. Br. 46) However, Andre also relied on the facts of *his* case to argue the mandatory enhancement is unconstitutional as applied to him. (Def. Br. 29-35)

The factual differences cited by the State from these cases to Andre's case (St. Br. 46-47), do not defeat the arguable legal basis for Andre's claim. For example, while the State focuses on the fact that the defendant in *Barnes* committed an armed robbery (St. Br. 46), the defendants in *Womack*, *Aikens*, and *Gipson* were all convicted of the same offense as Andre–attempt murder; the defendants in *Aikens* and *Gipson* were each convicted of *two* attempt murders, and the defendant in *Womack* paralyzed his victim. *See Womack*, 2020 IL App (3d) 170208, ¶15; *Aikens*, 2016 IL App (1st) 133578, ¶28; *Gipson*, 2015 IL App (1st) 122451, ¶24. Here, Andre shot one person in the arm. (R. 272-74) Likewise, while the State notes that the defendant in *Aikens* had a troubling social history and that the court there imposed the minimum sentence (St. Br. 47), Andre also has a troubling social history (*see* Def. Br. 29-33), and the courts in *Womack* and *Barnes* found mandatory enhancements arguably or actually unconstitutional as applied, even though the courts did *not* impose the minimum sentence.

Womack, 2017 IL App (3d) 170208, ¶17; *Barnes*, 2018 IL App (5th) 140378, ¶¶26-29. Thus, courts have found firearm enhancements unconstitutional as applied in legal circumstances similar to Andre's, confirming his claim is not frivolous under the law.

The State cites various cases where the appellate court has rejected as-applied challenges to mandatory firearm enhancements. (St. Br. 47-48) However, *People v. Woods*, 2020 IL App (1st) 163031, ¶57, rejected the as-applied challenge because it did not result in the defendant receiving a *de facto* life sentence. In *People v. Thomas*, 2017 IL App (1st) 142557, ¶¶47-48, the court rejected an as-applied challenge because the defendant was 18 at the time of his offense, stating as a matter of law that "a line must be drawn at some point." The State agrees elsewhere in its brief that both of these propositions are incorrect, and that any offender may raise an as-applied challenge, with no particular length of sentence required. (St. Br. 40-41) Where *Woods* and *Thomas* rejected as-applied challenges for *incorrect* legal reasons, they do not undermine the arguable legal basis of Andre's own claim.

Next, *People v. Wilson*, 2016 IL App (1st) 141500 (St. Br. 47) acknowledged that the cases cited by the defendant to support his claim, but ultimately rejected the defendant's as-applied challenge on its *facts*. 2016 IL App (1st) 141500, ¶43. Finally, *People v. Hunter*, 2016 IL App (1st) 141904, ¶59 (St. Br. 48) only included a cursory discussion to conclude that the mandatory enhancement did not violate the proportionate penalties clause, since the trial court could still consider the defendant's age when choosing the underlying sentence. That logic conflicts with more recent cases on this issue, cited above. The State does not dispute that a claim is not legally frivolous due to a split in authority on the issue. (Def. Br. 36-40)

The State also cites cases where this Court has rejected facial or as-applied challenges. (St. Br. 36-37) None of these cases, however, preclude a particular class of offender from making such a claim, but only rejected the various arguments on their merits. *See People v. Coty*, 2020

IL 123972, ¶¶31, 43-44 (mandatory life sentence not unconstitutional as applied to recidivist adult child sex offender with intellectual disabilities); *People v. Huddleston*, 212 Ill. 2d 107, 129-48 (2004) (same); *People v. Rizzo*, 2016 IL 118599, ¶¶26-44 (rejecting facial challenge to speeding statute); *Sharpe*, 216 Ill. 2d at 523-27 (rejecting facial challenge to firearm enhancements in first-degree murder statute); *Morgan*, 199 Ill. 2d at 451-59 (same for home invasion); *People v. Arna*, 168 Ill. 2d 107, 114 (1995) (rejecting facial challenge to consecutive sentencing statute); *People v. Dunigan*, 165 Ill. 2d 235, 244-48 (1995) (rejecting facial challenge to habitual criminal statute); and *People v. Taylor*, 102 Ill. 2d 201, 204-10 (1984) (murder statute did not violate separation of powers doctrine). None of these cases address the constitutionality of a mandatory firearm enhancement applied to a late adolescent offender; thus, they do not provide a basis for summarily dismissing Andre's claim at the first stage.

The State argues that "for serious crimes like petitioner's, this Court has found it cruel or degrading to apply the mandatory minimum penalty to a particular offender in just one case," *Leon Miller*, 202 Ill. 2d at 340-43. (St. Br. 37) This argument ignores that this Court has held repeatedly that emerging adults, like Andre, may raise as-applied challenges in an initial post-conviction petition, without *ever* rejecting such a claim on the merits. *See Thompson*, 2015 IL 118151, ¶¶43-44; *Harris*, 2018 IL 121932, ¶48; *People v. House*, 2021 IL 125124, ¶32. *See also People v. Clark*, 2023 IL 127273, ¶87 ("Defendant is correct that this court has not foreclosed 'emerging adult' defendants between 18 and 19 years old from raising as-applied proportionate penalties clause challenges to life sentences based on the evolving science on juvenile maturity and brain development."). Thus, Andre's claim has arguable legal merit.

The State also suggests that *Leon Miller* only supports allowing juveniles found guilty under a theory of accountability to raise as-applied challenges. (St. Br. 37-38) It notes further that, in *People v. Davis*, 2014 IL 115595, ¶45, this Court held that the proportionate penalties

clause "does not necessarily prohibit a sentence of natural life without parole where a juvenile offender actively participates in the planning of a crime that results in multiple murders." (St. Br. 28) Neither argument precludes Andre from raising this claim at the first stage. Indeed, Andre did not actively participate in a crime that led to even one murder, let alone two. Moreover, in *Leon Miller*, this Court disavowed any set test for what punishment is so wholly disproportionate as to shock the moral sense of the community; rather, the issue turns on the facts of each case, viewed under evolving standards of decency. 202 Ill. 2d at 339-40. *See also People v. Daniels*, 2020 IL App (1st) 171738, ¶¶29, 31 ("Nowhere did the *Harris* court suggest . . . that a defendant's degree of participation in a crime . . . should utterly disqualify him from raising such a claim"); *accord People v. Ross*, 2020 IL App (1st) 171202, ¶28. *Gipson*, *Aikens*, *Barnes*, and *Womack* all found mandatory firearm directly or arguably enhancements unconstitutional in cases where the defendants were principal offenders (Def. Br. 14-15), and courts have even allowed principal offenders convicted of *murder* to raise an as-applied challenge. (Def. Br. 14-15m 23, 36-37) Therefore, there is an arguable legal basis for Andre's claim.

Finally, the State argues this Court has never held that the Illinois Constitution "categorically" requires individualized sentencing for a particular offender. (St. Br. 39) However, Andre's argument does not hinge on individualized sentencing being categorically required. Rather, he contends that the mandatory firearm enhancement is unconstitutional as applied to him under the specific facts of his own case. (Def. Br. 29-35)

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.

The State argues that the fact that the legislature has authorized a designated punishment for a crime says "something" about the general moral ideas of the people. (St. Br. 35, *citing*

Coty, 2020 IL 123972, ¶43.) While true, that is only the starting point for this analysis; accepting that principle, courts must *also* review the gravity of the defendant's offense in connection within *evolving* standards of decency. *See Leon Miller*, 202 Ill. 2d at 339-41.

Andre established the arguable legal basis necessary to survive first-stage dismissal where the mandatory firearm enhancements were enacted almost 25 years ago in 1999. That decade represented a time when this country implemented a wave of "tough on crime" laws, and Illinois responded in turn through "tougher sentences," including mandatory and enhanced sentences. *People v. Buffer*, 2017 IL App (1st), ¶80 (Pucinski, J., concurring). The "tough on crime" environment in which Illinois's mandatory firearm enhancements were enacted no longer represents current societal values, either in Illinois or nationwide. *See* Hector, M., *Criminal Justice Reform Commission Seeks to Shrink Prison Population*, 103 Ill. Bar. J 14 (2015) (discussing efforts of former governor Bruce Rauner in seeking criminal justice reform and citing comments from Attorney General Kwame Raoul regarding the "bi-partisan" and "remarkable" manner in which people had changed their views on "tough on crime" laws in Illinois); Bagaric, M. & Accord, D., *Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform*, 67 Buff. L. Rev. 227, 246-56 (April 2019) (noting that the "tough on crime" approach that was a "mainstay" of American politics and society in the past was "no longer receiving unquestioned support," that the "errors of mass incarceration" have been so well documented that "no scholar has advanced an argument in favor of incarceration at the levels currently experienced in the United States," that media and modern politicians have criticized the "overly punitive" nature of the sentencing system, and that recent surveys reveal "strong public support" for reform).

The State does not dispute that the very model on which Illinois's mandatory firearm enhancement statute was based–a California law also passed in the 1990s–no longer exists;

California courts now have discretion to strike firearm enhancements for both juveniles *and adults*. (Def. Br. 17-18, citing CAL. PENAL CODE §§12022.3 (eff. Jan. 1, 2022), 12022.5(a),(c) (eff. Jan. 1, 2018)). The Illinois legislature has also stepped back from this law, no longer mandating these enhancements on juveniles. *See* 730 ILCS 5/5-4.5-105(b) (eff. 2017). Thus, the State's argument that the creation of the statute mandating firearm enhancements itself reflects the current standards of decency in Illinois is incorrect.

The State asks this Court to disregard the firearm enhancement statutes in other states, since Andre did not argue in his *pro se* petition that his claim was "grounded" in other states' statutes. (St. Br. 48) However, Ander cited these other statutes to illustrate the evolving standards of decency on this issue in support of the arguable legal basis of his claim. *See Graham v. Florida*, 560 U.S. 48, 62 (2010) ("clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures") (internal citations and quotations omitted). *Pro se* petitioners are not required to cite legal authority in their petition. *People v. Brown*, 236 Ill. 2d 175, 184 (2010) (at first stage, "petitioner need present only a limited amount of detail and is not required to include legal argument or citation to legal authority"); *Hodges*, 234 Ill. 2d at 9. Though the State cites *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (St. Br. 48), that decision only requires petitioners to attach "evidence" necessary to support their claims. *See id*. The statutes in other states are legal authority, not evidence, and Andre was not required to cite this law in his *pro se* petition to have it be considered on appeal.

The State also argues that as-applied challenges look only to whether a sentence is shocking to "*our* community's moral sense." (St. Br. 48) (Emphasis in original.) *Leon Miller* actually held that as-applied challenges consider whether the penalty shocks "the moral sense of *the* community," citing decisions from the U.S. Supreme Court. 202 Ill. 2d at 339-40 (emphasis added). Thus, the manner in which other states punish the use of a firearm in a crime is relevant

when considering whether the mandatory firearm enhancement as applied to Andre reflects evolving standards of decency. *See Graham*, 560 U.S. at 62.

The State's argument that some states approve of sentencing practices like the death penalty (St. Br. 48) does not say anything about the evolving standards of decency in imposing a 25-year mandatory firearm enhancements on a late adolescent first-time offender for a *non-homicide* offense. Likewise, the State's citation (St. Br. 48-49) to *Huddleston*, 212 Ill. 2d at 138-41, is not helpful because there, this Court supported its analysis by citing "many states that impose mandatory life sentences upon repeat sex offenders." *Id*. at 140-41.[4]

Citing Andre's opening brief, the State claims "many" of the other states' firearm laws "only involve juvenile offenders." (St. Br. 49) This is incorrect for Andre's brief only cites two states–Montana and Washington–that have special firearm enhancement statutes for juveniles. (Def. Br. 18-19) The State also wrongly contends–without citation–that "none" of these other statutes involve "a preplanned murder." Andre was not convicted of murder, preplanned or otherwise. Moreover, the statutes cited by Andre included the firearm enhancements for violent crimes. (Def. Br. 17-20, A1-8)

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

The State agrees that "any offender" may raise an as-applied challenge. (St. Br. 40-41)

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

Addressing the facts, the State primarily focuses on how the mandatory enhancement allows a minimum sentence of 31 years, which it contends is not shocking to the community. (St. Br. 31) It must be reiterated that this case is only the first stage of proceedings, where Andre is not required to *prove* the mandatory firearm enhancement shocks the moral sense

[4] It is incorrect that *Huddleston* noted that "only" five states mandated life sentences for recidivist child sex offenders (St. Br. 49); it actually stated that "at least five states" required that sentence even for a defendant's first sexual assault of a child. *See id*. at 140-42.

of the community. He only need show that a non-frivolous argument can be made in that regard. *See Hodges*, 234 Ill. 2d at 12-16. The State's general argument also falls far short of demonstrating that Andre's claim is wholly frivolous, especially given the evolving standards of decency as reflected by more recent legislation directed at young offenders. *See Aikens*, 2016 IL App (1st) 133578, ¶38 (assessing evolving standards of decency by looking at "recent changes" made in Illinois sentencing statutes). As Andre explained in his opening brief, a juvenile offender who *kills* someone with a firearm is subject to a minimum sentence of 20 years and–in all but the rarest cases, a maximum of 40 years–and both juvenile and late adolescent offenders who, like Andre, commit attempt murder with a firearm, but are sentenced after June 1, 2019, are eligible for parole after 10 years. (Def. Br. 34-35) Where these laws reflect current standards of decency, they further support Andre's first-stage claim that the community would be shocked that Andre–who was less than a year past his 18th birthday–was subject to a mandatory *25-year* enhancement that resulted in a 40-year sentence, served at 85%, with no chance at parole.

Citing *People v. Thomas*, 2017 IL App (1st) 142557, ¶¶46-47, the State argues that the fact that firearm enhancements are still mandatory for 18-year-old offenders shows Illinois still believes in drawing a line at that age. (St. Br. 44-45) This argument may be suited for subsequent stages of proceedings, but is improper at the summary dismissal stage. Notwithstanding the *facial* line drawn by the legislature, Andre has shown at the first stage that his *as-applied* claim has a factual basis both by citing the evidence supporting his own immaturity in the record and by citing numerous cases where courts allowed emerging adults to raise as-applied challenges to their sentence, as well as secondary authority supporting that trend in the law. (Def. Br. 22-29) Moreover, since *Thomas* was issued in 2017, Illinois has extended sentencing protections to late adolescents through parole laws, 720 ILCS 5/5-4.5-115(b), because it wanted late adolescent offenders to "have the opportunity to go back into the civilized

world." *See* 100th Ill. Gen. Assem. House Proceedings, 150th Legislative Day Nov. 28, 2019, pp. 50, 54, 61. As the State notes (St. Br. 51), the legislature is *also* currently considering making the firearm enhancements discretionary for late adolescents, as well as requiring that mitigating factors related to their youth be considered at sentencing. *See* 103d Ill. Gen. Assem., HB 1501 (introduced 1/26/23). Whether or not that bill is passed, Andre seeks to show through further proceedings that he functioned like a juvenile at the time of this offense, and therefore the legislative demarcation with the firearm enhancement is unconstitutional as applied to him.

The State also notes that neither statute is retroactive, "demonstrating that each choice was one of policy," not that the prior statutes are "morally offensive." (St. Br. 44-45, 50-51) However, the State's general facial claim does not undermine the arguable factual basis of Andre's as-applied challenge at the first stage, especially where, as the State notes, the legislature *is* currently considering a bill to make the youthful offender parole scheme retroactive. (St. Br. 51) *See* 103d Gen. Assem., Senate Bill 2073 (introduced Feb. 9, 2023). If an as-applied challenge could be summarily rejected at the first stage on the simple ground that new legislation supporting the claim was not retroactive, there would be no need for as-applied challenges, as the defendant would already receive the benefit of the new legislation. *Cf. People v. Lusby*, 2020 IL 124046, ¶135 (Neville, J., dissenting) ("By offering parole eligibility only prospectively to future offenders, the legislature has placed a high duty on the Illinois judicial system to ensure that juvenile homicide offenders sentenced to life in prison before June 1, 2019, receive a full and adequate hearing regarding their corrigibility at the time of sentencing.")

In any event, the non-retroactivity of these statutes is not at issue; but the *evolved* standards of decency–reflected in those current laws–provide the backdrop in which as-applied challenges are assessed. *See Leon Miller*, 212 Ill. 2d at 340. While not every 18-year old may be able to make an arguable claim that a mandatory enhancement given to him shocks the moral sense

of the community, Andre can, given the attributes of his own youth and the facts of this case.

The State seeks to minimize those mitigating facts, asserting first that while Andre "had no prior criminal convictions . . . he had serious difficulties controlling his violent behavior as a juvenile, those difficulties required juvenile court intervention, and he continued to display difficulties complying with rules at the time of trial." (St. Br. 4) The State's discussion of "juvenile court intervention" appears to be a reference to a self-report Andre made to a treating physician at Hartgrove Hospital (at age 14) that he "used to get in a lot of fights at school," until he was placed in the "Aud[y] home" for two weeks for an aggravated battery. (SEC. C. 350-51) The record also shows, however, that Andre never received any juvenile delinquency adjudications or criminal convictions, a fact conceded by the State at sentencing. (SEC. C. 144; R. 461) As argued in the opening brief, Andre also experienced a tumultuous relationship with his drug-dealing father, suffered from psychological conditions for which his parents did not enforce his treatment or ensure his took his medication, and he was not even required to attend even a day of high school. (Def. Br. 29-32) Thus, Andre's family life is the type of environment that can be linked to transient violence in youth and arguably should have been considered when determining to impose a firearm enhancement. *See Miller*, 567 U.S. at 471-72. The mere fact that he showed some aggression in his youth far from renders his as-applied challenge factually fanciful or delusional at the pleading stage of proceedings, but is instead to be weighed at subsequent stages of proceedings where decisions on the merits are made. *See Daniels*, 2020 IL App (1st) 171738, ¶36 (granting post-conviction proceedings to resolve 18-year-old offender's claim that his *de facto* life sentence was unconstitutional, where record documented psychological conditions that "could have" inhibited his development and caused him to act impulsively, and where further proceedings "may" allow him to show his conditions affected his development and that he could outgrow them); *accord People v. Savage*, 2020 IL App (1st) 173135, ¶¶67-80.

The same logic applies to the State's claims that Andre had "difficulties complying with rules" during trial, that he "chose to shoot Killingsworth with the intent to kill him," and that Andre's actions created an additional risk toward other bystanders. (St. Br. 42) In Andre's brief (Def. Br. 32-33), he described his difficulties in court and unsettled feelings during the PSI interview process as indicative of his immaturity. *See Miller*, 567 U.S. at 477-78; *Graham*, 560 U.S. at 78; 730 ILCS 5/5-4.5-105(a)(7). He also cited to the mitigating facts of this case. (Def. Br. 33-34) Any resolution of these facts and competing arguments is premature at the first stage of proceedings *See People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998) (factual disputes are not to be resolved from pleadings at first stage and courts may not engage in fact-finding at that stage). Likewise, a risk exists that harm will be inflicted on bystanders nearly every time a gun is fired, so the State's argument would preclude any Illinois defendant who ever shoots a firearm from claiming the mandatory enhancement is unconstitutional as applied to them. Such an argument is inconsistent with legislation now existing that firearm enhancements are discretionary for juvenile offenders. *See* 730 ILCS 5/5-4.5-105(b). *See also People v. McKinley*, 2020 IL App (1st) 191907, ¶90 (juvenile murderer's use of gun "certainly did not cancel out the characteristics that defined him as a juvenile" and instead "lend[ed] support to the fact that defendant lacked maturity which led to reckless and heedless risk-taking"); *Womack*, 2020 IL App (3d) 170208, ¶17 (leave to file successive petition granted on as-applied challenge to mandatory firearm enhancement, where "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").

Finally, the State cites *Coty*, 2020 IL 123972, ¶24, to argue that the Illinois constitution does not require that the possibility of rehabilitation be given greater weight than the seriousness of the offense. (St. Br. 43) *Coty* involved a 52-year-old recidivist child sex offender and has

no application here, where Andre is not a recidivist and this offense occurred when he was 18 years old. As this Court recently held in *Clark*, 2023 IL 127273, Illinois has long been aware that "'less than mature age can extend into young adulthood–and [has] insisted that sentences take into account that reality of human development.'" (*Quoting People v. Haines*, 2021 IL App (4th) 190612, ¶47.) In any event, Andre does not argue that his rehabilitative potential be given *greater* weight than the seriousness of the offense, but that the mandatory 25-year enhancement *hinders* his rehabilitative potential, while *also* being disproportionate to his offense. (Def. Br. 34-35) Neither this argument nor any other argument from the State show that Andre's *pro se* as-applied challenge is frivolous or patently without merit, and therefore it should not have been summarily dismissed at the first stage of proceedings.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Andre Hilliard's claim is neither legally frivolous nor factually fanciful or delusional. He easily met the low threshold to survive first-stage proceedings and 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,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Caroline E. Bourland
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APPENDIX TO THE BRIEF

2022 IL App (2d) 210530-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, Second District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Brian E. CHRISMAN, Defendant-Appellant.

No. 2-21-0530

|

Order filed July 28, 2022

Appeal from the Circuit Court of Boone County. No. 15-CF-218, Honorable C. Robert Tobin III, Judge, Presiding.

ORDER

PRESIDING JUSTICE BRIDGES delivered the judgment of the court.

***1** ¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's postconviction petition. Therefore, we affirm.

¶ 2 Following a jury trial, defendant, Brian E. Chrisman, was convicted of 10 counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and received consecutive sentences of 7½ years for each count. Defendant currently appeals from the summary dismissal of his postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant previously filed a direct appeal of his convictions, arguing that he was not proven guilty beyond a reasonable doubt and that the trial court erred in refusing to declare a mistrial and in replacing a particular juror with an alternate. We affirmed, holding that the invited error doctrine applied to defendant's arguments about jury errors and that there was sufficient evidence to prove defendant guilty beyond a reasonable doubt of all counts. *People v. Chrisman*, 2021 IL App (2d) 190529-U, ¶¶ 38, 53, 67.

¶ 5 We restate the facts from the previous appeal regarding jury deliberations, as they also relate to defendant's arguments in this appeal.

¶ 6 The jury deliberated for several hours after closing arguments. The next morning, the trial court announced that juror number 10 had told the bailiff late the prior day that he wanted to talk to the trial court because there was an issue that he wanted to raise about another juror. The trial court had advised the attorneys that they would meet with the juror before the jury resumed deliberations. Juror 10 was brought in and stated that after a night's rest, he was wondering if the issue was that it was "heated" in the jury room yesterday and if he was "misreading personalities." The trial court asked if he could continue to deliberate, and the juror replied in the affirmative.

¶ 7 In the afternoon, the trial court stated that "[a]pparently there was an altercation" or "it's gotten loud between two jurors," to the point that there was pounding on the door and someone saying "let's take this outside." The bailiff then stepped between the jurors. The trial court stated that one juror was on his way to the chambers. The State stated that they could consider excusing both of the jurors and using the alternates. Defense counsel stated that whatever happened may have already prejudiced the jury pool.

¶ 8 Juror number 6 entered the chambers, and the trial court stated that it "sound[ed] like things may have gotten a bit heated down there." Juror 6 responded, "Really heated. I'm still shaking." He stated that the other juror (juror number 2) said that he and a family member had experience with this type of case, and that juror 2 had done research on the statistics of such cases. Juror 2 kept making statements about "letting a rapist go." Juror 2 asked juror 6 if he would be able to sleep, and that if something happened after the case ended, he would be sure to call juror 6 and tell him about it. Juror 6 continued:

> "Today he made a statement about that I hope you're able to sleep at night if you vote a certain way. Yesterday I made a comment and it didn't quite come out the way I wanted it to, and he just jumped up, threw his hands up in the air, marched off to the bathroom. On the way there, he said, 'That's the most asinine statement I ever heard.' Yesterday towards the end of the day, I asked him to quit using the F word because he was doing a lot of that. So that's about it."

***2** The trial court asked the parties if they had any questions of the juror, and they responded in the negative.

¶ 9 The trial court stated that it was inclined to find that the jury was hung and declare a mistrial. Defense counsel agreed, stating that a juror had apparently been intimidating and discussing outside sources. The State again suggested getting rid of both jurors and replacing them with the alternates, saying that each of them seemed to have a "faction" and that kicking out only one might signal approval of the other side. Defense counsel again raised the issue of the entire jury pool being tainted.

¶ 10 Juror 2 was brought into chambers and stated that "although [he] clearly [was] not getting along with a member of this jury and [did not] have very much respect for him, [he had] to see this through" because the jury had spent so much time working on the case. He admitted reading a couple of psychology articles online about basic sexual assault statistics. Juror 2 said that he would make himself get along with juror 6.

¶ 11 After juror 2 left the chambers, defense counsel stated that they were talking to only three jurors and that he was concerned about the rest of the jury pool. The trial court stated that it did not disagree and that if they were going to continue by excluding one or two of the jurors, they would have to see if the remaining jurors could continue to deliberate based on everything that had happened. The trial court asked juror 10 to return. He stated that the "other person [was] very passionate about his side" and that there might be a need for one, if not both, alternates in the case. He said that juror 2 had read some statistics about abuses that are reported. Juror 10 said that it "was just information that [juror 2] wanted to put out there," and that it did not become a part of deliberations. Juror 10 thought that everyone on the jury was "pretty much on their stance as to what their votes" were and that they would not be able to negotiate further. When asked by the trial court if he thought that the jury could restart deliberations with the two alternates and come to a resolution, Juror 10 responded in the affirmative. He said that it would "neutraliz[e] the acidity of the situation."

¶ 12 After juror 10 left the room, the trial court stated, "Let's hear what everybody says." The State took the position that the statistics juror 2 recited were not something the jury focused on or discussed. It stated that putting in the alternates would get rid of the toxicity in the room, as juror 10 had stated. Defense counsel responded that it seemed like the jury was deadlocked and that he did not believe that there was sufficient evidence to get rid of jurors 2 and 6. He stated, "I don't think that it's proper to throw these two out and bring in two new jurors just because they have opposite views of what's going on." The trial court stated that it was not sure that they had opposite views. It stated that it did not believe that juror 2's language was a threat but that juror 6 was shaking and having a difficult time based on what he perceived to be threats. Defense counsel stated that he did not disagree that juror 6 had "physical manifestations of what's going on." The trial court stated that juror 6 would need to be dismissed not because of his opinion, but rather based on him saying that he could not continue and how he looked when he said this. [1] That is, he was both physically and mentally unable to serve. The trial court's only concern about juror 2 was that his outside research was contrary to instructions. The trial court stated that, therefore, both jurors 6 and 2 would need to be removed, and the question was whether the trial could proceed with the remaining 10 jurors plus the two alternates. It stated that it would call up the 10 remaining jurors and ascertain if they could disregard the research and start from scratch with the two alternates. Otherwise, the trial court would declare a mistrial. The trial court asked, "Any thoughts? I mean, other than what you stated." Defense counsel replied, "No. I just think finding out from the rest of the jurors I think is probably real important." He then participated in a discussion about how the remaining jurors should be questioned.

1 The record does not reflect that juror 6 directly made such a statement.

***3** ¶ 13 The following dialogue subsequently took place:

"THE COURT: All right. So I'm going to discharge those two after we've got the jurors addressed and then I'll bring each one maybe back up here individually and just thank them for their service and we'll figure out the escort, but we'll deal with all of that out there in—I guess it's in open court. Actually, it can't be open court. They're a jury deliberating. We'll clear the—we'll at least clear the courtroom.

BAILIFF FAST: Okay. I'll do that now.

THE COURT: Get people out of here.

[DEFENSE COUNSEL]: Just for the record, Judge, I mean, obviously—*[Juror 6], are we in agreement he's going because of his physical inability?*

THE COURT: His mental as manifested by his physical. He started out—again, just to make a little record. He seems like he's got pretty good health, but he does use some sort of

—he's got some sort of a limp or something to his gate [*sic*], but as he came up here this time, he was physically shaking and appeared distraught and indicated, as far as I was concerned, that he could—he could no longer participate in that because he felt that he was being threatened, but based upon the statements made, I don't really think those were threats as much as they were just communications that he didn't like.

[ASSISTANT STATE'S ATTORNEY]: [Juror 6] is the one who knocked on the door to request the bailiff; correct?

THE COURT: Yeah.

BAILIFF FAST: Yes. He opened the door and asked for a bailiff.

THE COURT: I think from his standpoint, he's unable to serve both physically and mentally. He's not willing to do what's required of a juror is to keep those communications going.

[DEFENSE COUNSEL]: *Okay.*

THE COURT: If they were actual threats, then I'd leave him in and remove the person making the threat. I don't see anything that—I don't see the statements that were being made by [juror 2] as threats to the point of removal. I do —my issue with [juror 2] is the outside research. That you can't do.

[DEFENSE COUNSEL]: *Right.*

THE COURT: So one removal is his inability and sort of his unwillingness to continue to serve from [juror 6]. The other one [juror 2], he did exactly the opposite of what I asked. He went out and did his own research. So let's leave those two I guess down there with a sitter and bring the other two up—the other ten up into the jury box and I'll address them, and in the meantime, call in our alternates and get them in." (Emphases added.)

¶ 14 The trial court called in the 10 jurors and asked if there was anyone who would not be able to disregard one of the juror's outside research. No juror raised his or her hand. The trial court stated that the two alternates would join the group and that the 10 jurors would have to go back to the stage of having an open mind and consider the opinions of the alternates.

¶ 15 After the alternates joined, the jury returned a verdict in about 2 hours, finding defendant guilty of all counts.

¶ 16 On May 6, 2019, defendant filed a motion for a new trial. He raised the arguments presented on appeal, among others. He also filed a motion for judgment *n.o.v.* arguing that the evidence was insufficient to prove him guilty beyond a reasonable doubt. The trial court denied the motions on May 29, 2019. Regarding the removal of juror 6, the trial court stated that he was banging on the jury door to get out of the room, he was interpreting the statements of juror 2 to be threatening even though they were not, and he was shaking, which was a physical manifestation of the distress that he was in. The trial court stated that to send juror 6 back to the jury room may have put his physical and mental health in jeopardy, that he would not have been able to fulfill his duties, and that defendant never argued that he could continue to serve as a juror. Regarding juror 2, the trial court stated that it instructed the jury from the beginning not to do outside research. It stated that although this occurred, it did not become a point of discussion during deliberations, the jurors were advised that they could not consider the information, and the jurors were specifically asked if any one of them could not disregard the information. The trial court further stated that the alternate jurors were not exposed to outside prejudicial influences, any concern about the original jurors forming opinions about the case was mitigated by the instruction to start over with an open mind, and the reconstituted jury was instructed to begin deliberations anew. The reconstituted jury took a little less than two hours to reach a verdict, and since there was not a lot of evidence to go over, the almost two-hour deliberations indicated that they started from scratch.

***4** ¶ 17 In his direct appeal, defendant argued, *inter alia*, that juror 6's removal deprived him of the right to a unanimous verdict rendered by an impartial jury. *Chrisman*, 2021 IL App (2d) 190529-U, ¶ 47. He argued that prejudice from the trial court's postsubmission replacement of the juror was shown by the original jurors' exposure to outside prejudicial influences in the form of juror 2's statistical research, by the trial court's failure to inquire about the alternate jurors' exposure to improper influence, by the original jurors forming opinions about the case prior to the addition of the alternates, and by the reconstituted jury returning a verdict within two hours. *Id.* ¶ 48. Defendant also argued that there was a reasonable possibility that the trial court dismissed juror 6 due to the juror's views about the case. *Id.* ¶ 49.

¶ 18 The State argued that the doctrine of invited error applied, and we agreed. *Id.* ¶¶ 51, 53. We stated that the record showed that defense counsel consented to jurors 6 and 2 being replaced with alternates rather than arguing for juror 6 to remain on the jury. *Id.* ¶ 53. We stated that even if invited error did not apply, defendant forfeited the issue by failing to argue at trial and in a posttrial motion that the trial court should have dismissed juror 2 but still kept juror 6. *Id.* ¶ 54.

¶ 19 On August 9, 2021, defendant filed a *pro se* postconviction petition. He argued that trial counsel was ineffective for (1) failing to properly preserve the issue of the trial court's dismissal of the "hold out juror" (juror 6) during jury deliberations, resulting in "waiver" of the issue on review; (2) not arguing that defendant could not be guilty of predatory criminal sexual assault of a child because it requires that the child be under 13 years old, but the alleged victim lived in defendant's house well past her 13th birthday; (3) failing to "formally object" to juror 2 and his outside research, and seek a mistrial; and (4) not objecting to evidence that was irrelevant and overly prejudicial.

¶ 20 The trial court summarily dismissed defendant's petition on August 17, 2021. Regarding the issue of juror 6, the trial court stated that defendant could not show prejudice, as even if defense counsel requested that the juror remain on the jury, the trial court would have denied the request because it believed that juror 6 could not continue to serve based on his statements and physical manifestations of emotional distress. The trial court stated that there was also nothing to suggest that such a ruling would have been viewed by the appellate court as an abuse of discretion.

¶ 21 Defendant timely appealed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant maintains that he stated an arguable claim that trial counsel was ineffective for failing to argue that "hold out" juror 6, who committed no misconduct and merely reported tensions within the jury room, should be allowed to continue to deliberate. Defendant argues that, liberally construed, his petition also alleges facts implicating appellate counsel's failure to raise this claim as a matter of ineffective assistance of trial counsel, so as to avert procedural default.

¶ 24 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2020)) provides a means for individuals serving criminal sentences to assert that their convictions resulted from substantial denials of their constitutional rights. *People v. Johnson*, 2017 IL 120310, ¶ 14. It creates a three-stage process for adjudicating postconviction petitions. *Id.* During the first stage, the trial court independently determines, without input from the State, whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1 (West 2020). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact, meaning that it relies on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Allen*, 2015 IL 113135, ¶ 25. A meritless legal theory is one that is contradicted by the record, and factual allegations are fanciful if they are fantastic or delusional. *People v. Knapp*, 2020 IL 124992, ¶ 45. At the first stage, the petition's allegations, liberally construed and taken as true, need to present only "the gist of a constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

***5** ¶ 25 If the trial court determines that the petition is not frivolous or patently without merit, the petition advances to second-stage proceedings during which the trial court may appoint counsel for the defendant, and counsel may file an amended petition. *People v. Patterson*, 2018 IL App (1st) 160610, ¶ 17. If the trial court does not dismiss the petition during the second stage, it will conduct an evidentiary hearing on the petition's merits during the third stage. 725 ILCS 5/122-6 (West 2020). We review *de novo* the first-stage dismissal of a postconviction petition. *People v. Hatter*, 2021 IL 125981, ¶ 24.

¶ 26 Defendant's postconviction petition alleged that his trial counsel rendered ineffective assistance of counsel. For such a claim, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The defendant must first establish that, despite the strong presumption that trial counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms such that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice. *People v. Valdez*, 2016 IL 119860, ¶ 14. In most situations, this is done by showing a reasonable probability that the proceeding would have resulted differently absent counsel's errors. *Id.* A failure to establish either prong of the *Strickland* test precludes a finding of ineffectiveness. *People v. Peterson*, 2017 IL 120331, ¶ 79. At the first stage of postconviction

proceedings, a defendant must make a showing that counsel's performance arguably fell below an objective standard of reasonableness and that the defendant was arguably prejudiced by the deficient performance. *Hatter*, 2021 IL 125981, ¶ 25.

¶ 27 The State argues that defendant forfeited his argument on appeal because he did not raise it in his postconviction petition. See *People v. Jones*, 211 Ill. 2d 140, 147 (2004) (issues reviewed on appeal of first-stage dismissal of postconviction petition must have been presented in the petition). The State notes that defendant argued in his petition:

> "Petitioner was denied his right to the effective assistance of counsel where defense counsel failed to properly preserve the issue of the trial court's dismissal of hold out juror during jury deliberations. The Appellate Court in its decision rendered on February 8, 2021[,] ruled that the issue was waived due to counsel's actions or inactions and refused to consider the issue raised on its merits."

The State points out that defendant currently takes the position that these allegations, liberally construed, stated a claim that counsel was ineffective for failing to argue that juror six should have been allowed to deliberate, and that appellate counsel was also ineffective for failing to avoid procedural default by framing the issue as one of ineffective assistance of trial counsel. The State argues that the trial court considered defendant's argument that juror 6 should not have been dismissed when ruling on defendant's motion for a new trial, and the trial court ruled that the dismissal and replacement was proper. The State asserts that despite the issue being clearly presented in the record, appellate counsel did not raise it on appeal, and defendant's postconviction petition does not claim that his appellate counsel was ineffective.

***6** ¶ 28 We conclude that defendant did not forfeit his argument. He clearly raised the issue of ineffective assistance of trial counsel for not challenging the dismissal of the "hold out," juror during the trial itself, meaning that defendant was arguing that counsel should have argued in favor of keeping juror 6 on the jury. It is true that defendant did not directly raise the issue of ineffective assistance of appellate counsel in his petition, but doing so requires a higher level of legal procedural knowledge, whereas a *pro se* defendant is often "unaware of the precise legal basis for his claim or all the legal elements of that claim." *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). "[B]y definition, a 'gist' of a claim is something less than a completely pled or fully stated claim." *Id.* A *pro se* petition is required only to allege enough facts to make out a claim that is arguably constitutional. *People v. Robinson*, 2021 IL App (1st) 181653, ¶ 34. Defendant here clearly identified his claim and also argued that this court did not consider this issue due to "waiver," so he sufficiently preserved the arguments that he raises on appeal.

¶ 29 Turning to the merits, defendant argues that instead of agreeing to dismiss juror 6, effective trial counsel would have done everything possible to keep him on the jury, as juror 6 never asked to be dismissed and it was apparent during questioning that he favored a not guilty verdict. Defendant notes that in ruling on his motion for a new trial, the trial court cited four reasons for removing juror 6: (1) he was "banging on the jury door to get out" of the jury room; (2) he was interpreting statements made by juror 2 as threatening when they were not; (3) he was shaking as a physical manifestation of his distress; and (4) defense's counsel's failure to argue at trial that juror 6 could have continued to serve as a juror. Defendant maintains that it was perfectly acceptable for juror 6 to alert the bailiff or the court to the increasingly toxic atmosphere in the jury room, and that the record reflects that the courtroom bailiff had to separate the two men. Defendant asserts that there was no indication that juror 6 was the aggressor and that contrary to the trial court's belief, juror 6 was entirely justified in feeling threatened by juror 2. According to defendant, juror 2's hostility stemmed from juror 6's conviction that defendant was not guilty, as juror 6 said that juror 2 kept making statements about "letting a rapist go" and asking if juror 6 would be able to sleep after the case was over, and "if something would happen after this case was over, he'd be sure and call [him] and tell [him] about it."

¶ 30 Regarding juror 6's ability to continue serving, defendant argues that the juror never said that he was unwilling or unable to resume deliberations. Defendant argues that effective counsel would have pointed out that once juror 2 was removed for his gross misconduct, the source of juror 6's troubles would disappear. Defendant contends that the solution to juror 2's misbehavior was not to penalize defendant by removing a juror favorable to him. Defendant argues that because the trial court highlighted that defense counsel failed to advocate for juror 6's retention, it means that the trial court might have been receptive to such an argument had it been timely made, particularly when the removal of a juror mid-deliberations is not favored. See *People v. Roberts*, 214 Ill. 2d 106, 123-24 (2005) ("substitution of an alternate juror during deliberations involves substantial potential for prejudice").

¶ 31 As for the prejudice prong of the *Strickland* test for ineffective assistance of counsel, defendant maintains that he has stated an arguable claim that he was prejudiced by counsel's failure to object to juror 6's dismissal. Defendant points out that in evaluating prejudice when determining whether the trial court abused its discretion in the postsubmission replacement of a juror, we consider the totality of the circumstances, including:

> ***7** "(1) whether the alternate juror and the remaining original jurors were exposed to outside prejudicial influences about the case; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution." *People v. Roberts*, 214 Ill. 2d 106, 124 (2005).

Defendant argues that the trial court never determined whether the two alternate jurors had been exposed to prejudicial outside influences; that factor 2 is met because juror 6 had clearly formed an opinion and was leaning towards an acquittal and that juror 10 had stated that everyone was "pretty much on their stance as to what their votes" were; and that the trial court instructed the reconstituted jury to begin deliberations anew, but the record reflects that they failed to do so because the original jury had deliberated for just under five hours and asked two questions whereas the reconstituted jury deliberated for less than two hours and asked no questions before finding defendant guilty.

¶ 32 Last, defendant argues that appellate counsel was also ineffective in that counsel raised the dismissal of juror 6 as a matter of trial court error but failed to consider the obvious problem posed by invited error, which could have been avoided via a challenge of ineffective assistance of trial counsel. See *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 210 ("The doctrine of invited error blocks defendant from raising this issue on appeal, absent ineffective assistance of counsel.").

¶ 33 The State asserts that applying the *Roberts* factors, the totality of the circumstances establishes that defendant was not prejudiced by the trial court's decision to remove juror 6 and install an alternate juror. Regarding whether the original jurors had formed opinions about the case, the State argues that defendant's claim that juror 6 was a "hold out" juror is nothing more than pure speculation. The State points out that the trial court advised all of the jurors questioned not to disclose the actual deliberations and anyone's positions. The State notes that after defense counsel stated, "We have two people that have opposite opinions and how they're handling it in the back is not good," the trial court responded, "I'm not sure that they have the opposite views going on. We don't have any idea what the views are." The State argues that the trial court further clearly and properly instructed the reconstituted jury to begin deliberations anew. The State argues that there is no evidence that the reconstituted jury failed to heed the trial court's instructions, as it deliberated for almost two hours. The State points to the trial court's statement, "There wasn't a whole lot of evidence so for them to go and give it almost a two-hour run I think showed that they started over from scratch."

¶ 34 The State distinguishes this case from *People v. Gallano*, 354 Ill. App. 3d 941 (2004), where the court stated that if the record discloses any reasonable probability that the impetus for a juror's dismissal is the juror's views on the case's merits, the trial court may not dismiss the juror and must either have the jury continue to deliberate or declare a mistrial. The State argues that here, juror 6 never disclosed his position in the case, and, regardless, the impetus behind his dismissal was clearly his physical and emotional state after his altercation with juror 2.

***8** ¶ 35 The State further contends that it was not arguably deficient performance for defense counsel to acquiesce in the removal of a juror who was clearly shaken and distressed, as the juror might not be able to remain firm in a position or carefully weigh and consider the evidence in that state. The State argues that, correspondingly, it was not arguably deficient performance for appellate counsel to decline this issue on appeal. The State reasserts that defendant also cannot show prejudice.

¶ 36 We conclude that the trial court did not err in summarily dismissing defendant's postconviction petition, as defendant failed to show that he was arguably prejudiced by defense counsel's decision to acquiesce in the dismissal of juror 6. See *People v. Coats*, 2021 IL App (1st) 181731, ¶ 26 (as both prongs of the *Strickland* test for ineffective assistance of counsel must be satisfied, courts may resolve an ineffectiveness claim in a postconviction petition by reaching just the prejudice prong). The trial court would not arguably have allowed juror 6 to stay even if defense counsel had requested it, as the trial court stated in ruling on defendant's posttrial motion that sending juror 6 back to the jury room

may have put his physical and mental health in jeopardy, and that the juror would not have been able to fulfill his duties.

¶ 37 The decision to replace juror 6 would also not arguably have been reversed on appeal, even if the issue had been preserved or if appellate counsel had raised the issue of ineffective assistance of trial counsel. Again, "postsubmission replacement of a juror is permissible under limited circumstances, and the decision whether to proceed in that manner is within the discretion of the trial court." *Roberts*, 214 Ill. 2d at 109. The primary consideration in determining whether the trial court abused its discretion is the potential prejudice to the defendant as a result of the replacement. *Id.* at 121. In evaluating prejudice, we consider the totality of the circumstances, including applying the factors set forth in *Roberts* (see *supra* ¶ 32).

¶ 38 For the first *Roberts* factor, the alternate jurors were not exposed to the statistics at issue and there is no evidence of exposure to any other improper influences. The remaining original jurors heard the statistics, but juror 10 stated that the information did not become a part of deliberations, and when the remaining jurors were asked if there was anyone who would not be able to disregard the information, no one raised his or her hand. For the second factor, juror 10 stated that "everybody is pretty much on their stance as to where their votes" were, but he then stated that if the alternates were brought in, it would "neutraliz[e] the "acidity of the situation" and that they could all "respect each other's evidence." Regarding the next two factors, the trial court instructed the jury to restart deliberations, and there was no indication that the jury failed to follow the instruction. Rather, the last factor supports the notion that the reconstituted jury followed the instruction, as they deliberated for about two hours on a case that largely hinged on credibility, with very little other evidence to evaluate. Although the jury had deliberated for five hours before, this was presumably in part because of the conflict between jurors 2 and 6.

¶ 39 We agree with defendant that juror 6 never directly requested to be relieved of duty. Further, although the trial court repeatedly told the jurors it questioned not to disclose the substance of deliberations or jurors' votes, juror 6 still made a reference to juror 2 making statements about "letting a rapist go," which could indicate their views of the evidence. However, unlike *Gallano*, there is not a reasonable probability that the trial court's impetus for dismissing juror 6 was based on his views. The trial court repeatedly told the jurors not to disclose their views during the questioning, which shows that its intent was to remain neutral. More significantly, it is undisputed that juror 6 banged on the jury door because he was so concerned about juror 2, and even when he was out of juror 2's presence, his physical shaking, which defense counsel acknowledged, showed that he was still in distress. As such, it would have been within the trial court's discretion to determine that simply dismissing juror 2 would not have resolved juror 6's physical and mental agitation. Accordingly, defendant cannot show arguable prejudice from his trial counsel's failure to assert that juror 6 should remain on the jury, such that the trial court did not err in dismissing defendant's postconviction petition at the first stage of proceedings.

¶ 40 III. CONCLUSION

***9** ¶ 41 For the reasons stated, we affirm the judgment of the circuit court of Boone County.

¶ 42 Affirmed.

Justices Hudson and Birkett concurred in the judgment.

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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

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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 May 4, 2023, the Reply Brief 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 Reply Brief to the Clerk of the above Court.

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