No. 20-5487

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



JEROME ADAMS — PETITIONER
(Your Name)

vs.

STATE OF ILLINOIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jerome Adams
(Your Name)

711 Kaskaskia Street
(Address)

Menard, Illinois 62259
(City, State, Zip Code)

N/A
(Phone Number)

## QUESTION(S) PRESENTED

Whether the procedural bar of *res judicata* may serve as the basis for the dismissal of constitutional claims that were previously raised, but with substantially different underlying *reasonings*.

Whether case law authorities may be applied to any constitutional claims that were not subject of those decisions.

Whether the 15/20/25 years to life Firearm enhancement provisions render Illinois' Attempt statute unconstitutional on its face under the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Whether the Illinois Supreme Court's decision *Sharpe* overruling the Illinois Supreme Court's constitutional decision in *Morgan* was badly reasoned and wrongly decided, and therefore must be overruled.

Whether petitioner's 25-year firearm enhancement is unconstitutional as-applied to him under the Due Process Clause of the Fifth Amendment.

## LIST OF PARTIES

[☒] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

N/A

# TABLE OF AUTHORITIES CITED

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## STATUTES AND RULES

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## INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts:** N/A

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Illinois Appellate court appears at Appendix A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts:** N/A

The date on which the United States Court of Appeals decided my case was N/A.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was May 27, 2020. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V

No person shall ... be deprived of life, liberty, or property, without due process of law.

United States Constitution Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Illinois Constitution 1970, Article I, Section 11

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

720 ILCS 5/33A-1(a)(3)(West 2000)

Current law does contain offenses involving the use or discharge of a gun toward or against a person, such as aggravated battery with a firearm, aggravated discharge of a firearm, and reckless discharge of a firearm; however, the General Assembly has legislated greater penalties for the commission of a felony while in possession of a firearm because it deems such acts as more serious.

720 ILCS 5/33A-1(b)(1)(West 2000)

In order to deter the use of firearms in the commission of a felony offense, it is intended that more severe penalties are imposed. The use of firearms in felony offenses causes a serious threat to the public health, safety, and general welfare.

720 ILCS 5/33A-1(b)(2)(West 2000)

With the additional elements of the discharge of a firearm and great bodily harm inflicted by a firearm, it is the intent of the General Assembly to punish those elements more severely during commission of a felony offense than when those elements stand alone as the act of the offender.

720 ILCS 5/8-4(a)(West 2012)

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

720 ILCS 5/8-4(c)(1)(B)(West 2012)

An attempt to commit first degree murder while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court.

720 ILCS 5/8-4(c)(1)(C)(West 2012)

An attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court.

720 ILCS 5/8-4(c)(1)(D)(West 2012)

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

## STATEMENT OF THE CASE

The Illinois Appellate Court affirmed the dismissal of Jerome Adams' petition for relief From judgment, filed pursuant to 735 ILCS 5/2-1401, challenging the constitutionality of his 25-year firearm enhancement. (Appendix A)

Overview

Jerome Adams was indicted and tried on five counts of attempted first degree murder and one count of aggravated battery with a firearm for the September 7, 2012 shooting of Michael Gray. (Tr. C. 30-35)[1] Following a bench trial, Adams was convicted on all counts. (Tr. R. U2-13) Adams' convictions were merged into a single count of attempted murder, for which he was sentenced to 10 years on the attempt murder and a 25-year add-on for personally discharging a firearm that proximately caused great bodily harm to Michael Gray, totaling 35 years imprisonment. (Tr. C. 142; Tr. R. U13, Y18-19)

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[1] The common law and report of proceedings records for the bench trial proceedings will be cited as (Tr. C.) and (Tr. R.) respectfully. The common law records for the post-conviction proceedings will be cited as (C.) respectfully.

Trial and Direct Appeal

During the early morning of September 7, 2012, Adams and his girlFriend, Carolyn Webster, were at their house with Webster's sister, Tyesha Sanders, Sherita Mullen, Michael Gray, Shakira and Shamya Johnson, Tomeshah Patterson, and a number of children. (Tr.R. 514-15, 46-50, 72-75, T4-6, 28-31, 50-56) Webster, Mullen, Sanders, and Adams had been drinking liquor all day. (Tr. R. 514-15, T31, 44)

As midnight passed, Sanders went to bed upstairs because she was drunk, Shakira was outside talking on the phone, and Patterson also went upstairs, where Shamya, Mullen, and the children were sleeping. (Tr. R. 548-54, 74-75, T31-32, 51-53) At some point, Adams took Webster's drink and threw it in the street, and they began fighting inside the house. (Tr. R. 515-16, T6) Gray intervened and pulled Adams off of Webster, and Adams left the house out the back door. (Tr. R. T9-10)

A few minutes later, Adams walked in the back door with a gun in his hand. (Tr. R. T9) The next thing Gray remembered was waking up in the hospital. (Tr. R. T9-10) Because Gray did not remember the incident, and Adams did not testify, Webster was the only eyewitness to the shooting.

Webster testified that she seen Gray and Adams tussling over a gun that Adams had. (Tr. R. 519-21) Webster stepped back and heard a shot, but did not see who fired the gun, and did not know if Adams left the house. (Tr. R. 522) However, according to Webster's

videotaped statement, while Gray and Adams wrestled over the gun, she seen Adams free his hand, bring the gun up to Gray's head and shoot him once, then run out the front door. (St. Ex. 19) Shakira and Patterson also seen Adams fleeing after the shooting. (Tr.R. 554-59, T 53-55)

Officers testified that they responded to the scene and an ambulance took Gray to the hospital. (Tr.R.T21, 60-63) On September 17, 2012, Adams was arrested and taken into custody. (Tr.R.T68)

On February 7, 2014, the trial court ruled that Webster's trial testimony was not credible, and relied on her videotaped statement instead, and on that basis, found Adams guilty on all counts. (Tr.R.U2-13) Adams' convictions were merged into a single count of attempt murder. (Tr.R.U13) Adams' motion for a new trial was denied. (Tr.R. X20)

On May 19, 2014, during Adams' sentencing, the trial court stated:

> "The sentence that I believe is most appropiate would be 10 years on the attempt murder and that is enhanced by the 25 years. So, that total would be 35 years. That's the sentence that I will impose, sir ..." (Tr.R. Y18-19)

Adams' motion to reconsider sentence was denied. (Tr.R. Y20)

Adams filed a timely notice of appeal on May 19, 2014, but subsequently moved to dismiss the appeal on January 12, 2016 because his appellate counsel filed a brief on November 24, 2015, raising one issue which was frivolous. (Tr.C. 145) On February 25, 2016, the Appellate Court granted his dismissal in No. 1-14-1750.

## Previous Collateral Proceedings

On August 21, 2014, Adams filed a petition for declaratory judgment (C.92), and raised a facial challenge to the constitutionality of the 15/20/25 years to life firearm enhancement provisions to the Attempt statute, on the basis that they violate due process, the proportionate penalties clause, the rule against double enhancement, and are unconstitutionally vague and overbroad. (C.92-96) On September 30, 2014, the circuit court denied the petition based on its finding that the mandatory sentencing enhancements has been challenged and upheld on all the aforementioned basis in *People v. Bloomingburg*, 346 Ill. App. 3d 308 (2004); *People v. English*, 353 Ill. App. 3d 337 (2004); *People v. Thompson*, 2013 IL App (1st) 113105; and *People v. Hale*, 2012 IL App (4th) 100949. (C.107-108) Adams' request to file a late notice of appeal was denied. (C.131)

On October 22, 2014, Adams filed a second petition for declaratory judgment, setting forth the same claims. (C.113-119) The petition was denied by the circuit court on December 29, 2014, based on its previous ruling on the first petition. (C.133-135) Adams did not appeal this judgment.

On January 20, 2016, Adams filed a *pro se* petition for post-conviction relief, which was amended on February 16, 2016. (C.189, 211) In the petition, he claimed, *inter alia*, that the 15/20/25 years to life firearm enhancement provisions to the Attempt statute are facially unconstitutional under the double jeopardy clause, one-act/one-crime rule, rule against double enhancement, proportionate

penalties clause, and due process and equal protection clause. (C. 218-225) On April 1, 2016, the circuit court summarily dismissed the petition based, in pertinent part, on its previous ruling on the petitions for declaratory judgment, and Adams appealed the dismissal. (C. 237-253, 281) On appeal, appellate counsel was permitted to withdraw, and the Appellate Court affirmed the dismissal in *People v. Adams*, No. 1-16-1407 (April 12, 2018)(unpublished order pursuant to Supreme Court Rule 23). Petition For Leave to Appeal was denied by the Supreme Court of Illinois on November 28, 2018 in Supreme Court No. 123948.

Instant Proceedings

On January 24, 2018, Adams filed the *instant* section 2-1401 petition for relief From judgment. (C. 400-410) In the petition, Adams claimed that his 25-year add-on is facially unconstitutional and void *ab initio* under the proportionate penalties clause; and is unconstitutional as-applied to him under the due process clause. (C. 402-408)

On March 29, 2018, the circuit court summarily dismissed Adams' section 2-1401 petition based on its previous ruling on the petitions for declaratory judgment, and petition for post-conviction relief. (C. 418-423) (Appendix B)

On March 4, 2020, counsel on appeal was allowed to withdraw, and the Appellate Court affirmed the dismissal of Adams' section 2-1401 petition, finding that there are no issues of arguable merit to be

asserted on appeal. *People v. Adams*, No. 1-18-0883 (March 4, 2020) (unpublished order pursuant to Supreme Court Rule 23)(Appendix A) Petition for Leave to Appeal was denied by the Supreme Court of Illinois on May 27, 2020. (Appendix C)

This appeal follows.

## REASONS FOR GRANTING THE PETITION

I.

The Illinois Appellate Court's judgment affirming the dismissal of Adams' section 2-1401 petition is erroneous because the dismissal was improperly based on *res judicata* and inapplicable case law authorities.

When the Illinois circuit court dismissed Adams' section 2-1401 petition, not only did the court misinterpret and mischaracterize Adams' proportionality claim, but it also improperly applied the doctrine of *res judicata* and inapplicable case law to the claim, and failed to give any due consideration to his due process claim, (Appendix B) Adams raised these claims before but with different underlying *reasonings*, and so have the defendants in the cases relied upon by the circuit court. Accordingly, the circuit court erred in dismissing Adams' petition and this issue does have arguable merit to be asserted on appeal, and, as such, the appellate court erred in affirming the circuit court's dismissal of Adams' section 2-1401 petition.

Petitions for relief from judgment are governed by 735 ILCS 5/2-1401. Section 2-1401 of the Code of Civil Procedure is a civil remedy that extends to criminal cases and provides a comprehensive statutory procedure by which final orders and judgments may be vacated more than 30 days after their entry. The statute requires that the petition be supported by affidavit or other

appropiate showing as to matters not of record. Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and due diligence in both discovering the defense or claim and presenting the petition. Section 2-1401 may also be used to attack a void judgment. 735 ILCS 5/2-1401 (a-f) (West 2017) "An act of the legislature, repugnant to the Constitution, is void." *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 177 (1803) (internal quotation omitted).

A. *The circuit court improperly applied the doctrine of* <u>res judicata.</u>

In its order summarily dismissing Adams' section 2-1401 petition, the circuit court noted that Adams raised his instant proportionality claim in his previous petition for declaratory relief and his initial post-conviction petition, and that the court already denied the claim on September 30, 2014, and April 1, 2016, respectfully. The court found that therefore, *res judicata* barred consideration of Adams' instant proportionality claim. (Appendix B at 4)

In Adams' previous petitions for declaratory judgment, he claimed, *inter alia*, that the 15/20/25 years to life firearm enhancement provisions to the attempt statute are facially unconstitutional because (1) they violate the proportionate penalties clause where they are cruel and degrading, and attempted murder with a firearm carries a more severe sentence than attempted murder with other

dangerous weapons; and (2) they violate due process where the penalties are not reasonably designed to remedy the evil targeted by the legislature since they do not deter the use of firearms during the commission of felony offenses. (C. 92-96, 113-119)

In Adams' previous petition for post-conviction relief, he claimed, *inter alia*, that the 15/20/25 years to life firearm enhancement provisions to the attempt statute are facially unconstitutional because (1) they violate the proportionate penalties clause where attempt murder has identical elements *as* but carries a more severe sentence *than* aggravated battery with a firearm, and that it is cruel, degrading, and shocks the moral sense of the community to subject a defendant to 6 to 30 years *and* 15/20/25 years to life for the same act of discharging a firearm; and (2) they violate due process where they are contrary to legislative intent and an invalid exercise of the State's police power, as the penalties are not reasonably designed to remedy the evil targeted by the legislature since they do not deter the use of firearms during the commission of felony offenses. (C.218-225)

In Adams' instant section 2-1401 petition, in support of his claim that his 25-year add-on violates the proportionate penalties clause, he reasoned that because the 15/20/25 years to life firearm enhancement provisions apply to attempt first degree murder without regard to whether the mitigating circumstance of possessing an unreasonable belief in the need for self-defense is present, which would preclude the imposition of these enhancements for the underlying offense of first degree murder and result in a much lesser sentence than that for an attempt, the penalties for attempt first degree murder

under the 15/20/25 years to life Firearm enhancement provisions are so wholly disproportionate the offense that they shock the moral sense of the community. (C.402-403)

The circuit court found this claim barred by *res judicata* on the basis that it was raised in Adams' previous petitions for declaratory judgment and petition for post-conviction relief, and already denied by the court in those proceedings. (C.422) However, the circuit court's finding is erroneous because although Adams raised proportionate penalties claims in those previous petitions, the *reasoning* of those claims is different from the **reasoning** of Adams' instant claim.

Furthermore, in Adams' instant petition, in support of his claim that his 25-year add-on violates the due process clause, he reasoned that as-applied to him, the 15/20/25 years to life Firearm enhancement provisions to the attempt statute are not reasonably designed to remedy the particular evil that the legislation was intended to target because, based on the legislative findings and intent sections of Public Act 91-404, Adams' mere use of a firearm did not subject him to these severe penalties. (C.406-408)

Therefore, *res judicata* does not apply here. *People v. Harris*, 206 Ill. 2d 1, 42 (2002).

B. *The circuit court improperly applied inapplicable case law.*

The circuit court also improperly dismissed Adams' petition on the merits, where the court applied the holdings in *People v. Bloomingburg*, 346 Ill. App. 3d 308 (2004); *People v. English*, 353 Ill.

App. 3d 337 (2004); *People v. Thompson*, 2013 IL App (1st) 113105; and *People v. Hale*, 2012 IL App (4th) 100949. The court's reliance on those cases is, however, misplaced, as the facts there are readily distinguishable.

In *Bloomingburg*, a *first degree murder* case, the defendant contended, *inter alia*, that the 25-year firearm enhancement provision for first degree murder violates the proportionate penalties clause because it punishes more severely those murders caused by firearms than those murders committed by other means. *Bloomingburg*, 346 Ill. App. 3d at 322-24. The court found no proportionate penalties violation because there was no basis to undertake the identical elements test of proportionate penalties analysis and this was the only test defendant relied upon to support his argument. *Bloomingburg*, at 324.

In *English*, an *armed robbery* case that did not involve the 15/20/25 years to life firearm enhancement provisions, the court rejected defendant's due process argument because *Apprendi* did not apply where his sentence did not exceed the prescribed statutory maximum. *English*, 353 Ill. App. 3d at 340.

In *Thompson*, a *first degree murder* case, the defendant argued that the 25 years to life firearm enhancement provision for first degree murder is unconstitutionally vague, and the court concluded that the 25 years to life firearm enhancement provision is not unconstitutionally vague. *Thompson*, 2013 IL App (1st) 113105, pars. 115, 120-21.

In *Hale*, a *threatening a public official and aggravated battery* case that did not involve the 15/20/25 years to life firearm enhancement

provisions, the court rejected defendant's maximum and excessive sentence arguments and found that defendant's 7-year sentence was not an abuse of discretion or manifestly disproportionate to the nature of the offense. *Hale*, 2012 IL App (4th) 100949, pars. 36-38.

These cases are inapplicable to Adams' case because, not only are they not attempt murder cases, but the defendants' arguments are clearly not the same as Adams', and, thus, the holdings in those cases does not control Adams' claims.

Therefore, Adams has stated cognizable claims under section 2-1401, and the circuit court erred in dismissing his petition on the basis of *res judicata*, and on the merits based on inapplicable case law authorities.

For these reasons, this Court should vacate the Illinois appellate court's judgment affirming the dismissal of Adams' section 2-1401 petition.

## II.

The 15/20/25 years to life firearm enhancement provisions render Illinois' current Attempt statute unconstitutional on its face under the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Illinois' attempt statute violates the Cruel and Unusual Punishment Clause of the Eigth Amendment to the United States Constitution because the 15/20/25 years to life firearm enhancement provisions of the statute are disproportionate to Illinois' *attempt* murder offense, where the penalties are applicable whether or not the offender acted while possessing an unreasonable belief that his actions were necessary for his defense, but are not applicable to Illinois' *actual* murder offense when the offender acted while possessing this same belief that also subjects the offender to a much *lesser* sentence than the sentence for an *attempt* with or without the 15/20/25 years to life firearm enhancements.

The Eighth Amendment to the United States Constitution, applicable to the states via the Fourteenth Amendment, bars cruel and unusual punishment, namely punishment that is "inherently barbaric" or is disproportionate to the offense. U.S. Const. Amend. VIII; *Graham v. Florida*, 560 U.S. 48, 59 (2010). This right "flows from the basic precept of justice that punishment for the crime should be graduated and proportioned to both offender and the offense."

*Miller v. Alabama*, 567 U.S. 460, 469 (2012). The Eighth Amendment is correlated to the Illinois Constitution's proportionate penalties clause. *See People v. Horta*, 2016 IL App (2d) 140714, par. 69 ("However, there is no dispute that the reach of the state provision is at least as great as that of the federal one").

The proportionate penalties clause requires that all sentences "be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, Art. I, § 11.

Illinois' attempt statute was amended by Public Act 91-404 (eff. Jan. 1, 2000). The Act created the 15/20/25 years to life firearm enhancement provisions which increased the penalty for attempt first degree murder based on the extent to which a firearm is involved in the commission of the offense. Pursuant to the amended statute, a defendant whose actions demonstrate an intent to kill, but do not result in death, is subject to sentencing ranges of 21 to 45 years, 26 to 50 years, or 31 years to natural life, to be served at 85%, depending on whether a firearm was in the defendant's possession, discharged, or the cause of bodily harm. 720 ILCS 5/8-4(c)(1)(B-D)(West 2012); 730 ILCS 5/5-4.5-25 (West 2012); 730 ILCS 5/5-5-3(c)(West 2012). At the same time, however, no provision has been made for one charged with attempt murder to introduce mitigation evidence that he acted while possessing an

unreasonable belief that his actions were necessary for his defense.

As such, under the current laws of Illinois, the defendant who intends to kill and, while using a firearm, succeeds in killing his victim has the opportunity to present mitigation evidence, the proof of which will result in a conviction on the lesser offense of second degree murder and, accordingly, exposure to a sentencing range of 4 to 20 years (to be served at 50%) or even a sentence of probation. 720 ILCS 5/9-2(a)(2), (d) (West 2012); 730 ILCS 5/5-4.5-30 (West 2012); 730 ILCS 5/5-6-1 (West 2012). If the victim does not die, however, the defendant is foreclosed from presenting the same mitigating evidence to secure a lesser sentence. In fact, where a mitigating circumstance is present, the defendant who possesses a gun with the intent to kill and who takes a substantial step toward the commission of first degree murder will be subject to a sentencing range where the *minimum* sentence is seven years greater than the *maximum* sentence available if the same defendant actually *fired* the gun and caused the victim's death.

Accordingly, the 15/20/25 years to life firearm enhancement provisions render Illinois' attempt statute unconstitutional on its face.

## *The Morgan Decision*

In *People v. Morgan*, 203 Ill. 2d 470 (2003), the Illinois circuit court found that, because the mandatory firearm enhancements

to the sentencing range for an attempted first degree murder conviction are added without regard to whether mitigating circumstances are present, the penalties for that offense are, in some instances, so disproportionate to the offense committed that they shock the moral sense of the community. *Morgan*, 203 Ill. 2d at 487 (quotations omitted).

The Supreme Court adopted the circuit court's position and found that the attempt statute (720 ILCS 5/8-4 (West 2000)), as amended by Public Act 91-404, is unconstitutional because it permits a defendant convicted of attempted first degree murder to be subject to penalties that are not set according to the seriousness of the offense. *Morgan*, at 491. The Court reasoned:

> The amended statute provides that a defendant who intends to kill but fails to cause the death of his victim shall be convicted of attempted first degree murder, whether or not mitigating circumstances exist, and shall be sentenced to a term of imprisonment between 6 and 30 years, with the mandatory addition of 15 years, 20 years, or 25 years to life, depending on whether a firearm was in defendant's possession, discharged, or the cause of bodily harm or death to another.
>
> At the same time, a defendant who intends to kill *and succeeds in causing the death of the victim*, whether or not a firearm is used in the commission of the offense, will be subject to a sentencing range of 4 to 20 years (730 ILCS 5/5-8-1 (1.5) (West 2000)) and may even be eligible for a sentence of probation (730 ILCS 5/5-6-1 (West 2000)), if the defendant can demonstrate

> that he acted under serious provocation or while possessing the unreasonable belief that self-defense was necessary.
>
> Thus, under the current attempt statute, persons whose actions are identical may be exposed to vastly disparate sentences depending on whether the victim lives or not. Moreover, the irony is that the person who fails to kill his victims stands to be sentenced to a much *greater* sentence than the person who actually causes the death of his victim.

*Id.* at 491-92.

## *The Morgan Dissent*

The two dissenting justices in *Morgan* (Thomas, J., dissenting, joined by **Kilbride**, J.), misinterpreted, mischaracterized, and incorrectly assessed the analysis and reasoning conducted by the majority in finding that the attempt statute, as amended by Public Act 91-404, violates the proportionate penalties clause. *Id.* at 493-96. The dissenters erroneously found that the majority relied upon the *then* proportionate penalties' cross-comparison analysis in making its finding. *Id.* at 493 (emphasis added).

At the time *Morgan* was decided, the second-type of proportionate penalties analysis was: whether the described offense, when compared to a similar offense, carries a more severe penalty although the proscribed conduct creates a less serious threat to the public health

and safety. *Id.* at 487.

The majority never compared attempted first degree murder with second degree murder for purposes of the cross-comparison analysis. Instead, the majority agreed with the circuit court's findings, and the majority's findings, reasoning, and conclusions align with those of the circuit court. See *Morgan*, at 481-92. As the dissent noted, "the majority finds that the statute here violates the proportionate penalties clause *because a defendant charged with attempted first degree murder will never have the opportunity to present mitigating evidence which would be a defense to a charge of* (first) *degree murder.*" *Id.* at 495-96 (emphasis added). Accordingly, this finding could not have formed the basis for a cross-comparison challenge.

Furthermore, contrary to the dissent's position, a defendant charged with attempted first degree murder *cannot* raise the mitigating factors set forth in the second degree murder statute to negate a charge that he intended to *unlawfully* kill. Unless it is determined that a defendant's actions were *lawfully* justified, this argument will fail because there is no difference between the mental states required to prove attempted murder and second degree murder. See *People v. Guyton*, 2014 IL App (1st) 110450, par. 47. First degree murder and second degree murder share the same elements, including the same mental states, but second degree murder requires the presence of a mitigating circumstance. *People v. Jeffries*, 164 Ill. 2d 104, 121-22 (1995). The presence of a mitigating circumstance does not negate the mental state of

murder because mitigating factors are not elements of the crime. *Jefferies*, 164 Ill. 2d at 121.

B. *Sharpe's overruling of Morgan was badly reasoned and wrongly decided, and therefore must be overruled.*

Overruling a decision of the Illinois Supreme Court necessarily implicates *stare decisis* principles. The doctrine of *stare decisis* allows the Supreme Court to revisit an earlier decision where experience with its application reveals that it is unworkable or badly reasoned. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Stare decisis* is not an inexorable command. *Payne*, 501 U.S. at 842 (Souter, J., concurring).

*Sharpe's* decision overruling *Morgan* should be nullified because it contravenes Eighth Amendment and Proportionate Penalties principles and, thus, causes serious detriment prejudicial to public interests.

## *The Sharpe Decision*

The faulty dissent in *Morgan* evolved further in *Sharpe*, in which the Illinois Supreme Court, Thomas, J., noted that the court considered a cross-comparison challenge to the 15/20/25-to-life enhanced offense of attempted first degree murder in *Morgan*. *Sharpe*, 216 Ill. 2d at 512. The *Sharpe* court explained:

> This court did not agree with the circuit court that the penalty was invalid under the first type of proportionate penalties challenge - whether the penalty is too serious for its particular offense.
>
> This court did find, nevertheless, that the penalty was invalid under the proportionate penalties clause when compared to the penalty for second degree murder (4 to 20 years).

*Sharpe*, at 513-14.

The *Sharpe* court's confusion arose from the *Morgan* court's conclusion that:

> "... we cannot say that, *where mitigating circumstances are not present*, it would be cruel, degrading, or so wholly disproportionate to the offense committed to subject a defendant who commits the offense of attempted first degree murder to mandatory add-on sentences of 15 years, 20 years or 25 years to life, depending on whether a firearm is present, discharged, or the cause of bodily injury."

*Morgan*, 203 Ill. 2d at 488 (emphasis added). The *Sharpe* court misinterpreted this conclusion to be disagreement by the *Morgan* court with the circuit court.

To the contrary of any disagreement, the *Morgan* court's above conclusion align with the circuit court's finding because the

finding was merely based on the amended attempt statute's absence of relevance to the *presence of mitigating circumstances* in an attempt first degree murder. *Morgan*, at 484-85, 487 (emphasis added).

The *Morgan* court never conducted a cross-comparison analysis or found that the penalties for attempted first degree murder were invalid under the proportionate penalties clause because second degree murder was a similar offense which carried a less severe penalty even though attempted murder created a less serious threat to the public health and safety. Attempted murder and second degree murder are clearly *not similar* because the former requires the victim to live, while the latter requires the victim to die.

Instead, based on the findings and an example scenario proposed by the circuit court, the *Morgan* court affirmatively found that the penalties for attempted first degree murder under the 15/20/25 years to life mandatory enhanced sentencing scheme were invalid under the proportionate penalties clause because, *when mitigating circumstances are present*, the person who fails to kill his victim (while possessing or using a firearm) stands to be sentenced to a much *greater* sentence than the person who actually causes the death of his victim (while using a firearm). See *Morgan*, at 490-92. This finding does not constitute a cross-comparison challenge. Moreover, the *Morgan* court affirmed the judgment of the circuit court, but not on other grounds. *Id.* at 470. Therefore, *Sharpe's* overruling of *Morgan* was badly reasoned and wrongly decided, and must be overruled.

Based on the foregoing reasons, departure from *stare decisis* was not justified in *Sharpe*, nor did good cause or compelling reasons

exist, to overrule the Illinois Supreme Court's decision in *Morgan*, and, as such, departure from *stare decisis* is specially justified and good cause and compelling reasons exist, in this matter, to overrule *Sharpe's* overruling of *Morgan*.

Consequently, *Morgan's* holding that the attempt statute, as amended by Public Act 91-404, adding the "15-20-25 to life" sentencing provisions to the offense of attempted first degree murder, is unconstitutional under the proportionate penalties clause, still stands because the statute does not permit the introduction of the statutory mitigating factor of possessing an unreasonable belief in the need for self-defense. *See Morgan*, at 492; 720 ILCS 5/8-4(c)(1)(E)(West 2012).

Accordingly, there is arguable merit to Adams' claim that his 25-year add-on is unconstitutional on its face, and this Court should grant him the relief sought as necessary to achieve justice.

The Constitution "does not 'partake of the prolixity of a legal code.' *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316, 407 (1819). It speaks instead with a majestic simplicity. One of 'its important objects,' *ibid.*, is the designation of rights. And in 'its great outlines,' *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced." *Davis v. Passman*, 442 U.S. 228, 241-42 (1979) (internal quotations omitted).

For these reasons, Adams respectfully requests this Court to vacate the Illinois appellate court's judgment affirming the dismissal of his section 2-1401 petition; declare Illinois' attempt statute unconstitutional on its face; overrule *Sharpe's* overruling of *Morgan*; and pursuant to *People v. Baker*, 341 Ill. App. 3d 1085, 1090 (2003), simply excise the 25-year add-on from his 10-year baseline sentence without remanding this matter for resentencing.

## III.

Adams' 25-year Firearm enhancement is unconstitutional as-applied to him under the Due Process Clause of the Fifth Amendment.

Adams 25-year add-on to his 10-year baseline sentence for attempted first degree murder is unconstitutional as-applied to him under the Due Process Clause of the Fifth Amendment to the United States Constitution because the penalty has no rational basis to remedy the particular evil that the legislation was intended to target, where the legislature clearly intended that the penalty is imposed upon those who inflict great bodily harm with a firearm during the commission of a serious felony offense that involves a *distinctive* criminal act, but the infliction of great bodily harm with a Firearm was Adams' sole **act**. (Tr.C.32; Tr.R.U13). Accordingly, Adams' claim does have arguable merit and this Court should grant him relief as necessary to achieve justice.[2]

The Fifth Amendment to the United States Constitution provides that "No person shall... be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend.V.

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[2] The Illinois state courts has shown that those courts will not resolve the constitutional infirmities in this case.

When neither the statute nor the sentencing guidelines define a certain term nor does the term have any established common-law meaning, the term must be given its ordinary meaning. *See Moskal v. United States*, 498 U.S. 103, 108 (1990). Adams' due process claim must be evaluated as the statute is applied to the facts of this case. *United States v. Powell*, 423 U.S. 87, 92 (1975).

## *Public Act 91-404*

The main purpose of Public Act 91-404, as stated in the Act, is "to deter the use of Firearms in the commission of a Felony offense." (Codified at 720 ILCS 5/33A-1(b)(1) (West 2000)). In order to accomplish this purpose, the Act amended ten criminal statutes, including Attempt, with the 15/20/25 years to life Firearm enhancement provisions. 720 ILCS 5/8-4(c)(1)(B-D) (West 2000).

The "use of Firearms in the commission of a Felony offense" literally means: possessing, brandishing, or discharging a firearm toward or against a person or in the air, *while at the same time*, performing an *act* against that same person or another, which is *distinctive* and constitutes a felony offense *per se*.

This literal meaning is evidenced by the legislative findings and intent sections of Public Act 91-404. Under "Legislative findings," the Act states in pertinent part:

Current law does contain offenses involving the use or

> discharge of a gun toward or against a person, such as aggravated battery with a firearm, aggravated discharge of a firearm, and reckless discharge of a firearm; however, the General Assembly has legislated greater penalties for the commission of a felony while in possession of a firearm because it deems such acts as more serious. (Codified at 720 ILCS 5/33A-1 (a) (3) (West 2000)).

Under "Legislative intent," the Act states in pertinent part:

> With the additional elements of the discharge of a firearm and great bodily harm inflicted by a firearm, it is the intent of the General Assembly to punish those elements more severely during commission of a felony offense *than when those elements stand alone as the act of the offender.* (Codified at 720 ILCS 5/33A-1 (b) (2) (West 2000))(emphasis added).

Based on these statements, in creating the 15/20/25 years to life firearm enhancement provisions, the legislature clearly intended that more severe sentences are imposed when an offender possesses or discharges a firearm toward or against a person during the commission of serious felonies that involve *distinctive* criminal acts *than* when the discharge of a firearm toward or against a person is the sole act of an offender. Thus, the legislature have determined that the former firearm conduct is a more serious

threat to the public health and safety than is the latter.

## *The Amended Attempt Statute*

The attempt statute provides in pertinent part:

(a) Elements of the Offense. A person commits an attempt when, with the intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

(c) Sentence. (1) The sentence for an attempt to commit first degree murder is the sentence for a Class X Felony, except that

(B) an attempt to commit first degree murder while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court;

(C) an attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court;

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

720 ILCS 5/8-4(a), (c)(1)(B-D)(West 2012). A Class X felony carries a sentencing range of 6 to 30 years. 730 ILCS 5/5-8-1(a)(3)(West 2012).

The measures added to the "General Definitions" section include sections 2-3.6 and 2-15.5 of the Criminal Code. Section 2-3.6 provides:

> "'Armed with a firearm.' Except as otherwise provided in a specific Section, a person is considered 'armed with a firearm' when he or she carries on or about his or her person or is otherwise armed with a firearm." (720 ILCS 5/2-3.6 (West 2000)).

Section 2-15.5 provides:

> "'Personally discharged a firearm.' A person is considered to have 'personally discharged a firearm' when he or she, while armed with a firearm, knowingly

and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm." (720 ILCS 5/2-15.5 (West 2000)).

The offense of attempted first degree murder requires the intent to kill, without lawful justification, and *any act to be done* which constitutes a substantial step toward the commission of first degree murder, 720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012) (emphasis added). "Intent may be inferred when the State shows defendant committed a substantial step toward the commission of murder: when he shoots and wounds his victim." *People v. Aliwoli*, 238 Ill. App. 3d 602, 616 (1992).

Adams was convicted and sentenced on Count 3 of his indictment which alleged, in pertinent part, that:

> "Jerome Adams committed the offense of Attempted First Degree Murder in that He, Without Lawful Justification, With Intent To Kill, *Did An Act, To Wit: Shot Michael Gray About The Body, While Armed With A Firearm, Which Constituted A Substantial Step Toward The Commission Of First Degree Murder*, And During The Commission Of The Offense Jerome Adams Personally Discharged A Firearm That Proximately Caused Great Bodily Harm To Michael Gray." (Tr. C. 32, 142; Tr. R. U13, Y18-19) (emphasis added).

Adams merely chose the method of using a firearm to commit attempt murder. Although alleged separately and differently in the indictment, the allegations that Adams shot Gray about the body while armed with a firearm and personally discharged a firearm that proximately caused great bodily harm to Gray, are one, and the same, *act*. It is the defendant's personal discharge of the firearm that triggers the 25-year enhancement, not the "great bodily harm" to the victim. *See People v. Grafton*, 2017 IL App (1st) 142566-U, par. 181. Thus, the discharge of a firearm against Gray inflicting great bodily harm stand alone as the *act* of Adams, and *both* his 10-year baseline sentence for attempt murder *and* his 25-year add-on were based on this sole *act*.

Consequently, Adams' 25-year add-on was imposed in contravention of the express intent of the legislature and not rationally based on the particular evil that the legislation was intended to target, and, as such, violative of the Due Process Clause.

Therefore, there is arguable merit to Adams' claim that his 25-year add-on is unconstitutional as-applied to him, and the Illinois circuit court erred in dismissing his section 2-1401 petition.

For these reasons, Adams respectfully requests this Court to vacate the Illinois appellate court's judgment affirming the dismissal of his section 2-1401 petition; and pursuant to *People v. Baker*, 341 Ill. App. 3d 1085, 1090 (2003), simply excise the 25-year add-on from his 10-year baseline sentence without remanding this matter for resentencing.

and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm." (720 ILCS 5/2-15.5 (West 2000)).

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## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerome Adams

Date: August 11, 2020