APPENDIX A

2020 IL App (1st) 190597-U

SECOND DIVISION
December 22, 2020

No. 1-19-0597

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 11-CR-9879
	)	
NIKOLAS GACHO,	)	The Honorable
	)	William G. Gamboney,
Petitioner-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's first-stage summary dismissal of postconviction petition, which alleged ineffective assistance of counsel for failing to inform petitioner of correct sentencing range until day of trial, failing to request a continuance on day of trial, and failing to include a claim in petition for leave to appeal to supreme court, is affirmed.

¶ 2 Petitioner Nikolas Gacho was convicted in a bench trial of attempted first-degree murder for an offense committed in 2010 when he was 17 years old. He was sentenced to 35 years in prison, and his sentence included a mandatory sentencing enhancement of 25 years based on his personal discharge of a firearm that proximately caused great bodily harm, permanent disability, or permanent disfigurement to the victim, Mario Palomino. See 720 ILCS 5/8-4(c)(1)(D) (West

2010). He now appeals from the trial court's first-stage summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2018). He contends that the trial court erred in summarily dismissing his petition because it presented an arguable claim that he was denied his constitutional right to the effective assistance of counsel in that: (1) his trial counsel did not inform him until the day of trial that he was subject to the mandatory sentencing enhancement of 25 years to life and then refused to request a continuance to allow him to consider the State's 20-year plea offer; and (2) his appellate counsel failed to include, as part of the petition for leave to appeal filed on his behalf in the Illinois Supreme Court, a claim that the mandatory sentencing enhancement imposed on him for an offense committed as a juvenile violated the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I, § 11. For the reasons that follow, we affirm the summary dismissal.

¶ 3 I. BACKGROUND

¶ 4 The record reflects that on the day the case was set for trial, the following colloquy occurred in court prior to the commencement of the bench trial:

> "MS. D'SOUZA [(ASSISTANT STATE'S ATTORNEY)]: *** The State is making an offer covering this case only of 20 years Illinois Department of Corrections on the attempt murder, which I believe the Defendant is rejecting. He is looking at a minimum of 31 years to natural life if he is convicted on this charge based on the fact that it is charged that the Defendant personally discharged a firearm that caused permanent disfigurement and permanent disability to the victim.
>
> THE COURT: Mr. Gacho, do you understand what the State's offer is?
>
> THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. You understand they are offering you 20 years on the attempt first degree murder, one of the lesser charges. If you are found guilty of one of the counts, Count 4 in that you proximately caused—that you personally discharged a firearm that proximately caused great bodily harm to Mario Palomino or caused permanent disability to Mario Palomino, the absolute minimum you could get would be 31 years. You could get a maximum up to natural life. I just want to make sure you understand.

THE DEFENDANT: I understand, your Honor.

THE COURT: Understanding that, do you reject the offer of 20 years?

THE DEFENDANT: I reject it, your Honor."

The trial court then confirmed that petitioner's waiver of his right to a jury trial was being made knowingly, intelligently, and voluntarily. The case proceeded immediately to a bench trial.

¶ 5 The trial evidence is not at issue in this appeal. In this court's prior order on direct appeal, we summarized the evidence as follows:

"At trial, the evidence established that on June 8, 2010, defendant and Mario Palomino had an argument over the phone about defendant's girlfriend, Jessica Drowns. Later in the evening, after Palomino left a party with Drowns to walk her home, defendant appeared and pulled out a firearm. Palomino began to run away, but defendant fired his weapon three times and hit Palomino once in the middle of his upper back, causing him to fall down. As a result of the gunshot, Palomino became paralyzed from the chest down and suffers from other conditions caused by the gunshot. Defendant presented evidence of previous altercations with Palomino and people associated with him. Defendant testified that when he saw Palomino and Drowns together on the night in question, Palomino made

a motion to his waistband and told defendant 'I got you now.' Thinking Palomino was reaching for a firearm, defendant pulled out his firearm and shot at Palomino three times.

The trial court rejected defendant's assertion of self-defense and found him guilty of attempted first-degree murder. The court subsequently sentenced defendant to 35 years' imprisonment, 10 years for attempted first-degree murder and another 25 years for personally discharging the firearm that proximately caused great bodily harm to Palomino." *People v. Gacho*, 2016 IL App (1st) 140896-U, ¶¶ 3-4.

¶ 6 On direct appeal, petitioner argued that the exclusive jurisdiction provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-120 (West 2010)) was unconstitutional under the eighth amendment of the United States Constitution (U.S. Const., amend. VIII), an argument that this court rejected. *Gacho*, 2016 IL App (1st) 140896-U, ¶¶ 5-15. He also argued that the application of the 25-year mandatory firearm sentencing enhancement (720 ILCS 5/8-4(c)(1)(D) (West 2010)), combined with the requirement of the truth-in-sentencing law that he serve at least 85% of his 35-year-sentence (730 ILCS 5/3-6-3(a)(2)(ii) (West 2010)), prevented the trial court from properly considering his youth and attendant circumstances in determining the appropriate sentence for his crime, and that this rendered his sentence unconstitutional under the eighth amendment and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). *Gacho*, 2016 IL App (1st) 140896-U, ¶¶ 16-22. The court rejected petitioner's argument on this issue. *Id.* ¶¶ 21-22. Finally, the court rejected petitioner's argument that he was entitled to resentencing under the statutory provision that became effective on January 1, 2016, while his direct appeal was pending, providing that when a trial court sentences an offender who was under the age of 18 at the time of the offense, it must consider certain additional factors in mitigation and also has the discretion to decline to impose an otherwise-mandatory sentencing enhancement based

on the offender's discharge of a firearm. *Id.* ¶¶ 23-31 (citing 730 ILCS 5/5-4.5-105 (West 2016)). Petitioner filed a petition for leave to appeal in the Illinois Supreme Court, which was denied. *People v. Gacho*, No. 121344, 94 N.E.3d 630 (Table), 419 Ill. Dec. 761 (Ill. Jan. 18, 2018).

¶ 7 On October 17, 2018, petitioner filed a *pro se* postconviction petition. On January 11, 2019, the trial court entered a written order summarily dismissing the petition upon finding that all claims raised in it were frivolous or patently without merit. The petition raised thirteen claims, only two of which are pertinent to this appeal. Both involve claims that he was denied his constitutional right to the effective assistance of counsel.

¶ 8 In his first claim, petitioner alleged that his trial counsel did not inform him until the day of trial that he was subject to a mandatory sentencing enhancement of 25 years to life. Rather, he asserted, throughout the case until that day, both of his attorneys had informed him that he was facing a sentence of between 6 to 30 years, without mentioning the sentencing enhancement, and they had assured him that because he was a juvenile at the time of the offense he would not receive a sentence of "anything near 30 years." He contended that this incorrect advice led him in late 2012 or early 2013 to reject the State's first offer of 26 years.

¶ 9 His petition asserted that on December 4, 2013, the day of his trial, his attorneys informed him that the State was offering him 20 years in exchange for a guilty plea. They also told him then that the State was seeking a mandatory 25-year-to-life sentencing enhancement and that he was thus facing a sentencing range of 31 years to life instead of 6 to 30 years. After his trial counsel informed him of this, he "asked his attorney(s) to try and get the offer down to 15 years." His attorneys returned and informed him that the State remained at its offer of 20 years. He asked his attorneys to go back a second time and attempt to "get the offer down to 15 years or as close to it as possible." They returned again and informed him that they had spoken to the judge and that the

judge felt 20 years was a fair offer. He asked his attorneys for advice about what to do, and they informed him that they could not help him in making his decision. Petitioner then told his attorneys he would like a continuance to consider the offer and speak to his family, but they told him that it was "not an option" to ask for a continuance on the day they were to start trial. One of his attorneys also said to him that asking for a continuance would undermine his credibility in front of the court. Based on his attorneys' "providing [him] with no useful information or advice and refusing to ask for a continuance," petitioner "refused the 20 year offer and proceeded to trial." He claimed that his trial counsel provided him ineffective assistance by failing to inform him of the correct sentencing range until the day of trial, providing him with no assistance about whether to accept the plea offer, and then refusing to ask for a continuance to allow him to consider the offer and make an informed decision after full consultation with his defense counsel. He claimed that he would have accepted the State's 20-year offer, but for the ineffective assistance of his counsel.

¶ 10 In its written order summarily dismissing petitioner's postconviction petition, the trial court determined that there was no basis in law to find that petitioner's attorneys' performance was unreasonable. The trial court reasoned that, although his attorneys may have stated an incorrect sentencing range at earlier stages, they ultimately provided him with accurate information by the time he had to make his choice about whether to accept the State's offer. Thus, he had received "all the relevant information that is constitutionally required to decide whether to accept or reject the plea offer when he made his choice." The court reasoned that the constitution did not require his counsel to tell him what to do or to persuade him to accept the plea. It further reasoned that petitioner's own conduct belied his assertion that he would have accepted the 20-year offer. Under his own telling, even after being informed of the correct sentencing range, he twice asked his lawyers to counter the State's offer with 15 years. Thus, the court determined, "he had a

meaningful opportunity to consider the offer with correct information," and "his actual decision to go to trial contradicts his conclusory claim that he would have accepted the plea."

¶ 11 The second claim that petitioner raised in his postconviction petition pertinent to this appeal was that he received ineffective assistance from his appellate counsel for not including in his petition for leave to appeal to the Illinois Supreme Court any claim that the imposition of the mandatory 25-year firearm sentencing enhancement was unconstitutional under the eighth amendment or the proportionate penalties clause of the Illinois constitution. He contended that he informed his appellate counsel that he was unwilling to forfeit review of this claim and that the omission of it deprived him of consideration of the issue by the supreme court or federal courts. The petition for leave to appeal was not attached to his postconviction petition.

¶ 12 In rejecting this second claim, the trial court reasoned that petitioner's appellate counsel was not arguably ineffective for failing to include the claim in the petition for leave to appeal. The trial court noted that if the supreme court had granted review, it could have considered the issue in its discretion, as other issues in the petition addressed sentencing and the court could have found the issues intertwined. The trial court further reasoned that it was "entirely speculative" whether petitioner's claim would have succeeded in the Illinois Supreme Court or federal courts.

¶ 13 II. ANALYSIS

¶ 14 On appeal, petitioner argues that the trial court erred in its first-stage, summary dismissal of his postconviction petition because it set forth a nonfrivolous, arguable claim that his constitutional rights were violated in the proceedings below. The Post-Conviction Hearing Act (725 ILCS 5/122-1(a)(1) (West 2018)) permits a person under criminal sentence to challenge his conviction or sentence by showing that, in the proceedings that resulted in his conviction, there was a substantial denial of his constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction

proceeding is a collateral attack on a prior conviction that is limited to constitutional matters that were not and could not have been previously adjudicated. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). The action is commenced by the filing of a petition in the circuit court where the original proceeding occurred. *People v. Tate*, 2012 IL 112214, ¶ 8.

¶ 15 A postconviction proceeding involves three stages. *People v. Johnson*, 2018 IL 122227, ¶ 14. This case is at the first stage, in which the trial court independently reviews the petition without input from the State. *Id.* This stage involves no hearings, arguments, or introduction of evidence. *Id.* ¶ 21. Rather, the trial court reviews the petition to determine whether it "is frivolous or is patently without merit," and the trial court must summarily dismiss that petition if it determines that it meets that standard. 725 ILCS 5/122-2.1(a)(2) (West 2018); see *Tate*, 2012 IL 112214, ¶ 9. A petition should be summarily dismissed under this standard "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12. "A petition lacks an arguable basis in law when it is grounded in 'an indisputably meritless legal theory,' for example, a legal theory which is completely contradicted by the record." *Morris*, 236 Ill. 2d at 354 (quoting *Hodges*, 234 Ill. 2d at 16). "A petition lacks an arguable basis in fact when it is based on a 'fanciful factual allegation,' which includes allegations that are 'fantastic or delusional' or belied by the record." *Id.* (quoting *Hodges*, 234 Ill. 2d at 16-17). Further, a petition alleging nonfactual and nonspecific assertions that merely amount to conclusions will not survive summary dismissal. *Id.*

¶ 16 In evaluating a petition at the first stage, the trial court must take the allegations as true and construe them liberally. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). Thus, although the petition must provide some facts about the constitutional deprivation alleged, a limited amount of factual detail is sufficient. *Id.* The threshold for a petition to survive the first stage of review is low. *People v. Allen*, 2015 IL 113135, ¶ 24. If a petition alleges sufficient facts to state the gist of a

constitutional claim, even if it lacks legal argument or citations to authority, first-stage dismissal is inappropriate. *Id.* In considering the petition, the trial court may examine the court file of the proceeding that resulted in the conviction, any transcripts of that proceeding, and any action taken by an appellate court in that proceeding. 725 ILCS 5/122-2.1(c) (West 2018). The summary dismissal of a postconviction petition is reviewed *de novo*. *Tate*, 2012 IL 112214, ¶ 10. Also, a reviewing court may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *People v. Walker*, 2018 IL App (1st) 160509, ¶ 23.

¶ 17 A petition that is not subject to summary dismissal advances to the second stage of a postconviction action, where counsel may be appointed for an indigent defendant and where the State may answer or move to dismiss the petition. *Tate*, 2012 IL 112214, ¶ 10; see 725 ILCS 5/122-4, 122-5 (West 2018). At the second stage, the trial court must determine whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *Tate*, 2012 IL 112214, ¶ 10 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). If no such showing is made, the petition is dismissed. *Id.* If such a showing is made, the petition is advanced to the third stage, at which an evidentiary hearing is conducted. *Id.*; 725 ILCS 5/122-6 (West 2018).

¶ 18 Petitioner's first argument is that he presented an arguable claim that he was denied his constitutional right to effective assistance of counsel, where his trial counsel failed until the day of trial to inform him that he was subject to a mandatory sentencing enhancement of 25 years to natural life if he was found guilty of personally discharging a firearm that proximately caused great bodily harm, permanent injury, or permanent disfigurement to another person. Instead, his counsel led him to believe until that day that he faced a sentencing range of only between 6 and 30 years and that he was unlikely to be sentenced to anything near 30 years because he was a juvenile at the time of the offense. He further argues that ineffectiveness is arguably shown by the fact that

counsel thereafter refused to request a continuance so that petitioner could consider the State's offer in light of his new knowledge of the accurate sentencing range, for fear that counsel would lose credibility with the trial court. Petitioner argues that there is arguably a reasonable probability that he would have accepted the State's offer of 20 years if his trial counsel had advised him of the accurate sentencing range prior to the day of trial or at least requested a continuance so that he had a reasonable time to consider the State's offer after learning of the accurate sentencing range.

¶ 19 A criminal defendant has a constitutional right to the effective assistance of counsel in the trial court. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The constitutional right to effective assistance of counsel extends to the plea-bargaining process. *People v. Hale*, 2013 IL 113140, ¶ 15. " 'A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer.' " (Emphasis in original.) *Id.* ¶ 16 (quoting *People v. Curry*, 178 Ill. 2d 509, 528 (1997)). "Concomitantly, a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged." *Curry*, 178 Ill. 2d at 528. The right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial. *Id.* at 518.

¶ 20 The familiar two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), governs claims of ineffective assistance of counsel in the plea-bargaining context. *Hale*, 2013 IL 113140, ¶ 15. Under that test, to ultimately prevail on a claim of ineffective assistance of counsel, it must be shown that counsel's performance " 'fell below an objective standard of reasonableness' " and that the deficient performance prejudiced the petitioner's defense. *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17 (quoting *Strickland*, 466 U.S. at 687-88)). However, a "more lenient formulation" of this standard applies at the first stage of a postconviction action alleging

ineffective assistance of counsel. *Tate*, 2012 IL 112214, ¶¶ 19-20. " 'At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases in original.) *Id.* ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17).

¶ 21 To establish prejudice, a petitioner must show that there is arguably a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *Hale*, 2013 IL 113140, ¶ 18. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "In other words, the defendant must establish that there is a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer." *Id.* This showing of prejudice must encompass more than the postconviction petitioner's own subjective, self-serving testimony. *Id.* Rather, there must be independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice and not on other considerations. *Id.* The disparity between the sentence faced and a significantly shorter plea offer can be considered supportive of a claim of prejudice. *Id.*

¶ 22 In support of his argument that his trial counsel was ineffective for failing to accurately advise him of the 25-year sentencing enhancement until the day of trial, after having previously advised him that he faced a sentencing range of 6 to 30 years and was unlikely to be sentenced to anywhere near 30 years because he was a juvenile, petitioner cites *People v. Barghouti*, 2013 IL App (1st) 112373, and *People v. Williams*, 2016 IL App (4th) 140502.

¶ 23 In *Barghouti*, this court reversed a trial court's first-stage dismissal of a postconviction petition alleging ineffective assistance of counsel. *Barghouti*, 2013 IL App (1st) 112373, ¶ 1. The petitioner, who was charged with aggravated criminal sexual assault and aggravated kidnapping,

had rejected the State's 12-year plea offer and proceeded to trial, where he was convicted and then sentenced to 35 years in prison. *Id.* ¶¶ 3-8. The postconviction petition alleged that during plea negotiations, counsel failed to advise the petitioner that he faced a possible prison term of 6 to 60 years if found guilty, but instead counsel had advised him that he would be eligible for probation if convicted since he had no criminal record. *Id.* ¶ 8. The petition further alleged that the petitioner had rejected the State's offer because of this erroneous advice and that if he had been aware of the maximum sentencing range and had not been erroneously advised that he would receive probation, he would have accepted the State's plea offer of 12 years. *Id.* After noting that a criminal defense attorney had the obligation to advise a client about the maximum and minimum sentences that could be imposed for the charged offenses and that the failure to do so is objectively unreasonable, this court held that the petition had adequately alleged facts showing that, arguably, counsel had been ineffective. *Id.* ¶¶ 17-18 (citing *Curry*, 178 Ill. 2d at 528-29). The court also held that arguable prejudice had been shown through the petitioner's allegation that he would have accepted the plea bargain if he had known the sentencing range applicable to the crimes charged. *Id.* ¶ 18.

¶ 24 In *Williams*, the court reversed a trial court's second-stage dismissal upon a finding that the postconviction petition alleged a substantial showing of a constitutional violation. *Williams*, 2016 IL App (4th) 140502, ¶¶ 1-2. The petitioner, who was charged with attempted first-degree murder, unlawful use of a weapon by a felon (UUWF), and attempted armed robbery, had rejected the State's 18-year plea offer and proceeded to trial, where he was found guilty and later sentenced to 45 years in prison. *Id.* ¶ 1. He alleged in his postconviction petition that his counsel had been ineffective during guilty-plea negotiations by informing him that he faced a sentence of up to 30 years at 50% on the attempted first-degree murder charge, 5 years on the UUWF charge, and between 4 and 15 years at 50% on the attempted armed robbery charge, by failing to tell him that

he could face up to 30 years on the attempted armed robbery charge, by failing to tell him the sentences could be consecutive based on his prior record, and by failing to tell him that he was subject to serving 85% of his sentence on the attempted first-degree murder charge. *Id.* ¶ 6. His petition further alleged that the advice he received caused him to reject the State's guilty-plea offer of 18 years and that if he had known the information his attorney failed to tell him, he would have accepted the State's offer. *Id.* The court noted that the allegations of the petition were uncontradicted by the record and therefore must be taken as true, as the trial court had not conducted a pretrial inquiry to make a record of the guilty-plea negotiations. *Id.* ¶ 44.

¶ 25 The court engaged in a lengthy discussion of the pretrial inquiries that it recommended trial courts undertake on the record "to ensure compliance with the defendant's constitutional rights." *Id.* ¶ 36. It recommended that trial courts conduct an inquiry to address the following matters:

> "• Ensure that the prosecutor, defense attorney, *and the defendant* all understand the applicable minimum and maximum sentences the defendant is facing on the State's charges if he is convicted at trial, which should include a discussion of any sentencing enhancements (such as extended terms), any mandatory or discretionary consecutive sentencing options, and any truth-in-sentencing considerations.
>
> • Inquire of the State whether it entered into negotiations with defense counsel, and if the State made a guilty-plea offer to defense counsel, the exact nature of the offer (including expiration dates, if any).
>
> • Confirm with defense counsel the terms of the State's stated guilty-plea offer *and* whether counsel conveyed that offer to the defendant.
>
> • Confirm personally with the defendant his understanding of the State's guilty-plea offer as conveyed by his counsel.

• Ensure the defendant's understanding that the ultimate decision whether to accept or reject the State's offer rests with the defendant after consultation with his counsel.

• Confirm the defendant's decision to reject the State's guilty-plea offer.

• Confirm that given his understanding of the minimum and maximum sentences that the trial court can impose if convicted of the State's current charges, the defendant persists with his decision regarding the State's guilty-plea offer.

• Admonish the defendant that although he should consult with his counsel and consider counsel's advice, the decision whether to (1) plead guilty or not guilty and (2) have a jury trial or a bench trial is ultimately the defendant's decision to make." (Emphases in original.) *Id.*

The court stated that conducting such an inquiry would "allow for the efficient adjudication of any collateral challenges at the first stage of the postconviction proceeding and, by extension, save time and limit the expenditure of scarce judicial resources." *Id.*

¶ 26 We conclude that neither *Barghouti* nor *Williams* assists petitioner in demonstrating an arguable claim of ineffective assistance of counsel in this case. The key distinction is that in both of those cases, the petitioners alleged that, as of the time they were considering and ultimately rejected the State's guilty-plea offers, they were operating under a misunderstanding based on their attorneys having provided them with inaccurate information about the sentences they faced, which led them to reject the plea offer and proceed to trial. *Barghouti*, 2013 IL App (1st) 112373, ¶ 8; *Williams*, 2016 IL App (4th) 140502, ¶ 6. Here, by contrast, there is no dispute that petitioner's attorneys had provided him with accurate information about the sentence he faced as of the time he was presented with, considered, and ultimately rejected the State's 20-year guilty-plea offer. This fact is confirmed not only by the allegations of the petition itself, but also by the fact that the

trial court here conducted the kind of pretrial inquiry recommended in *Williams*. The trial court confirmed on the record that defendant understood that the State was offering him 20 years on the charge of attempted first-degree murder and that, if he was found guilty on the count alleging that he personally discharged a firearm that proximately caused great bodily harm or permanent disability to Palomino, he faced a minimum sentence of 31 years and a maximum sentence of natural life. The trial court confirmed that, with that understanding, petitioner wished to reject the State's offer of 20 years. We note that it is "well established that admonishments by the circuit court can cure prejudice to a defendant resulting from counsel's incorrect advice." *People v. Valdez*, 2016 IL 119860, ¶ 31.

¶ 27 Given that a trial court's admonishments can cure prejudice even where an attorney has given incorrect advice, we find nothing in *Barghouti* or *Williams* to suggest that a criminal defendant whose counsel has provided him or her with accurate sentencing information by the time he or she is considering and ultimately decides whether to accept or reject a guilty-plea offer has received ineffective assistance of counsel, merely because counsel had provided incorrect sentencing information at an earlier point in this case. We thus agree with the trial court's assessment that, with respect to information about the potential sentence he faced, petitioner's attorneys had provided him with "all the relevant information that is constitutionally required to decide whether to accept or reject the plea offer when he made his choice."

¶ 28 Petitioner also argues that he presented a claim that his counsel was arguably ineffective for refusing to request a continuance to allow him to more fully consider the State's 20-year offer in light of the accurate sentencing information that he had been provided. As support for the contention that such conduct can amount to ineffective assistance, petitioner cites *People v. Minter*, 2015 IL App (1st) 120958, *United States v. Mota*, 685 F.3d 644 (7th Cir. 2012), and *People v.*

Gunartt, 218 Ill. App. 3d 752 (1991). Of these cases, only *Gunartt* involved a claim of ineffective assistance of counsel. In *Minter*, the issue was whether a trial court had abused its discretion by failing *sua sponte* to order a continuance to allow defense counsel to secure the appearance of a witness to perfect an impeachment, where no continuance was requested by counsel. *Minter*, 2015 IL App (1st) 120958, ¶¶ 69-75. Petitioner here cites the court's statement, in holding that the trial court had no obligation *sua sponte* to order a continuance, that it was " 'incumbent on defense counsel to request a continuance' " to secure presence of the witness. See *id.* ¶ 76. In *Mota*, the issue was whether the defendant was entitled to a new trial where defense counsel discovered at the start of trial that exculpatory evidence had been withheld but was nevertheless fully able to present the evidence to the jury. *Mota*, 685 F.3d at 648-49. In holding that the defendant was not entitled to a new trial, the court rejected the argument that the late revelation of the exculpatory evidence gave the defendant insufficient time to investigate it. *Id.* at 649. The court noted that defendant's counsel had not requested a continuance for further investigation and stated that "if his counsel needed more time, a request for a continuance was the proper course of action." *Id.*

¶ 29 In *Gunartt*, the court held that a defendant convicted of aggravated criminal sexual assault had received ineffective assistance of trial counsel that deprived him of a fair trial where, among a variety of ways in which it found counsel had failed to investigate and develop available defenses, counsel had "proceeded immediately to trial without requesting a continuance or even a brief recess to examine and evaluate" documents tendered by the prosecution for the first time on the morning defendant's trial began. *Gunartt*, 218 Ill. App. 3d at 762. It was shown that, had counsel obtained these documents prior to trial or requested the time to review them when they were turned over to him, he would have learned information that would have led a reasonable attorney to additional documents showing that the victim, her brother, and her mother had all given

statements about the incident at issue that differed from their trial testimony and to other evidence favorable to the defendant's case. *Id.*

¶ 30 We find that none of the cases cited by petitioner support the conclusion that an attorney's refusal to request a continuance on the day of trial, solely to allow a client to have additional time to consider a plea offer, is arguably conduct that falls below an objective standard of reasonableness to the prejudice of the defendant. Each of the cases cited by petitioner involved the need for a continuance for some purpose related to investigating or supporting a defense at trial: securing the presence of an impeachment witness, investigating exculpatory evidence discovered at the start of trial, or reviewing documents tendered on the day of trial that would have led the attorney to evidence favorable to his client's case. None of these cases suggest that an attorney is required to request a continuance of the trial for a purpose unrelated to the trial itself, such as allowing the client more time to consider a plea offer. See *United States v. Cronic*, 466 U.S. 648, 658 (1984) ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."). We believe that this is true regardless of whether the client was previously operating under a misunderstanding about the potential sentence he or she faced if convicted.

¶ 31 Furthermore, we agree with the trial court that petitioner has not shown that his decision to reject the guilty plea was caused by his attorneys' misinforming him of the sentencing range he faced prior to the day of trial and then refusing to request a continuance to allow him more time to consider the State's offer. His petition discloses that even after being informed of the correct sentencing range on the day of trial, he directed his attorneys twice to attempt to obtain an offer from the State of 15 years or as close to that as possible, which they attempted to do. Thus, even after learning that the State was holding firm to its 20-year offer and that the trial judge thought it

was fair, he nevertheless decided to reject it and proceed to trial. Further, during the trial court's pretrial inquiry into petitioner's understanding of the plea offer and his desire to reject it, petitioner did not suggest to the trial court that he wanted additional time to consider the State's offer or otherwise equivocate about his desire to reject the State's 20-year offer. See *People v. Mujica*, 2016 IL App (2d) 140435, ¶ 19. These facts contradict petitioner's own " 'subjective, self-serving' " assertion after-the-fact that he would have accepted the State's offer of 20 years if only his attorneys had obtained more time for him to consider it. See *Hale*, 2013 IL 113140, ¶ 18. Thus, petitioner has failed to show arguable prejudice.

¶ 32 For these reasons, we hold that the trial court correctly determined that petitioner's claim that he was denied the constitutional right to effective assistance of trial counsel was frivolous or patently without merit. The trial court therefore did not err in summarily dismissing this claim.

¶ 33 Petitioner's second contention on appeal is that his postconviction petition presented an arguable claim that he was deprived of his constitutional right to effective assistance of counsel because his appellate counsel failed to include, as part of the petition for leave to appeal filed on his behalf in the Illinois Supreme Court, a claim that imposition of the 25-year mandatory firearm sentencing enhancement imposed on him for an offense committed as a juvenile violated the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I, § 11. As stated above, on direct appeal this court rejected petitioner's argument that his sentence was unconstitutional under the proportionate penalties clause or the eighth amendment to the United States Constitution (U.S. Const., amend. VIII). *Gacho*, 2016 IL App (1st) 140896-U, ¶¶ 21-22. Following this court's decision, petitioner's appellate counsel filed a petition for leave to appeal with the Illinois Supreme Court, but, according to the postconviction petition, counsel did not argue this claim as grounds for taking the appeal. The supreme court denied the petition for leave

to appeal. Petitioner claims that his appellate counsel's omission of this meritorious claim from the petition for leave to appeal constituted ineffective assistance of appellate counsel.

¶ 34 Although this is not the basis for dismissal relied upon by the trial court or the State, this court has previously rejected the contention that a criminal defendant can suffer a deprivation of the constitutional right to effective assistance of counsel where his or her appellate counsel fails to include a particular claim in a petition for leave to appeal filed in the Illinois Supreme Court. *People v. Stephens*, 2012 IL App (1st) 110296, ¶¶ 115-118. In so holding, this court recognized that a criminal defendant has no constitutional right to appointed counsel to obtain discretionary appellate review. *Id.* ¶ 117 (citing *In re Adoption of L.T.M.*, 214 Ill. 2d 60, 72 (2005) (citing *Ross v. Moffitt*, 417 U.S. 600, 619 (1974))). Because no such constitutional right exists, a criminal defendant cannot be deprived of any constitutional right to the effective assistance of counsel when his or her appellate counsel fails to seek discretionary review. *Id.* (citing *People v. James*, 111 Ill. 2d 283, 291 (1986)). "Thus, even if appellate counsel's performance in preparing the application falls below minimum standards of performance, there is no deprivation of the constitutional right to counsel because there is no such right to counsel in filing the application." *Id.* (citing *Chalk v. Kuhlmann*, 311 F.3d 525, 529 (2d Cir. 2002)).

¶ 35 In this case, as in *Stephens*, petitioner merely had the ability to petition the supreme court to grant discretionary review of his appeal. See Ill. S. Ct. R. 315(a) (eff. Mar. 15, 2016). As such, he had no constitutional right to counsel in filing his petition for leave to appeal. *Stephens*, 2012 IL App (1st) 110296, ¶ 118. Because no such constitutional right to counsel existed, petitioner could not suffer a constitutional deprivation of the right to effective assistance of counsel through the failure of his appellate counsel to include claims in his petition for leave to appeal. See *id.*

Accordingly, his postconviction petition presents no arguable claim of ineffective assistance of appellate counsel and was properly dismissed as being frivolous or patently without merit.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, the trial court's summary dismissal of petitioner's postconviction petition is affirmed.

¶ 38 Affirmed.

APPENDIX B

Post - Conviction Notice (3/24/11) CCCR 0049

OFFICE OF THE CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
2650 S. CALIFORNIA AVE. 5TH FLOOR
CHICAGO, ILLINOIS 60608
TELEPHONE 773-674-6967

Date: JANUARY 15, 2019

PETITIONER

v.

THE PEOPLE OF THE STATE OF ILLINOIS
RESPONDENT

Case No. 11CR0987901

TO: NIKOLAS GACHO #M43072

ADDRESS: P.O. BOX 1700

CITY/STATE/ZIP: GALESBRG, IL 61402

NOTICE

Pursuant to Illinois Supreme Court Rule 651, as Amended and Adopted on January 25, 1996, and effective the same day to read as follows:

"You are hereby notified that on JANUARY 11, 2019 **the court entered an order, a copy of which is enclosed herewith. You may have a right to appeal. In the case of an appeal from a post-conviction proceeding involving a judgment imposing a sentence of death, the appeal is to the Illinois Supreme Court. In all other cases, the appeal is to the Illinois Appellate Court in the district in which the circuit court is located. If you are indigent, you have a right to a transcript of the record of the post-conviction proceedings and to the appointment of counsel on appeal, both without cost to you. To preserve your right to appeal you must file a notice of appeal in the trial court within 30 days from the date the order was entered."**

CIRCUIT COURT OF COOK COUNTY ILLINOIS

Dorothy Brown

Clerk of the Circuit Court of Cook County, Illinois

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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

PEOPLE OF THE STATE OF ILLINOIS

v.

NIKOLAS GACHO

Case No. 11CR0987901

CERTIFIED REPORT OF DISPOSITION

The following disposition was rendered before the Honorable Judge WILLIAM G. GAMBONEY ON JANUARY 11, 2019. SEE ATTACHED CONCLUSION.

I hereby certify that the foregoing has been entered of record on the above captioned case.

Date: JANUARY 15, 2019

Dorothy Brown

Dorothy Brown, Clerk of the Circuit Court

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	11 CR 09879-01
Plaintiff-Respondent,	)	
	)	
v.	)	Postconviction
	)	
NIKOLAS GACHO,	)	
	)	Hon. William G. Gamboney
Defendant-Petitioner.	)	Judge Presiding

Order

After a bench trial, Nikolas Gacho was convicted of attempted first degree murder for shooting Mario Palomino on June 9, 2010. Gacho was 17 years old at the time of the offense. He was sentenced to 35 years' imprisonment, including a mandatory 25-year enhancement for personally discharging a firearm that caused great bodily harm. On appeal, Gacho argued (1) the statute excluding him from juvenile court was unconstitutional, (2) the combined application of the mandatory firearm enhancement and truth-in-sentencing was unconstitutional, and (3) he should be resentenced under a later-enacted statutory amendment making firearm enhancements discretionary for juvenile offenders. The appellate court rejected those arguments and affirmed. *People v. Gacho*, 2016 IL App (1st) 140896 (unpublished) (appeal denied 2018 Ill. LEXIS 119).

Gacho filed a postconviction petition claiming: (1) he would have accepted a 20-year plea offer, but for counsel failing to inform him until the day of trial that he was subject to the mandatory firearm enhancement, (2) one of his lawyers instructed him to

testify in a manner inconsistent with the other lawyer's opening statement and trial preparation, (3) the appellate court failed to properly address his proportionate penalties challenge to his sentence separately from its eighth amendment analysis, (4) appellate counsel failed to include certain issues in his petition for leave to appeal to the supreme court, (5) his counsel should have argued serious provocation, (6) one of his lawyers had a conflict of interest by formerly representing a person on the State's witness list, (7) at sentencing, his counsel should have emphasized he was 17 at the time of the offense and that he turned himself in, (8) any waiver, forfeiture, or procedural default is due to ineffective assistance, (9) the cumulative effect of counsel's errors resulted in ineffective assistance, (10) the State failed to prove he had the specific intent to kill, (11) the State used personal discharge of a firearm to prove attempted murder, so the State could not also use it to enhance his sentence, and (12) the 25-to-life firearm enhancement violates proportionate penalties because it fails to differentiate between great bodily harm, permanent disability, permanent disfigurement, and death.

Background

Gacho's conviction stems from his shooting of Mario Palomino around 2:30 am on June 9, 2010, which left Palomino paralyzed from the chest down. Gacho's on-again, off-again girlfriend, Jessica Drowns, was at a party in the Bridgeport neighborhood of Chicago and called Gacho about getting together afterward. Palomino, then age 19 was at the party, too. Gacho and Palomino had a history of bad blood. The two got in a physical fight a few years prior in high school. Though disputed, the evidence suggested Palomino made comments about Gacho at the party; Gacho learned about it and called

him; and the two argued over the phone. Palomino said Gacho threatened to kill him. Palomino left the party with Drowns. In his account, he was walking her home. She said they were walking to a gas station to buy cigarettes. They walked down an alley near 33rd and Wallace. Gacho drove from his home in Burbank, Illinois to Bridgeport and encountered them in the alleyway. Gacho fired three shots at Palomino who had turned and run. One bullet struck him in his upper back. Drowns got in the truck with Gacho and rode to his house. He asked her a number of times if she was going to "rat him out." At his house, he quickly packed a bag and left. He threw the gun in a river. Gacho was identified as the shooter shortly after the incident. Police went to his home and took Drowns to a station for questioning. Gacho surrendered himself to police nearly a year later.

At trial, Gacho argued self-defense. He claimed that when he encountered Palomino with Drowns, Palomino said, "I got you now," and moved toward his waistband. Gacho said he believed Palomino was reaching for a gun so he pulled his own gun and shot at him.

He also testified about two prior incidents. Two weeks before the shooting, Gacho was driving through Bridgeport and saw Palomino standing around with half a dozen other young men. Upon seeing Gacho, Palomino and others got in an SUV and followed him. Gacho turned down an alley, but was blocked by another vehicle. The SUV hit him from behind and pushed him into the other vehicle. It then backed away and drove off. Gacho claimed Palomino was in the front passenger seat. Palomino acknowledged seeing

acknowledged seeing Gacho drive by and that his friends got in an SUV and drove the same direction. He denied being in it.

Gacho also testified he was beaten up by young men associated with Palomino the week before the shooting. Gacho did not provide any further detail about the incident. He did not say Palomino was present. Drowns testified Palomino was involved in a gang, but he denied it. Palomino did acknowledge a Facebook post showing a picture of him with gang members. He said they were friends who helped him since he was confined to a wheelchair.

In finding Gacho guilty of attempted murder, Judge Lacy provided the following assessment of the evidence:

> Let me first state that this case is not about gangs or intoxication. While I agree that there are inconsistencies in the testimony, there is one thing that is not inconsistent, and that is that the evidence is overwhelming that the Defendant shot the victim, Mario Palomino. The Defendant is the only one who came to the scene of this crime armed with a handgun. Both of the witnesses, Drowns and the complaining witness himself, Mr. Palomino, testified that the Defendant raised his arm towards the victim, that shots are fired by the Defendant, and the victim goes down. Both the victim and Ms. Drowns put the Defendant at the scene. Ms. Drowns says that the Defendant raised his arm and that he had a chrome object in his hand and she heard three or four shots. The victim says he actually sees the Defendant with the gun, and he starts firing. The victim turns and runs and eventually gets shot in the back. Ms. Drowns sees the Defendant with the gun in the vehicle seconds after the shooting takes place, and the Defendant repeatedly asks her if she is going to rat him out. He asks her that repeatedly. That stands uncontradicted.
>
> Further, the Defendant took the witness stand, and he admits he had the gun and that he shot the victim. The Defendant goes home. He packs a bag, leaves his home, leaves Ms. Drowns behind, gets rid of the gun by tossing it in the river, and then he has to be arrested by a fugitive warrants division.

There is no evidence in this case whatsoever that the victim, Mr. Palomino, had a gun or that he had any type of weapon. The Defendant took the witness stand, and he says he never—he talks about this movement, but he never sees the victim with a gun or with any type of weapon. Mere words or a fight that took place two or three years earlier do not support a theory of self-defense.

Let me talk about Mr. Gacho's testimony on the witness stand. His demeanor and his manner while testifying I can only describe as horrific. His story was totally incredible. How could the Defendant even know some of the things he claimed to know the victim said during the course of the evening? And why would someone who is unarmed—and absolutely no weapons that were found by the police or seen by anybody else involved with this case—why would that person turn and reach into his waistband, to try and draw some fire from another individual? That is just ridiculous. Furthermore, the victim is shot in the back. He is not shot in the front contrary to the physical testimony that the Defendant gave in this case. Finally, even if there is this whole stuff about prior bad blood that is true, which I certainly find to be inconsequential, this does not give someone a license to kill or attempt to kill.

Legal Standard

The Postconviction Hearing Act (Act) enables an imprisoned person to assert a substantial deprivation of rights afforded by the United States or Illinois constitutions occurred in the proceedings resulting in their conviction or sentence. 725 ILCS 5/122-1(a)(1). Proceedings begin by filing a petition in the circuit court of conviction. *Id.* § 1(b). The Act contemplates a three-stage process for adjudication. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, the circuit court determines whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2). If so, the circuit court must dismiss the petition by written order. *Id.*; *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). If not dismissed, the petition is docketed for further proceedings. *Id.* § 2.1(b).

A petition is frivolous or patently without merit if it has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. A petition lacking an arguable basis is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. A petition sufficient to avoid summary dismissal is one that is not frivolous or patently without merit. *Id.* at 11. A petitioner need only state the "gist" of a constitutional claim – that is, "allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Id.* at 9.

The circuit court reviews the petition independently (*id.* at 10) and takes all factual allegations as true unless affirmatively rebutted by the record. *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 47. The court may review the court file, transcripts, and any appellate court actions. 725 ILCS 5/122-2.1(c); *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

Further, a petition for postconviction relief is a collateral proceeding, not an appeal of the underlying judgment. *People v. Blair*, 215 Ill. 2d 427, 447 (2005). So, *res judicata* bars consideration of issues that were previously raised and decided on direct appeal and forfeiture bars issues that could have been raised, but were not. *Id.* at 443-44.

Analysis

a. *Forgone plea*

Gacho says that leading up to trial, his counsel, Donna Makowsi and Phillip Bartolementi, never informed him that he was subject to a 25 years to life mandatory sentencing enhancement if he were convicted of attempted murder and found to have personally discharged a firearm causing great bodily harm. Instead, they told him the sentencing range was 6 to 30 years and that and the judge was unlikely to impose a

sentence near 30 years because Gacho was 17 at the time of the offense. Based on that understanding, Gacho rejected the State's initial offer of 26 years at some point in late 2012 or early 2013. He did convey to counsel that he would accept the minimum of 6 years and asked that counsel try to get a "realistic" offer. On the day of trial, his lawyers did inform Gacho about the enhancement, that the State "enhanced his charges today," that he faced a range of 31 years to life, and the State was now offering 20 years. Gacho asked them to counter with 15. Counsel discussed it with the State and returned to inform him the State's offer remained 20. He asked them to try again. They returned and told him the judge thought 20 years was a fair offer. Gacho asked what he should do. The lawyers told him they could not help him make his decision. Gacho asked them to request a continuance so he could consider it and speak to his family. Bartolementi told him he could not and would not because he didn't want to undermine his credibility with the court. Then, "[b]ased on [Makowski and Bartolementi] providing Mr. Gacho with no useful information or advice and refusing to ask for a continuance Mr. Gacho refused the 20 year offer and proceeded to trial."

Gacho claims his lawyers were ineffective for (1) failing to inform him about the firearm enhancement until the day of trial, (2) providing him "no reasonable professional advice as to what decision to make," and (3) refusing to ask for a continuance. He says those factors "deprived [him] of making a knowing and informed decision." But for those errors, he would have accepted the 20-year plea offer.

An ineffective assistance claim premised on a defendant's reliance on counsel's advice in deciding to reject a plea is governed by the two-part test establish in *Strickland*

v. Washington, 466 U.S. 668 (1984). *People v. Curry*, 178 Ill. 2d 509, 518 (1997). First, a defendant must show counsel's performance fell below an objective standard of reasonableness; and second, show counsel's deficient performance prejudiced the defendant. *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999). Failure to satisfy either prong of the *Strickland* standard precludes a finding of ineffective assistance of counsel. *People v. Simpson*, 2015 IL 116512, ¶ 35.

The right to effective assistance of counsel does extend to the plea-bargaining process. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *People v. Hall*, 217 Ill. 2d 324 (2005). That includes the right to be informed of the offer of a plea bargain (*Missouri v. Frye*, 566 U.S. 134 (2012)) and the right to competent advice about whether to accept or reject a plea offer (*Lafler v. Cooper*, 566 U.S. 156 (2012)). However, the decision to accept or reject a plea is personal to the defendant. *People v. Robinson*, 2012 IL App (4th) 101048, ¶ 33. Counsel cannot dictate whether the defendant should accept the plea bargain and is not required to press a defendant who rejects a plea offer to change his mind. *Clark v. Lashbrook*, 2017 U.S. Dist. LEXIS 23645, * 30 (N.D. Ill.) (citing *Groves v. United States*, 755 F.3d 588, 591 (7th Cir. 2014)).

Here, defense counsel did inform Gacho the State made a plea offer and did, ultimately, inform him of the accurate sentencing range if convicted at trial. Judge Lacy also admonished Gacho of the applicable sentencing range and Gacho indicated he still wished to proceed to trial. While counsel may have stated an incorrect sentencing range at earlier stages, Gacho did have all the relevant information that is constitutionally required to decide whether to accept or reject the plea offer when he made his choice. His

argument supposes counsel should have instructed him which decision to make or persuaded him to accept the plea. The constitution does not require that. Only Gacho could make the decision. Counsel could not make it for him. Therefore, there is no basis in law that Gacho's lawyers' performance was unreasonable.

In addition, Gacho's own account belies the notion that he would have accepted the 20-year offer. In his telling, Gacho asked his lawyers to counter with 15 years after being informed that the sentencing range was 31 years to life. Yet he still rejected the 20-year offer when the State held firm and he was told the judge thought it fair. Thus, he had a meaningful opportunity to consider the offer with correct information. Under those circumstances, his actual decision to go to trial contradicts his conclusory claim that he would have accepted the plea. Ultimately, Gacho was not arguably prejudiced. See *People v. Miller*, 2013 IL App (1st) 111147, ¶ 43 (the prejudice inquiry under *Lafler* includes whether there is a reasonable probability that, but for erroneous advice, the defendant would have accepted the plea offer).

b. *Gacho's testimony*

Gacho also claims his lawyers were ineffective for giving conflicting instructions about his testimony. Gacho says he prepared for trial with Bartolementi. In the factual narrative they planned to present in accord with a self-defense theory, Gacho would testify that he and Drowns had agreed for him to pick her up at the alley that evening. In his opening statement, Bartolementi mentioned this. At some point, presumably in between opening statements and Gacho taking the stand, Makowski instructed Gacho not to testify that they had agreed to meet. She believed that would suggest premeditation

of shooting Palomino. Instead, she instructed Gacho to say he just saw them as he was driving and pulled in to the alley.

This claim appears to have two components. In one part, Gacho contends he received ineffective assistance because the opening statement and testimony differed. In the other, he suggests the fact that Bartolementi and Makowski conflicted on strategy rendered their assistance ineffective. Specifically, he says, "were it not for Makowski instructing [me] to say [I] initiated the contact and look[ed] like the aggressor, which negated the defense of self-defense, the outcome of the trial could've been different." The Court will address both in turn.

"Counsel's assistance may be ineffective if he or she promises that a particular witness will testify during opening statements, but does not provide the promised testimony during trial." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 80. But, that is not ineffectiveness *per se*. *Id.* There may be valid strategic reasons not to present promised testimony. *Id.* In this case, nothing as stark as counsel promising a certain witness would testify and then not calling that witness occurred. Rather, Gacho points to a subtle and ultimately insignificant discrepancy about a minor detail between Bartolementi's opening statement and his testimony.

In opening, Bartolementi merely said Gacho was standing by his truck waiting to pick Drowns up. (Tr. 12/4/13, AA-18). In Gacho's testimony, he said he left his house in Burbank because of a prearranged plan to pick Drowns up. (Tr. AA-137). They hadn't named a certain time or place. (Tr. AA-137-138). Instead, Gacho called her when he got to Bridgeport to see if she was ready. (Tr. AA-138). They had not yet worked out a time

or place, but Gacho saw Drowns walking as he was driving down 33rd near Wallace. (Tr. AA-138-139). He pulled in to the alley, got out, and called to Drowns. (Tr. AA-139-140).

Thus, Gacho's testimony was not materially different from what Bartolementi mentioned in his opening statement. In both the opening statement and Gacho's testimony, the overall point of what he was doing and why he was there are the same – he was picking Drowns up. Whether they met in the alley because of a specific agreement to do so or by happenstance that Gacho saw her as he was driving is of no moment to the legally significant question – whether Gacho was justified in shooting Palomino. Neither scenario has a tendency to make it more or less likely that he was. For these reasons, it is not arguable that the asserted difference between the opening statement and testimony is the type that could support a finding of ineffective assistance.

Similarly, Gacho's claim that the outcome may have been different had he not modified his testimony based on Makowski's instructions is not availing. Judge Lacy's remarks make clear that Gacho's testimony that Palomino appeared to be reaching for a gun was entirely unconvincing and that other aspects of the evidence worked against Gacho's claim of self-defense. By no means did Gacho "negate" his self-defense claim by saying he turned into the alley after seeing Drowns instead of saying he was waiting for her there. That minor difference had no bearing on whether he acted in self-defense. His self-defense claim failed because of the reasons Judge Lacy stated in his ruling.

For what it's worth, Drowns testified she and Gacho had planned to meet at 35th and Wallace by a White Sox memorabilia shop. (Tr. AA-74-75). Palomino testified they left the alley through a "T" segment and walked around the block because of a truck,

presumably Gacho's, already parked in the alley before turning back down the alley from the other direction. (Tr. AA-61-62). In contrast, Drowns denied they saw a truck parked in the alley or that they walked around the block. (Tr. AA-101-102). Instead, she said Gacho just pulled up in the alley. (Tr. AA-77).

As noted, Judge Lacy recognized these inconsistencies and explained why they didn't make any difference. The salient facts showed that Gacho did not act in self-defense. Accordingly, the ineffectiveness claim on this point is not arguable. As an aside, this claim is troubling because Gacho is essentially saying he gave false testimony, or would have testified falsely to craft a defense, or both. That is a problem of a different nature and not one that would warrant relief from a criminal conviction.

c. *Proportionate penalties in appellate analysis*

Next, Gacho claims the appellate court deprived him of due process by not independently analyzing his as-applied challenge to the firearm enhancement and truth-in-sentencing law under the proportionate penalties clause, separate from its eight amendment analysis. After rejecting his claim under the eight amendment, the appellate court stated Illinois' proportionate penalties clause is co-extensive with the eighth amendment, so Gacho's proportionate penalties challenge must also fail. *Gacho*, 2016 IL App (1st) 140896, ¶ 22. Gacho argues the proportionate penalties clause is more expansive than the eighth amendment and cites *People v. Clemons*, 2012 IL 107821 and *People v. Harris*, 2016 IL App (1st) 141744 as examples where Illinois courts have said so.

This is not a cognizable postconviction claim because the matter is of record and was actually decided by the appellate court. The recourse for any alleged error in the

appellate court's analysis is to seek leave to appeal to the supreme court. The issue is *res judicata* for the circuit court.

Even if cognizable, similar proportionate penalties challenges to the firearm enhancement and truth-in-sentencing have not been successful. See, e.g., *People v. Wilson*, 2016 IL App (1st) 141500, ¶¶ 38-43 (affirmed *People v. Hunter*, 2017 IL 121306). And the supreme court reversed *Harris*. 2018 IL 121932. For these reasons, the claim is not arguable.

d. *PLA*

Somewhat related to his last claim, Gacho says his appellate counsel was ineffective for failing to include his challenge to the firearm enhancement under the proportionate penalties clause and eighth amendment in his petition for leave to appeal (PLA) to the Illinois Supreme Court. He argues the omission deprived him of consideration of the issue by the supreme court or federal courts.

The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 233 (2001). A petitioner must establish that appellate counsel's performance was deficient, and that, but for counsel's errors, there is a reasonable probability the appeal would have been successful. *People v. Williams*, 2016 IL App (1st) 133459, ¶ 27. If the underlying issue lacks legal merit though, the requisite probability of a successful appeal cannot be shown. *Id.* ¶ 33.

"Failure to include an issue in a petition for leave to appeal is not an absolute bar to review by the supreme court." *People v. Rolandis G.*, 232 Ill. 2d 13, 37 (2008). It is not a jurisdictional bar but, "a principle of administrative convenience." *Id.* The supreme court

has discretion to review matters not specifically mentioned in a PLA and will be likely do so when an issue is "inextricably intertwined" with other matters properly before the court. *Id.*

Appellate counsel was not arguably ineffective for failing to include the firearm enhancement issue in the PLA. Had the supreme court granted leave to appeal, it could have reviewed the issue in its discretion. The issues included in the PLA did address sentencing, so the court could have found the issues intertwined.

Apart from that, whether Gacho's appeal would have succeeded at the Illinois or United States Supreme Court is entirely speculative. The Illinois Supreme Court has repeatedly upheld the constitutionality of mandatory firearm enhancements for adults. *People v. Sharpe*, 216 Ill. 2d 481 (2005); *People v. Guyton*, 2014 IL App (1st) 110450, ¶¶ 58-62. In the Court's research, the appellate court has twice held mandatory firearm enhancements unconstitutional as applied to juveniles. *People v. Aikens*, 2016 IL App (1st) 133578 (appeal granted 2018 Ill. LEXIS 1128, Nov. 28, 2018); *People v. Barnes*, 2018 IL App (5th) 140378. But, the issue is not settled and is pending before the supreme court. For these reasons, appellate counsel's omission of the issue is not an arguable ineffectiveness claim.

e. *Serious provocation*

Next, Gacho contends his trial counsel was ineffective for failing to argue for a lower Class 1 sentencing range based on the attempted murder being an act under sudden and intense passion resulting from serious provocation. See 720 ILCS 5/8-4(c)(1)(E). He points to Drowns' testimony that she was kissing and holding hands with

Palomino when he encountered him in the alley and the prosecutor's remarks in closing that Gacho committed an "act of rage" when he caught Drowns with Palomino.

Our supreme court has recognized four categories of serious provocation—substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. *People v. Harris*, 2013 IL App (1st) 110309, ¶ 13. None of those are applicable here. Neither can mere words or gestures constitute serious provocation. *People v. Lauderdale*, 2012 IL App (1st) 100393, ¶ 24. Accordingly, counsel was not arguably ineffective nor Gacho arguably prejudiced by failing to argue serious provocation at sentencing.

f. *Conflict of interest*

Further, Gacho claims one of his trial lawyers, Makowski, had a conflict of interest. The State included Carl Freemon on its witness list in discovery. Drowns first told police Freemon shot Palomino before she admitted Gacho did. Gacho attaches a police report indicating that. Palomino testified he was friends with Freemon, Freemon got in the vehicle that followed Gacho two weeks before the shooting, and Palomino saw Freemon the night of the party and shooting. Through a woman with whom Gacho has a child, Gacho learned Makowski "had gotten [Freemon] out of a lot of trouble." Presumably, this means Makowski represented Freemon as a criminal defendant.

The sixth amendment right to effective assistance includes the right to conflict-free counsel. *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 17. Unless a defendant waives his right to conflict-free counsel, a *per se* conflict is grounds for automatic reversal and the defendant is not required to show an actual prejudice resulted from the conflict. *People v.*

Hernandez, 231 Ill. 2d 134, 143 (2008). A *per se* conflict exists in only three situations: (1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved with the prosecution of defendant. *People v. Peterson*, 2017 IL 120331, ¶ 103. In the absence of a *per se* conflict of interest, reversal of defendant's conviction requires a showing of an actual conflict of interest and resulting prejudice. *Id.* ¶ 115.

Here, Makowski did not have a *per se* conflict of interest. Even if she had represented Freemon at some point, he was only a potential witness. He did not testify and Makowski never "assumed the status of attorney for a prosecution witness." *People v. Morales*, 209 Ill. 2d 340, 346 (2004). Accordingly, Illinois courts do not recognize this situation as a *per se* conflict. See *id.*

Gacho suggests that Makowski's prior representation of Freemon may have impeded Bartolementi's attempt to interview him and provide potential testimony. This fails to establish an actual conflict of interest. Gacho has offered no evidence that Freemon's interests were adverse to him such that Makowski was conflicted. In addition, this claim is lacking factual specificity or even a proffer of what Freemon's testimony would have been. Because of that, Gacho has not shown he was arguably prejudiced even if there was a conflict.

g. *Sentencing arguments*

Next, Gacho claims his counsel was ineffective for failing to emphasize at sentencing that he was 17 years old at the time of the offense and that he turned himself in to police. Counsel's performance with sentencing matters is also analyzed under the *Strickland* test. *People v. Ford*, 368 Ill. App. 3d 562, 574 (2006). Strategic decisions will generally not support an ineffectiveness claim. *Wilborn*, 2011 IL App (1st) 092802, ¶ 79. In Gacho's case, it was readily apparent that he was 17 at the time of the offense. His date of birth and the date of the offense were basic information available to Judge Lacy. Further, it would have been a valid strategic decision not to mention Gacho surrendered himself to police. Doing so would have also brought attention to the fact he only did so in May 2011, almost a year after the shooting. That fact was not in his favor. In sum, this is not an arguable claim.

h. *Specific intent*

Next, Gacho claims the State failed to prove he had the specific intent to kill to sustain his conviction for attempted murder. This claim is forfeited because it could have been raised on direct appeal. It is also meritless. In order to prove a defendant guilty of attempted first degree murder, the State is required to prove beyond a reasonable doubt that he acted with the specific intent to kill the victim. *People v. Brown*, 2015 IL App (1st) 131873, ¶ 14. However:

> [i]ntent may be inferred from the character of the defendant's conduct and the circumstances surrounding the commission of the offense. These surrounding circumstances may include the character of the assault, the use of a deadly weapon, and the nature and extent of the victim's injuries.

> Further, an intent to kill may be inferred if one willfully does an act, the direct and natural tendency of which is to destroy another's life.

People v. Carlisle, 2015 IL App (1st) 131144, ¶ 59 (internal quotation marks and citations omitted). Here, the evidence was sufficient to infer Gacho intended to kill Palomino. He used a deadly weapon, fired multiple shots, and caused permanently disabling injury. This claim is not arguable.

i. *Same evidence used to prove an element and enhance sentence*

Building on his last claim, Gacho argues imposing the firearm enhancement to his sentence violates double jeopardy. In his view, evidence that he shot Palomino proved Gacho did an act that was substantial step toward the commission of first degree murder for purposes of establishing attempted murder. Thus, it was "exhausted" and should not have been also allowed to be used to enhance his sentence. This claim also could have been raised on direct appeal and is, therefore, forfeited. And it is meritless. Illinois courts have already rejected double jeopardy challenges to firearm enhancements. See *Sharpe*, 216 Ill. 2d at 526 (rejected the argument that firearm enhancement is greater punishment for the same crime. Additional facts must be proven for the enhancement); *People v. Alexander*, 2017 IL App (1st) 142170, ¶¶ 42-43 ("The gun was simply the method selected by [the defendant] to accomplish the crime, and the particular method selected subjects [him] to an additional penalty"). This claim is not arguable in law.

j. *Different harms*

Gacho further challenges the 25 years to life firearm enhancement under the proportionate penalties clause on the grounds that the enhancement is the same for

"different levels of harm"—great bodily harm, permanent disability, permanent disfigurement, or death. See 720 ILCS 5/8-4(c)(1)(D). Again, this is a claim that could have been raised on direct appeal, so it is forfeited. It is also without merit. Gacho appears to assert this as a facial challenge arguing "the penalty for these different levels of harm were not determined according to the[ir] seriousness."

The proportionate penalties clause provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A proportionality violation may be found where the penalty imposed for the offense is "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *People v. Miller*, 202 Ill. 2d 328, 338 (2002). Or, a defendant may "challenge a penalty on the basis that it is harsher than the penalty for a different offense that contains identical elements"—identical elements analysis. *Sharpe*, 216 Ill. 2d at 521. The legislature implemented the 15/20/25-to-life firearm sentencing provisions to deter the use of firearms in the commission of a felony offense." *Guyton*, 2014 IL App (1st) 110450, ¶ 58. Our supreme court has stated "it would not shock the conscience of the community to learn that the legislature has determined that an additional penalty ought to be imposed when murder is committed with a weapon that not only enhances the perpetrator's ability to kill the intended victim, but also increases the risk that grievous harm or death will be inflicted upon bystanders." *Sharpe*, 216 Ill. 2d at 525.

Likewise, the Court cannot find it arguably cruel, degrading, or wholly disproportionate to subject persons who committed attempted murder to the same

enhancement irrespective of whether the offender's personal discharge of a firearm caused great bodily harm, permanent disability, permanent disfigurement, or death. All four of those are serious and among the worst harm that can result from the use of firearms in the commission of the offense. Thus, the 25 years to life firearm enhancement does not arguably violate proportionate penalties under the cruel and degrading standard.

Further, Gacho's proportionate penalties challenge is not cognizable under identical elements analysis. That applies when the legislature assigns two different penalties to the exact same elements. When that occurs, one penalty has not been set in accordance with the seriousness of the offense. But, that is not the situation here. Great bodily harm, permanent disability, permanent disfigurement, and death resulting from a defendant's personal discharge of a firearm in the commission of the same offense receive the same penalty. Gacho seems to contend these should be treated as different elements and carry different penalties commensurate with differing degrees of seriousness. The proportionate penalties clause does not require that. The legislature was free to determine great bodily harm, permanent disability, permanent disfigurement, and death as equally serious to warrant similar punishment. Overruling the legislature's determination would be akin to cross-comparison analysis, which our supreme court abandoned. *Sharpe*, 216 Ill. 2d at 521. Additionally, the legislature already differentiated these alternate forms of the same element from situations where attempted murder is committed while merely armed with a firearm (720 ILCS 5/8-4(c)(1)(B)) or by personally discharging a firearm without causing injury (*id.* § 4(c)(1)(C)) and established lower

sentences when only those comparatively less serious elements are proven. In any event, Gacho did not receive a greater punishment than the legislature assigned to the exact same elements elsewhere in the Criminal Code. For these reasons, Gacho's claim has no arguable basis in law.

k. *Procedural default and cumulative effect*

Last, the Court addresses Gacho's claims that any procedural default results from ineffective assistance and that the cumulative effect of trial and appellate counsel's errors render their assistance ineffective. Counsel's cumulative error can make out an arguable claim on postconviction, but establishing that typically involves finding some merit in the individual claims. See, e.g., *People v. Tucker*, 2017 IL App (5th) 130576. By contrast, when individual claims of ineffectiveness are not merited, their cumulative effect does not rise to the level of ineffective assistance. *People v. Perry*, 224 Ill. 2d 312, 356 (2007); *People v. Lacy*, 407 Ill. App. 3d 442, 467 (2011). That is the case here. The whole of Gacho's petitione is not greater than the sum of its unmerited parts.

Moreover, counsel did subject the State's case to meaningful adversarial testing. A defendant is entitled to competent, not perfect representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). *Strickland* is aimed at "errors so egregious that they probably caused the conviction or the sentence." *Id.* It is not arguable that occurred here.

Conclusion

Based on the foregoing, the Court finds Gacho's petition to be frivolous and patently without merit. Accordingly, the petition is hereby **Dismissed**.

Entered:

Judge William G. Gamboney
Cook County Circuit Court
Criminal Division

Date: January 11, 2019

APPENDIX C

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

May 26, 2021

In re: People State of Illinois, respondent, v. Nikolas Gacho, petitioner.
Leave to appeal, Appellate Court, First District.
127000

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 06/30/2021.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1ST JUDICIAL DISTRICT

People of the state of Illinois, Respondent-Plaintiff	)	Case No. 11-cr-9879
VS	)	
Nikolas Gacho, Petitioner-Defendant	)	Honorable William G. Lacy Judge presiding.

PETITION FOR POST-CONVICTION RELIEF

Nikolas Gacho, Pro-se
Reg No. M-43072
Hill Correctional center
600 Linwood Road
P.o. Box 1700
Galesburg,IL 61401

COVER PAGE

TABLE OF AUTHORITY

Table of Exhibits

Exhibit #:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1st JUDICIAL DISTRICT

People of the state of Illinois, Respondent-Plaintiff VS	)	Case No. 11cc-9879
Nikolas Gacho, Petitioner-Defendant	)	Honorable William G. Lacy Judge Presiding.

PRO SE POST CONVICTION PETITION

Now comes Nikolas Gacho, pro-se, and petitions this Honorable Court to grant him relief under the post-conviction act.[725 ILCS 5/122-1et.seq.

In support of this petition, petitioner (Hereinafter Mr. Gacho) states:

1. He was convicted of the offense(s) of: Attempted 1st degree murder after a bench trial before Honorable William G. Lacy and was sentenced to 35 years on February 10, 2014.

2. He appealed his convicition to the Appellate Court of Illinois and that Court affirmed his convicition on August 23, 2016 (No.1-14-0896).

3. His petition for leave to appeal was denied on January 18,2018 (SUPREME COURT NO.121344)

4. This petition was mailed to the clerk of the circuit court within the time frame enumerated under 725 ILCS 5/122-1.

This petition now follows:

MR.GACHO'S SIXTH (6th) AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO ARTICLE 1. SECTION 8. OF THE ILLINOIS CONSTITUTION WERE VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr.Gacho argues he received ineffective assistance of counsel during the plea bargaining process. Mr.Gacho states that over the 31 month period of pre-trial proceedings, he had not been informed by either his trial attorney(s) (Phillip Bartolementi) and (Donna Makowski) or the Court, that he was subject to a mandatory 25 year-Life firearm sentencing enhancement. Mr.Gacho states he wasn't informed of the enhancement until the day of trial. Mr.Gacho states that based on incorrect sentencing information and deficient advice provided by counsel, caused Mr.Gacho to reject two (2) plea offers.

Both the United States and Illinois Constitutions guarantee criminal defendants the right to the effective assistance of counsel. U.S. CONST., AMENDS (6),(14); ILL. CONST. 1970, ART 1. §8; **STRICKLAND V. WASHINGTON, 466 U.S. AT 685-86, 104 S. CT. 2052; PEOPLE V. ALBANESE, 104 ILL. 2D 504, 525-26, 85 ILL. DEC. 441, 473 N.E.2D 1246 (1984).** THE SIXTH AMENDMENTright t to effective assistance of counsel applies to the plea-bargaining process. **LAFLER V. COOPER, 566 U.S. ___,___, 132 S.CT. 1376, 1384, 182 L.ED 2D 398 (2012)/; MISSOURI V. FRYE, 566 U.S. ___,___, 132 S.CT. 1399, 1406- 07, 182 L.ED 2D 379 (2012); SEE ALSO PEOPLE V. CURRY, 178 ILL.2D 509, 227 ILL. DEC. 395, 687 N.E. 2D 877 (1997); PEOPLE V. HALE 2013 IL 113140 (2013).**

Mr.Gacho states, that from the beggining of representation and the commencement of pre-trial proceedings, and threwout the nearly 31 month preperation of his defense, Mr.Gacho had not been informed by either his trial attorney(s) (Mr.Bartolementi) and (Ms.Makowski), or the court that he was subject to a mandatory 25 year- life firearm sentencing enhancemant and a sentencing range of 31 years- life if convicted at trial. From the beggining of representation by (Mr.Bartolementi) and (Ms.Makowski). Mr.Gacho was informed that he was facing a class x with a sentencing range of 6-30 years.There was no mention of being subject to anymandatory firearm sentencing enhancements. (Mr.Bartolementi) and (Ms.Makowski) repeatedly assured Mr.Gacho and his family, that by him being only 17 years old at the timeof the commission of this offense, there was no way even if we lost at trial, a judge was going to give Mr.Gacho anything near 30 years.

Furthermore, Mr.Gacho states that between the months of 11/2012 to 4/2013.(Mr.Bartolementi) when visiting Mr.Gacho at Cook County jail, informed Mr.Gacho that the state was making an offer of 26 years. Mr.Gacho rejected this offer based on the incorrect sentencing information from (Mr.Bartolementi) and (Ms.Makowski). However, (mr.Bartolementi) proceeded to ask Mr.Gacho if he was willijng to accept a plea deal on this charge. Mr.Gacho informed (Mr.Bartolementi) that he would accept a plea deal. (Mr.Bartolementi) then asked Mr.Gacho

what he would be willing to accept. Mr.Gacho responded surely he would accept the minimum of 6 years, but asked (Mr.Bartolementi) to try and get a realistic offer. Mr.Gachogoing off the incorrect sentencing information provided by (Mr.Bartolementi) and (Ms.Makowski) felt a 26 year offer was to high, thinking the most he could get at trial was 30 years. (Mr.Bartolementi) agreed 26 years was high in light of the sentencing range.

Mr.Gacho states, it wasn't until the day trial was set to start 12-4-2013, when (MS.makowski) and (Mr.Bartolementi)first informed Mr.Gacho that he was subject to a mandatory 25 year to life sentencing enhancement, making his actual sentencing range 31 years- life. Up until 12-4-2013 Mr.Gacho had not been informed by either his trial attorneys, or the court that he was subject to a 25 year- life firearm sentencing enhancement or a sentencing range of 31 years to life. On the day trial was to start 12-4-2013 (Mr.Bartolementi) and (Ms.Makowski) informed Mr.Gacho the state was offering a 20 year plea deal. (Mr.Bartolementi) and (Ms.Makowsk (Ms.Makowski)also informed Mr.Gacho the state had enhanceed his charges today. They informed Mr.Gacho the state was now seeking a mandatory 25 year- life firearm sentencing enhancement. Making his sentencing range # 31 years - life, instead of the 6-30 year range they had previously informed him of.Mr.Gacho asked his attorney(s) to try and get the offer down to 15 years. (Mr.Bartolementi) and (Ms.Makowski) returned to inform Mr.Gacho the state remained at their 20 year offer. Mr.Gacho expressed his concern as to the significant shift in the sentencing range, and as to how the state could enhance his charges on the day of trial. Mr.Gacho again askedhis attorneys to attempt to get the offerdown to 15 years or as close to it as possible. (Mr.Bartolementi) and (Ms.Makowski) again returned and informed Mr.Gacho they had spoken to the judge, and the judge felt 20 years was a fair offer. Mr.Gacho then asked (Mr.Bartolementi) and (Ms.Makowski) for advice as to what to do. (Mr.Bartolementi) and (Ms.Makowski) informed Mr.Gacho that they could not help Mr.Gacho in making his decision . Based on them providing Mr.Gacho with no advice as to what he should do. Mr.Gacho informed his attorneys he would like a continuance, to consider offer and speak to his family about accepting the plea offer. IN light of the significant shift in the sentencing range and that everything thaty was planned and consideredup until that point, had been done so with Mr.Gacho thinking his sentencing was 6-30 years. (Mr.Bartolementi) upon hearing Mr.Gacho's request for a continuance, informed Mr.GAcho there was no way he could ask for a continuance on the day we're to start trial, that is not an option. (Mr.Bartolementi)went on to say he could not and would not ask for a continuance because it would under mind his credibility infront of the court. Based on (Mr.Bartolementi) and (Ms.Makowski)providing Mr.Gacho with no useful information or advice and refusing to ask for a continuance Mr.Gacho refused the 20 year offer and proceeded to trial.

In **PEOPLE V. CURRY, 178 ILL. 2D 509, 528, 227 ILL. DEC. 395,687 N.E. 2D 877, 887 (1997),** The Illinois Supreme Court recognized a defendant's sixth amendment right to the effective assistance of counsel during guilty-plea negotiations. Specifically, the Supreme Court held that " a criminal defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a guilty plae offer". Inso holding, the Supreme Court noted that the constitutional right to the effective assistance of counsel durihg guilty-plea negotioations " extends to the decision to reject a plea offer , even if the defendant subsequently receives a fair trial". Id at 518, 227 Ill. Dec. 395, 687 N.E. 2d at 882.

Mr.Gacho argues his attorney(s) performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. Mr.Gacho maintains that, but for his attorney's ineffective assistance during plea negotioations with the state he would have accepted the 20 year plea offer and avoided trial.

Mr.Gacho argues (Mr.Bartolementi's) and (Ms.Makowski's) performance was unreasonable in that over the 31 month preperation of the defense they did not inform Mr.Gacho of the correct sentencing range. As stated earlier it wasn't until 12-4-2013 the day of trial, when Mr.gacho's attorneys first informed him of the mandatory 25year-life firearm sentencing enhancement and the 31year-life sentencing range. The decision to go to trial, and everything that was planned and considered, had been done so with Mr.Gacho thinking his sentencing range was 6-30 years. Therefore, Mr.Gacho's decision to reject the 20 year offer and go to trial was not made after a full consultation with defense counsel giving effective assistance of counsel and reasonable professional advice, in light of the actual 31year- life sentencing range. Also at the time of the offer (Mr.Bartolementi) and (Ms.Makowski) after, for the first time informing Mr.Gacho of the correct sentencing range, they then provided Mr.Gacho with no reasonable professional advice as to what decision to make, and (Mr.Bartolementi) erroneously informed Mr.Gacho he could not ask for a continuance, and later said he would not ask for a continuance because it would under mind his credibility infront of the court.

In **MISSOURI V. FRYE, 132 S.CT AT 1408,** The supreme Court of the United States, stated "Though the standard for counsel's performance is not solely determined by reference to codified standards of professional practice, these guids can be important guides".

See American Bar Associations Fourth Edition of the Criminal Justice standars for the Defense function, Standard 4-4.1(c), states in relevent part, **Defense counsel's investigative efforts should commence promptly and should explore** appropriate avenues that might lead to information relevent to the merits of the matter, **consequences of the criminal proceedin**

-gs, and potential dispostions and penalties;
Standard 4-5.1(e), states, defens counsel should provide the client with advice **sufficiently in advance of decisions to allow the client to consider available options, and avoid unnecessarily rushing accused into decisions;**
Standard 4-5.2 (b),(iii), The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include: whether to accept a plea offer;
Standard 4-8.3(a), States, **Early in the representation**, and threwout the pendency of the case, **Defense counsel should consider potential issues that might affectsentencing. Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted.**

Mr.Gacho argues that (Mr.Bartolementi) and (Ms.Makowski), provided ineffective assistance that was highly prejudicial, by not informing Mr.gacho of t the correct sentencing range until the day of trial, providing no assistance as to whether to accept plea offer, and then refusing to ask for a continuance for Mr.Gacho to consider offer and make an informed decision, after a full cunsultation with defense counsel.
United States V. Gordon, 156 F.3d 376, 380 (2dcir.1998) Failure to advise client fully on whether plea appears desirable constituted ineffective assistance of counsel;
United States V. Day, 969 F. 2d 39, 43 (3d cir. 1992) Advice that was so insufficient and incorrect that undermined petitioner's ability to make intelligent decision whether to accept plea stated claim of ineffective assistance of counsel.People V. Pollard, 231 Cal. RPTR. 778, 818 P. 2 People V. Pollard, 231 Cal. App. 3d 823, 282 Cal. Rptr. 588,594. CERT Granted, 286 Cal. Rptr. 778, 818 P. 2d 61 (1991),When counsel fails " To advise or has misstated some aspect of the law important to the intelligent evaluation of the plea offer, deficient representation has benn demonstrated" ".; State V. James, 48 WASH. App. 353, 739 p.2d 1161, 1167 (1987), To effectively assist client, counsel must aid client in making an informed decision to accept or reject plea offer by discussing with client the strengths and weaknesses of client's case.

Missouri v. Frye, 132 S. Ct. 1399, at 1409 (2012), To show prejudice from ineffective assistanee of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probility they would have accepted the earlier plea offer had they been provided effective assistance of counsel. Defendants must also demonstrate a reasonable probility the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.
To establish prejudice in this instance,, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. cf. Glover V. United States, 531 U.S. 198, 203, 121 S. Ct.696, 148 L. Ed. 2d 604 (2001) (" any amount of additional jail time has Sixth Amendment significance").

Furthermore, in support of his claim that he did suffer prejudice and that he would've accepted the 20 year offer, were it not for counsel's deficient performance.
First Mr.Gacho points to the sentencing range he was informed of from the beggining of representation and threwout the 31 month preperation of his defense. This prejudiced Mr.Gacho for it, one caused Mr.Gacho to reject an e earlier 26 year plea offer. Two, everything that was planned and considered , was done so with Mr.Gacho thinking the most he could receive was 30 years. When in fact he faced a mandatory minimum of 31 years-life. Three, Mr.Gacho was deprived of making a knowing and informed decision after full consultation with counsel providing effective assistance.
Second Mr.Gacho points out that when he was offered the 20 years, he made a close counter offer of 15 years. See **Turner V. Tennesse, 858 F. 2d 1201, at 1206.** A reasonable probility of accepting a plea offer was established by the defendant's testimony and by the fact that the defendant made a close counteroffer to the state's plea offer and competent advice might have closed the gap between the two. And had (Mr.Bartolementi) or (Ms.Makowski) advised him to accept the offer he would've done so.
Mr.Gacho supports his claim that had (Mr.Bartolementi) or (Ms.Makowski) advised him to accept the offer he would've done so with the following.
First Mr.Gacho states, that after full consultation with counsel, they advised Mr.Gacho to surrender himself to the authorities. Mr.Gacholistened to their advice and accomponied by (Mr.Bartolementi) surrendered himself to the area 2 violent crimes unit on May 23, 2011, see ek exhibit # 1.

Two, after consultation with (Mr.Bartolementi) he advised Mr.Gacho to go with a bench trial. Mr.Gacho followed his advice and went with a bench trial. However, counsel provided no assistance or advice as to whether to accept offer after blindsiding him with a significantly longer sentencing range on the day of trial, and then forced him to make a decision uninformed decision with no assistance of counsel, and then after (Mr.Bartolementi) after Mr.Gachoasked him to ask for a continuance to seek advice from family and consider offer ,(Mr.Bartolementi) erroneously informed Mr.Gacho he could not ask for a continuance, and then later said he would not ask for a continuance, because it would under mind his credibility infront of the court.

Last Mr.Gacho states that it is likely the state and judge would've accepted offer. In support of this claim Mr.Gacho states that the state had no reason to withdraw the offer, because the offer was made on the day of trial, surely after the state had reviewed all of the facts of the case.
Next the judge would've likely accepted Mr.Gacho's plea, because during a consultation with Mr.Gacho's attorneys, the judge stated 20 years was a fair offer. Also the judge kept his word in another one of Mr.Gacho's cases and allowed Mr.Gacho to plea guilty to his offer. See Report of proceedings (CC)-2 line 13-22, (CC)-6 line 18-24, (CC)-7 line 1621 16-21.
Attached to this petition is an affidavit from Mr.Gacho's Grandmother Judy Macedo, supporting Mr.Gacho's claim we weren't informed of the firearm enhancemebt until the day of trial. See exhibit # 2.

MR.GACHO'S SIXTH(6TH) AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO ARTICLE 1. SECTION 8 .OF THE ILLINOIS CONSTITION WERE VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr.Gacho argues his trial attorney(s) were ineffective for n were after (Mr.Bartolementi) made a promise in his opening statement as to a specific line of facts Mr.Gacho was to testify to. (Ms.Makowski) instructed Mr.Gacho to change parts of his testimony. The changes she instructed Mr.Gacho to make were not consistent with the promises (Mr.Bartolementi) made in his opening. They were not consistent with the trial strategy, and the reasons for which she instructed Mr.Gacho to make the changes were obvious from the outset of the case. Mr.Gacho argues counsels performance was deficient and the deficient performance prejudiced the defense.STRICKLAND V. WASHINGTON, 466 U.S. 668,at687 (1984).

Mr.Gacho states, that (Mr.Bartolementi) was the one who he worked with on the preperation of his defense and trial strategy. (Ms.Makowski) was never present for any of the preperation of the defense or trial strategy.

Mr.Gacho states, that (Mr.Bartolementi) instructed him that the testimony that should be presented at trial was the following.
Mr.Gacho was to testify that he went to pick up jessica DRowns in Bridgeport, Chicago.
Mr.Gacho and Ms.Drowns had agreed to meet in Wallace/Parnell alley.
Mr.Gacho was waiting in alley to pick up Ms.Drowns, when he encountered Mario Palomino.
Mr.Gacho who was leaning against his truck, turned to see Mario Palomino and Jessica Drowns walking up the alley. Atthis point they were only a few feet away, and when Mr.Gacho turns toward them is when Mr.Palomino reaches under his shirt. When Mr.Palomino reached under his shirt, Mr.Gacho thoughthe was reaching for a gun.
Mr.Gacho who truly believd Mr.Palomino was reaching for agun had a legitimate fear for his safety, and shot in self-defense.
This is the line of facts (Mr.Bartolementi) instructed Mr.Gacho to testify to. Mr.Gacho points to (Mr.Bartolementi's) opening statement see(TT)AA-18 (Mr.Bartolementi) states ''Jessica walks down the alley with Mario walking towards Nick, who is standing by the truck.He is waiting to pick her up." MrGacho argues (Mr.Bartolementi) primed the court to Hear this version of the events from the defense.

However, prior to Mr.Gacho getting on the stand. Mr.Gacho states he showed (Ms.Makowski) a list of guidelines of which he was going to testify to. After reviewing these guidelines (Ms.Makowski) was shocked to see what (Mr.Bartolementi) instructed Mr.Gacho to testify to. She then instructed Mr.Gacho not to say he already had a prearranged plan to meet Jessica in that alley, and also not to say he was already parked in that alley waiting to pick Jessica up. She then instructed Mr.Gacho to say he he seen Jessica walk into the alley and followed her in. She stated that the testimony (Mr.Bartolementi) instructed would be considered premeditated and looks bad. Mr.Gacho argues that (Ms.Makowski) couldn't of been informed of the defense that(Mr.Bartolementi) had prepaired with Mr.Gacho.Because the changes she instructed Mr.Gacho to make were not consistent with the trial strategy. More importantly they were not consistent with the version of events (Mr.Bartolementi) promised in his opening statement, and the reasons for which she instructed Mr.Gacho to make the changes were obvious from the outse t of the case. In U.S.ex rel. Hampton V. Leibach, 347 F.3d 219, at 257 (2003), citing Drake V. Clark, 14 F.3d 351, 356 (7th CIR.1994), when the failure to present the promised testimony cannot be chalked up to unforseeable events,the attorney;sbroken promise may be unreasonable, for"little is more damaging than to fail to produce important evidence that had been promised in an opening". Furthermore, (Ms.Makowski) never informed (Mr.Bartolementi) of the changes she instructed Mr.Gacho to make prior to Mr.Gacho taking the stand.

Therefore,(Mr.Bartolementi) was totally unaware during his examination of Mr.Gacho that (Ms.Makowski) had instructed Mr.Gacho to abandonthe prearranged defense.

Mr.Gacho points to (Mr.Bartolementi's) direct examination of him as evidence that he was unaware of the changes (Ms.Makowski) instructed MrGacho to make. See (TT) AA137-140. From this line of questioning Mr.Gacho believes it is evident that (Mr.Bartolementi) is attempting to get to the line of facts in which he promised in his opening statement. Mr.Gacho points to (TT)AA138-Line 18-24, and argues that these questions are so specific, that there evidence that (Mr.Bartolementi) was not getting the testimony in which he expected from Mr.Gacho, and therefore supports Mr.Gacho's claim (Mr.Bartolementi) had no knowledge of the changes (Ms.Makowski) instucted Mr.Gacho to make.

Mr.Gacho points to (Ms.Makowski's) examination of Jessica Drowns,and her closing agu arguement to support his claim (Ms.Makowski)instructed him to change his testimony. See (TT) AA 101-104, (TT) AA161 line 21- AA 162 line 14 , AA163 line 1-6.

Mr.Gacho argues it is evident from (Ms.Makowski's) examination of Ms.Drowns and her closing arguement that she was attempting to negate any evidence of premeditation. Furthermore, Mr.Gacho argues (Ms.Makowski's) closing arguement AT (TT) AA 161 line 21- AA 162 line 14 directly contradicted the line of fact promised in (Mr.Bartolementi's) opening statement. AT (TT) AA 18 line 15-18 surely affecting the credibility of the defense.

Mr.Gacho argues he received constitutionally ineffective representation, and the identified acts of counsel were outside the range of professionally compentent assistance. Also Mr.Gacho argues the action which caused the i ineffective representation wast the prouduct of inattention rather than a strategic decision. Mr.Gacho argues by (Ms.Makowski) being unaware and uninformed of the defense prior to the commencement of trial, is what caused her to instruct Mr.Gacho to change his testimony. By (Ms.Makowski) instructin Mr.Gacho to change his testimony, she instructed him to commit perjury, she ineffectively abandoned (Mr.Bartolementi's) prearranged defense and trial strategy, and she did so without informing (Mr.Bartolementi) she had done so. Mr.Gacho arhues he was in an adversarial tug of war between his coun counselors. Both were actively working different trial strategies. Both had different directions and objectives in which they were directing the defense. Both of which were unknown to the other.

As a result Mr.Gacho argues he was prejudice, in that he was deprived of a defense carried out by effective assistance of counsel. Wre it not for (Ms.Makowski) instructing Mr.Gacho to say he seen Ms.Drowns walk into the alley, and followed her in. Which led Mr.Gacho to say he intiated thecontact , and look like the aggressor, whichnegated the defense of self-defense. The outcome of the trial could've been diferent.

Mr.Gacho'sDUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER BOTH THE FOURTEENTH (14th) AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1. SECTION 2. OF THE ILLINOIS CONSTITUTION WERE VIOLATED.

Mr.Gacho argues his rights to Due Process and Equal Protection were violated, by the Appellate Court not addressing seperately his as-applied claim, raised under both the EIGHTH AMENDMENT of the U.S. CONSTITUTION, AND UNDER ARTICLE 1. §11. OF THE ILLINOIS CONSTITUTION MR.GACHO STATES THAT ON HIS DIRECT APPEAL HE ARGUED THAT THE Application of the mandatory 25 year-life firearm sentencing in-conjunction with the Truth-in-sentencing provisions were unconstitutional as-applied under both the EIGHTH AMENDMENT of the U.S. CONSTITUTION and ARTICLE 1. § 11. of the ILLINOIS CONSTITUTION.

MR.GACHO ARGUES THE FIRST DISTRICT SECOND DIVISION APPELLATE COURT errored, by denying his as-applied ART 1. § 11. claim without addressing it seperately from the EIGHTH AMENDMENT. The Appellate Court in denying Mr.Gacho's ART 1. § 11. claim stated "The Illinois Supreme Court has stated the " The Illinois proportionate penalties clause is co-extensive with the EIGHTH AMENDMENT'S cruel and unusual punishment clause". **PATTERSON, 2014 IL 115102, ¶ 106. THEREFORE, FOR THE SAME REASON DEFENDAN'S eighth amendment CHALLENGE FAILED, HIS PROPORTIONAT E PENALTIES** clause challenge must also fail. **PATTERSON, 2014 IL 115102, ¶ 106;** ALSO SEE **PEOBLE** V. BANKS, **2015 IL APP (1st) 130985, ¶ 24".** People v. Gacho, 2016 IL App (1st) 140896-U, ¶22. Mr.Gacho argues the Appellate court misinterpreted **PATTERSON'S ¶106,** and improperely applied it to Mr.Gacho's ART 1. §11. claim.

People v. Patterson, 2014 IL 115102 (2014), ¶ 106, states " **Therefore, in the absence of of actual punishment imposed by the transfer statute, defendants Eighth Amendment challenge cannot stand.** See Ingraham v. Wright, 430 U.S. 651, 671n. 40, 97 S.Ct. 1401, 51 L.ed 2d 711. Because the Illinois proportionate penalties clause is co-extensive with the Eighth Amendments cruel and unusual clause (In re Rodney H., 223 Ill. 2d 510, 518, 308 Ill. dec.292, 861 N.E.2d 623 (2006)), we also reject defendant's challenge under our state constitution". The Appellate court in Gacho interprets Patterson, ¶106 as if every claim raised thATfails under the Eighth Amendment, must also fail under ART 1. §11.. MrGacho arguues their interpretation is incorrect, and incosistent with a later opinion of theirs in **People v. Harris, 2016 IL App (1st) 141744 (2016), ¶ 35-38.**

Mr.Gacho argues a more logical interpretation of Patterson's, ¶ 106 can be found in People v. Gipson, 2015 IL App (1st) 122451 (2015), ¶70 which states in relevant part, " we do not belive the court intended to depart from its prior statements inn Clemons; Rather, itappears the court meant only that k like the Eighth Amendment, the proportionat penalties clause does not apply unless a penalty has benn imposed. See People v.Boeckmann, 238 ILL. 2d 1, 16-17,

342 ILL .Dec.537, 932 N.E. 2d 998 (2010) (Finding that the Eighth Amendment and the Proportionate penalties clause are " coextensive" in that both require the government y to inflict punishment)".

Furthermore, the Appellate Court who deinied Mr.Gacho's ART 1. § 11. claim, The First D District Second Division, just four months later in **PEOPLE V. HARRIS, 2016 IL APP (1st) 141744, ¶ 35-38** abandoned their following of Patterson, ¶ 106.
Therefore, in light of the Appellate Court's revised interpretation of Patterson, ¶ 106 Mr.Gacho argues the denial of his ART 1. § 11. claim was the result of manifest error. The controlling precedent at the time the Appellate court denied Mr.Gacho's ART 1. § 11. was and still is **PEOPLE V. CLEMONS, 2012 IL 107821 (2012).** The Appellate court in H People v. Harris, 2016 IL App (1st) 141744, ¶ 38 admitted that " That Patterson did not abrogate Clemons and that the Proportionate penalties clause is more expansive than its federal counter part". Therefore, Mr.Gacho's as-applied ARTICLE 1. SECTION 11. claim shouldve been adressed seperately from the Eighhth amendment.

Since Mr.Gacho;s Article 1. Section 11. claim was improperly denied due to manifest error, wh which resulted in a violation of Mr.Gacho's due process and equal protection rights Mr. Gacho asks that this court adress his as-applied Article 1. Section 11. claim contained in Post- conviction petition.

MR.GACHO'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL UNDER ARTICLE 1. SECTION 8. OF THE ILLINOIS CONSTITION WAS VIOLATED.
Mr.Gacho argues he expressed received ineffective assistance of Appellate counsel by Meredith N. Baron of the state appellate defenders office, for not raising in Mr.Gacho's petition for leave to appeal in the Illinois Supreme Court, that the denial of his Article 1. Section 11. claim was the result of manifest error. Also for not incorporating into the P.L.A. Mr.Gacho's challenge to the imposition of the mandatory 25 year firearm enhancement being unconstitutio nal under the Eighth Amendment, which failure to do so may have resulted in procedural default of said claim for any potential federal review.

Mr.Gacho argues he expressed his concern about the absence of the firearm enhancement claim from the P.L.A.to(Ms.Baron) See Exhibits # 3-6. Mr.Gacho states he informed(Ms.Baron) he was unwilling to forfeit said claim from any potential ILL.S.CT review or any potential Federal review. Mr.Gacho requested (Ms.Baron) to incorporate said claim, at the very least for preservation purposes.

Mr.Gacho argues (Ms.Baron) blatantly disregarded his request, knowing that failure to pl place said claim infront of highest state court would result in Federal procedural default of said claim.

Also any potential forfeiture, waiver, or procedural default of this claim is the result of ineffective assistance of appellate counsel.

MR.GACHO'S SIXTH (6th) AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO ARTICLE 1. SECTION 8. OF THE ILLINOIS CONSTITUTION WERE VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr.Gacho argues counsel was ineffective for failing to argue that Mr.Gacho was eligible for sentencing under 8-4 (c),(1),(E) of the criminal code of 1961(720 ILCS 5/8-4 (c),(1),(E)(WEST 2010)).

Mr.Gacho argues, based on the states' conclusion of the evidencein their closing arguement see (TT) AA-157, line9-24-AA-158,line 4. The state suggest Mr.Gacho committed this offense out of an act of rage, see (TT)AA-157,line 19 an act of rage resulting from Mr.Gacho catching Mario Palomino with his girl, see (TT)AA-158,line 1-4. Also the state submitted Jessica Drowns' testimony "is a credible evaluation of what happened that night"see(TT)AA-156,line22-24 .If the state accepts Ms.DRowns' testimony as a credible evaluation of what happened that night, they also accept Ms.Drowns' testimony that as her and Mr.Palomino were walking they were kissing and holding hands,this continued as they walked into the alley. All the way up to the point the suv pulled up that Mr.Gacho exited from.see(TT)AA-76-78.

Mr.Gacho argues all of the above is supportive of a filing to be sentenced under 720 ILCS 5/8-4 (c),(1),(E) (WEST 2010), the filing of such a motion had only potential for up side and no potential down side. Also a filing of this motion is not without merit, basedon the testimony and evidence presented by the state.

Mr.Gacho argues a compelling arguement could've been presented to support a filing to be sentenced under 720 ILCS 5/8-4 (c),(1),(E).Also any potential forfeiture, waiver, or procedural default of this claim is the result of ineffective assistance of both trial and appellate counsel.

MR.GACHO'S SIXTH (6th) AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO ARTICLE 1. SECTION 8. OF THE ILLINOIS CONSTITUTION WERE VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr.Gacho argues he was provided ineffective assistance of counsel due to a conflict of interest between his trial attorney (Donna Makowski) and a potential state witness Carl Freemon.

Mr.Gacho states, that Carl Freemon was the first person named by eye witness Jessica Drowns as the person who shot Mario Palomino. SEE Exhibit #8 PG.2

Mr.Gacho states, Carl Freemon is a friend of Mario Palomino and evidence can be found in the record by Mario Palomino's own testimony. See(TT)AA-50,line 3-7.

MR.Gacho states, Carl Freemon was preserved as a potential state witness, in an answer to discovery, were the state preserved their right to call as witness any person named in the police reports. See Exhibit # 9

Mr.Gacho states, (Mr.Bartolementi) informed him he was attempting to locate Carl Freemon for an interview.

Mr.Gacho states, he received information from BreAnne Valadez who is the mother of Mr.Gacho's child. She informed Mr.Gacho that she was at a friends house Rosie Blevans, who happens to be related to Carl Freemon. While at her friends house she ran into Carl Freemon. She stated she and Carl Freemon spoke and Carl Freemonstated, he knew Mr.Gacho, he knew of his case, also that he k knew Mr.Gacho's lawyer (Donna Makowski), and he and (Ms.Makowski) had worked together, and she had gotten him out of alot of trouble.
Mr.Gacho further states, that he has been attempting to obtain an affidavit from BreAnne Valadez. Mr.Gacho has been unable to do so.

Mr.Gacho argues that, if (Ms.Makowski) previously represented or simultaneously represented Carl Freemon during pretrial proceedings in this case (Ms.Makowski) would've been working under a conflict of interest.

Mr.Gacho states, that (Ms.Makowski) knew or should've known that (Mr.Bartolemen was attempting to obtain contact information for Carl Freemon, so that he could interview him. If (Ms.Makowski) knew and didn't provide the information, that is an acted on conflict, and she is not acting as conflict free counsel. Because confidentiality keeps her from providing Carl Freemon's contact information, but failure to do so results in depriving Mr.Gacho of an opportunity to potentially obtain exculpatory evidence.

MR.GACHO'S SIXTH (6TH) AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO ARTICLE 1. SECTION 8. OF THE ILLINOIS CONSTITUTION WERE VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr.Gacho argues his trial counsel provided ineffective assistance of counsel, for not emphasizing at sentencing, that at the time of the commission of this offense Mr.Gacho was only 17 years old. Instead (Mr.Bartolementi) repeatedly stated Mr.Gacho was 20 years old, without once reminding the court Mr.Gacho was only 17 years old at the time the offense was committed. See report of proceedings (CC)-14.

Mr.Gacho also argues counsel was ineffective for not clarifying for the record that Mr.Gacho turned himself in. Instead allowing the Judges statement that Mr.Gacho had to be arrested by a fugitive warrants division, stand without clarification knowing it was used to emphasize guilt. See (TT)AA-166,line 23-24; See also Exhibit #1.

Mr.Gacho argues in light of MIller v. Alabama, and all the recent studies pertaining to juvenile offenders culpability, that were available at the time of Mr.Gacho's sentencing. A competent attorney would've realized the significance of emphasizing that Mr.Gacho was only 17 years old at the time of this offense.

MR.GACHO'S SIXTH (6TH) AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO ARTICLE 1. SECTION 8. ~~WERE VIOLATED BY~~ OF THE ILLINOIS WERE VIOLATED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr.Gacho argues that, any potential forfeiture, waiver, or procedural default of any of the issues raised in the post conviction petition stems from the incompetence and ineffectiveness of trial and/or appellate counsel SEe People v. Mauro , 362 Ill.App.3d 440, at444 (2005).

MR.GACHO,S SIXTH (6TH) AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO ARTICLE 1. SECTION 8. OF THE ILLINOIS CONSTITUTION WERE VIOLATED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr.Gacho argues the cumulative effect of all of counsels errors raised in this post-conviction petition, resulted in ineffective assistance of counsel.

MR.GACHO'S RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH (14TH)AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1. SECTION 2. OF THE ILLINOIS CONSTITUTION WERE VIOLATED.

Mr.Gacho argues, the state failed to prove Mr.Gacho had the specific intent to kill in order to sustain a conviction for an attempt to commit first degree murder.

Mr.Gacho argues the evidence presented at trial was, that Mr.Gacho discharged a firearm, strikingMario Palomino, which caused great bodily harm.Other than the discharge of the firearm there is no evidence that substantiates that Mr.Gacho acted with the specific intent to kill.

Mr.Gacho argues, that if the act of discharging the firearm, which caused great bodily harm was used to establish the element that Mr.Gacho acted with the specific intent to kill, requsite to obtain a conviction for attempt to commit first degree murder, than that act has been exhausted, and can not be used to seek the 25 year firearm sentencing enhancement.

THE IMPOSITION OF THE 25YEAR FIREARM SENTENCING ENHANCEMENT TO MR.GACHO'S SENTENCE VIOLATES THE DOUBLE JEOPARDY CLAUSE OF BOTH THE FIFTH (5TH) AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICL 1. SECTION 10. OF THE ILLINOIS CONSTITUTION.

Mr.Gacho states, 720 ILCS 5/8-4 (a), elements of the offens ~~ta~~- states a person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

Mr.Gacho states, in order to obtain a conviction of a violation of chapter 720 act 5 section 8-4 (a) (720-5/9-1(a)(1) of the Illinois compiled statutes 1992, as the charging of information reads. The state would have to proveMr.Gacho had the specific intent to kill, and did any act that constitutes a substantial step toward the commission of first degree murder.

Mr.Gacho states, the charging of information, count 4 ,reads, Nikolas Gacho, committed the offense of, attempted first degree murde, in that he, without lawful justification, with intent to kill, did an act, to wit: shot Mario Palomino while armed with a firearm which constituted a substantial step towards the commission of first degree murder, and during the commission of the offense he personally discharged a firearm that proximately caused great bodily harm to Mario Palomino.

Mr.Gacho argues, the state exhausted the personal discharge of the firearm, by using it as the act which constituted the substantial step towards the commission of first degree murder. Furthermore, since there was no evidencepresented other than the personal discharge of the firearm to substantiate the specific intent to kill,and there is no elaboration as to what was considered to establish the specific intent to kill element, requisite to obtain a conviction. Its only logical to say the personal discharge of the firearm was also used to establish the specific intent to to kill element. Therefore, the sole act of shooting Mario Palomino was used to establish the offense's elements, that resulted in a class X sentence of 10years, and cannot be used to impose the 25 year firearm sentencing enhancement.

THE 25 YEAR-LIFE FIREARM SENTENCING ENHANCEMENT IS UNCONSTITUTIONAL UNDER ARTICLE 1. SECTION 11. OF THE ILLINOIS CONSTITUTION.

Mr.Gacho argues the 25 year to life firearm sentencing enhancement is unconstitutional under ART 1.§ 11. for incorporated in it are four different levels of harm, great bodily harm, permanent disability, permanent disfigurement, and Death. All of which are subject to the same 25~~yae~~ year- liferange.However, ART 1.§11. requires, all penalties shall be determined according to the seriousness of the offense.

Mr.Gacho argues the penaltyfor these different levels of harm were not determinèd according to the seriousness.

C O N C L U S I O N

Wherefore, for the above_stated reasons cited in Mr.Gacho's petition for post-conviction relief, Mr.Gacho respectfully reguset that this Honorable Court grant(s) petitioner the following relief:

1). Make a finding that the claim(s) raised by Mr.Gacho in the instant petition have merit, and advance Mr.Gacho's petition for post-conviction relief to the second-stage of the post-conviction process.

2). Allow Mr.Gacho to proceed in forma pauperis, and appoint petitioner counsel.

3). Make a finding, based on Mr.Gacho's claim(s) and supporting evidence that petitioner's trial counsel (Phillip Bartolementi) and (Donna Makowski), representation fell below an objective standard of reasonableness which rendered their representation of Mr.Gacho deficient; and that as a result, they failed to provide Mr.Gacho with effective assistance of counsel on each of petitioner's claim(s).

4). Make a finding, based on Mr.Gacho's claim(s) and supporting evidence that the cumulative effect of the errors raised resulted in representation that fell below an objective standard of reasonableness which rendered their representation deficient; and that as a result, they failed to provide Mr.Gacho with effective assistance of counsel.

5). Make a finding, that the p appellate court's denial of Mr.Gacho's ART 1. §11. claim was the result of manifest error and this court should address his ART 1.§11. claim seperately from the eighth amendment.

6). Make a finding, that petitioner's appellate counsel was ineffective for not preserving Mr.Gacho's Eighth amendment claim for federal review, and to remedy this constitutional violation address Mr.Gacho's Eighth amendment claim, so petitioner can present said claim to each level of state courts and preserve federal review of the claim.

7). Make a finding (Ms.Makowski) was working under a conflict of interest.

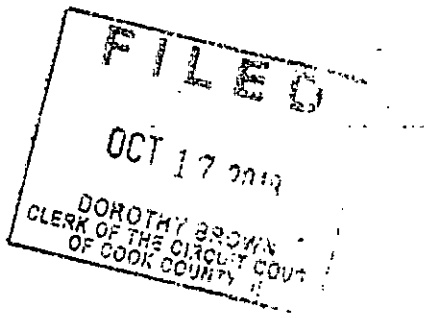
8). Make a finding that any forfeiture, waiver, or procedural default of any issues raised in this post-conviction petition is the result of ineffectiveness of trial and/or appellate counsel.

9). Make a finding the state failed to prove Mr.Gacho had the specific intent to kill.

C O N C L U S I O N

10). Make a finding that the imposition of the 25year firearm sentencing enhancement to Mr.Gacho's sentence violates the double jeopardy clause.

11). Make a finding that the 25year-life firearm sentencing enhancement violates ART 1.§11.



Respectfull Submitted,

/s/ Nikolas Gacho
Nikolas Gacho, pro-se.

Nikolas Gacho
Reg. No. M-43072
Hill Correctional Center
P.O. Box 1700
Galesburg, IL 61402

On 23 May 2011 at 1340 hrs, Nikolas GACHO (IR# 1625289), in the company of his attorney, arrived at the 002nd district desk to surrender himself to the arresting detectives. GACHO was placed in custody and processed accordingly.

Investigative alert # 299965513 was cancelled.

On 23 May 2011 at approximately 1901 hrs, R/d advised Nikolas GACHO of his Miranda rights in the presence of Det. McNally. GACHO invoked his rights and stated he did not wish to speak to r/d regarding this case. The interview was then ended.

R/d contacted the office of felony review and was instructed to contact the listed witness Sampson Yuen, 3229 S. Wallace to re-interview him regarding this case. R/d contacted Yuen via telephone at approximately 1940 hrs. Yuen stated he saw nothing regarding this case. Yuen re-iterated he heard cries for help and called 911. He could provide no further information.

R/d was also instructed to interview Adam Oczkowski, M/2/24 who was believed to have driven GACHO from his (GACHO's) residence at 7732 S. Mobile on 09 Jun 2010 in a gold colored car. R/d contacted Oczkowski via telephone at 1955 hrs. Oczkowski stated he used to own a gold colored Chevy Malibu but thought he wrecked it before June of 2010. Oczkowski stated he doesn't remember if he picked up GACHO or not, and that he probably didn't get off work at U.P.S until after 0300 hrs. he could add nothing more.

A.S.A. Jamie Dickler reviewed the facts of this case and approved a charge of Aggravated Battery:Firearm against GACHO at 2100 hrs on 23 May 11.

During the initial investigation on 09 Jun 10, a safe was recovered from GACHO's residence at 7732 S. Mobile. (See Patrol Division Supplementary Report) At that time, the recovering officers were instructed by A.S.A Simpson to not obtain a search warrant for the contents until the investigation was further along. It was inventoried under #12162913.

R/d obtained a search warrant (Inv#12417350) on 24 May 11 and, in the presence of Sgt. Bowden #816 at the CPD bulk storage warehouse, opened it at 1220 hrs. The safe contained miscellaneous papers and car keys which were inventoried under #12322821.

Base don the above r/d requests this case be Cleared Closed (Arrest and Prosecution).

Det. W. Marley #20182

Exhibit # 2

AFFIDAVIT

JUDGE LACY
CASE # 11CR 9879 01

THROUGHOUT THE PRELIMINARY PROCESS LEADING UP TO TRIAL THE LAWYES TOLD ME, JUDY MACEDO, THAT THIS CASE HELD SENTENCE OF 6-30 YEARS. THE DAY OF TRIAL THE TATES ATTORNEY INFORMED ME THAT ~~SHE~~ WAS ASKING FOR THE GUN ENHANCEMENT AND THAT THIS CASE CARRIED A 31-LIFE ENTENCE WHICH I WAS NOT INFORMED PREVIOUSLY.

SIGNED ON THIS DAY 8TH OF SEPTEMBER, 2018

JUDY MACEDO
Judy Macedo
AFFIANT

DAWID KOMPERDA
Official Seal
Notary Public – State of Illinois
My Commission Expires May 24, 2021

SIGNED AND SWORN TO BEFORE ME THIS DAY 8th OF September, 2018

NOTARY PUBLIC

EXHIBIT 3.

OFFICE OF THE STATE APPELLATE DEFENDER
FIRST JUDICIAL DISTRICT

203 North LaSalle Street • 24th Floor
Chicago, Illinois 60601
Telephone: 312/814-5472 • Fax: 312/814-1447
www.state.il.us/defender • E-mail: 1stDistrict@osad.state.il.us

MICHAEL J. PELLETIER
STATE APPELLATE DEFENDER

PATRICIA MYSZA
DEPUTY DEFENDER

BARBARA C. KAMM
ASSISTANT DEPUTY DEFENDER

MEREDITH N. BARON
ASSISTANT APPELLATE DEFENDER

September 26, 2016

Mr. Nikolas Gacho
Register No. M43072
Menard Correctional Center
PO Box 1000
Menard, IL 62259

RE: ***People v. Nikolas Gacho***
Cook County No. 11 CR 9879
Appellate Court No. 1-14-0896

Dear Mr. Gacho:

Enclosed find a copy of the petition for leave to appeal that has been filed on your behalf. It could be several months before the Illinois Supreme Court decides whether to review your case. I will let you know when the court rules on the petition.

If you have any questions, do not hesitate to contact me.

Sincerely,

MEREDITH N. BARON
Assistant Appellate Defender

EXHIBIT 4.

LEGAL MAIL RECEIPT

MENARD CORRECTIONAL CENTER, MENARD, IL 62259

RESIDENT: GACHO REGISTER NO.: N43072 LOCATION: NL 435

FROM MAIL OFFICE

DATE: 10/3/16

LEGAL MAIL FROM: SAO

CHI

SIGNATURES: _____
OFFICER HANDING OUT LEGAL MAIL DATE: 10-3-16

Nicholas Gacho
INMATE RECEIVING LEGAL MAIL DATE: 10-3-16

PLEASE RETURN THIS FORM TO THE MAIL OFFICE. THANK YOU.

IL 429-8298
DCA-18174

Ms. Baron 10-3-16

EXHIBIT 5.

Hello Ms. Baron, I'm writing to inform you that I received the Plea you filed on my behalf. I feel you did a very good job, and I would like to thank you I very much appreciate you I do have some questions. If the Supreme court was to grant the Plea would they only address the issue within the Plea or would they adress all the issues that where raised in the Appellate court? If I'm correct ~~that impression~~ in order for potential Federal review all issues must be presented and preserved at all stages of state court proceedings, and failure to do so would result in procedural default of claim for Federal review. Now if the Illinois Supreme court where to deny the Plea would I be limited to what was preserved in the Plea or would I be able to put all the issues raised in the Appellate court in my writ of certiorari! Because I want to make sure to preserve all the issues that where raised in the Appellate court. Especially the Mandatory imposition of the firearm enhancement claim, which I feel is very important

I feel uncomfortable not impl incorporating it in Pla at the very least for preservation. Must me do so in order for me to put it in my writ of certiorari, and if I must do so can you please help me to do this, for I fully intend to file a writ of certiorari and I would not want to forfeit this claim. Also I would really like to place it in front of the Illinois Supreme Court for their potential ~~opion~~ opinion on it as well. I also would not want to forfeit their review of this issue. If there is nothing you can do to help me with this, how can I go about doing it myself. Well thank you very much Ms. Baron if you could please respond via letter I would appreciate it.

Sincerely,

Nikolas Dacho

FC

PC

WRITTEN REPLICA

Ms. Baron

EXHIBIT 6.

10-18-16

Hello Ms. Baron, I haven't received a response to my last letter dated 10-3-16. well in that letter I had some questions and ~~[illegible]~~ concerns. I expressed that I didn't want to forfeit the firearm enhancement claim for either potential Illinois Supreme Court review or potential Federal Court review. ~~[illegible]~~ I've put together to the best of my abilities an argument for the firearm enhancement, to be incorporated into the Petition for leave to Appeal. I'm hoping you will decide to encorporate this argument into the Pla, so then you can put your professional touch on it. In the event you dont respond or decide ~~to~~ your not going to incorporate the issue, I will ~~be~~ attempt to file a motion to supplement the Pla. I would be far more comfortable and very thankful if you would help me with this please. I'm no ~~[illegible]~~ Lawyer as you can see as much as I try I cant construct this argument the way I know you can. ~~But I [illegible] feel like~~ I ~~[illegible]~~ would like to speak to you, so if you can please get back to me, I would truly appreciate it.

Sincerely,

Exhibit # 7

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, Illinois 60601-3103
(312) 793-1332
TDD: (312) 793-6185

November 8, 2016

Nikolas Gacho
Reg. No. M-43072
Menard Correctional Center
P.O. Box 1000
Menrd, Illinois 62259

Re: People State of Illinois, respondent, v. Nikolas Gacho, petitioner. Leave to appeal, Appellate Court, First District, No. 1-14-0896. No. 121344

Dear Mr. Gacho:

This is to acknowledge receipt of your motion to supplement the above-mentioned petition for leave to appeal on November 4, 2016. Your submission is being returned to you unfiled with this letter.

You are advised that since you have legal representation in the Supreme Court by State Appellate Defender Meredith Baron, you cannot file *pro se* documents in this case. The appearance of Ms. Baron on your behalf constitutes your legal presence in this proceeding, and the legal representative is the one who files the documents. Please be advised that this practice is premised on well-established principles of legal representation, and the Supreme Court has held that a defendant has no right to both self-representation and the assistance of counsel. See People v. McDonald, 168 Ill. 2d 420, 434 (1995), and People v. Barrow, 195 Ill. 2d 506, 540 (2001).

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

CTG/as
Enclosure

met with Beat unit 924R, P.O. KILLMER #5095 who informed R/d of the following, in summary account of the incident. KILLMER stated that he and his partner P.O. VAZQUEZ #16531 had been assigned to respond to a call via OEC of "Shot's fired in the area of 3200 South Parnell Ave. KILLMER stated that upon touring the area they observed a M/2 lying in a gang way at approximately 3226 South Parnell Ave. KILLMER stated that upon interview it was learned that the victim's name was Mario S. PALOMINO Jr. PALOMINO stated that he was walking down the alley N/B with a F/2 he knows as Jessica DROWNS. Palomino stated that as he and Jessica reached the above location a M/2 known to him as "Nick" approached in a Blue /Blue Suburban, SUV. This M/2 known to him as "Nick" then exited the vehicle produced a C/S handgun and fired 3-4 times striking PALOMINO in the back. PALOMINO then informed KILLMER that the offender known to him as "Nick" then got back into the stated vehicle and fled the scene in an unknown direction. PALOMINO stated that the M/2 known to him as "Nick" was a known member of the street gang known as the "Insane Popes".

KILLMER stated that also at the scene was a witness who identified himself as Sampson YUEN was reported that he was asleep when he heard 4 "pops" that woke him up. YUEN stated that he then went to see what had made the noise and heard voices screaming and another voice saying "Help me, help me". YUEN then informed KILLMER that it was him that had called the police. R/d then met with Evidence Tech., P.O. POLAND #13825 and requested that all physical evidence be collected and inventoried.

R/d then proceeded to Stroger Hospital and was informed by hospital that the victim known as Mario S. PALOMINO Jr. was now being treated in cubical #6 by Dr. ROBERTS. As R/d entered the emergency room area he was approached by an M/4 who stated that his name was Mario S. PALOMINO Sr. Mr. PALOMINO Sr. then stated the following, in summary, and not verbatim. PALOMINO Sr. stated that he had spoke to his son and that his son had that he was walking a girl home from a party held at 3347 South Wallace Street. PALOMINO Sr. stated that his son then said that the girl he was walking home told him that he had better leave because she heard the person(s) in the van had yelled something to them. PALOMINO Sr. stated that his son then told him that a blue/blue SUV then went around the block and returned a short time later. PALOMINO Sr. stated that his son stated that he recognized the person that then jumped out of the SUV as "Nick" who had produced a handgun and fired 3-4 times at him as he attempted to run N/B down the alleyway. PALOMINO Sr. stated that he then felt pain in his back, fell to the ground near a gangway, and then crawled into this gangway in an attempt to get out of the line of fire. PALOMINO Sr. stated that his son then told him that he yelled for someone to help him. PALOMINO Sr. stated that his son had told him that "Nick" had shot him, but that he did not understand why. PALOMINO Sr. Stated that he knows the offender named by his son but that he could not recall the offenders last name.
PALOMINO Sr. then informed R/d that he used to work with the father of "Nick" and that he could take R/d to the house where "Nick" lived. R/d then asked PALOMINO Sr. to accompany him, and to direct R/d to the home of the named offender known to him as "Nick". PALOMINO Sr. then directed r/d to 3117 South Throop Street and stated that where "Nick" lives. R/d then returned with PALOMINO Sr. to the Stroger Hospital in an attempt to interview the victim.

R/d again entered the emergency room and to cubical #6. Upon entry R/d stated his office to Mario S. PALOMINO Jr. and informed him of his reason for interview. R/d was able to confirm that the victim had known the offender "Nick" for several years because they were class mates a Tilden H.S. The interview was then ended by instruction of Dr. ROBERTS.

R/d then returned to the Area One Division and was informed that the female witness that was walking with PALOMINO at the time of the shooting had been located and that she wished to make a statement. R/d was then informed that the female had been identified as Jessica Lynn DROWN. R/d then entered interview room #1 and stated his office. R/d then asked Ms. DROWN to relate the chain of events leading to the shooting of PALOMINO Jr. Ms. DROWNS gave several different

accounts of how the shooting took place and named Carl FREEMAN as the person she had scene firing a handgun at PALOMINO. After continuing to question DROWNS, she stated that she had not been honest with R/d and that her boyfriend, Nikolas GACHO was the shooter. R/d then by use of Police assists produced a computer generated photo of Nikolas J. GACHO. DROWN then identified this photo IR#1625289 as being a photo of her boyfriend, and stated that Nikolas J. GACHO was the person who had fired several shots at the victim.

Based on the identification by Jessica DROWNS' of Nikolas GACHO IR# 1625289 as the person who had shot Mario PALOMINO, Det. William MARLEY #20182 contacted Felony Review. ASA James PONTRELLI then responded into the Area One Detective Division. ASA PONTRELLI then interviewed Jessica DROWNS. This interview of DROWNS was then recorded in written form. Jessica DROWNS was then allowed to read this written statement and to make any corrections or changes that she wished. This statement was then signed by ASA PONTRELLI, Jessica DROWNS and Det. MARLEY.

Det. MARLEY then issued an Investigative Alert #299965513 for the arrest of Nikolas GACHO IR# 1625289.

Based on the stated facts, R/d request that this case be classified as "Suspended", pending the arrest of Nikolas GACHO.

REPORT OF: DET. TURNER, E. #20069 BEAT 5134
DET. MARLEY, W. #20182 BEAT 5126

Exhibit # 9

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

FILED
JUL 07 2011
DOROTHY BROWN
CLERK OF CIRCUIT COURT

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.)
Nikolas Sacho No. 11CR9839

ANSWER TO DISCOVERY

Now come the PEOPLE OF THE STATE OF ILLINOIS, through ANITA ALVAREZ, State's Attorney for Cook County, and answer the defendant's motion for discovery as follows:

1. State may call as witnesses any person named in the police reports, transcripts, medical reports and other documents attached to and incorporated as part of this answer.

2. All items set forth in said documents may be used at trial as physical evidence and will be available for inspection at a reasonable date, time and place upon request.

3. Statements of persons State may call as witnesses; statements made by defendant or co-defendant and list of witnesses to the making; date, time and place of occurrence; process used to seize evidence and identification procedure are in above said documents.

4. Grand Jury transcript as described in Supreme Court Rule 412 (iv) available upon receipt.

5. Reports of experts and examination results, if any, will be tendered to defense upon receipt.

6. No known record of criminal convictions which can be used for impeachment of intended State witnesses and no electronic surveillance of accused or his premises.

7. No known material or information within possession or control of State which tends to negate guilt or accused or reduce punishment of accused.

8. PURSUANT TO SUPREME COURT RULE 415 (C) MATERIALS FURNISHED TO ATTORNEY SHALL REMAIN IN HIS EXCLUSIVE CUSTODY AND BE USED ONLY FOR THE PURPOSE OF CONDUCTING HIS SIDE OF THE CASE.

ANITA ALVAREZ
State's Attorney of Cook County
Bonnie J. Greenstein

BY: Bonnie Greenstein
Assistant State's Attorney

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

I, NIKOLAS GACHO, hereby declare under penalty of perjury that the following is true and correct based upon my personal knowledge and that I am competent to testify thereto if called upon as a witness.

IT WASN'T UNTIL THE DAY OF TRIAL DECEMBER 4, 2013, THAT I WAS INFORMED FOR THE FIRST TIME THAT I WAS SUBJECT TO A MANDATORY 25 YEAR TO LIFE FIREARM SENTENCING ENHANCEMENT, AND A SENTENCING RANGE OF 31 YEARS TO LIFE. PRIOR TO DECEMBER 4, 2013 I HAD NOT BEEN INFORMED OF THIS ENHANCEMENT OR SENTENCING RANGE BY EITHER THE TRIAL COURT OR MY TRIAL ATTORNEYS. OVER THE 31 MONTH PREPERATION OF THE DEFENSE I WAS INFORMED THAT I WAS FACING 6-30 YEARS, AND ASSURED THAT BY ME BEING ONLY 17 YEARS OLD AT THE TIME OF THE OFFENSE WAS COMMITTED. THERE WAS NO WAY EVEN IF WE LOST AT TRIAL, THE JUDGE WOULD GIVE ME ANYTHING NEAR 30 YEARS. EVERYTHING THAT HAD BEEN PLANNED AND CONSIDERED, HAD BEEN DONE SO WITH ME THINKING MY SENTENCING RANGE WAS 6-30 YEARS, AND ALSO THE ASSURANCE THAT BY ME BEING ONLY 17 EVEN IF WE LOST AT TRIAL THE JUDGE WOULDN'T GIVE ME ANYTHING NEAR 30 YEARS HAD I BEEN INFORMED OF THE CORRECT SENTENCING RANGE OF 31 YEARS TO LIFE FROM THE BEGINNING OF REPRESENTATION I WOULD'VE NEVER EVEN CONSIDERED GOING TO TRIAL. HAD MY TRIAL ATTORNEYS ADVISED ME TO ACCEPT THE 20 YEAR OFFER I WOULD'VE DONE SO. HAD THEY NOT REFUSED TO SEEK A CONTINUANCE, SO I COULD RE-ASSESS MY OPTIONS IN LIGHT OF THE SIGNIFICANT SHIFT IN THE SENTENCING RANGE AND SPEAK TO MY FAMILY. I WOULD'VE ACCEPTED THE 20 YEAR OFFER.

Nikolas Gacho
AFFIANT

State of Illinois
County of Cook

Signed and sworn (or affirmed) to before me on 21st day of October, 2018 (date) by Nikolas Gacho (name's of person s making statement).

(Seal)

AIMEE BEQUETTE-CHANEY
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
April 16, 2022

Aimee Bequette Chaney
Signature of Notary Public

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

I, NIKOLAS GRACHO, hereby declare under penalty of perjury that the following is true and correct based upon my personal knowledge and that I am competent to testify thereto if called upon as a witness.

PRIOR TO ME GETTING ON THE STAND TO TESTIFY ON MY OWN BEHALF, MY TRIAL ATTORNEY DONNA MAKOWSKI INSTRUCTED ME TO MAKE THE FOLLOWING CHANGES TO MY TESTIMONY. SHE INSTRUCTED ME NOT TO SAY JESSICA AND I HAD A PREARRANGED PLAN FOR ME TO PICK HER UP IN THAT ALLEY. ALSO NOT TO SAY I WAS ALREADY PARKED IN THAT ALLEY WAITING TO PICK JESSICA UP. SHE THE INSTRUCTED ME TO SAY I SEEN JESSICA WALK INTO THE ALLEY, AND I FOLLOWED HER IN. ALL OF THESE CHANGES SHE INSTRUCTED WERE MADE OUTSIDE THE PRESENCE OF PHILLIP BARTOLEMENTI. TO MY KNOWLEDGE MS MAKOWSKI NEVER INFORMED PHILLIP BARTOLEMENTI OF THE CHANGES SHE INSTRUCTED ME TO MAKE.

Nikolas Gracho
AFFIANT

State of Illinois
County of Kane

Signed and sworn (or affirmed) to before me on 25th day of September 2018 (date) by Nikolas Gracho (name s of person s making statement).

Aimee Bequette Chaney
(Signature of Notary Public)

(Seal)

AIMEE BEQUETTE-CHANEY
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
April 16, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

I, NIKOLAS GACHO, hereby declare under penalty of perjury that the following is true and correct based upon my personal knowledge and that I am competent to testify thereto if called upon as a witness.

I HAVE READ THE ATTACHED PETITION FOR POST-CONVICTION RELIEF, AND THE FACTS STATED THEREIN ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Nikolas Gacho
AFFIANT

State of Illinois
County of Lake

Signed and sworn (or affirmed) to before me on Saturday September 2018 (date) by Nikolas Gacho (name of person making statement).

(Seal)

AIMEE BEQUETTE-CHANEY
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
April 16, 2022

Aimee Bequette Chaney
(Signature of Notary Public)

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1ST JUDICIAL DISTRICT

FILED
OCT 17 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

Vs.

NIKOLAS GACHO
Defendant/Respondent

No. 11-CR-9879

PROOF/CERTIFICATE OF SERVICE

TO: COOK COUNTY STATES ATTORNEY'S OFFICE
2650 S. CALIFORNIA, 11TH FL
CHICAGO, IL 60608

TO: CLERK OF THE CIRCUIT COURT
2650 S. CALIFORNIA, ROOM 526
CHICAGO, IL 60608

PLEASE TAKE NOTICE that at: _____ AM/PM 10-9, 2018, I placed the documents listed below in the institutional mail at HILL Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service.

Pursuant to 28 USC 1746, 18 USC 1621 or 735 ILCS 5/1-109 I declare, under penalty of perjury that I am a named party in the above action, that I have read the above documents, and that the information contained therein is true and correct to the best of my knowledge and belief.

DATED: 10-9-2018

/s/ Nikolas Gacho
Name: NIKOLAS GACHO
IDOC No. M-43072
HILL Correctional Ctr.
POB 1700
GALESBURG, IL

Revised 4/15/16