No. 125738

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RECARDO JOHNSON Petitioner-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-16-3169. There on appeal from the Circuit Court of Cook County, Illinois , No. 07 CR 17223. Honorable Alfredo Maldonado, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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POINT AND AUTHORITIES

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NATURE OF THE CASE

Recardo Johnson, petitioner-appellant, appeals from a judgment dismissing his petition for post-conviction relief.

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

ISSUES PRESENTED FOR REVIEW

Whether the circuit court erred in summarily dismissing Mr. Johnson's post-conviction petition without analyzing the constitutional claim, instead finding that he lacked standing.

STATUTE INVOLVED

725 ILCS 5/122. Post-Conviction Hearing

§ 122-1. Petition in the trial court.

(a) Any person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that:

(1) in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both;

(2) * * *

(b) The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. * * *

(c) * * *

When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

This limitation does not apply to a petition advancing a claim of actual innocence.

* * *

§ 122-2. Contents of Petition. The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

§ 122-2.1. (a) Within 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section.

(1) * * *

(2) If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry.

(b) If the petition is not dismissed pursuant to this Section, the court shall order the petition to be docketed for further consideration in accordance with Sections 122-4 through 122-6. * * * Continuances may be granted as the court deems appropriate.

(c) In considering a petition pursuant to this Section, the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding.

* * *

§ 122-5. Proceedings on petition. Within 30 days after the making of an order pursuant to subsection (b) of Section 122-2.1, or within such further time as the court may set, the State shall answer or move to dismiss. In the event that a motion to dismiss is filed and denied, the State must file an answer within 20 days after such denial. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in civil cases.

* * *

STATEMENT OF FACTS

On July 25, 2007, Mr. Recardo Johnson was arrested in connection with an attempt aggravated robbery. (R.C4-8) Mr. Johnson was ultimately charged via information with attempt aggravated robbery (a Class 2 felony) and unlawful restraint (a Class 4 felony) in case no. 07-CR-17223. (R.C13-17).

On October 2, 2007, Mr. Johnson pled guilty to unlawful restraint in exchange for a sentence of two years in prison. (A.2-6) At the plea hearing, Mr. Johnson was told the sentencing range including the mandatory supervised release requirement and the possibility of a fine. (A.2-3) No mention was made of a duty to register as a violent offender. Mr. Johnson affirmed that he wanted to plead guilty and understood he was forgoing certain rights by pleading guilty–namely, his rights to a trial, to a jury, to confront witnesses, to call witnesses, to testify or remain silent, and to be proven guilty beyond a reasonable doubt. (A.3-4) He affirmed that no threats or promises were made, and that he was pleading guilty of his own free will. (A.4-5) The parties stipulated to a factual basis which did not include the age of the complainant. (A.6) The court accepted the plea and sentenced Mr. Johnson to two years in prison. (A.6,8); (R.C30) The court informed Mr. Johnson of his appellate rights. (A.9-10) No direct appeal was taken.

On July 8, 2016, Mr. Johnson mailed a request for "Leave to File Late Post-Conviction Petition" in case no. "07-CR-1722301" from Robinson Correctional Center. (R.C35-36) It was file-stamped on July 18, 2016. (R.C35-36) It sought post-conviction relief where (1) the age of the complainant was never stated, (2) the judge did not tell Mr. Johnson that he would be required to register as a violent offender

against youth ("VOAY")[1], (3) various people were excused from the courtroom when the minor-complainant was on the stand, and (4) the prosecutor coerced the complainant. (R.C37) The petition further alleged that plea counsel was ineffective for failing to inform Mr. Johnson that he would be required to register. (R.C37) Finally, it alleged that Mr. Johnson was not admonished as to the rights he was surrendering by pleading guilty under the "VOAY Act." (R.C37)

The petition was set for consideration on July 25, 2016. (R.C34,39) On September 30, 2016, the circuit court summarily dismissed the petition due to lack of standing. (D.2);(R.C41-44) In a written order, the court found that Mr. Johnson was imprisoned for failure to register in case no. 14-CR-1312801. (R.C41) The court noted that Mr. Johnson alleged a constitutional claim before finding Mr. Johnson lacked standing because he had completed his sentence for unlawful restraint. (R.C42-44). In finding a lack of standing, the court relied on Mr. Johnson's original sentence and arraignment date, the record in 14-CR-1312801, and the website for the Department of Corrections. (R.C43-44)

On appeal from the dismissal of the petition, Mr. Johnson argued that the circuit court erred in summarily dismissing based on lack of standing. *People v. Johnson*, 2019 IL App (1st) 163169, ¶ 1. The appellate court rejected this argument. *Id.* at ¶¶ 12, 28-29. The appellate court considered standing an issue of "substantive virtue" central to the merits of a petition. *Id.* at ¶ 19. It further reasoned that standing could be determined from the court file. *Id.* Thus, it held that lack of standing was a proper grounds for summary dismissal. *Id.* at ¶¶ 20-22. The appellate

[1] This refers to the requirement to register as a "violent offender against youth" for unlawful restraint under the Murderer and Violent Offender Against Youth Registration Act (VOYRA). 730 ILCS 154/5(b)(1).

court then found that Mr. Johnson's claim to standing was frivolous and patently without merit, because a registry requirement is not a part of the punishment for the triggering conviction. *Id*. at ¶¶ 23, 28-29.Therefore, Mr. Johnson's imprisonment for failure to register was not arguably the result of his unlawful restraint conviction. *Id*. at ¶ 29.

This Court granted leave to appeal on whether and when lack of standing is an appropriate grounds for summary dismissal on March 25, 2020. The present appeal follows.

ARGUMENT

The circuit court erred in summarily dismissing a *pro se* petition solely on the basis that Mr. Johnson lacked standing.

This case presents a narrow question: when can a circuit court *sua sponte* dismiss a post-conviction petition due solely to a finding that the petitioner lacked standing where this analysis requires the court to determine whether the petitioner's liberty was constrained by the attacked conviction. The problem with a premature dismissal is that it short-circuits two important components of the Post-Conviction Hearing Act—the *pro se* petitioner's chance for counsel's help in shaping the underlying constitutional claim and the State's chance to waive lack of standing in the interests of doing justice on the claim.

This Court should find that lack of standing is not an appropriate grounds for summary dismissal based on both the language and history of the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (the Act). Alternatively, this Court should find that lack of standing is not an appropriate grounds for summary dismissal in cases where the relevant conviction led to restrictions and imprisonment based on registry requirements since this is a complicated area of law that is still developing.

This case raises a purely legal question, so review is *de novo*. *People v. Hommerson*, 2014 IL 115638, ¶ 6.

A. The Post-Conviction Hearing Act does not permit summary dismissal on standing grounds at the first stage of proceedings.

The central inquiry is whether the legislature intended for standing issues to be resolved during the initial review of *pro se* petitions. See *People v. Hommerson*,

2014 IL 115638, ¶ 6 (noting the primary objective is to construe the statute to give effect to the legislature's intent). In the present case, the circuit court recognized that the *pro se* petition alleged constitutional error in the original plea. (R.C43) However, the court did not analyze this allegation, instead dismissing based on lack of standing—a legal argument not found in the *pro se* petition. (R.C43-44) (citing 725 ILCS 5/122-1(a)(1)). The court's ruling was premised on a factual finding that Mr. Johnson was not serving a sentence for unlawful restraint as supported by the court's review of a separate case record and the Illinois Department of Corrections (IDOC) website. (R.C43) Since it was a first-stage dismissal, neither the State nor Mr. Johnson had any opportunity to respond to this factfinding or analysis. 725 ILCS 5/122-2.1(a)(2); *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Standing is a technical legal issue which is not inherently tied to the underlying constitutional claim, so a *pro se* petitioner may not even know to plead it in the initial petition. See 725 ILCS 5/122-2 (listing the required contents for a post-conviction petition). Where the legislature did not intend to include lack of standing as a grounds for summary dismissal, this Court should reverse and remand for second-stage proceedings.

The Post–Conviction Hearing Act provides a three-stage procedure by which criminal defendants may challenge their convictions or sentences for violations of federal or state constitutional law. 725 ILCS 5/122-1 *et seq.*; *Hommerson*, 2014 IL 115638, ¶ 7. At the first stage, the trial court has 90 days to decide whether to summarily dismiss the petition as "frivolous or * * * patently without merit." 725 ILCS 5/122-2.1(a)(2). To avoid summary dismissal, the petition need only present the "gist" of a constitutional claim. *People v. Boclair*, 202 Ill. 2d 89, 99

(2002). If the petition advances to the second-stage, the petitioner can consult with appointed counsel who can shape the petition into proper legal form. 725 ILCS 5/122-2.1(b), 122-4; *Hommerson*, 2014 IL 115638, ¶ 8. The State can also move to dismiss. *People v. Allen*, 2015 IL 113135, ¶ 33; 725 ILCS 5/122-5. The third stage is an evidentiary hearing. *Hommerson*, 2014 IL 115638, ¶ 8.

This case asks to what extent standing is an appropriate consideration at the first-stage of proceedings. As this Court has previously noted, "[t]he legislature intended that the circuit court at the first stage would look to whether the petition allege[d] a constitutional deprivation" that was susceptible to corroboration. *People v. Allen*, 2015 IL 113135, ¶ 33. To that end, this Court has repeatedly interpreted the Act to avoid premature dismissals on grounds which do not directly relate to the underlying constitutional claim. See *Hommerson*, 2014 IL 115638, ¶¶ 11-12; *People v. Hodges*, 234 Ill. 2d 1, 11-17 (2009) (holding that an arguable basis in law or fact is sufficient to survive the first stage); *Boclair*, 202 Ill. 2d at 99 (barring summary dismissal based on untimeliness); *Allen*, 2015 IL 113135, ¶ 34 (barring summary dismissal based on the failure to notarize an evidentiary statement).

This Court first interpreted the meaning of "frivolous or * * * patently without merit" in 2002. 725 ILCS 5/122-2.1(a)(2); *Boclair*, 202 Ill. 2d at 100-02. In *Boclair*, this Court found that untimeliness was not included within the phrase. *Boclair*, 202 Ill. 2d at 100-02. It reasoned that timeliness was not mentioned in section 122-2.1, and was instead found in a separate provision of the Act—namely, section 122-1. *Id*. at 100-01; 725 ILCS 5/122-1(c). This Court further noted that timeliness was not an inherent element of the petition as it could be raised, waived, or forfeited by the State. *Boclair*, 202 Ill. 2d at 101-02. Thus, this Court held that untimeliness

should be left for the State to raise at the second stage of proceedings. *Id*. at 102.

More recently, in *Hommerson*, this Court held that the lack of a verification affidavit is not an appropriate grounds for summary dismissal. *People v. Hommerson*, 2014 IL 115638, ¶ 11. The court emphasized that the first stage should focus on "substantive virtue" or whether the "allegations set forth a constitutional claim." *Id*. As in *Boclair*, this Court reasoned that the Act separated the section on the verification affidavit from the section on summary dismissal. *Hommerson*, 2014 IL 115638, ¶ 11. Indeed, like timeliness, the verification requirement is found in section 122-1. 725 ILCS 5/122-1(b). Further, this Court again noted that the State could waive or object to the lack of a verification affidavit at the second stage of proceedings. *Hommerson*, 2014 IL 115638, ¶ 11 (citing *People v. Cruz*, 2013 IL 1213399).

The issue of standing is akin to issues raised in *Boclair* and *Hommerson*. Like requirements for timeliness and a verification affidavit, the standing requirement is found in a provision of the Act which is separate from the summary dismissal provision. *Compare* 725 ILCS 5/122-1(a) *with* 725 ILCS 5/122-2.1(a)(2). Standing is not even referenced in the frivolousness provision. 725 ILCS 5/122-2.1(a)(2). Nor is there any mention of standing in the section of the Act on what the petition should contain. 725 ILCS 5/122-2. Thus, the structure of the Act, like in *Boclair* and *Hommerson*, indicates that the legislature did not intend for standing to be considered at the first stage of proceedings.

Additionally, standing—like timeliness and a verification affidavit—can be waived or forfeited by the State. *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 252-53 (2010). In Illinois civil proceedings, lack of standing is an affirmative

defense which must be raised by the opposing party. *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 494 (1988); see *People v. Harris*, 2016 IL App (1st) 141778, ¶ 16 (recognizing that post-conviction proceedings are civil in nature and generally follow the rules of civil procedure); 725 ILCS 5/122-5. There is generally no burden on the plaintiff to plead or prove standing at the initial stages of civil litigation. *Greer*, 122 Ill. 2d at 494. Instead, the opposing party must raise and prove *lack* of standing. *Id.* Even in the federal system, where lack of standing can effect jurisdiction, standing controversies are considered best resolved *after* the pleading stage when evidence can be developed and factual issues explored. *Id*. at 494-95 (citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n. 15 (1973)).

Notably, the State may well choose to waive statutory standing in order to correct a manifest injustice. But if lack of standing is used for summary dismissal, the State won't get the chance to consider the petition or underlying claim as the State has no input at the first stage of proceedings. 725 LCS 5/122-2.1(a)(2); *Gaultney*, 174 Ill. 2d at 418-20. In *Boclair*, this Court recognized that premature dismissals based on untimeliness effectively usurped the State's chance to waive a flaw in order reach a claim of actual innocence. *Boclair*, 202 Ill. 2d at 102 (interpreting the timeliness provision under a prior version of the Act).[2] The same concern is apparent with lack of standing. *People v. Dunn*, 2020 IL App (1st) 150198, ¶¶ 18-21 (finding a petitioner alleging actual innocence lacked standing); *People v. Steward*, 406 Ill. App. 3d 82, 82-83, 89-90 (1st Dist. 2010) (same). A petition showing actual innocence could be entirely missed at the first stage because it

[2] In 2003, the legislature amended the Act so that the time limitation no longer applies to claims of actual innocence. P.A. 93-605.

was filed one day after the original sentence ended. The State may even decide to waive standing and re-open a conviction due to unforseen immigration consequences or to free a defendant from the consequences of an otherwise inequitable conviction.

Next, it is important to realize lack of standing cannot be fully determined from the petition and the contents listed in the Act as proper for consideration during summary dismissal. See 725 ILCS 5/122-2.1(c). *Cf. People v. Blair,* 215 Ill. 2d 427, 442-45 (2005). Section 122-2.1 specifically authorizes the circuit court to examine the court file, appellate record, and transcripts in the case when considering summary dismissal. 725 ILCS 5/122-2.1(c).

In *Blair*, this Court reasoned that *res judicata* and forfeiture were appropriate for first-stage dismissals because they could be determined from the legislature's list of items to be considered during the first stage of proceedings. *Blair,* 215 Ill. 2d at 442-45. Including this list was a clear indication that the legislature intended for courts to consider whether claims in the petition had been or could have been litigated during direct appeal. *Blair,* 215 Ill. 2d at 445-46. Thus, *res judicata* and forfeiture were appropriate grounds for summary dismissal. *Id*. As a final note, unlike standing, a verification affidavit, and timeliness, the Act has no separate provision which deals with *res judicata* or forfeiture based on the direct appeal. 725 ILCS 5/122-1 *et seq*.

This Court's analysis in *Blair* strengths the argument that the legislature did not intend for lack of standing to be analyzed during first stage proceedings. Unlike *res judicata* and forfeiture, whether a petitioner has standing cannot be determined by looking at the petition and the specific records listed in section

122-2.1(c). Standing requires knowing how the sentence was served including things like whether the petitioner got good time credit or whether there was any interruption in serving the sentence. See *People ex rel. Colletti v. Pate*, 31 Ill. 2d 354, 357 (1964) (noting "good time" credit can be forfeited); *People v. Figuero*a, 2020 IL App (1st) 172390, ¶¶ 31-32 (providing examples for lost "good time" from the Illinois Administrative Code); *Vega v. United States*, 493 F.3d 310, 322 (3d Cir. 2007) (citing *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930), and discussing the counterbalancing interests at issue when determining how the prisoner must complete their sentence after accidental early release).

For example, consecutive sentencing impacts standing in a manner that would not necessarily be apparent in the court file for a given case. A petitioner who was sentenced to 7 years in prison in Case No. 1, and later sentenced to a consecutive 60 years in prison in Case No. 2. The mittimus in the file for Case No. 1 would not reflect the consecutive sentence. However, under *People v. Pack*, the petitioner would have standing to pursue a claim against the conviction in Case No. 1 long after serving seven years of the combined sentence. *People v. Pack*, 224 Ill. 2d 144, 145-46, 152 (2007). This is because a petitioner has standing under the Act to attack either conviction for the entire time that the consecutive sentences run. *Id*. But the information about consecutive sentencing may not be in the original court file, transcripts, or appellate court decision for Case No. 1. To get standing right, the court would need to look at the IDOC website and court file for a separate case. Disturbingly, if the circuit court were to get standing wrong, the petitioner would not even have a chance to correct the error as there is no right to be present or give input at the first stage of proceedings. *Gaultney*, 174 Ill. 2d at 418 (noting

the first stage occurs without input from the petitioner).

In this very case, the circuit court relied on the website of the Department of Corrections, the record from case no. 14-CR-1312891, and assumptions based on the arraignment date and mittimus in case no. 07-CR-17223 to find that Mr. Johnson lacked standing. (R.C43) Section 122-2.1 does not permit factual finding that extends to the Department of Corrections website or other case files. This type of investigation and factfinding to support an affirmative defense is not appropriate at the first stage of post-conviction proceedings. It should be saved for the second-stage where the proceeding is adversarial and the petitioner has counsel to assist in understanding the legal arguments at play.

The First District of the Illinois Appellate Court is the only district of the appellate court to hold that lack of standing is an appropriate grounds for summary dismissal. *Steward*, 406 Ill. App. 3d at 89-90; *People v. Vinokur*, 2011 IL App (1st) 090798, ¶¶ 11-14 (relying on *People v. Steward*, 406 Ill. App. 3d 82 (1st Dist. 2010)); *People v. Johnson*, 2019 IL App (1st) 163169, ¶¶ 19-22. The appellate court's reasoning should not be followed and this Court should overrule those cases.

In the first such case, the appellate court in *People v. Steward* based its analysis on a definition of "merit" quoted in *People v. Boclair*. *Steward*, 406 Ill. App. 3d at 90 (quoting *Boclair*, 202 Ill. 2d at 101). The quoted definition for merit was "legal significance, *standing*, or importance." *Steward*, 406 Ill. App. 3d at 90 (emphasis added in *Steward*). Importantly, the *Boclair* Court was concerned with timeliness, and the decision included no discussion of the legal concept of standing. *Boclair*, 202 Ill. 2d 89.

The problem with the appellate court's analysis is that it effectively relied

on a single, out-of-context word (i.e. standing) in a definition from a non-legal dictionary. See *Boclair*, 202 Ill. 2d at 101 (citing Webster's Third New International Dictionary for an analysis of whether timeliness is inherent to merit). Outside the legal context, "standing" can refer to one's relative rank or position in society—as in a lawyer of high standing or merit. Webster's Third New International Dictionary, Unabridged, "standing," accessed August 11, 2020, https://unabridged.merriam-webster.com. This meaning fits well in the quoted definition of merit which can be read as a list of three synonyms for something worthy or meaningful. On the other hand, Black's *Law* Dictionary defines "merits" as focused on substantive claims with no mention of standing:

> The elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure.

Black's Law Dictionary 1010 (8th ed. 2004). The definition in Black's aligns with this Court's repeated emphasis on considering only the substance of the constitutional claim at the first stage of proceedings. *Hommerson*, 2014 IL 115638, ¶ 11; see also *Allen*, 2015 IL 113135, ¶ 33.

The commentary on the word standing in Black's Law Dictionary also strengthens the argument that the legislature did not intend to include standing controversies in the first-stage review of *pro se* filings. Black's defines standing as a "party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1442 (8th ed. 2004); see Webster's Third New International Dictionary 2224 (1986) (defining "standing," in relevant part, as "a place from which one may assert or enforce legal rights and duties"). It then goes on to quote from a 1978 book which reflected that

> *standing* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our century. * * * The word appears here and there, spreading very gradually with no discernible pattern.

Black's Law Dictionary 1442 (8th ed. 2004) (citing Joseph Vincent, *Legal Identity* 55 (1978)). In other words, standing is technical legal concept that was of relatively recent vintage at the time the summary dismissal provision was created. See P.A. 83-942. It is well-known that petitions at the first stage are drafted largely by "defendants with little legal knowledge or training." *Hodges*, 234 Ill. 2d at 9. To ensure their access under the Act, the legislature drafted pleading requirements that did not require legal arguments or citations to legal authority. *Id*.; *People v. Porter*, 122 Ill. 2d 64, 72-73 (1988) (rejecting a procedural due process claim on the basis that petitioner need only state the gist of a constitutional claim); 725 ILCS 5/122-2. Presumably, the legislature would have been explicit if it expected *pro se* petitioners to include allegations or arguments on standing in their initial filing. Yet, section 122-2 and section 122-2.1 are both silent on the matter. 725 ILCS 5/122-2, 122-2.1. Thus, the *Steward* court's analysis based on an out-of-context work in a definition should not be followed to expand summary dismissal to include standing issues.

In Mr. Johnson's case, the appellate court found that standing related to the "substantive virtue" of a petition. *Johnson*, 2019 IL App (1st) 163169, ¶ 19. Thus, the court reasoned that lack of standing fit within the meaning of "without merit" in section 122-2.1. *Id*. at ¶¶ 21-22. This analysis is also wrong.

Illinois has long recognized that standing to file suit is distinct from the underlying merits of a suit. Indeed, this Court rejected the federal test for standing in the context of a suit to enjoin administrative action, because the federal test

risked confusing the standing analysis with the merits analysis. *Greer*, 122 Ill. 2d at 487-92. In the post-conviction context, this Court made clear in *Boclair* that the circuit court in the initial stage "should only determine whether the petition alleges constitutional deprivations." *Boclair*, 202 Ill. 2d at 102 ; see also *Hommerson*, 2014 IL 115638, ¶ 11 (reasoning that the first stage focuses on substantive virtue and the allegations of constitutional error); *Allen*, 2015 IL 113135, ¶ 33 (reasoning that the first stage review should determine whether the petition alleged a constitutional claim capable of corroboration). It is the underlying constitutional claim which is key to a petition's substantive virtue. Even *res judicata* and forfeiture ask whether the underlying claim was previously litigated or forgone. See *Blair*, 215 Ill. 2d at 445-46. In contrast, standing does not directly relate to the underlying claim at all. Instead, it is akin to untimeliness in that it can act as a bar to a petition regardless of the constitutional error raised.

Standing simply is not a constitutional issue. It is statutory requirement that is not found in the provision of the Act dictating what the petition must contain. 725 ILCS 5/122-2. Surely, if the legislature intended for *pro se* petitioners to prove standing in their initial petition, it would have been included in the section on the contents of the petition. Instead, the legislature presumably expected lack of standing to operate as an affirmative defense to be raised by motion of the State as it is in other civil proceedings. *Greer*, 122 Ill. 2d at 494-95; 725 ILCS 5/122-5. Therefore, this Court should find that the legislature did not intend for the circuit court to decide standing for *pro se* petitions during the initial review for substantive virtue.

To close, it is worth reiterating that the question on appeal is not whether

dismissal is ever appropriate on standing grounds. It is whether poor petitioners should be permitted to consult with an attorney prior to dismissal based on lack of standing. See *Allen,* 2015 IL 113135, ¶ 34. It is whether circuit courts should let a prosecutor consider a petition in the interests of justice even if it was filed the day after a sentence was concluded. This Court's precedent as well as the language, structure, and history of the Act all indicate that standing should not be included within the frivolous and patently without merit standard used for reviewing *pro se* petitions.

Here, the petition was filed and received by the clerk on July 18, 2016. (R.C34-35) It was set before the judge by July 25, 2016. (R.C34,39) The circuit court dismissed the petition on September 30, 2016, and the court lost jurisdiction when notice of appeal was filed on November 7, 2016. (R.C45,53-54) At that point, more than 90 days had passed. As there was not a circuit court finding which applied the statutory standard from section 122-2.1, this Court should reverse the summary dismissal and remand for second-stage proceedings. *Hommerson*, 2014 IL 115638, ¶ 14.

B. Alternatively, this Court should find that summary dismissal was inappropriate in Mr. Johnson's case given the unusual situation created by registry requirements.

If this Court finds that there may be cases where lack of standing could support summary dismissal, it should nonetheless limit that holding to cases where lack of standing is clear and obvious. In a case like Mr. Johnson's, it would be premature and unfair to dismiss at this early stage where the challenged conviction was tied to ongoing restraints on Mr. Johnson's liberty. (R.C36-37,43)

In this case, Mr. Johnson did not file a petition against his unlawful restraint conviction while imprisoned on an entirely unrelated conviction. Instead, according to the circuit court's research, Mr. Johnson was imprisoned for the related offense of failure to register when he filed a petition alleging the original imposition of the registry requirement was unconstitutional. (R.C37,41) Thus, Mr. Johnson, as a *pro se* petitioner, arguably followed the language of section 122-1(a) when he was "imprisoned" for failure to register and he alleged a constitutional defect in the proceedings that led to his duty to register. 725 ILCS 5/122-1(a)(1)("Any person imprisoned in the penitentiary may institute a proceeding [under the Act] if the person asserts that * * * [there was a constitutional defect] in the proceedings which resulted in his or her conviction."). In short, the "proceedings which resulted in [Mr. Johnson's] conviction" for failure to register included the guilty plea for unlawful restraint as this led to the registry requirement in the first place.

Further, Mr. Johnson would have had standing to attack the failure to register conviction which led to his imprisonment at the time of filing. 725 ILCS 5/122-1(a)(1). If the registry requirement was not properly imposed due to a failure to prove the complainant's age, Mr. Johnson may have had a viable argument that his conviction for failure to register was constitutionally defective. *People v. Armstrong*, 2016 IL App (2d) 140358, ¶ 21 (finding counsel ineffective for failing to challenge a failure to register conviction where the defendant negotiated around the registry requirement by not including the complainant's age in the factual basis). An attorney could help Mr. Johnson explore whether to amend his petition to challenge the failure to register conviction, rather than the conviction for unlawful restraint.

Additionally, Mr. Johnson is not merely trying to "purge [his] criminal record."

People v. Martin-Trigona, 111 Ill. 2d 295, 299 (1986) (making clear that the Act is not intended as a means to purge a criminal record of a conviction which no longer restrains someone's liberty). Instead, he is trying find the right way to attack the unexpected registry requirements which attached to his guilty plea to a low-level, non-sexual offense. (R.C13-16,36-38) In his petition, he specifically attacked the conviction which has turned what would be innocent behavior for others into a felony for him. See 730 ILCS 154/10(a) & 60 (making it a felony to not report an address where a person has spent an aggregate of five days throughout the year). Thus, he seeks more than a simple purge of his criminal record—he is trying to address the real-world consequences that he faces to this day.

Notably, it is still an open question whether a registry requirement might so limit a petitioner's liberty as to provide standing under the Act. Though the Act uses the word "imprisoned," this Court has made clear that a person's "liberty interest [is] paramount when construing the Act." *People v. Pack*, 224 Ill. 2d 144, 150; 725 ILCS 5/122-1(a)(1). This Court has liberally construed the standing provision to ensure the Act provides meaningful access to petitioners whose liberty is constrained. *Martin-Trigona*, 111 Ill. 2d at 302-03. It has found that someone released on an appeal bond or mandatory supervised release still falls within the meaning of "imprisoned" for purposes of the Act. *Martin-Trigona*, 111 Ill. 2d at 300-02; *People v. Correa*, 108 Ill. 2d 541, 546 (1985).

Recently, federal courts have begun recognizing that registry requirements may be so onerous as to confer standing for filing a federal *habeas* petition. *Piasecki v. Court of Common Pleas, Bucks Cty., PA,* 917 F.3d 161, 170-76 (3d Cir. 2019) (noting that among other constraints the State could order the petitioner to be

at certain place to register multiple times a year and that the petitioner had less freedom to "come and go as he pleased" where he had to report any trips or changes in address); 730 ILCS 154/10 (Duty to Register), § 30 (Duty to Report & Inform), § 60 (felony penalties for non-compliance). In the least, these developments show that this area is not fully settled or obvious to a *pro se* petition sitting in prison and trying to challenge the constitutionality of how the registry requirements were imposed. *Wright u. Alaska,* 2019 WL 2453641, at *3 (D. Alaska June 12, 2019) (granting a certificate of appealability on whether registry requirements confer standing); see *Banks v. Dretke,* 540 U.S. 668, 705 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'") Though in federal court, these developments are noteworthy as this Court has previously looked to federal *habeas* precedent when interpreting the standing provision in the Act. *Pack*, 224 Ill. 2d at 148-51 (relying on federal *habeas* cases interpretation of "in custody" to interpret the meaning of "imprisoned" under the Act); *People v. Carrera,* 239 Ill. 2d 241, 256-58 (2010) (relying on *habeas* decisions in interpreting who has standing under the Act); see also *People v. Hodges,* 234 III. 2d 1, 16 n.7 (2009) ("With regard to *pro se* defendants, federal decisions in the area of *habeas corpus* have mirrored [the Illinois Supreme Court's] concern [with pleading standards]."); *People v. Shellstrom,* 216 III. 2d 45, 55-56 (2005) (rejecting the State's argument that federal *habeas* was distinguishable from the Act when adopting federal rules on how to recharacterize under the Act). These cases may well lead to new arguments that registry requirements confer standing under the Act.

Mr. Johnson's own specific struggles under the registry requirement may give rise to a colorable argument that the registry has created sufficient constraints on his liberty to confer standing. See *People v. Bingham*, 2018 IL 122008, ¶ 22 (recognizing the need for factual development for any as-applied challenge including to registry requirements); see also *Does #1-5 v. Snyder*, 834 F.3d 696, 701 (6th Cir. 2016) (finding the sex offender registry in Michigan was punitive in practice). But a *pro se* petitioner cannot be expected to properly investigate and explore this type of nuanced legal argument and factual development at the first stage of proceedings. Therefore, Mr. Johnson respectfully requests that this Court remand for further proceedings where he can have the help of a lawyer in reviewing and shaping his petition into proper legal form.

CONCLUSION

For the foregoing reasons, Recardo Johnson, petitioner-appellant, respectfully requests that this Court reverse the summary dismissal and remand for further second-stage proceedings where he can have the assistance of counsel in shaping his petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 23 pages.

/s/Maggie A. Heim
MAGGIE A. HEIM
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Recardo Johnson 125738

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State App Pc Feder

Heim

2019 IL App (1st) 163169

SIXTH DIVISION
December 31, 2019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 1-16-3169

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 17223
	)	
RECARDO JOHNSON,	)	Honorable
	)	Alfredo Maldonado,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court, with opinion.
Justices Cunningham and Harris concurred in the judgment and opinion.

OPINION

¶ 1 In this appeal, defendant Recardo Johnson argues that the circuit court erred in summarily dismissing his *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2016)) on the basis of standing. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 In October 2007, Mr. Johnson pleaded guilty in case No. 07 CR 17223 to the offense of unlawful restraint (see 720 ILCS 5/10-3 (West 2006)) in exchange for a sentence of two years' imprisonment. Before Mr. Johnson entered his plea, the court informed him:

> "Mr. Johnson, you are charged with the offense of unlawful restraint ***.
>
> That in the State of Illinois is what is referred to as a Class 4 felony, which means

it's punishable by 1 to 3 years in the Illinois State Penitentiary. If I find you have been found guilty of the same or greater class felony within the last ten years, the maximum penitentiary time in this case can increase all the way up to 6 years.

In addition, upon your release from the penitentiary there would be a period of 1 year mandatory supervised release. That's sometimes referred to as parole."

¶ 4 Upon entering his plea, Mr. Johnson said he understood he was giving up certain rights by pleading guilty, including his right to plead not guilty and have a jury trial. Mr. Johnson said he was not threatened or promised anything in exchange for his plea.

¶ 5 The State provided a factual basis for the plea, the circuit court found that Mr. Johnson pleaded guilty to the charge freely and voluntarily, and the court accepted the plea. The court then sentenced Mr. Johnson to two years in prison and admonished him of his right to a direct appeal. Mr. Johnson did not avail himself of that right.

¶ 6 On July 18, 2016, Mr. Johnson, *pro se*, moved the circuit court to file a late postconviction petition. In the petition, Mr. Johnson said that he was presently incarcerated, he had been incarcerated for approximately one year, and the lateness of his filing was not due to his culpable negligence. Mr. Johnson filed his petition under case No. 07 CR 1722301, the case in which he had pleaded guilty to unlawful restraint in October 2007. Mr. Johnson argued in his petition that the age of the victim in his case was never stated in court, the circuit court never informed him that he would need to register under the Child Murderer and Violent Offender Against Youth Registration Act (Violent Offender Act) (see 730 ILCS 154/1 *et seq.* (West 2006)), and that his plea counsel was ineffective for failing to tell him he would need to register under the Violent Offender Act.

¶ 7 On September 30, 2016, the circuit court summarily dismissed Mr. Johnson's petition. The

court noted that Mr. Johnson had not withdrawn his 2007 guilty plea or appealed that conviction and had already served the term of imprisonment and mandatory supervised release (MSR) to which he was sentenced in case No. 07 CR 1722301. The circuit court noted that at the time he filed his petition, Mr. Johnson was independently serving "a term of two years of imprisonment for failure to register" under the Violent Offender Act in case No. 14 CR 1312801. The circuit court's opinion indicated that it obtained this information from the website for the Illinois Department of Corrections. Citing *People v. Pack*, 224 Ill. 2d 144, 150 (2007), the circuit court stated that the Act "and its remedies are not available to petitioners who have completed their sentences and merely seek to purge their criminal records." The court found that, because Mr. Johnson was "no longer imprisoned or otherwise in the custody of the [Illinois Department of Corrections]" as it related to the case in which he claimed error in his petition, the petition was frivolous and patently without merit.

¶ 8 II. JURISDICTION

¶ 9 Mr. Johnson timely filed his notice of appeal on September 30, 2016. We have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Mar. 20, 2009); R. 651(a) (eff. Dec. 1, 1984)).

¶ 10 III. ANALYSIS

¶ 11 On appeal, Mr. Johnson argues that the circuit court erred in dismissing his petition at the first stage on the basis of standing. However, this single argument gives rise to two separate questions: (1) whether standing is ever an appropriate consideration at the first stage of postconviction proceedings and, if so, (2) whether, in this case, Mr. Johnson's argument that he

has standing is frivolous or patently without merit. We consider each question in turn.

¶ 12 First, Mr. Johnson argues that standing is never an appropriate basis for dismissal at the first stage of postconviction proceedings. The State, on the other hand, argues that the circuit court properly dismissed Mr. Johnson's petition based on standing at the first stage because if it is clear that a defendant lacks standing, his petition is necessarily frivolous and patently without merit. We agree with the State.

¶ 13 The Act "provides a three-stage process for adjudicating postconviction petitions." *People v. Hommerson*, 2014 IL 115638, ¶ 7. At the first stage the circuit court determines whether the petition is frivolous or patently without merit, which our supreme court has defined as "having no basis in law or fact and obviously without legal significance." *People v. Blair*, 215 Ill. 2d 427, 445 (2005). If the court finds the petition to be frivolous or patently without merit, it dismisses the petition; if not, the petition proceeds to the second stage of proceedings, at which point the court may appoint counsel to represent an indigent defendant. *Hommerson*, 2014 IL 115638, ¶¶ 7-8. We review the dismissal of a postconviction petition *de novo*. *Id.* ¶ 6.

¶ 14 What the circuit court may consider at the first stage of postconviction proceedings is a question our supreme court has focused on primarily in three cases: *People v. Boclair*, 202 Ill. 2d 89 (2002); *Blair*, 215 Ill. 2d 427; and *Hommerson*, 2014 IL 115638. In *Boclair*, the court found that the timeliness of a petition was not a proper subject for consideration at the first stage of postconviction proceedings. *Boclair*, 202 Ill. 2d at 97. In so holding, the supreme court noted first that timeliness and frivolousness are addressed by two separate sections of the Act (see 725 ILCS 5/122-1(c) (West 2000) (timeliness); *id.* § 122-2.1(a)(2) (frivolousness)). *Boclair*, 202 Ill. 2d at 100. The court continued:

> "Under a plain reading of section 122-2.1(a)(2), the circuit court may dismiss a

post-conviction petition at the initial stage only if the petition is deemed to be 'frivolous or *** patently without merit,' not if it is untimely filed. *** By addressing timeliness and frivolousness in separate provisions of the Act, the legislature plainly intended to draw a distinction between these two flaws of post-conviction petitions.

To accept the argument that the circuit court has the authority to dismiss a petition pursuant to section 122-2.1(a)(2) of the Act we would have to hold, contrary to the language of the Act, that the phrase 'frivolous or *** patently without merit' encompasses untimely petitions. We will not ignore the Act's language and adopt this interpretation. If a petition is untimely that does not necessarily mean that the petition lacks merit." *Id.* at 100-01.

¶ 15 The supreme court then went on to define the words used in section 122-2.1(a)(2): " '[f]rivolous' has been defined as 'of little weight or importance: having no basis in law or fact.' [Citations.] '[P]atently' means 'CLEARLY, OBVIOUSLY, PLAINLY.' [Citations.] 'Merit' means 'legal significance, standing, or importance.' [Citations.]" *Id.* at 101. Importantly, the court concluded that "[t]hese terms do not include issues of timeliness." *Id.* "Further, time is not an inherent element of the right to *bring* a post-conviction petition. [Citation.] For that reason, time limitations in the Act should be considered as an affirmative defense and can be raised, waived, or forfeited, by the State." (Emphasis in original.) *Id.*

¶ 16 In *Blair*, our supreme court held that a circuit court may consider at the first stage whether claims in a petition are barred by *res judicata* or forfeiture. *Blair*, 215 Ill. 2d at 429-30. The court noted that both *res judicata* and forfeiture are "inherently legal determinations which may bar relief under the Act. Thus, an otherwise meritorious claim has no basis in law if *res judicata* or forfeiture bar the claim." *Id.* at 445. And because "*res judicata* and forfeiture preclude a defendant

from obtaining relief, such a claim is necessarily 'frivolous' or 'patently without merit.' " *Id.* The court therefore concluded that "the legislature intended that the court be allowed to make legal determinations based on both *res judicata* and forfeiture" and that "[t]o hold otherwise, we would be forcing courts to waste judicial resources by merely delaying the dismissal of a petition which the judge knows could never bear fruit for the petitioner." *Id.* at 446-47.

¶ 17 The supreme court in *Blair* distinguished its holding on *res judicata* and forfeiture from its holding in *Boclair* on timeliness, noting that section 122-2.1(c) specifically allows the circuit court to " 'examine the court file of the proceeding in which the petitioner was convicted,' " and that, "[u]nlike timeliness, *res judicata* and forfeiture do not have exceptions which would require a factual determination at the summary dismissal stage, such as the culpable negligence exception to timeliness, requiring credibility determinations." *Id.* at 450 (quoting 725 ILCS 5/122-2.1(c) (West 2002)). The court concluded by saying, in part:

> "Since section 122-2.1(a)(2) expressly requires the petition to be 'frivolous or patently without merit,' trial courts will rely upon those grounds for summary dismissal where it is clear from the facts ascertainable in the record that the petitioner's claims are barred by legal concepts of *res judicata* or forfeiture. Thus, where the court need look only at the record of the former proceedings, it may properly dismiss the petition." *Id.*

¶ 18 Finally, in *Hommerson*, our supreme court considered whether a postconviction petition may be dismissed at the first stage on the basis that it lacked a verification affidavit, as required by section 122-1(b) of the Act (see 725 ILCS 5/122-1(b) (West 2010)). *Hommerson*, 2014 IL 115638, ¶ 6. Following *Boclair*, the court in *Hommerson* held that "the circuit court may not dismiss a petition at the first stage of proceedings solely on the basis that it lacked a verification affidavit." *Id.* ¶ 11. The crucial factor that the *Hommerson* court highlighted was whether the

consideration was procedural or substantive in nature; as the *Hommerson* court itself stated, "[a]llowing a trial judge to *sua sponte* dismiss a petition" on the sole basis that it lacked a verification affidavit would "conflict[ ] with our prior holdings that, at the first stage of proceedings, the court considers the petition's substantive virtue rather than its procedural compliance." *Id.*

¶ 19 In keeping with this distinction between "substantive virtue" and "procedural compliance," we think it clear that standing relates to the "substantive virtue" of a postconviction claim, and therefore may be an appropriate consideration for the first stage of postconviction proceedings. "[S]tanding" is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (11th ed. 2019). Like *res judicata* or forfeiture, the right of a petitioner to bring a legal claim goes directly to the merits of that claim. Like *res judicata* and forfeiture, standing does not have an "exception[ ] which would require a factual determination at the summary dismissal stage" as timeliness does. See *Blair*, 215 Ill. 2d at 450. And like *res judicata* and forfeiture, standing can often be determined from the circuit court's examination of "the court file of the proceedings in which the petitioner was convicted," which it is explicitly permitted to do by section 122-2.1(c) of the Act. 725 ILCS 5/122-2.1(c) (West 2016).

¶ 20 Relying on the supreme court's observations in both *Boclair* and *Hommerson* that timeliness and the verification affidavit requirements were addressed in separate sections of the Act from frivolousness (compare *id.* § 122-1(b) (verification affidavit) and *id.* § 122-1(c) (timeliness) with *id.* § 122-2.1(a)(2) (frivolousness)), Mr. Johnson argues that standing, also governed by a separate section (see *id.* § 122-1(a)), should, like timeliness and the lack of a verification affidavit, not be considered at the first stage of postconviction proceedings. Although we acknowledge the court's comments on the structure of the legislation, it is clear to us in reading

Hommerson that, as we noted above, the crucial point on which the supreme court has relied is the distinction between the substantive aspects of a claim and the procedural requirements for filing one.

¶ 21 Consideration of standing at the first stage is consistent not only with *Boclair*, *Blair*, and *Hommerson*, but also with this court's own precedent. In *People v. Steward*, 406 Ill. App. 3d 82, 90 (2010), which was decided before *Hommerson*, this court held that standing was properly considered at the first stage of proceedings because a petition filed by someone without standing is necessarily without merit. We reaffirmed *Steward* in *People v. Vinokur*, 2011 IL App (1st) 090798, ¶¶ 13-14, recognizing that the "legislature intended for the ' "frivolous or *** patently without merit" ' standard to encompass the issue of standing."

¶ 22 Mr. Johnson argues that, more recently, in *People v. Begay*, 2018 IL App (1st) 150446 (2018), we suggested that *Hommerson* calls into question our holding in *Steward* that standing can be considered at the first stage of postconviction proceedings. We do not read *Begay* that way; rather, the court in *Begay* simply noted that the petitioner in that case was represented by an attorney at the first stage of proceedings and thus "suffered little prejudice" from the court's consideration of standing at the first stage instead of at the second stage when a *pro se* petitioner would have been appointed counsel. *Id.* ¶ 55. We think our holding in *Steward*, as affirmed in *Vinokur*, survives and is consistent with our supreme court's analysis in *Hommerson.*

¶ 23 Because we find that the circuit court properly considered Mr. Johnson's standing at the first stage of postconviction proceedings, we now consider whether Mr. Johnson's argument that he has standing is frivolous or patently without merit.

¶ 24 The Act provides that "[a]ny person imprisoned in the penitentiary may institute a proceeding under [the Act] if the person asserts that" "in the proceedings which resulted in his or

her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2016). But because "actual incarceration is not a strict prerequisite" to invoke postconviction relief (*People v. West*, 145 Ill. 2d 517, 519 (1991)), exactly what it means to be "imprisoned in the penitentiary" has been considered by Illinois courts on numerous occasions. As recognized by our supreme court in *West*, the phrase "imprisoned in the penitentiary" "has been held to include defendants who have been released from incarceration after the timely filing of their petition [citation], released on appeal bond following conviction [citation], released under mandatory supervision [citation], and sentenced to probation [citation]." *Id.*

¶ 25 In *West*, the defendant was sentenced to death in the state of Arizona for murder, a sentence that was in part aggravated by a prior Illinois conviction for voluntary manslaughter. *Id.* at 518. The defendant filed a postconviction petition in Illinois challenging his Illinois conviction. *Id.* The supreme court, however, noted that the defendant had completed both his sentence and MSR for his Illinois conviction and concluded that the defendant's present imprisonment in Arizona was "not imprisonment within the meaning of the language in the [Act]." *Id.* at 519. The supreme court stated that a postconviction petitioner "must be in prison for the offense he is purporting to challenge." *Id.*

¶ 26 In contrast, the supreme court found in *Pack*, 224 Ill. 2d at 147, 152, that a defendant was "imprisoned" for purposes of the Act when he was serving consecutive sentences of 60 and 7 years, even though he challenged the conviction that resulted in the 7-year sentence after being in prison for 13 years. The court reasoned that, because the "defendant's liberty [wa]s certainly curtailed by the state due to his status as a prisoner" and the Illinois Department of Corrections "treats consecutive sentences in the aggregate," the defendant's successful challenge to either of his

convictions that resulted in his consecutive sentences would advance his release date and would accordingly have a direct effect on his liberty. *Id.* at 152.

¶ 27 Relying on *West* and *Pack*, this court more recently found that a defendant who was serving a natural-life sentence in Illinois did not have standing to challenge his prior conviction that was "used as an element in sentencing him in [the] subsequent murder conviction." *People v. Dent*, 408 Ill. App. 3d 650, 653-54 (2011). The *Dent* court first noted that "[t]he common thread" in cases that had defined a defendant as imprisoned for purposes of the Act "is that the defendants were pursuing a liberty interest *** and that invalidating the challenged convictions would advance the defendants' release dates from the constraints affecting their liberty." *Id.* at 652-53. The court then stated:

> "The facts of the instant case are more similar to those in *West* than those in *Pack*. The *Pack* defendant had not completed his sentence for the challenged conviction because the two consecutive sentences were *considered as one*. Consequently, the invalidation of the challenged conviction would reduce the sentence for *that offense* such that the restraints on his liberty could be reduced by seven years. In contrast, because defendant successfully completed his sentence for the challenged conviction, his liberty interest for the [prior] murder cannot be affected. Rather, defendant effectively requests the ability to purge his record. The supreme court has been clear that a defendant may not use the Act to purge his record of a conviction for which the sentence has been completed." (Emphases in original.) *Id.* at 654.

See also *Steward*, 406 Ill. App. 3d at 90 ("a person serving a new sentence enhanced by a previous conviction does not have standing to challenge that previous conviction").

¶ 28 Mr. Johnson's current imprisonment is not the direct result of the 2007 conviction that he

is challenging in his postconviction petition. Mr. Johnson had completed his prison sentence and MSR for that conviction well before he filed the petition. Upon his release, Mr. Johnson was required to register under the Violent Offender Act (see 730 ILCS 154/1 *et seq.* (West 2006)). This court has, however, repeatedly held that registration as a sex offender—under a statutory scheme that is similar to the Violent Offender Act—is not a part of a defendant's criminal sentence. *Begay*, 2018 IL App (1st) 150446, ¶¶ 57-61; *People v. Stavenger*, 2015 IL App (2d) 140885, ¶¶ 11-12; *People v. Downin*, 394 Ill. App. 3d 141, 146 (2009). Therefore, this imprisonment, which grows out of that registration requirement, cannot be considered a continuation of Mr. Johnson's original sentence.

¶ 29 A postconviction petition should be summarily dismissed if it is found to be frivolous or patently without merit. *Boclair*, 202 Ill. 2d at 100. In *People v. Hodges*, 234 Ill. 2d 1, 16 (2009), our supreme court explained that a petition is frivolous or patently without merit only if it "has no arguable basis either in law or in fact" and is "based on an indisputably meritless legal theory or a fanciful factual allegation." Although in some cases the issue of standing may be nuanced enough that it would be inappropriate for the circuit court to dismiss a petition at the first stage, that is simply not the case here. Mr. Johnson does not dispute that his sentence and MSR for the 2007 conviction are both completed, and his counsel cannot point to any legal support for an argument that the registration requirement he violated was imposed as part of Mr. Johnson's criminal sentence for the 2007 conviction. In short, there is no arguable basis in fact or in law that would give Mr. Johnson standing to challenge his 2007 conviction at this point. Therefore, the circuit court properly dismissed Mr. Johnson's petition at the first stage.

¶ 30 IV. CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 32 Affirmed.

No. 1-16-3169

Cite as:	*People v. Johnson*, 2019 IL App (1st) 163169
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 07-CR-17223; the Hon. Alfredo Maldonado, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Patricia Mysza, and Maggie A. Heim, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg and Brian K. Hodes, Assistant State's Attorneys, of counsel), for the People.

16-3169

In the Circuit Court of the First Judicial Circuit
Cook County, Illinois
(Or in the Circuit Court of Cook County).

9.30

THE PEOPLE OF THE STATE OF ILLINOIS)
v.)
Recardo Johnson)
Defendant/Appellant

No. 07CR1722301

FILED
CIRCUIT COURT OF COOK COUNTY
2016 NOV -7 PM 4:17
CIVIL APPEALS DIVISION

Notice of Appeal

An appeal is taken from the order or judgment described below:

(1) Court to which appeal is taken:
Cook County

(2) Name of appellant and address to which notices shall be sent:
Name: Recardo Johnson R65353
Address: 13423 E 1150th Ave Robinson IL 62454

(3) Name and address of appellant's 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: October 2 2007

(5) Offense of which convicted: Unlawful Restraint

(6) Sentence: Two years IDOC

FILED
NOV -7 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

(7) If appeal is not from a conviction, nature of order appealed from: conviction

Signed Recardo
(May be signed by appellant, attorney for appellant, or clerk of circuit court)

Revised Feb 2002

AFFIDAVIT

I, Recardo Johnson, after being duly sworn upon my oath, deposes and states that I have read the attached documents before signing this Affidavit, and the statements and attached documentation is true in substance and fact to the best of my knowledge and belief.

Signature

ROBINSON CORRECTIONAL CENTER
13423 E.1150th Ave.
Robinson, Illinois 62454

SUBSCRIBED AND SWORN TO BEFORE ME

THIS 28 DAY OF October, 2016

Notary Public

OFFICIAL SEAL
MEGAN T MAURER
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:04/05/17

Seal

FILED
NOV - 7 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

No. 125738

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RECARDO JOHNSON Petitioner-Appellant	)	Appeal from the Appellate Court of Illinois, No. 1-16-3169. There on appeal from the Circuit Court of Cook County, Illinois , No. 07 CR 17223. Honorable Alfredo Maldonado, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

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

Mr. Recardo Johnson, 5849 S. Francisco St., Apt. 2B, Chicago, IL 60629

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 August 21, 2020, 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/Marquita S. Harrison
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