No. 123010

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DERRELL DORSEY Petitioner-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-15-1124. There on appeal from the Circuit Court of Cook County, Illinois , No. 96 CR 21035. Honorable William G. Lacy, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

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

COUNSEL FOR PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
8/3/2020 8:56 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

Page

Applicable Law

Cause and Prejudice

NATURE OF THE CASE

Derrell Dorsey, Petitioner-Appellant, appeals from the First District Appellate Court's unpublished order affirming the circuit court's ruling denying Dorsey leave to file a successive post-conviction petition. Dorsey raises an issue concerning the sufficiency of the post-conviction pleadings.

ISSUE PRESENTED FOR REVIEW

In his *pro se* successive post-conviction petition of 2014, Derrell Dorsey alleged his 76-year aggregate sentence for offenses committed when he was 14 years old is unconstitutional under the Supreme Court's opinion in *Miller v. Alabama*, 567 U.S. 460 (2012). In affirming the denial of leave to file the petition, the First District Appellate Court found Dorsey established cause for not raising this issue in his initial post-conviction petition in 2005. The appellate court concluded, however, that Dorsey failed to establish prejudice. According to the appellate court, Dorsey's eligibility for day-for-day sentencing credit precluded a finding that his sentence constitutes a *de facto* life sentence, a proposition the First District has subsequently rejected in two published opinions. Where Dorsey's successive petition established prejudice for his juvenile sentencing claim – whether or not eligibility for day-for-day sentence credit is considered – did the appellate court err in denying Dorsey leave to file the petition?

JURISDICTION

Derrell Dorsey, Petitioner-Appellant, appeals the First District Appellate Court's unpublished order affirming the denial of leave to file a successive post-conviction petition. This Court granted leave to appeal on March 25, 2020. Jurisdiction lies in this Court, therefore, pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rule 315(a).

STATEMENT OF FACTS

Trial Proceedings

In 1996, 14-year-old Derrell Dorsey was charged with having committed the first-degree murder of Tyran Snow and the attempt murders of Irene Williams and Calvin Sims. (Tc. 159).[1] After a juvenile transfer hearing, the trial court granted the State's motion to prosecute Dorsey as an adult. (Tc. 31, 50). At trial, Williams and Sims testified that they went to a carry-out restaurant in Chicago, around 7:00 p.m., on March 11, 1996. (Tr. D228, 230, E71, 101)*; People v. Dorsey*, 2016 IL App (1st) 151124-U, ¶¶3-4 (unpublished order of November 2, 2017). Williams and Sims testified that the west door of the restaurant suddenly opened, and that a person they identified as Dorsey, a member of the Blackstone gang, fired four shots inside the restaurant. (Tr. D233-42, D252-53, D308, E77-81); *Dorsey*, 2016 IL App (1st) 151124-U, ¶¶3-4. The first two shots fatally struck Tyran Snow. (Tr. D239, E82); *Id*. The third shot struck Sims and the fourth shot struck Williams. (Tr. D240-41, 245-46, 278, E82-83); *Id*.

The day Sims was released from the hospital, police appeared at his house and showed him a class photograph that included Dorsey and 16 classmates; Sims identified Dorsey as the shooter. (Tr. E93-94, 96, 74-77); *Dorsey*, 2016 IL App (1st) 151124-U at ¶4.

A jury convicted Dorsey of the first-degree murder of Snow and the attempt murders of Sims and Williams. (Tc. 68-70)*; Dorsey*, 2016 IL App (1st) 151124-U at ¶5. At a subsequent

---

[1]Citations to the common law and report of proceedings from trial are indicated by (Tc. __) and (Tr. __) citations, respectively. Citations to the common law and report of proceedings from appeal number 1-05-2480 are indicated by (PC1. __) and (PR1. __) citations, respectively. Citations to the common law and report of proceedings from appeal number 1-11-2856 are indicated by (PC2. __) and (PR2.__) citations. Citations to the common law and report of proceedings from appeal number 1-13-0875 are indicated by (PC3. __) and (PR3.__) citations. Citations to the common law and report of proceedings from the post-conviction proceedings underlying the instant appeal, 1-15-1124, are indicated by (C. __) and (R. __) citations.

sentencing hearing, the State presented victim impact statements in aggravation, and testimony from another juvenile in custody. *Id*. The State also argued that Dorsey was on probation for a juvenile offense at the time of this offense. *Id*.

Dorsey presented several letters written on his behalf in mitigation, and testimony from his aunt and his cousin, who testified, respectively, that Dorsey was "a good kid" and "a good boy." (Tr. G33-34, 37-38); *Dorsey*, 2016 IL App (1st) 151124-U at ¶6.

In imposing a 76-year sentence, the trial judge said:

> I have taken into consideration the nature and character of this offense. I have taken into consideration history and character of the defendant.
>
> As you know I presided over this trial and I'm very familiar with the facts with regard to this matter. I've considered the pre-sentence investigation. All the evidence and arguments that were presented here today. In aggravation and mitigation. And I have reviewed and considered the statutory factors in aggravation and the statutory factors in mitigation.
>
> In reviewing the statutory factors in aggravation and mitigation, court does note that the defendant's conduct in this matter caused and threatened serious harm to others. Obviously the charges to which the defendant has been convicted inherently recognize harm to certain individuals.
>
> However, I do note that outside of Tyran Snow, Irene Williams and Calvin Simms [*sic*], the defendant's conduct threatened serious harm to other individuals that were in that restaurant, including the other individual who was named to be inside the waiting area and the individual[s] that were working in the restaurant. Their safety was certainly put in jeopardy by this attack by the defendant. So I find that that factor in aggravation certainly is applies [*sic*].
>
> I have also taken into consideration the fact that the defendant has a history of prior delinquency. He has had the benefit as a result of his wardship, of the juvenile probation authorities and apparently that was ... unsuccessful.
>
> In mitigation, obviously I recognize the youth of [Dorsey]. In some respects, I would say that [Dorsey] might count himself to be a fortunate person. Because those of us that are intimately familiar with the facts of this incident, know that it was certainly just a fortuitous happening that [Dorsey] only killed one person. And injured two others. Because from the nature of this attack that he launched on that restaurant, that evening, it would be very possible that [Dorsey] would be sitting here charged with four murders. And facing a life sentence in prison.
>
> So one might say that he is fortunate. That he's in a situation where he's not

facing life in prison.

We all know from the facts of this case that [Dorsey] simply kicked open that door, walked in and started indiscriminately shooting. And everybody dove for cover and three people were hit, one person wasn't. All those people could be dead today. It certainly wasn't as a result of a lack of trying of [Dorsey] that they are not.

It was a very small space that those people were running around in trying to dodge those bullets. So when I reviewed the facts of this case and I tried to come up come to a description as to what I thought would be the term that would characterize [Dorsey's] actions, I came up with indiscriminate ruthlessness.

Now it's clear from the pre-sentence investigation, also from the facts of this case, that [Dorsey] was a gang member. And when I talk about indiscriminate ruthlessness, I have to talk about the fact that in cases such as this, we see or have seen the argument that well one gang member shot another gang member. But of course that's a totally unacceptable argument. And society has the right to demand that persons conduct themselves according to the law and obviously society has the right to demand that one person not take another person's life.

But ... the real inherent evil of gang crime is the fact that time and time again, we see that the result, the end result of gang crime is the fact that so often the people that get hurt are in addition to the targets, the innocent bystanders. We have seen it time and time again.

And in this case, it's not clear from the evidence or at least it's not – we can't say with 100% certainty which of those four people inside the waiting area of the restaurant was the intended target.

But the fact of the matter is, three people were shot. And that's what happens. Because when you have indiscriminate gang violence everybody in the area gets hit. So it's not just the death of or the wounding of an intended target who may or may not be a gang member, it's everybody else that's affected by gang crime. And that's particularly aggravating.

[Dorsey] acknowledged in his pre-sentence investigation that he was a member of a street gang. And I would point out to [Dorsey] that none of your gang buddies are sitting with you today. And I would point out to anybody else who happens to be involved in that particular way of life, nobody's sitting with [Dorsey] today. And [Dorsey], none of your gang member friends are going to do your time for you. You're going to do it.

You may have all been standing around, all patting each other on the back and happy and talking about what you're going to do in that restaurant, but once you took that gun and went into that restaurant on your own and started firing, you're on your own. That's the way it is. You have to do the time. They are not going to be there to help you.

(Tr. G55-62)*; Dorsey*, 2016 IL App (1st) 151124-U at ¶7.

The trial court then sentenced Dorsey to a term of 40 years for first-degree murder and two 18-year terms for attempt murder. (Tc. 159)*; Dorsey*, 2016 IL App (1st) 151124-U at ¶8. The trial court implicitly found that Dorsey caused severe bodily injury to each of the attempt murder victims (Tr. G56-58), which triggered a requirement that Dorsey's sentences run consecutive to each other. 730 ILCS 5/5-8-4(a) (West 1996) (requiring consecutive sentences where "one of the offenses for which the defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury").

Direct Appeal

Dorsey argued, *inter alia*, that the trial court imposed an excessive sentence by failing to consider his youth. On September 7, 2000, the First District Appellate Court found that Dorsey forfeited his sentencing argument, and that the trial court properly balanced the factors in aggravation and mitigation. (PC1. Supp. 4-9); *People v. Dorsey*, No. 1-98-3979, 11 (1st Dist. 2000) (unpublished order); *Dorsey*, 2016 IL App (1st) 151124-U at ¶9.

Prior Collateral Proceedings

In June of 2001, trial counsel filed a petition for relief from judgment challenging Dorsey's consecutive sentences under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The petition was denied and Dorsey did not appeal. (C. 152)*; Dorsey*, 2016 IL App (1st) 151124-U at ¶10.

In April of 2005, Dorsey filed a *pro se* post-conviction petition, alleging, *inter alia*, that trial counsel was ineffective for failing to investigate and call five alibi witnesses. (PC1. 20-115)*; Dorsey*, 2016 IL App (1st) 151124-U at ¶11. Dorsey alleged that he told counsel the alibi witnesses could have testified that he was at his grandmother's house the night of the shooting acting as a disc jockey for a party. (PC1. 34-39, 48-51, 69). The appellate court reversed the summary dismissal of Dorsey's petition and remanded for further proceedings, finding the *pro se* pleadings raised the gist of an ineffective-assistance claim. (PC2. 24-29); *People v. Dorsey*, 1-05-2480 (1st Dist. 2007) (unpublished order of June 29, 2007); *Dorsey*, 2016 IL App (1st) 151124-U at ¶11.

In April of 2007, while the above post-conviction proceedings were pending, Dorsey filed a second *pro se* petition for relief from judgment, arguing that his conviction was void because it was based on a non-existent statute. The appellate court affirmed the denial of the petition on July 6, 2007. (C. 152); *People v. Dorsey*, 1-07-2307 (1st Dist. 2007) (unpublished order); *Dorsey*, 2016 IL App (1st) 151124-U at ¶12.

In November of 2010, on remand from the summary dismissal of Dorsey's *pro se* post-conviction petition of 2005, appointed post-conviction counsel filed an amended post-conviction petition and memorandum of law on Dorsey's behalf. In addition to the ineffectiveness claim above, counsel asserted that Dorsey was deprived of his right to testify at trial, prejudiced by the jury's receipt of an erroneous version of Illinois Pattern Jury Instruction, Criminal ("IPI") No. 3.15, and actually innocent based on newly discovered evidence in the form of affidavits from three witnesses. (PC2. 40-59, 140-54).

The circuit court granted the State's motion to dismiss after a hearing in September of 2011. (PC2. 185-95). In so doing, the court found that Dorsey failed to establish a lack of culpable negligence. The court further found that Dorsey's actual innocence claim was not based on newly discovered evidence, and that Dorsey failed to make a substantial showing that the result would have been different if the alibi witnesses had testified. (PC2. 192-95). The appellate court granted appellate counsel's motion to withdraw on appeal. *People v. Dorsey*, 2012 IL App (1st) 112856-U.

In October of 2012, Dorsey filed a third *pro se* petition for relief from judgment, arguing that his consecutive sentences were illegal where there was insufficient proof that either of the attempt murder victims, Williams and Sims, suffered great bodily harm. (C. 153; PC3. 27-29). The appellate court granted appellate counsel's motion to withdraw on appeal. (C.153); *People v. Dorsey*, 2014 IL App (1st) 130875-U; *Dorsey*, 2016 IL App (1st) 151124-U at ¶13.

Current Post-Conviction Petition

In December of 2014, Dorsey filed a petition for leave to file a successive petition for post-conviction relief, and the petition itself, which raised two issues. (C. 31-44, 47-62); *Dorsey*,

2016 IL App (1st) 151124-U at ¶14. First, Dorsey argued that is entitled to sentencing relief "pursuant to the new Supreme Court ruling in *Miller v. Alabama*, 567 U.S. 460 (2012)," where the trial court "did not consider the special circumstances that often make lengthy sentences particularly inappropriate for youthful offender[ ]s." (C. 34-39, 49-52); *Id*. To establish cause and prejudice for raising this issue in a successive petition, Dorsey argued *Miller* was decided in 2012, about seven years after he filed his initial post-conviction petition in 2005, and that he would have received a lesser sentence if the trial court had considered all of the relevant factors. (C. 36-39); *Id*. Dorsey's second issue alleged the jury received an erroneous identification instruction regarding how to assess identification testimony. (C. 40-44, 53-61); *Id*.

Dorsey attached several affidavits and documents in support of his arguments. For his juvenile sentencing argument, Dorsey attached portions of transcripts from his juvenile transfer hearing that included testimony he argued should have been considered in mitigation at sentencing. (C. 101-120). Specifically, Dorsey attached the testimony of Probation Officer Tom Ortega indicating he believed Dorsey should not have been tried as an adult where it would deprive him of the opportunity to benefit from juvenile services he had not yet received, such as residential placement and intensive therapy and counseling. (C. 101-05). Dorsey also attached testimony from psychiatrist Dr. Daniel Schiff indicating Dorsey had better than average intellectual ability and capacity for empathy. Schiff further testified that Dorsey had expressed remorse about his troubles in school having brought discomfort to his grandmother, and expressed his belief that Dorsey would benefit from education and therapy. (C. 106-11). Dorsey attached testimony from psychologist Dr. John Murray indicating Dorsey was amenable to treatment or intervention, and that he was vulnerable to manipulation and exploitation by more sophisticated people such as older members of a street gang. (C. 112-20).

Dorsey also attached certificates showing he had earned his GED while in prison, and completed two college-level courses, Introduction to Gerontology and Cultural Anthropology, and several therapeutic courses, including House of Healing Mentor, Logical Thinking, Anger Management, Grief and Loss, and Stress Management. (C. 133-46). Finally, Dorsey attached

the portion of the sentencing transcript containing the sentencing court's discussion of the considerations underlying its sentencing determination. (C. 121-32).

On February 20, 2015, the circuit court denied Dorsey leave to file a successive petition, finding that Dorsey failed to show he was prejudiced by his inability to raise a *Miller* issue in his initial post-conviction petition of 2005. (C. 151-57; R. D2)*; Dorsey*, 2016 IL App (1st) 151124-U at ¶15. In so holding, the court found that *Miller* only applies to juvenile offenders who have mandatory life sentences without parole. (C. 155); *Id*.

On appeal, the First District Appellate Court affirmed the circuit court's holding that Dorsey failed to establish prejudice for purposes of filing a successive post-conviction petition. *Dorsey*, 2016 IL App (1st) 151124-U at ¶43. The appellate court recognized that *Miller* applies retroactively to *de facto* life sentences (*Id*. at ¶25), but requested "guidance from either our State's highest court, or the legislature as to what qualifies as a *de facto* life sentence, and what are appropriate considerations in making that determination[.]" *Id*. at ¶¶34, 37. "Without any additional guidance," the court concluded that Dorsey's 76-year sentence does not constitute a *de facto* life sentence where Dorsey is eligible for day-for-day good-time credit. *Id*. at ¶37. The court further found that *Miller* does not apply to long term-of-years sentences that are not *de facto* life sentences. *Id*. at ¶¶39-40.

Petition for Leave to Appeal

Dorsey requested review in this Court for clarification of what factors Illinois courts should consider in determining whether a *pro se* post-conviction petitioner has a *de facto* life sentence. He specifically asked this Court to provide guidance regarding whether to consider his statutory eligibility for day-for-day sentence credit in determining if the 76-year sentence imposed by the trial court constitutes a *de facto* life sentence. This Court granted leave to appeal on March 25, 2020. *People v. Dorsey*, No. 123010 (March 25, 2020). This appeal now follows.

ARGUMENT

Reversal Is Warranted Where Derrell Dorsey's *Pro Se* Successive Post-Conviction Petition Established Prejudice for His Claim That The Imposition Of A 76-Year Prison Sentence With Eligibility For Day-For-Day Sentencing Credit, For Offenses Committed When He Was 14 Years Old, Constitutes An Unconstitutional *De Facto* Life Sentence.

In 1998, Derrell Dorsey was convicted of three offenses committed when he was 14 years old. (Tc. 68-70; Tr. F125). The trial court imposed a 40-year prison sentence for first-degree murder, and mandatorily consecutive 18-year sentences for each of two attempt murders, for a total sentence of 76 years' imprisonment. (Tc. 159; Tr. G3-62). Shortly thereafter, this Court found the truth-in-sentencing statute in effect at the time of sentencing unconstitutional (*People v. Reedy*, 186 Ill. 2d 1, 11, 18 (1999)), making Dorsey eligible for day-for-day sentencing credit.[2]

In 2014, after the Supreme Court of the United States released *Miller v. Alabama*, 567 U.S. 460 (2012), Dorsey filed a *pro se* successive post-conviction petition, arguing his sentence is an unconstitutional *de facto* life sentence. (C. 31-44, 47-62). The circuit court found Dorsey established cause for filing a successive post-conviction petition, but denied him leave to file, finding *Miller* inapplicable to discretionary sentences less than natural life in prison. (C. 155).

On appeal, the First District Appellate Court affirmed the circuit court's order denying Dorsey leave to file a successive petition. *People v. Dorsey*, 2016 IL App (1st) 151124-U, ¶¶29-43 (unpublished order of November 2, 2017). The appellate court agreed Dorsey had established cause for filing a successive petition, but like the circuit court, found that *Miller* only applies to mandatory sentences. *Dorsey,* 2016 IL App (1st) 151124-U at ¶25. The appellate court recognized that this Court found *Miller* applicable to *de facto* life sentences, but found Dorsey's sentence falls short of being a *de facto* life sentence. *Id.* at ¶37. In so finding, the appellate court presumed Dorsey would receive all of the sentencing credit for which he is

[2]The truth-in-sentencing statute in effect at the time of the offense, 730 ILCS 5/3-6-3(a)(2)(i) (West 1996), was based on Public Act 89-404. *Reedy*, 186 Ill. 2d at 10-11.

eligible, effectively treating his 76-year sentence as a 38-year sentence. *Id*. at ¶¶29-37. The court expressed doubt about its reliance upon the possibility of sentencing credit, however, admitting it needed "guidance" regarding what are the "appropriate considerations" for determining whether a particular sentence constitutes a *de facto* life sentence. *Id.* at ¶¶34, 37.

After the appellate court released its unpublished order in this case, this Court released *People v. Holman,* 2017 IL 120655*,* and *People v. Buffer*, 2019 IL 122327, holding, respectively, that *Miller* applies to discretionary sentences equivalent to life in prison (*Holman*, 2017 IL 120655 at ¶40), and that a sentence of more than 40 years imposed for an offense committed as a juvenile constitutes a *de facto* life sentence. *Buffer*, 2019 IL 122327 at ¶¶40-41. Under *Holman* and *Buffer*, Dorsey's 76-year sentence is a *de facto* life sentence on its face. No Illinois court has found the mere possibility of statutory sentencing credit fatal to a *Miller*-based sentencing claim in any context, much less at the preliminary leave-to-file stage of successive post-conviction proceedings.

On the other hand, three separate panels of the First District Appellate Court – including a panel from the same division that wrote the unpublished order below – recently issued published opinions finding the possibility of sentencing credit irrelevant to whether a defendant has a *de facto* life sentence. *People v. Peacock*, 2019 IL App (1st) 170308, ¶¶17-19; *People v. Thornton*, 2020 IL App (1st) 170677, ¶22; *People v. Daniel*, 2020 IL App (1st) 172267, ¶¶21-26.[3] Under prevailing Illinois law, the appellate court thus erred in considering the possibility of sentencing credit in determining that Dorsey's 76-year sentence is not a *de facto* life sentence. *See Buffer*, 2019 IL 122327 at ¶¶40-41; *see also Peacock*, 2019 IL App (1st) 170308 at ¶¶17-19; *Thornton*, 2020 IL App (1st) 170677 at ¶22; *Daniel*, 2020 IL App (1st) 172267 at ¶¶21-26.

[3]The Honorable Justice Margaret McBride wrote the majority opinion in both this case and in *Peacock*. The appellate court decided this case in 2014 before this Court decided *Buffer*. It decided *Peacock* in 2019 after this Court decided *Buffer*.

To ensure fundamental fairness in post-conviction proceedings, and the consistent application of law, this Court should establish a simple bright-line rule: When a defendant challenges the constitutionality of his sentence in a successive post-conviction petition, eligibility for statutory sentencing credit should not be considered at the leave-to-file stage in determining whether the sentence qualifies as a *de facto* life sentence.

Even if this Court finds statutory eligibility for day-for-day sentencing credit relevant to whether a defendant should be granted leave to file a successive post-conviction petition challenging the constitutionality of his sentence, Dorsey's *pro se* pleadings were sufficient to survive the leave-to-file stage. A 76-year sentence with the possibility of day-for-day credit provides Dorsey no meaningful opportunity to obtain release based on demonstrated maturity or rehabilitation, and thus violates Illinois' proportionate penalties clause. Ill. Const. 1970, art. I, §11; *see also People v. Leon Miller*, 202 Ill. 2d 328, 337-41 (2002) (finding the 15-year-old defendant's 50-year sentence violated Illinois' proportionate penalties clause)*; People v. House,* 2019 IL App (1st) 110580-B, ¶¶63-65 (finding the 19-year-old defendant's natural- life sentence unconstitutionally disproportionate) (*leave to appeal allowed*, No. 125124 (January 29, 2020)).

Where Dorsey has a *de facto* life sentence, and his juvenile sentencing claim is based on law that did not exist when he filed his initial *pro se* post-conviction petition, he established cause and prejudice for filing a successive petition. This Court should, therefore, reverse the appellate court's order affirming the denial of leave to file a successive post-conviction petition, and remand Dorsey's case for a new sentencing hearing. *See Buffer*, 2019 IL 122327 at ¶¶44-47 (reversing the summary dismissal of defendant's *pro se* post-conviction petition and remanding for a new sentencing hearing); *see also Thornton*, 2020 IL App (1st) 170677 at ¶26 (same); *Peacock*, 2019 IL App (1st) 170308 at ¶25 (reversing the denial of leave to file a successive post-conviction petition and remanding for a new sentencing hearing)*; Daniel*, 2020 IL App

(1st) 172267 at ¶¶30-31 (same). Alternatively, this Court should grant Dorsey leave to file a successive petition and remand his case for further post-conviction proceedings. *See Buffer*, 2019 IL 122327 at ¶45 (recognizing that remand for further post-conviction proceedings is an available remedy where a reviewing court reverses the dismissal of post-conviction pleadings prior to the appointment of counsel).

Applicable Law

The Post-Conviction Hearing Act ("the Act") allows a person under criminal sentence in Illinois to collaterally attack his conviction if it resulted from a substantial denial of his constitutional rights. 725 ILCS 5/122-1, *et seq; People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Though the Act generally contemplates the filing of only a single petition, this statutory bar is relaxed "where fundamental fairness so requires." *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 464 (2002). A defendant can obtain leave to file a successive post-conviction petition by showing both "cause" for his inability to raise the issue in a prior petition and "prejudice" resulting therefrom. *People v. Smith,* 2014 IL 115946, ¶33. "Cause" is shown by identifying an objective factor external to the defense that prevented the defendant from raising the claim earlier. *Smith,* 2014 IL 115946 at ¶33 (citing 725 ILCS 5/122-1(f)*; People v. Davis,* 2014 IL 115595, ¶14. "Prejudice" is shown by demonstrating the alleged constitutional error "so infected the entire trial that the resulting conviction or sentence violates due process." *Id.; Davis,* 2014 IL 115595 at ¶14 (citing 725 ILCS 5/122-1(f)). The cause-and-prejudice test is a preliminary screening to determine whether a defendant's *pro se* motion for leave to file a successive post-conviction petition adequately alleges facts demonstrating cause and prejudice. *People v. Bailey*, 2017 IL 121450, ¶24 (citing *Smith,* 2014 IL 115946 at ¶34). At the leave-to-file stage, a petitioner need only make a *prima facie* showing of cause and prejudice. *Bailey*, 2017 IL 121450 at ¶24.

A circuit court should *only* deny leave to file where "it is clear" from a review of the petitioner's successive pleadings, that his claims "fail as a matter of law," or where the successive pleadings are "insufficient to justify further proceedings." *Smith*, 2014 IL 115946 at ¶35, *see also People v. Edwards*, 2012 IL 111711, ¶24; *People v. Robinson*, 2020 IL 123849, ¶¶42-44. For purposes of this determination, all well-pleaded facts must be taken as true, and courts may not resolve any factual conflicts. *People v. Towns*, 182 Ill. 2d 491, 503 (1998); *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998).

This Court reviews *de novo* the question of whether a defendant's post-conviction pleadings are sufficient to establish cause and prejudice for filing a successive post-conviction petition. *See Bailey*, 2017 IL 121450 at ¶13 (holding that the denial of leave to file a successive post-conviction petition is reviewed *de novo*); *see also Robinson*, 2020 IL 123849 at ¶39 (same); *People v. Taylor*, 2015 IL 117267, ¶11 (holding that the constitutionality of a sentence is reviewed *de novo*). In this case, Derrell Dorsey's *pro se* post-conviction pleadings establish cause and prejudice for filing a successive post-conviction petition challenging the constitutionality of his 76-year sentence.

Cause and Prejudice

In 2014, Dorsey filed a *pro se* successive post-conviction petition, alleging his 76-year sentence constitutes an unconstitutional *de facto* life sentence under *Miller v. Alabama*, where the sentencing court failed to take into account all factors relevant to sentencing a juvenile convicted in adult criminal court. (C. 31-44, 47-62). Both the circuit court, and the appellate court, found that Dorsey established cause for filing a successive petition. (C. 155); *see also People v. Dorsey*, No. 96-CR-21035-01 (order of February 20, 2015) ("Although petitioner may be able to show cause for his failure to raise his claim in an earlier petition, ..."); *Dorsey*, 2016 IL App (1st) 151124-U at ¶23 ("Because [Dorsey] is raising a challenge to his sentence

based on *Miller*, which was not available at the time of his original petition, he may be excused from failing to raise that claim previously."). The lower courts's findings regarding cause are consistent with this Court's opinion in *People v. Davis*, holding that "*Miller*'s new substantive rule constitutes 'cause'" where "it was not available earlier[.]" 2014 IL 115595, ¶42. Where Dorsey indisputably established cause for filing a successive petition, the only remaining question is whether the possibility of statutory day-for-day sentencing credit should be considered in determining if his 76-year sentence qualifies as a *de facto* life sentence for purposes of establishing prejudice under section 122-1 of the Act.

The Eighth Amendment prohibits, *inter alia*, "cruel and unusual punishments," and applies to the states through the Fourteenth Amendment. U.S. Const., amends. VIII, XIV; Ill. Const. 1970, art. I, §11; *Buffer,* 2019 IL 122327 at ¶15 (citing *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). The Eighth Amendment's ban on excessive punishment flows from the basic precept that criminal punishment should be graduated and proportioned both to the offender and the offense. *Buffer,* 2019 IL 122327 at ¶15*; Miller*, 567 U.S. at 469; *Roper*, 543 U.S. at 560; *Davis*, 2014 IL 115595 at ¶18. Reviewing courts should look to "the evolving standards of decency that mark the progress of a maturing society" to determine whether a punishment is so disproportionate as to be unconstitutionally cruel and unusual. *See Davis*, 2014 IL 115595 at ¶18 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), and citing *Miller*, 567 U.S. at 469, *Graham v. Florida*, 560 U.S. 48, 58 (2010), and *Roper*, 543 U.S. at 561))).

The Supreme Court of the United States has concluded that the Eighth Amendment prohibits capital sentences for juveniles who commit murder (*Roper*, 543 U.S. at 578-79), mandatory life sentences for juveniles who commit non-homicide offenses (*Graham*, 560 U.S. at 82), and mandatory life sentences for juveniles who commit murder. *Miller*, 567 U.S. at 489. The Court's opinions in *Roper*, *Graham*, and *Miller* establish that "children are constitutionally different from adults for purposes of sentencing." *Id*. at 471. In recognition

of this difference, *Miller* established both a substantive and a procedural requirement. *Id*. at 479-80; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 732, 734 (2016) (explaining that *Miller* announced new substantive and procedural rules).

The substantive component of *Miller* draws a line between children whose crimes reflect "unfortunate yet transient immaturity" and those rare children whose crimes reflect "irreparable corruption." *Miller*, 567 U.S. at 479-80. Under *Miller*, a sentence equivalent to life in prison without parole is unconstitutional for all but "'the rare juvenile offender whose crime reflects irreparable corruption.'" *Montgomery*, 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at 479-80, and *Roper*, 543 U.S. at 573). "It will be uncommon" that this "rare juvenile offender" exhibit enough "irretrievable depravity" to justify a life sentence. *Id*. at 733-34.

The procedural component of *Miller* "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S. Ct. at 734. A trial court must take into account the minor offender's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences," in addition to his home life, peer pressure, family history, and the circumstances of the offense. *Miller*, 567 U.S. at 477-78. The Illinois legislature has codified these factors. 730 ILCS 5/5-4.5-105(a)(1)-(9), (b) (West 2016).

Like the Eighth Amendment, the proportionate penalties clause of the Illinois Constitution embodies our evolving standard of decency. *People v. Leon Miller*, 202 Ill. 2d 328, 339 (2002) ("[A]s our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community."). Specifically, 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."The purpose of the proportionate penalties clause is to add a limitation on penalties beyond those provided by the [E]ighth [A]mendment and to add the objective of restoring

the offender to useful citizenship." *People v. Clemons*, 2012 IL 107821, ¶39. The State Constitution's requirement that penalties be determined with the objective of restoring the offender to useful citizenship goes beyond the framers's understanding of the Eighth Amendment. *Clemons*, 2012 IL 107821 at ¶40.

In March of 2014, this Court held that a post-conviction petitioner's reliance upon *Miller* "constitutes prejudice" for filing a successive post-conviction petition where *Miller* "retroactively applies to the defendant's sentencing hearing." *Davis*, 2014 IL 115595 at ¶42 (citing 725 ILCS 5/122-1(f) (West 2012)). In September of 2016, this Court held that *Miller* applies to lengthy term-of-years sentences "functional[ly] equivalent" to life without parole, also known as *de facto* life sentences. *People v. Reyes*, 2016 IL 119271, ¶¶8-10. About one year later, in September of 2017, this Court held that *Miller* applies to discretionary life sentences, natural or *de facto*, in addition to mandatory sentences of the same nature. *People v. Holman*, 2017 IL 120655, ¶¶44-45. In addition, this Court held that trial courts must specifically consider each of the juvenile sentencing factors set forth in *Miller* and codified under section 5-4.5-105 before imposing a life sentence or its equivalent. *Holman*, 2017 IL 120655 at ¶44. Most recently, in April of 2019, this Court held that a sentence of more than 40 years imposed upon a juvenile offender constitutes a *de facto* life sentence. *Buffer*, 2019 IL 122327 at ¶41.

This Court's recent jurisprudence regarding the sentencing of children convicted of adult criminal offenses establishes that *Miller* applies to Dorsey's 76-year sentence, and thus that Dorsey established prejudice for filing a successive post-conviction petition.

A. Dorsey established prejudice where his 76-year sentence constitutes a *de facto* life sentence because day-for-day sentencing credit is irrelevant at the leave-to-file stage of successive post-conviction proceedings.

Dorsey's 76-year sentence ostensibly constitutes a *de facto* life sentence under *Buffer*. *See Buffer*, 2019 IL 122327 at ¶42 ("Because defendant's sentence was greater than 40 years, we conclude that defendant received a *de facto* life sentence."). Dorsey thus established prejudice

for purposes of filing a successive post-conviction petition. In finding that Dorsey does not have a *de facto* life sentence, the First District Appellate Court "declin[ed] to look" at Dorsey's "total 76-year sentence in a vacuum[,]" and instead assumed Dorsey would "receive the day-for-day credit for which he is eligible." *People v. Dorsey*, 2016 IL App (1st) 151124-U, ¶29. In other words, the appellate court treated Dorsey's 76-year sentence as a 38-year sentence. The appellate court's confounding decision to turn a blind eye to the actual sentence imposed by the trial court, and treat Dorsey's 76-year sentence as a 38-year sentence, is inconsistent with Illinois law, recognizing, in multiple other contexts, that statutory sentencing credit is not guaranteed and should be treated distinct from the sentence imposed by the trial court.

Where the receipt of day-for-day credit is uncertain and highly individualized in its application, this Court should establish a bright-line rule that it should not be considered at the leave-to-file stage of successive post-conviction proceedings.

1. Eligibility for sentencing credit is not part of the sentence.

More than 50 years ago, this Court held, in assessing the validity of a revised sentencing credit schedule, that "[g]ood time, although part of every sentence, is a conditional right which may be forfeited prior to the time a convict is entitled to discharge, having served his maximum sentence less good-time credits." *People ex rel. Colletti v. Pate*, 31 Ill. 2d 354, 357 (1964). In the context of determining whether a consequence of pleading guilty is direct or collateral, "the focus" is thus on "the sentence imposed, not the time to actually be served." *People v. Thomas*, 2017 IL App (4th) 150815, ¶17. Illinois courts have specifically recognized that trial attorneys are not required to advise their defendant clients of truth-in-sentencing consequences related to a guilty plea because truth in sentencing is a collateral consequence, meaning it "does not relate to the length of the sentence imposed." *People v. Powers*, 2011 IL App (2d) 090292, ¶¶9, 11. This is because the truth-in-sentencing statute "no more mandates that [a defendant] serve a certain sentence *than the day-for-day good-conduct provisions require a defendant*

to serve half of his or sentence."*Powers*, 2011 IL App (2d) 090292 at ¶10 (emphasis added) (citing *People v. Frison*, 365 Ill. App. 3d 932, 936 (2nd Dist. 2006)). Likewise, where Dorsey's eligibility for sentencing credit creates no certainty that he will serve anything but the full 76-year sentence imposed by the trial court, the appellate court should have focused on the actual sentence imposed in determining whether Dorsey has a *de facto* life sentence.

Three separate panels within two divisions of the First District Appellate Court recently released published opinions finding that eligibility for day-for-day sentencing credit is irrelevant to the question of whether a defendant has a *de facto* life sentence. *People v. Peacock*, 2019 IL App (1st) 170308, ¶¶18-19; *People v. Thornton*, 2020 IL App (1st) 170677, ¶¶19-22; *People v. Daniel*, 2020 IL App (1st) 172267. The appellate decisions in *Peacock*, *Thornton*, and *Daniel* are directly on-point, well-reasoned, and informative.

In *Peacock*, the trial court sentenced the defendant to 80 years in prison with eligibility for day-for-day sentencing credit. *Peacock*, 2019 IL App (1st) 170308 at ¶3. The circuit court denied the defendant leave to file a *pro se* successive post-conviction petition, and the defendant argued on appeal that he should have been granted leave-to-file based on his unconstitutional *de facto* life sentence. *Id*. at ¶¶2-3. The State responded that the defendant did not have a *de facto* life sentence where his eligibility for day-for-day sentencing credit created a possibility he would serve 40 years or less. *Id.* at ¶¶14-15.

The Fourth Division of the First District Appellate Court held that the defendant's sentence was unconstitutional under *Miller*, despite the defendant's eligibility for sentencing credit. *Peacock*, 2019 IL App (1st) 170308 at ¶17. The appellate court reasoned, "Defendant was not sentenced to 40 years' imprisonment but was instead sentenced to 80 years' imprisonment with the mere possibility or release after 40 years." *Id*. at ¶19. Moreover, the "receipt of day-for-day credit is not guaranteed," where "the trial court has no control over the manner in which a defendant's good conduct credit is earned or lost." *Id*. The appellate court emphasized that

the Illinois Department of Corrections ("IDOC") "ultimately has discretion as to whether defendant will be awarded any credit." *Id*.

Similarly, in *Thornton*, the trial court sentenced the 17-year-old defendant to 70 years in prison, with eligibility for day-for-day sentencing credit. *Thornton*, 2020 IL App (1st) 170677 at ¶¶3-7, 18-19. On appeal from the summary dismissal of his *pro se* post-conviction petition, the defendant argued he had raised a potentially viable claim, under *Miller,* that his sentence constitutes an unconstitutional *de facto* life sentence. *Id*. at ¶17.

The Fifth Division of the First District Appellate Court agreed with the Fourth Division's holding in *Peacock* that statutory eligibility for day-for-day sentencing credit is irrelevant to whether the defendant has a *de facto* life sentence. *Thornton*, 2020 IL App (1st) 170677 at ¶22 (citing *Peacock*, 2019 IL App (1st) 170308 at ¶19). As in *Peacock*, *Thornton* reasoned that the trial court ultimately lacked discretion to determine whether the defendant would be awarded any day-for-day credit, where the allocation of credit is entirely within the control of IDOC. *Id*. *Thornton* thus held that the defendant's 70-year sentence was a *de facto* life sentence "regardless of [his] eligibility for day-for-day credit." *Id*. at ¶23.

In *Daniel*, the trial court sentenced the 16-year-old defendant to 70 years in prison, with eligibility for day-for-day credit. *Daniel*, 2020 IL App (1st) 172267 at ¶1. As in *Peacock*, the defendant argued on appeal from the denial of leave to file a successive post-conviction petition that he has an unconstitutional *de facto* life sentence that warrants a new sentencing hearing. *Id*. A different panel of the Fifth Division than that which decided *Thornton* concluded that, where the "defendant would not serve a sentence shorter than a 40-year *de facto* life sentence unless he receives a substantial portion of the good conduct credit for which he is eligible," his 70-year sentence constitutes "a *de facto* life sentence" requiring a new sentencing hearing

"regardless of his eligibility for day-for-day credit." *Id*. at ¶24.[4] *Peacock*, *Thornton,* and *Daniel* are soundly reasoned in light of the broad discretion IDOC has to revoke credit at any time.

It would take no extraordinary measure for IDOC to revoke all of Dorsey's day-for-credit, at its own discretion, with little to no due process afforded to Dorsey. Section 107.150 of the Illinois Administrative Code allows IDOC to revoke up to 30 days of day-for-day credit in a 12-month period at the discretion of the Director of the DOC for misconduct or violations of departmental rules. 20 IL ADC 107.150 (a), (c). If the cumulative revocation exceeds 30 days in a 12-month period, IDOC need only submit its recommendation for revocation to the Prisoner Review Board for approval. 20 IL ADC 170.150 (c), (d) (requiring IDOC to "submit its recommendation for revocation to the Prisoner Review Board for approval" if "the amount of credit at issue exceeds 30 days, or when, during any 12 month period, the cumulative amount of credit revoked exceeds 30 days").

Making matters worse, IDOC can revoke day-for-day credit for such minor infractions as hanging up a towel up while using a restroom, possessing condiments, "horseplaying," or other innocuous or ambiguous activity. Illinois Introduction to the Orientation Manual, Centralia Correctional Center, IDOC.[5] Even if a defendant is awarded statutory day-for-day credit, IDOC may seek to revoke 180 days of earned credit for filing a "frivolous" lawsuit against the State, IDOC, or the Prisoner Review Board, *including a second post-conviction petition*. 730 ILCS

---

[4]The Honorable Justice Thomas Hoffman wrote the majority opinion in *Thornton*, while the Honorable Justice Shelvin Louis Marie Hall wrote the majority opinion in *Daniel*. Justices Mary Rochford and Mathias Delort concurred in both cases.

[5]Prisoners may also lose good-time for: forgetting to possess an identification card, running in the yard while not participating in a game, giving, loaning, trading, or receiving "anything" to or from another offender, signing petitions, having a "design" cut into his hair, having partially braided hair, failing to keep an authorized medication in its original container, and sleeping on the floor. Available at: https://www.law.umich.edu/special/policyclearinghouse/Documents/Illinois%20Intro%20to%20Orientation%20Manual.pdf (last checked July 30, 2020).

5/3-6-3(a)(5)(d) (emphasis added). These types of infractions are aimed at encouraging discipline and maintaining control within the prison; they do not reflect upon a prisoner's actual rehabilitation or rehabilitative potential. *See Lane v. Sklodowski,* 97 Ill. 2d 311, 320 (1983) (determining that statutory good-time credit is a means of establishing control and discipline within the prison); *see also Guzzo v. Snyder*, 326 Ill. App. 3d 1058, 1063 (3rd Dist. 2001) ("The award of good-time credit is conferred upon inmates as a means to acknowledge and encourage meritorious service by inmates and to promote prison discipline.").

Citing this Court's opinions in *People v. Patterson*, 2014 IL 115102, and *People v. Reyes*, 2016 IL 119271, the appellate court concluded that "[t]he great weight of authority on this issue indicates that a court looks, not only to the total sentence imposed, but to the availability and amount of sentence credit applicable to a given sentence before determining whether it actually amounts to a *de facto* life sentence without the possibility of parole." *Dorsey*, 2016 IL App (1st) 151124-U at ¶29. The appellate court's reliance upon *Patterson* and *Reyes* is misplaced.

This Court decided *Patterson* and *Reyes* years before it decided *Buffer.* Further, *Patterson* and *Reyes* do not address whether eligibility for statutory sentencing credit should be considered in determining if the defendant has a *de facto* life sentence. In both of those cases, this Court referenced the defendants's respective eligibilities for statutory sentencing credit, but ultimately considered the full sentence imposed by the trial court in determining the constitutionality of the defendants's sentences. In *Patterson*, this Court wrote, "A prison term *totalling* 36 years for a juvenile . . . does not fall into th[e] [*de facto* life sentence] category." *Patterson*, 2014 IL 115102 at ¶110 (emphasis added). Similarly, in *Reyes*, this Court concluded the defendant's full 97-year sentence was a *de facto* life sentence. *See Reyes*, 2016 IL 119271 at ¶10 ("Defendant's term-of-years sentence is a mandatory, *de facto* life-without-parole sentence."). Where *Patterson* and *Reyes* do not reach the question of how eligibility for sentence credit impacted the nature

of the defendants's sentences, they fail to support a conclusion that eligibility for day-for-day credit is relevant in determining whether the defendant has a *de facto* life sentence at all, let alone that this is proper at the leave-to-file stage of successive post-conviction proceedings.

Like *Patterson* and *Reyes*, the appellate decisions relied upon by the court below – *People v. Nieto*, 2016 IL App (1st) 121604, *People v. Gipson*, 2015 IL App (1st) 122451, *People v. Harris*, 2016 IL App (lst) 141744, *People v. Ortiz*, 2016 IL App (lst) 133294, and *People v. Morris*, 2017 IL App (1st) 141117 – do not address whether the possibility of statutory sentencing credit should be considered in determining if a particular sentence constitutes a *de facto* life sentence.

In *Nieto*, the appellate court found that the defendant did not have a *de facto* life sentence because he received a discretionary sentence that was above the mandatory minimum, but less than natural life. *See Nieto*, 2016 IL App (1st) 121604 at ¶43 ("[W]hile the trial court cumulatively sentenced defendant to 78 years in prison, the court could have sentenced [him] to only 51 years[.]"). Not only does this antiquated reasoning no longer hold water – this Court now recognizes *Miller* applies to discretionary term-of-years sentences of 40 years and above, but below natural life (*See Buffer*, 2019 IL 122327 at ¶42) – *Nieto* did not even address sentencing credit in the "Analysis" section of its opinion. *Nieto* merely made a passing reference to the defendant's eligibility for sentencing credit in its factual recitation, which did not factor into the court's resolution of the issue on appeal. *Nieto*, 2016 IL App (lst) 121604 at ¶¶13, 19-58. Moreover, this Court has remanded *Nieto* for reconsideration in light of *Buffer* and *Holman* to determine whether the defendant has an unconstitutional *de facto* life sentence. *People v. Nieto*, No. 120826 (order of March 25, 2020).

In *Ortiz*, *Morris*, and *Harris*, the appellate court found the defendants's full 60-year, 100-year, and 76-year, sentences to be unconstitutional *de facto* life sentences. *Ortiz*, 2016 IL App (lst) 133294 at ¶15; *Morris*, 2017 IL App (1st) 141117 at ¶30; *Harris*, 2016 IL App

(lst) 141744 at ¶54. The defendant in *Ortiz* was ineligible for statutory good-time credit, so the appellate court there lacked an opportunity to address the question at-hand here. *Ortiz*, 2016 IL App (lst) 133294 at ¶¶15, 24. In *Morris*, the appellate court mentioned the defendant's eligibility for statutory sentencing credit, but based its holding regarding the nature of the defendant's sentence on "the rationale in *Nieto* and *Ortiz*." *Morris*, 2017 IL App (1st) 141117 at ¶30. As discussed above, *Nieto* and *Ortiz* did not consider the possibility of sentencing credit in assessing whether the defendants have *de facto* life sentences. *Nieto*, 2016 IL App (lst) 121604 at ¶¶19-58; *Ortiz*, 2016 IL App (lst) 133294 at ¶¶15, 24; *see also* pages 22-23, *supra*.

In *Harris*, the appellate court also referenced the possibility of sentencing credit, noting that the trial court imposed a 76-year sentence for an offense the defendant committed as an 18-year old, and that "at best" the defendant would be 89 years old when he is released. *Harris*, 2016 IL App (1st) 141744 at ¶54. Because a 76-year sentence will keep the defendant behind bars for the rest of his life, regardless of good-time, the court did not determine whether to consider the potential impact of good-time credit. *See Id.* at ¶49 (acknowledging that truth-in-sentencing "'do[es] not change the sentence actually imposed'" by the trial court) (citing *People v. Harris*, 2012 IL App (1st) 092251 at ¶24).[6] Because *Nieto, Ortiz, Morris, and Harris* did not address whether day-for-day sentencing credit should be considered in determining the nature of a defendant's sentence, they fail to support the appellate court's conclusion that Dorsey's 76-year sentence is not a *de facto* life sentence.

It is true that, in *Gipson*, the appellate court considered the possibility of sentencing credit in finding that the defendant's 52-year sentence was not a *de facto* life sentence. *Gipson*, 2015 IL App (1st) 122451 at ¶66. However, *Gipson* was decided before *Buffer*, and the appellate

---

[6]This Court subsequently reversed the appellate court's determination, in *Harris*, that the defendant's sentence was unconstitutional, finding that, as an 18-year-old adult, his sentencing claim was outside the scope of *Miller*. *People v. Harris*, 2018 IL 121932, ¶61.

court's ultimate conclusion was based on a misreading of this Court's opinion in *Patterson*. Specifically, *Gipson* erroneously found that, in *Patterson*, this Court "considered the potential credit available to the defendant." *Id*. However, *Patterson* focused on the *total* 36-year sentence imposed by the trial court in finding that the defendant did not have a *de facto* life sentence. *See* page 21, *supra* (citing *Patterson*, 2014 IL 115102 at ¶110). Moreover, the defendant in *Gipson* conceded during oral argument that his sentence was not akin to a natural life sentence without parole. *Gipson*, 2015 IL App (1st) 122451 at ¶67. None of the cases relied upon by the appellate court contradict the holdings in *Peacock, Thornton*, and *Daniel* that statutory eligibility for day-for-day credit has no bearing on whether a defendant has a *de facto* life sentence.

Finally, while the First District Appellate Court found *Miller* inapplicable to discretionary sentences, the appellate court's finding was based on a misinterpretation of this Court's opinion in *People v. Davis,* 2014 IL 115595. *Dorsey*, 2016 IL App (1st) 151124-U at ¶25 (citing *Davis*, 2014 IL 115595 at ¶43). Following the appellate court's decision below, this Court clarified, in *Holman*, that *Davis* does not limit the application of *Miller* to mandatory sentences, writing:

> *[M]iller* and *Montgomery* send an unequivocal message: Life sentences, *whether mandatory or discretionary*, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics.

Holman, 2017 IL 120655 at ¶40 (emphasis added) (citing *State v. Riley*, 315 Conn. 637 (Conn. 2015), and *Aiken v. Byars*, 410 S.C. 534 (S.C. 2014)). Thus, *Holman* explicitly rejects the notion that *Miller* only applies to mandatory sentences.

Not only does *Holman* unambiguously hold that *Miller* applies to discretionary sentences, it explains why *Davis* does not limit the application of *Miller* to mandatory sentences, stating, "In *Davis*, ... we were not asked to decide whether *Miller* could apply to discretionary sentences. Further, we did not discuss *Miller* at length or address *Montgomery* [*v. Louisiana,* 136 S. Ct. 718, 735-36 (2016)] at all because it had not yet been decided." *Holman*, 2017 IL 120655 at

¶34. Where *Davis* does not address whether *Miller* applies to discretionary sentences, the appellate court's reliance upon *Davis* was misplaced. Under *Holman*, the discretionary nature of Dorsey's 76-year sentence implicates *Miller*.

Where Dorsey's 76-year sentence is sufficiently long, on its face, to constitute a *de facto* life sentence under *Buffer*, *Miller* retroactively applies to his sentencing hearing. Dorsey thus established prejudice under section 122-1(f).

2. Consideration of sentencing credit involves factual matters inappropriate for review at the leave-to-file stage.

Given the precarious nature of statutory sentencing credit, the only certainty for Dorsey is that the full 76-year prison sentence is permanently hanging over his head. Any conclusion about the application of day-for-day credit would need further development and should not, therefore, alleviate the severity of Dorsey's sentence for purposes of establishing prejudice at the preliminary stage of successive post-conviction proceedings. The cause-and-prejudice test is meant to separate out *pro se* claims that indisputably have no merit from those that might have merit and need to be developed by appointed counsel. *See People v. Smith*, 2014 IL 115946, ¶35 (holding leave to file should be denied only if the *pro se* claim "fails as a matter of law"). Consideration of statutory eligibility for sentencing credit at this stage would frustrate the purpose of the cause-and-prejudice test.

Because IDOC can revoke sentence credit at any time, a *pro se* post-conviction petitioner will likely be unaware of how much good-time credit he ultimately will earn or lose at the time he requests leave to file a successive petition. *See, e.g., Peacock*, 2019 IL App (1st) 170308 at ¶20 (stating that the defendant's projected release date changed, for unknown reasons, between the time defendant filed a supplemental brief and the time the State filed a response). Any allegation regarding actual time served is, therefore, necessarily speculative. The Illinois Appellate Court has recognized that a defendant's success at the preliminary stages of post-conviction

proceedings should not be based on speculation about how much time the defendant might actually serve. *See Thornton*, 2020 IL App (1st) 170677 at ¶22 ("[T]he State's assurances [that it is 'more than likely' the defendant will receive all of the good-time credit for which he is eligible] are not enough for us to consider the defendant's sentence as anything other than a 70-year term."). Where Dorsey's 76-year sentence is almost twice as long as the 40-year line this Court drew in *Buffer* (*Buffer*, 2019 IL 122327 at ¶42), it would be premature to dismiss his sentencing claim without, at the very least, an opportunity to develop it with the appointment of counsel. Requiring conclusive proof of prejudice at the leave-to-file stage fails to serve the purpose of the cause-and-prejudice test. *See Smith*, 2014 IL 115946 at ¶29 ("From a practical standpoint, if a petitioner is required to establish cause and prejudice conclusively prior to being granted leave to file a successive petition, it may render the entire three-stage post-conviction process superfluous.").

A bright-line rule prohibiting the consideration of eligibility for sentence credit at the leave-to-file stage is a practical, common-sense solution that would achieve justice here. The law in effect at the time of sentencing required Dorsey to serve 100% of his 76-year sentence. 730 ILCS 5/3-6-3(a)(2)(i) (West 1996). This means that the trial court intended to impose a sentence that would keep Dorsey in prison for a term of years that would unambiguously be considered a *de facto* life sentence if imposed today. That the trial court wanted to keep Dorsey in prison for 76 years, until he is 90 years old, completely contradicts the rationales of *Miller* and *Buffer*, and evidences an unconstitutional *de facto* life sentence.

B. Even if this Court considers eligibility for statutory sentencing credit, Dorsey established prejudice where his long sentence violates Illinois' Proportionate Penalties Clause.

Even if this Court considers eligibility for statutory sentencing credit, Dorsey's lengthy term-of-years sentence violates the proportionate penalties clause of the Illinois Constitution. A 76-year sentence with the possibility of day-for-day sentence credit will keep Dorsey behind

bars for at least most of his life, for an offense committed when he was a 14-year-old child, while providing no opportunity for early release based on demonstrated rehabilitation. This sentence is unconstitutionally disproportionate. Ill. Const. 1970, art. I, §11.

A sentence violates the proportionate penalties clause when, considering both the offense and the defendant's individual characteristics, it "shocks the moral sense of the community," based upon an "'evolving standard of decency that mark[s] the progress of a maturing society.'" *People v. Leon Miller*, 202 Ill. 2d 328, 338-42 (2002) (finding that the imposition of a long sentence can constitute an "as applied" violation of the proportionate penalties Clause of the Illinois Constitution) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). By "demand[ing] consideration of the defendant's character," an analysis that is "much broader than defendant's past conduct in committing the offense," (*People v. Gipson,* 2015 (1st) 122451, ¶72), the proportionate penalties clause "provide[s] a limitation on penalties beyond those afforded by the [E]ighth [A]mendment." *People v. Clemons,* 2012 IL 107821, ¶39; *see also Leon Miller,* 202 Ill. 2d at 340-42 (finding a mandatory life sentence unconstitutional where the trial court was statutorily precluded from considering defendant's age at the time of the crime or his individual level of culpability); *People v. House*, 2019 IL App (1st) 110580-B (applying *Miller* principles to a 19-year old defendant); *People v. Johnson*, 2020 IL App (1st) 171362 (same); *People v. Minniefield*, 2020 IL App (1st) 170541 (same); *People v. Ruiz*, 2020 IL App (1st) 163145 (applying *Miller* principles to an 18-year-old defendant).

This Court has acknowledged, both before and after the United States Supreme Court's decision in *Miller v. Alabama*, "the long-standing distinction in Illinois between adult and juvenile offenders," and the "greater rehabilitative potential" of young offenders. *Leon Miller*, 202 Ill. 2d at 340-43; *see also People ex rel. Bradley v. Illinois State Reformatory,* 148 Ill. 413, 423 (1894) ("There is in the law of nature, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors. The habits and

characteristics of the latter are, presumably, to a large extent, as yet unformed and unsettled.")*;* *People v. Patterson*, 2014 IL 115102, ¶100 (acknowledging juveniles "possess a less well formed character, making their actions less indicative of irreversible depravity"). This Court has explicitly contemplated constitutional infirmities arising from "lesser sentences than life without parole," finding the possibility of geriatric release insufficient "to escape the rationales of *Graham* or *Miller*." *People v. Buffer*, 2019 IL 122327, ¶62; *see also People v. Holman*, 2017 IL 120655, ¶33 (holding that "[w]hen the offender is a juvenile and the offense is serious, there is a genuine risk of disproportionate punishment."). That is the case here.

If Dorsey receives every day of statutory sentencing credit for which he is eligible, he would be released from prison on September 20, 2034, when he will be 53 years old. According to the Center for Disease Control ("CDC"), African-American males born in 1981, like Dorsey, have a life expectancy of just 64.5 years outside of prison. *See* Center for Disease Control, Estimated life expectancy at birth, in years, by race, Hispanic origin, and sex: Death-registration states, 1900 - 1928, and United States, 1929 - 2017.[7] Under CDC projections, this means that a non-incarcerated African-American man in Dorsey's shoes might live about 10 years beyond Dorsey's expected release date. However, as applied to Dorsey, who has spent the past 25 years in prison, the above life-expectancy projection is highly optimistic.

It must not be overlooked that "[t]he violence, anxiety, and stress of prison life, isolation from family and friends, and the possibility of spending most or all of the rest of one's life behind bars ... contribute[s] to accelerated aging once incarcerated." Human Rights Watch, *Old Behind Bars, The Aging Prison Population in the United States*, at 17 (Jan. 2012).[8] Indeed,

---

[7]Available at: https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_07-508.pdf (last visited July 30, 2020).

[8]Available at https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0_0.pdf (last visited July 30, 2020).

a Michigan study found that the average life expectancy for African-American adults serving life in prison was reduced about six years (from 56 to 50.6) for those, like Dorsey, who began serving that sentence as a minor. *See* Deborah LaBelle, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, ACLU of Michigan Juvenile Life Without Parole Initiative (2012).[9] Another publication estimates that two years of life are lost for every year spent in prison. *See* Evelyn J. Patterson, *The Dose-Response of Time Served in Prison On Mortality Rates: New York, 1989-2003*, American Journal of Public Health 103 (3), 523-28 (March 2013).[10] Under the measures described above, there is no guarantee Dorsey will live long enough to be released from prison, even if he receives every day of sentence credit for which he is eligible. This is particularly likely where the correctional centers in Illinois are old, overcrowded, and have been shown in court to provide inadequate healthcare. *See Lippert v. Baldwin*, 2017 WL 1545672, *9 (finding defendants "provided deficient medical care on a systemic basis that jeopardizes the ongoing well-being of plaintiffs and other prisoners in IDOC with serious medical needs").

Furthermore, the onset of the corona virus and COVID-19 have had disastrous impacts on the life expectancy of Illinois jail and prison populations. Within the first two weeks of Illinois' stay-at-home order, issued April 1, 2020, 123 inmates at Stateville Correctional Center tested positive for COVID-19; six of those prisoners died before April 16. '*They Should Be Lettering Guys Go': Six Illinois Prisoners Dead from COVID-19*, Lee V. Gaines (April 16, 2020)[11]. As the pandemic progressed, the number of cases and deaths in Illinois detention facilities

---

[9]Available at http://www.lb7.uscourts.gov/documents/17-12441.pdf (last visited July 30, 2020).

[10]Available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673515/ (last visited July 30, 2020).

[11]Available at http://will.illinois.edu/news/story/they-should-be-letting-guys-go-six-illinois-prisoners-dead-from-covid-19/ (last checked July 30, 2020).

continued to rise at an alarming rate. By May 18, Illinois had discovered more than 195 cases of COVID-19 within IDOC and 12 prisoners had died from COVID-19. *Covid-19 in Illinois Prisons,* Uptown People's Law Center, *Confirmed COVID-19 Cases in IDOC*.[12] The situation became so dire that Governor J.B. Pritzker encouraged IDOC to release inmates in an attempt to slow the spread of the virus. However, African-American prisoners, like Dorsey, have absorbed the brunt of the startling racial inequities inherent in this process.

A recent study by Restore Justice Illinois has found that white prisoners are being released at much higher rates – and much earlier – than their African-American and Latinx peers. *Illinois Failing Key Pillar of Covid-19 Response*: *Prisons Remain Crowded While Early Releases Exacerbate Racial Inequality,* Restore Justice Illinois, (June 15, 2020).[13] While white prisoners comprise just 32 percent of the Illinois prison population, they account for nearly half of all early releases. On the other hand, African-American people account for 54 percent of the IDOC population, but only 45 percent of early releases. *Id*. As a result, just 29 percent of people released between 90 and180 days early are African-American, and just 26 percent of those released more than 180 days early are African-American. *Id*.

Further exacerbating the situation, COVID-19 is particularly dangerous to older individuals, yet 87 percent of individuals between age 50 and 59 incarcerated in March are still incarcerated. *Id*. For people between the ages of 60 and 64, it is 89 percent, and for those 65 and older, it is 86 percent. *Id*. This study lends credence to the many studies that have already recognized that the life expectancy of an African-American prisoner is greatly diminished by the fact of incarceration alone. *See* pages 28-29, *supra*. The disparate negative health impact

---

[12]Available at http://uplcchicago.org/what-we-do/prison/il-prison-covid-response.html. (last checked July 30, 2020).

[13]Available at https://restorejustice.org/early-releases-exacerbate-racial-inequity/?mc_cid=5dda4f7305&mc_eid=4a2f14d9e4 (last checked July 30, 2020).

of COVID-19 on the Illinois prison population, and disparate treatment of African-American prisoners within that population, shocks the moral sense of the community and highlights the disproportionate nature of Dorsey's sentence. This Court should correct this injustice. *See Statement on Racial Injustice*, Supreme Court of Illinois (June 22, 2020) (recognizing that while "[p]eople of color have no less expectation of fairness, equity and freedom from racial discrimination than others," they are "continually confronted with racial injustices" that "*the Courts have the ability to nullify and set straight"*) (emphasis added).

The increasing protections for young offenders enacted by the Illinois legislature further highlight the disproportionate nature of Dorsey's sentence. If a 14-year-old child were convicted of the same offenses in 2020 for which Dorsey was convicted in 1998, the modern day juvenile's sentence would be far less extreme. First, there would be no guarantee that the juvenile in Dorsey's shoes would even be sentenced as adult. In 2016, the Illinois legislature amended the excluded jurisdiction statute to ensure that 14-year-old children charged with any adult offense, including murder and attempt murder, have the right to a transfer hearing before being tried and sentenced in adult criminal court. 705 ILCS 405/5-130 (West 2016). Here, Dorsey was subject to an automatic transfer from juvenile court to adult criminal court, where he was subject to a mandatory minimum sentencing scheme designed for adults, without any consideration of his young age, its attendant characteristics, or the circumstances of the offense. The automatic transfer to adult criminal court, and mandatory minimum sentencing, are important factors evidencing a constitutionally disproportionate sentence. *See Leon Miller,* 202 Ill. 2d at 340-42 (finding juvenile defendant's sentence constitutionally disproportionate, in part, where he was automatically transferred to adult criminal court and subject to a mandatory minimum sentence).

Even if the modern day juvenile were sentenced as an adult after a transfer hearing, the juvenile would be entitled to a parole hearing after 20 years (730 ILCS 5/5-4.5-115(b)),[14] about 18 years before Dorsey's earliest opportunity for release based on the possibility of statutory sentencing credit. Unlike day-for-day credit, a parole hearing would primarily focus on the juvenile's rehabilitative efforts. *See People v. Brown*, 60 Ill. App. 2d 447, 450 (1st Dist. 1965) (recognizing the purpose of parole is to "determine when defendants have been rehabilitated sufficiently to re-enter society"); *see also People v. Griffin*, 8 Ill. App. 3d 1070, 1072 (5th Dist. 1972) (recognizing the parole board has access to institutional reports, psychological and sociological reports, and sometimes even psychiatric reports that allow for an accurate determination regarding rehabilitation) . The juvenile would have an opportunity for a second parole hearing after an another 10 years (730 ILCS 5/5-4.5-115(b)), giving him two opportunities to demonstrate rehabilitation during his first 30 years in prison. As it stands now, Dorsey will never have an opportunity to obtain early release based on demonstrated rehabilitation. While Dorsey's eligibility for day-for-day credit provides some possibility of release after 38 years, this possibility is entirely unrelated to his rehabilitative progress. *See* pages 20-21, *supra*.

It is fundamentally unfair that Dorsey has no opportunity for early release based on demonstrated rehabilitation. The record fails to show that Dorsey is among the rarest, most incorrigible juvenile offenders. Dorsey had good grades in school and was considered an "excellent student motivated to learn." (Tc. 136; Tr. G52-54). In addition, he obtained his GED in prison, successfully completed several college-level courses in prison, and participated in counseling and mentoring sessions. (C. 133-46). He received a certificate of achievement for participation in the Black History Bowl Contest and a certificate of excellence for being

[14]This section was originally added as section 5-4.5-110(b) of the Uniform Code of Corrections by Public Act 100-1182, §5 (eff. June 1, 2019). However, the section was amended and renumbered as Section 5-4.5-115(b) by Public Act 101-288, §5 (eff. Jan. 1, 2020) (amending 730 ILCS 5/5-4.5-110(b) and renumbering as 730 ILCS 5/5-4.5-115(b)).

the quarter final winner. (C. 136). Given what is known about a juvenile's capacity for change, Dorsey's demonstrated rehabilitative efforts, and his high capability for intellectual achievement (C. 117), it cannot be said, as a matter of law, that he is irreparably corrupted. The trial court made no such finding. (Tc. 131-32).

If Dorsey is denied an opportunity for early release based on demonstrated rehabilitation, he will be unlikely to outlive his prison sentence and will have missed many opportunities at rehabilitation and education, making it less likely he will become a productive member of society if he ever obtains release. Where Dorsey's sentence offers no meaningful incentive of restoration to useful citizenship, it seems more consistent with eliminating his utility as a citizen. *See Gipson*, 2015 IL App (1st) 122451 at ¶74 (holding that defendant's 52-year sentence, with a possibility of release after 44 years, "seems more consistent with eliminating his utility as a citizen"). Illinois courts have recognized that "long periods of confinement have little, if any, value in a rehabilitative strategy." *People v. Kosanovich*, 69 Ill. App. 3d 748, 752 (1st Dist. 1979). Additionally, studies have shown that, despite the fact that many youth will not reoffend as they mature, an extended period of incarceration is one factor that will increase recidivism. *See* Juvenile Court Working Group on Sentencing Best Practices, *Dispositional and Sentencing Best Practices for Delinquent and Youthful* Offender Matters, 14 (April 2016) (writing that unnecessary institutional confinement leads to harmful exposure to negative peer influence and may have unintended consequences of causing youth to self-identify as an offender and to increase recidivism rates);[15] *see also* National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 163, 174-75 (2014) ("Many aspects of prison life – including material deprivations; restricted movement and liberty;

[15] Available at: https://www.gabar.org/committeesprogramssections/sections/childprotectionandadvocacy/upload/MA-Trial-Court-Dispo-Best-Practice-for-Delinquent-Matters.pdf (last visited July 30, 2020).

a lack of meaningful activity; a nearly total absence of personal privacy; and high levels of interpersonal uncertainty, danger, and fear – expose prisoners to powerful psychological stressors that can adversely impact their emotional well-being.").[16]

In finding Dorsey was unable to establish prejudice, the First District Appellate Court declined to consider arguments based on scientific studies, such as those above (*see* pages 28-31, *supra*), since they were not introduced in the circuit court. *Dorsey*, 2016 IL App (1st) 151124-U at ¶33. This portion of the appellate court's order contradicts jurisprudence from this Court establishing that reviewing courts may consider not only the record, but "sources outside the record, including legal and scientific articles[.]" *People v. McKown*, 226 Ill. 2d 245, 272 (2007) (quoting *In re Commitment of Simons*, 213 Ill. 2d 523, 531 (2004)); *see also People v. Huddleston*, 212 Ill. 2d 107, 134-35 (2004) (referring to a variety of scientific literature discussing the prevalence of child sexual abuse and its psychological effect on children).

The appellate court's refusal to consider arguments based on studies from outside of the trial record is also inconsistent with *Miller.* In *Miller,* the Supreme Court explicitly recognized that scientific studies informed its determination that children are constitutionally different than adults. *See Miller*, 567 U.S. at 471 ("Our decisions rested not only on common sense – on what 'any parent knows' – but on science and social science as well.") (citing *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005), and *Graham v. Florida*, 560 U.S. 48, 68 (2010)). The appellate court's decidedly unscientific approach to the question before it undermines the reliability of its rejection of Dorsey's constitutional challenge.

While there very well may be cases where a harsh term-of-years is an appropriate sentence for a juvenile, the application of this extreme penalty to Dorsey is unconstitutionally disproportionate. Because Dorsey's sentence is unconstitutionally disproportionate, he has established a *prima facie* showing of prejudice for purposes of filing a successive petition.

---

[16]Available at: https://www.nap.edu/read/18613/chapter/1 (last visited July 30, 2020).

C. Dorsey made at least a *prima facie* showing that his sentencing hearing was unconstitutional under *Holman*.

In his *pro se* successive post-conviction pleadings, Dorsey alleged that his sentencing hearing was unconstitutional, where the sentencing court failed to fully consider the mitigating characteristics of youth. (C. 51). This allegation must be taken as true at the leave-to-file stage of successive post-conviction proceedings (*People v. Towns*, 182 Ill. 2d 491, 503 (1998); *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998)), and is sufficient, on its own, to make a *prima facie* showing of cause and prejudice. *See People v. Smith*, 2014 IL 115946, ¶29 ("Section 122-1(f) does not provide that a petitioner is entitled to relief upon satisfaction of the cause-and-prejudice test. The cause-and-prejudice test "only gives a petitioner an avenue for filing a successive postconviction petition."); *see also People v. Robinson*, 2020 IL123849, ¶44 (holding that leave to file should only be denied where it is clear, as a matter of law, that petitioner's claim fails). However, if this Court finds that Dorsey is required to conclusively establish his sentencing hearing was unconstitutional in order to obtain leave to file a successive petition, Dorsey easily meets this burden.

In *People v. Holman*, this Court held that a *du jure* or *de facto* life sentence can only be imposed on a juvenile offender if the trial court appropriately considered their youth at the sentencing hearing. 2017 IL 120655, ¶¶42-47. *Holman* found that the mitigating characteristics of youth, codified by the Illinois legislature (730 ILCS 5/5-4.5-105(a)(1-9)), must be fully considered at a juvenile offender's sentencing hearing. *Holman*, 2017 IL 120655 at ¶¶47-50. Specifically, section 5-4.5-105, requires consideration of the juvenile offender's:

> (1) age, impetuosity, and the level of maturity at the time of the offense, including the ability to consider risks and consequences of behavior, and the presence of cognitive or developmental disability, or both, if any;
>
> (2) exposure to outside pressure, including peer pressure, familial pressure, or negative influences;
>
> (3) the person's family, home environment, educational and social

> background, including any history of parental neglect, physical abuse, or other childhood trauma;
>
> (4) potential for rehabilitation or evidence of rehabilitation, or both;
>
> (5) the circumstances of the offense;
>
> (6) the degree of participation and specific role in the offense, including the level of planning by the defendant before the offense;
>
> (7) opportunity to meaningfully participate in his or her defense;
>
> (8) prior juvenile or criminal history; and
>
> (9) any other information the court finds relevant and reliable, including an expression of remorse, if appropriate. However, if the person, on the advice of counsel chooses not to make a statement, the court shall not consider a lack of an expression of remorse as an aggravating factor.

Holman, 2017 IL 120655 at ¶¶45-46 (citing 730 ILCS 5/5-4.5-105 (a) (1-9)). It is *not* sufficient for a court to merely consider "generally mitigating circumstances" related to youth. *Id.* at ¶¶42-46. The sentencing court here failed to adequately consider the above factors.

The general mitigation statute in effect at the time of sentencing did not require consideration of the mitigating qualities of youth, or the higher rehabilitative capacity possessed by children. 730 ILCS 5/5-5-3.1 (West 1996). This statute required no consideration of age at all, and applied with equal force to adults and children. *Id*. As such, the sentencing court failed to consider Dorsey's higher rehabilitative capacity, his potential for rehabilitation, or how those factors impacted the imposed sentence.

In constructing an aggregate 76-year sentence, the sentencing court focused on the severity of the crime and Dorsey's status as a gang member, stating that the gang-related nature of the offense was "particularly aggravating." (Tr. G55-62). Dorsey's susceptibility to manipulation and exploitation by more sophisticated people, such as older gang members, should have been considered as a factor in mitigation. *See Holman*, 2017 IL 120655 at ¶35 (recognizing that, under *Miller*, a sentencing court must consider a juvenile offender's

vulnerability to influence); *see also Daniel*, 2020 IL App (1st) 172267 at ¶28 (finding defendant's sentencing hearing unconstitutional where the "trial court focused on the severity of the crime and the age of the victim.").

At the sentencing hearing, defense counsel asked the court to consider, in mitigation, reports generated by social workers and psychologists who testified at the juvenile transfer hearing. (Tr. G50). These reports by trained professionals explicitly discussed Dorsey's rehabilitative potential and capacity (C. 110-11, 113-20), unlike the lay-witness testimony of his family members, who merely testified Dorsey was "a good kid" and "a good boy." (Tr. G33-34, 37-38). Yet, adding insult to injury, the sentencing court showed no consideration of the reports before imposing a 76-year sentence it believed would be served at 100%. (Tr. G55-62); *see also* page 26, *supra*.

The sentencing court mentioned Dorsey's juvenile status and showed consideration of the pre-sentence investigation report ("PSI"), stating, "I've considered the [PSI]," and "[i]n mitigation, obviously I recognize the youth of [Dorsey]." (Tr. A40). This Court and the Illinois Appellate Courts have unambiguously held, however, that a review of the PSI, combined with general consideration of the defendant's age, is insufficient under *Miller*. *See Holman*, 2017 IL 120655 at ¶¶43-44 (holding that sentencing courts *must* fully explore the impact of the defendant's juvenility on the sentence rendered); *see also Peacock*, 2019 IL App (1st) 170308 at ¶23 ("[W]e conclude that the court's mere awareness of a defendant's age and consideration of a PSI does not provide evidence that the circuit court specifically considered defendant's youth and its attendant characteristics")*; Thornton*, 2020 IL App (1st) 170677 at ¶25 ("[W]e find nothing in the record to show that the circuit court specifically considered the defendant's youth and its attendant circumstances, such as the factors articulated in *Holman*[.]"); *Daniel*, 2020 IL App (1st) 172267 at ¶28 (finding "nothing in the record" showed consideration of the *Miller* factors, even though the sentencing court "mentioned defendant's youth").

As with the child defendants in *Miller*, *Buffer*, *Peacock*, *Thornton*, and *Daniel* Dorsey received a harsh sentence designed for adults without consideration of his "diminished culpability and heightened *capacity* for change." *Miller*, 567 U.S. at 479 (emphasis added). His sentencing hearing was thus unconstitutional. *See Holman*, 2017 IL 120655 at ¶¶47-50 (holding that the sentencing court must fully consider the characteristics of youth).

D. This Court should remand Dorsey's case for a new sentencing hearing, or alternatively, for further post-conviction proceedings.

In *People v. Buffer*, this Court reversed the summary dismissal of the defendant's post-conviction petition and remanded for a new sentencing hearing. 2019 IL 122327, ¶¶44-47. In so doing, this Court stated that "the usual remedy," when reversing the denial of a post-conviction pleading prior to an evidentiary hearing, would be to "remand for the advancement of the postconviction proceedings[.]" *Buffer*, 2019 IL 122327 at ¶45. This Court explained, however, that where "[a]ll of the facts and circumstances to decide defendant's claim are already in the record," the proper remedy is to vacate defendant's sentence and to remand for a new sentencing hearing." *Id*. at ¶47. The Illinois Appellate Court has applied this portion of *Buffer* to cases arising from both the summary dismissal of a *pro se* post-conviction petition, and the denial of leave to file a successive post-conviction petition. *See People v. Peacock*, 2019 IL App (1st) 170308, ¶25 (remanding for a new sentencing hearing where defendant established cause and prejudice for filing a successive post-conviction petition raising a *Miller*-based sentencing claim); *see also People v. Daniel*, 2020 IL App (1st) 172267, ¶¶30-31 (same); *People v. Thornton*, 2020 IL App (1st) 170677, ¶26 (remanding for a new sentencing hearing where defendant's *pro se* post-conviction pleadings were sufficient to survive summary dismissal).[17] At the very least, this Court should remand Dorsey's case for further post-conviction proceedings;

[17]The issue of whether a reviewing court may grant collateral relief prior to the conclusion of the three-stage post-conviction process is currently pending in this Court. *People v. Lusby*, No. 124046 (petition for leave to appeal granted January 31, 2019).

however, under *Buffer*, *Peacock*, *Thornton*, and *Daniel* a new sentencing hearing is warranted.

As in each of the above-cited cases the record here requires no factual development. The sentencing transcripts unambiguously show that Dorsey has a *de facto* life sentence, and that the trial court failed to fully consider the mitigating characteristics of youth. (Tr. G55-62)*; see also* pages 35-38, *supra*; *Buffer*, 2019 IL 122327 at ¶46 (finding the record was fully developed where the record "d[id] not indicate that the court considered defendant's youth and its attendant characteristics"). Because no factual development is needed, and Dorsey has exceeded a *prima facie* showing of cause and prejudice, this Court should remand Dorsey's case for a new sentencing hearing. *See Buffer*, 2019 IL 122327 at ¶45*; see also Peacock*, 2019 IL App (1st) 170308 at ¶25; *Thornton*, 2020 IL App (1st) 170677 at ¶26; *Daniel*, 2020 IL App (1st) 172267 at ¶31. Alternatively, if this Court finds that the record needs to be developed, it should remand this case for further post-conviction proceedings, or an evidentiary hearing pursuant to 730 ILCS 5/5-4.5-115(b), where Dorsey would have the opportunity, with the assistance counsel, to present evidence of actual rehabilitation for purposes of determining whether he is retroactively entitled to a parole hearing. *See* page 32, *supra*.

Conclusion

Derrell Dorsey established cause and prejudice for his juvenile sentencing issue in his successive post-conviction petition. The Supreme Court of the United State did not issue a decision in *Miller* until years after Dorsey had filed his initial post-conviction petition, and the sentencing court imposed an unconstitutionally disproportionate *de facto* life sentence. This Court should, therefore, vacate the circuit court's order denying Dorsey leave to file a successive post-conviction petition, and remand his case for a new sentencing hearing. *See People v. Buffer*, 2019 IL 122327, ¶¶44-47; *see also People v. Thornton*, 2020 IL App (1st) 170677, ¶26; *People v. Peacock*, 2019 IL App (1st) 170308, ¶25. Alternatively, because Dorsey has at the very least made a *prima facie* showing of cause and prejudice, this Court should remand for further post-conviction proceedings, or for an opportunity to prove actual rehabilitation at an evidentiary hearing by retroactively applying section 5-4.5-115(b) here.

CONCLUSION

For the foregoing reasons, Derrell Dorsey, Petitioner-Appellant, respectfully requests that this Court reverse the appellate court's order affirming the denial of leave to file a successive post-conviction petition, and remand his case for a new sentencing hearing, or alternatively reverse the circuit court's order and remand for further post-conviction proceedings, or a third-stage evidentiary hearing for purposes of determining whether Dorsey is retroactively entitled to a parole hearing.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

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

COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 40 pages.

/s/Bryon M. Reina
BRYON M. REINA
Assistant Appellate Defender

APPENDIX TO THE BRIEF

INDEX TO THE RECORD

Index to the Record
Appellate Court No. 05-2480

Index to the Direct Appeal
Appellate Court No. 98-3979

Direct Appeal Report of Proceedings ("SR")

	Direct	Cross	Redir.	Recr.
Volume I of IX				
May 26, 1998				
Motion to Suppress Identification				
Defense Witnesses				
James Boylan	A4	A19	A23	
Defense Rests				A24

Index to the Record
Appellate Court No. 07-2307

Report of Proceedings ("R")

	Direct	Cross	Redir.	Recr.
July 6, 2007				
Petition for Post-Conviction Relief - Denied	E2			

Index to the Record
Appellate Court No. 11-2856

Common Law Record ("C") **Page**

Supplemental Common Law Record (S.C.)

Report of Proceedings ("R")

	Direct	Cross	Redir.	Recr.	
November 17, 2010					
Amended Petition Memorandum of Law and Attorney's 651 (c) certificate Filed					I1
March 30, 2011					
State's Motion to Dismiss Filed					K3
September 7, 2011					
State's Motion to Dismiss Petition for Post-Conviction - Allowed					O3
Notice of Appeal and State Appellate Defender is Appointed to Represent Defendant on Appeal					O4

Index to the Record
Appellate Court No. 13-0875

Common Law Record ("C") **Page**

Common Law Record ("C") **Page**

Report of Proceedings ("R")

	Direct	Cross	Redir.	Recr.	
December 21, 2012					
Petition for Post-Conviction Relief - Denied					C1

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

PEOPLE OF THE STATE OF ILLINOIS

v.

DERRELL DORSEY

Case No. 96CR21035-01

CERTIFIED REPORT OF DISPOSITION

The following disposition was rendered before the Honorable Judge WILLIAM G. LACY ON FEBRUARY 20, 2015. SEE ATTACHED CONCLUSION.

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

Date: FEBRUARY 27, 2015

Dorothy Brown /jo
Dorothy Brown, Clerk of the Circuit Court

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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

A-11

C: 00160

2016 IL App (1st) 151124-U

FOURTH DIVISION
November 2, 2017

No. 1-15-1124

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 96 CR 21035
	)	
DERRELL DORSEY,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant leave to file a successive postconvicition petition challenging his sentence based on *Miller v. Alabama*. Defendant could not show prejudice from the failure to raise such an issue because he was not sentenced to a *de facto* life sentence.

¶ 2 Defendant, Derrell Dorsey, appeals the trial court's denial of leave to file a successive post-conviction petition based on alleged violations of the Eighth Amendment to the U.S. Constitution pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

¶ 3 Defendant, who was 14 years old at the time of the underlying offense, was convicted as an adult of the first-degree murder of Tyran Snow and the attempted first-degree murders of

Calvin Sims and Irene Williams. At trial, Williams testified that around 7 p.m. on March 11, 1996, she was standing in a carry-out restaurant in Chicago, when she saw defendant "kick the door in" and "start [] firing" a silver gun. Defendant fired two gunshots which struck and fatally wounded Snow. Defendant then fired two more gunshots, one hitting Sims, and the other striking Williams in the right upper thigh. Both before and after Williams was transported to the hospital, she told the police that defendant, whom she knew from school, was the shooter.

¶ 4 Sims also testified that he was at the restaurant when the shooting occurred, and that he was struck by a gunshot three inches above his hip. Sims was taken to the hospital and immediately went into surgery. The night that he was released from the hospital, detectives came to his house and showed him a class photo that included defendant and 16 other students. Sims identified defendant as the offender, and told them that he recognized him from when Sims used to pick up his cousin at defendant's school.

¶ 5 Defendant was convicted by a jury of first-degree murder and two counts of attempted first-degree murder. At the subsequent sentencing hearing, in aggravation, the State presented victim impact statements from the surviving victims, and from Bessie Snow, grandmother of the deceased Tyran Snow. The trial court also heard testimony from Adrian Bowman, who was in custody with defendant at the juvenile detention center, and who testified that defendant had struck him in the face with a chair during a card game. The State further advised the court that defendant was on probation at the time of the murder for a prior juvenile robbery offense.

¶ 6 In mitigation, defendant presented letters from various individuals on his behalf. Defendant also presented the testimony of Sheila Teague, defendant's aunt, who testified that she lived with defendant most of his life, that he was "always a good kid[,]" and that he "always

respected all adults." Seana Tegue, defendant's cousin, also testified that defendant was "a good boy" and that he "always had good grades in school."

¶ 7 At the conclusion of the sentencing hearing, the trial court stated:

> "I have taken into consideration the nature and character of this offense. I have taken into consideration history and character of the defendant.
>
> As you know I presided over this trial and I'm very familiar with the facts with regard to this matter. I've considered the pre-sentence investigation. All the evidence and arguments that were presented here today. In aggravation and mitigation. And I have reviewed and considered the statutory factors and aggravation in the statutory factors in mitigation."
>
> In reviewing the statutory factors in aggravation and mitigation, the court does note that the defendant's conduct in this matter caused and threatened serious harm to others. Obviously the charges to which the defendant has been convicted inherently recognize harm to certain individuals.
>
> However I do know that outside of Tyran Snow, Irene Williams and Calvin Simms [*sic*], the defendant's conduct threatened serious harm to other individuals that were in that restaurant, including the other individual who was named to be inside the waiting area and the individual[s] that were in working in the restaurant. Their safety was certainly put in jeopardy by this attack by the defendant. So I find that factor in aggravation certainly is applies [*sic*].
>
> I have also taken into consideration the fact that the defendant has a history of prior delinquency. He has had the benefit as a result of his wardship, of the juvenile probation authorities and apparently that was *** unsuccessful.

In mitigation, obviously I recognize the youth of [defendant]. In some respects, I would say that [defendant] might count himself to be a fortunate person. Because those of us that are intimately familiar with the facts of this incident, know that it was certainly just a fortuitous happening that [defendant] only killed one person. And injured two others. Because from the nature of this attack that he launched on that restaurant, that evening, it would be very possible that [defendant] would be sitting here charged with four murders. And facing a life sentence in prison.

So one might say that he is fortunate. That he's in a situation where he's not facing life in prison.

We all know from the facts of this case that defendant simply kicked open that door, walked in and started indiscriminately shooting. And everybody dove for cover and three people were hit, one person wasn't. All those people could be dead today. It certainly wasn't as a result of lack of trying of [defendant] that they are not.

It was a very small space that those people were running around in trying to dodge those bullets. So when I reviewed the facts of this case and I tried to come up come to a description as to what I thought would be the term that would characterize [defendant's] actions, I came up with indiscriminate ruthlessness.

Now it's clear from the pre-sentence investigation, also from the facts of this case, that [defendant] was a gang member. *** [T]he real inherent evil of gang crime is the fact that time and time again, we see that the result, the end result of gang crime is the fact that so often the people that get hurt are in addition

> to the targets, the innocent bystanders. *** And in this case, it's not clear from the evidence or at least it's not—we can't say with 100% certainty which of those four people inside the waiting area of the restaurant was the intended target.
>
> But the fact of the matter is, three people were shot. And that's what happens. Because when you have indiscriminate gang violence everybody in the area gets hit. So it's not just the death of or the wounding of an intended target who may or may not be a gang member, it's everybody else that's affected by gang crime. And that's particularly aggravating."

¶ 8 The trial court then sentenced defendant to consecutive terms of 40 years for the first-degree murder of Snow, 18 years for the attempted first-degree murder of Williams, and 18 years for the attempted first-degree murder of Sims.

¶ 9 On direct appeal, defendant contended that the trial court had improperly allowed gang-related testimony, and relied on evidence of his gang membership when imposing his sentence. He also contended that the trial court failed to consider his youth when imposing his sentence. This court affirmed defendant's convictions and sentences, finding that "[d]efense counsel mentioned defendant's age, and the trial court specifically affirmed that it was considering defendant's 'youth' as a mitigating factor." *People v. Dorsey,* No. 1–98–3979, 11 (2000) (unpublished order pursuant to Supreme Court Rule 23).

¶ 10 On June 21, 2001, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)), challenging the consecutive nature of his sentences based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The petition was denied, and defendant did not appeal.

¶ 11 On April 1, 2005, defendant filed a *pro se* post conviction petition based on alleged ineffective assistance of counsel for failing to investigate certain alibi witnesses. This court reversed the summary dismissal of defendant's petition and remanded for further proceedings, finding that, when considering the evidence in defendant's supporting affidavits as true, he had raised the gist of a constitutional claim of ineffective assistance. *People v. Dorsey,* No. 1–05–2480, 7-8 (2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 12 On April 20, 2007, defendant filed a second petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2000)), alleging that his conviction was void because it was based on a non-existent statute. The trial court denied defendant's petition, and this court affirmed. *People v. Dorsey*, No. 1–07–2307 (2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 13 Defendant filed a third petition for relief from judgment on October 22, 2012, alleging that his consecutive sentences were improperly imposed, rendering his sentence void. The trial court dismissed the petition, and defendant appealed. The State Appellate Defender filed a motion for leave to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The court allowed appellate counsel's motion, and affirmed the judgment of the trial court. *People v. Dorsey*, 2014 IL App (1st) 130875-U (2007).

¶ 14 On December 17, 2014, defendant filed a Petition for Leave to File a Successive Petition for Post Conviction Relief, and the petition itself, which are the subject of this appeal. Defendant raised two issues. The first, entitled "Cruel and Unusual Punishment 8th Amendment Violation[,]" "sought "relief pursuant to the new Supreme Court ruling in *Miller v. Alabama,"* 567 U.S. 460 (2012). Defendant asserted that "although his 76 year sentence is not technically a Natural Life sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger

Miller type protections." Defendant alleged that the trial court in his case "did not consider the special circumstances that often make lengthy sentences particularly inappropriate for youthful offender[]s." (emphasis in original). Defendant stated that he could establish cause and prejudice for the filing of a successive post conviction petition because *Miller,* 567 U.S. 460 (2012), was decided after he filed his initial post conviction petition, and, because he "would have attained a lesser sentence" if the trial court had considered the ideas espoused in *Miller*. Defendant's second issue concerned the "deni[al of] his constitutional right to a fair trial under the Fifth and Fourteenth Amendments" based on "the giving of an erroneous jury instruction on the factors to be considered in assessing identification testimony."

¶ 15 On February 20, 2015, the trial court entered an order on defendant's petition for leave to file a successive postconviction petition, finding both of defendant's claims to be frivolous. Regarding defendant's juvenile sentencing claim, the trial court stated, "Although petitioner may be able to show cause for his failure to raise his claim in an earlier petition, he is entirely unable to show prejudice had petitioner asserted this claim in the initial petition. *** Although petitioner was under the age of 18 when he committed first degree murder, he was not sentenced to mandatory life without the possibility of parole in violation of the Supreme Court's holding in *Miller*." Defendant appealed.

¶ 16 In this court, defendant claims that the trial court erred in denying his motion for leave to file a successive postconviction petition. As an initial matter, we note that defendant focuses his argument on the first issue contained in his successive postconviction petition, namely that his sentence violates the Eighth Amendment to the U.S. Constitution pursuant to *Miller v. Alabama,"* 567 U.S. 460 (2012). Defendant raises no argument regarding the second issue raised in his successive petition regarding an allegedly erroneous jury instruction, and, as such,

defendant has abandoned that issue and forfeited it for review. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 17 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1, *et seq.* (West 2014)) provides a tool by which any person imprisoned in the penitentiary can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2014); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999).

¶ 18 Only one postconviction proceeding is contemplated under the Act (*People v. Edwards*, 2012 IL 111711, ¶ 22) and a defendant seeking to file a successive postconviction petition must first obtain leave of court (*People v. Tidwell*, 236 Ill. 2d 150, 157 (2010)). The bar against successive postconviction proceedings should not be relaxed unless: (1) a defendant can establish "cause and prejudice" for the failure to raise the claim earlier; or (2) he can show actual innocence under the "fundamental miscarriage of justice" exception. *Edwards*, 2012 IL 111711, ¶¶ 22, 23; *People v. Smith,* 2014 IL 115946, ¶ 34. Defendant has alleged only the first basis in the instant appeal.

¶ 19 The cause and prejudice standard is higher than the normal first-stage "frivolous or patently without merit" standard applied to initial petitions. *Edwards,* 2012 IL 111711, ¶¶ 25–29; *Smith,* 2014 IL 115946, ¶ 34 ("the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122–2.1(a)(2) of the Act"). Under the cause-and-prejudice test, a defendant must establish both: (1) cause for his or her failure to raise the claim earlier; and (2) prejudice

stemming from his or her failure to do so. *Edwards,* 2012 IL 111711, ¶ 22 (citing *People v. Pitsonbarger,* 205 Ill. 2d 444, 459 (2002)). "A defendant shows cause 'by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings.' " *People v. Wrice*, 2012 IL 111860, ¶ 48 (quoting 725 ILCS 5/122–1(f) (West 2014)). In other words, to establish "cause" a defendant must articulate why he could not have discovered the claim earlier through the exercise of due diligence. *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 72. A defendant shows prejudice by demonstrating that the claim so infected the trial that the resulting conviction or sentence violated due process. *Wrice*, 2012 IL 111860, ¶ 48.

¶ 20 Whether abuse of discretion or *de novo* review applies to decisions granting or denying leave to file successive postconviction petitions is currently unclear. See *Edwards*, 2012 IL 111711, ¶ 30 (pointing out that decisions granting or denying leave of court are generally reviewed for abuse of discretion, but that the requirement that a successive postconviction petition based on a claim of actual innocence must state a colorable claim, as a matter of law, suggests *de novo* review). Although our supreme court has not resolved this question, we need not address it here because defendant's claim fails under either standard. See *Edwards*, 2012 IL 111711, ¶ 30; *People v. Calhoun*, 2016 IL App (1st) 141021, ¶ 32.

¶ 21 In defendant's successive post conviction petition, he raised a claim based on the Supreme Court's decision in *Miller*, which held that mandatory life sentences for juveniles violate the Eighth Amendment's prohibition on cruel and unusual punishment, and that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller v. Alabama*, 567 U.S. 460, 489, 132 S. Ct. 2455, 2475 (2012). *Miller* has since been held to apply retroactively (see *Montgomery v. Louisiana*,

136 S.Ct. 718, 735-36 (2016); *People v. Davis*, 2014 IL 115595, ¶ 42), and not only to minors sentenced to mandatory life imprisonment, but also those having discretionary life sentences (*People v. Holman*, 2017 IL 120655, ¶ 40), and those whose sentences are so long that they "amount[] to the functional equivalent of life" (*People v. Reyes*, 2016 IL 119271, ¶¶ 9-10).

¶ 22 In this appeal, defendant contends that the trial court erred in denying him leave to file a post-conviction petition based on *Miller*. Defendant recognizes that he is eligible for day-for-day credit since he was sentenced before the truth-in-sentencing statute was enacted in 1998, and thus he is "scheduled to be released from prison on September 20, 2034, when he will be 53 years old." However, defendant contends that his sentence constitutes a *de facto* life sentence in violation of *Miller*.

¶ 23 Defendant alleges that he established cause, because he could not have raised his claim based on *Miller* in his initial *pro se* petition, when *Miller* was not decided until 2012. The State responds that defendant "cannot use *Miller* as a basis to satisfy 'cause' " because he will be "released at the age of 53." Defendant replies that the State's argument goes to defendant's ability to establish prejudice, not cause, for filing his successive petition. We agree with defendant. Because defendant is raising a challenge to his sentence based on *Miller*, which was not available at the time of his original petition, he may be excused from failing to raise that claim previously. See *People v. Davis,* 2014 IL 115595, ¶ 42 ("*Miller*'s new substantive rule constitutes 'cause' because it was not available earlier."); *People v. Nieto,* 2016 IL App (1st) 121604, ¶ 39 ("Illinois procedural rules regarding forfeiture cannot be applied to juvenile defendants raising claims under *Miller*"); *People v. Warren,* 2016 IL App (1st) 090884–C, ¶ 48 (defendant was not barred from raising his challenge on appeal from the denial of leave to file a successive petition, where "*Miller* was not available for earlier postconviction proceedings");

People v. Sanders, 2016 IL App (1st) 121732–B, ¶ 19 (*Miller* "changed the law and gave postconviction petitioners cause for failing to raise the issue in proceedings that preceded" it.). However, whether defendant can establish that *Miller* applies to his situation, and accordingly that he suffered prejudice from his inability to raise the issue previously, is a different question, and relevant to the second prong of the cause and prejudice test.

¶ 24 We thus turn to the question of whether defendant established prejudice such that he may file a successive post-conviction petition raising a *Miller* issue. Defendant contends that he has established prejudice, because, under *Miller* and its progeny, the Eighth Amendment to the U.S. constitution prohibits mandatory life and *de facto* life sentences. Defendant further contends that the Eight Amendment prohibits sentencing schemes that subject juvenile offenders to "a 'state's 'most severe penalties' without consideration of the mitigating qualities of youth."

¶ 25 Although *Miller* and its progeny have prohibited mandatory life and *de facto* life sentences that are imposed on juveniles without consideration of the defendant's "youth and its attendant characteristics" (see *Montgomery*, 136 S. Ct. at 735), we are aware of no case that has categorically prohibited life sentences, or *de facto* life sentences for juvenile offenders. Indeed, our supreme court has stated that *Miller* does not prohibit a natural life sentence without the possibility of parole, but "only its *mandatory* imposition on juveniles. [citation] A minor may still be sentenced to natural life imprisonment without parole so long as the sentence is at the trial court's discretion rather than mandatory." *Davis*, 2014 IL 115595, ¶ 43.

¶ 26 As an initial matter, we note that when defendant was sentenced, he was subject to sentencing ranges with a minimum of 20 years and a maximum of 60 years for first-degree murder (730 ILCS 5/5-8-1(a)(1) (West 1996)), and a minimum of 6 years and a maximum of 30 years for attempted first-degree murder (720 ILCS 5/8-4(c)(1) (West 1996); 730 ILCS 5/5-8-

1(a)(3) (West 1996)). Defendant's sentences were required to run consecutively, based on the severe bodily injury that defendant inflicted on each of the attempted murder victims. 730 ILCS 5/5-8-4(a) (West 1996)). Defendant was thus subject to a mandatory minimum aggregate sentence of 32 years' imprisonment. As previously stated, defendant is eligible for day-for-day credit, and thus, the trial court had the discretion to sentence him to as little as 32 years, which would have made him eligible for release in only 16 years. This cannot be said to be a sentencing scheme subjecting defendant to a mandatory *de facto* life sentence.

¶ 27 Defendant, however, did not receive the minimum sentence. The trial court, in its discretion, sentenced him to a prison term exactly halfway between the minimum and maximum: 76 years. Defendant contends that his sentence is a *de facto* life sentence, and that it was imposed in violation of *Miller*'s requirement to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480, 132 S. Ct. at 2469.

¶ 28 Defendant initially appears to argue that his 76-year aggregate sentence should be considered a *de facto* life sentence *per se*, because sentences of a lesser number of years have been held to constitute *de facto* life sentences. Defendant compares his sentence to those at issue in out-of-state cases, in which courts in Iowa and Wyoming have found 35-year and 45-year sentences to amount to *de facto* life sentences (see *State v. Pearson*, 836 N.W.2d 88, 97 (Iowa 2013); *Bear Cloud v. State*, 334 P.3d 132, ¶ 37 (Wyo. 2014)). Defendant acknowledges that "because the underlying offense was committed in 1996 before the truth-sentencing statute was enacted in 1998, he might actually serve only 38 years of his aggregate 76-year sentence," thus making him eligible for release at the age of 53. Defendant, however, asks us to find that his

sentence is a *de facto* life sentence because "there is no guarantee that [he] will receive day-for-day credit."

¶ 29 The great weight of authority on this issue indicates that a court looks, not only to the total sentence imposed, but to the availability and amount of sentence credit applicable to a given sentence before determining whether it actually amounts to a *de facto* life sentence without the possibility of parole. See, e.g., *Reyes*, 2016 IL 119271, ¶ 10; *People v. Patterson*, 2014 IL 115102, ¶ 108; *Nieto*, 2016 IL App (1st) 121604, ¶ 13; *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66, *appeal allowed*, 65 N.E.3d 844 (2016); *People v. Harris*, 2016 IL App (1st) 141744, ¶ 54; *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 24; *People v. Morris*, 2017 IL App (1st) 141117 ¶ 30. This authority informs us that any sentencing credit that is available to the defendant is relevant to the analysis, and should be accounted for in making the decision as to whether a sentence constitutes a *de facto* life sentence. We join that authority, and decline to look to defendant's total 76-year sentence in a vacuum, without consideration of his scheduled release date or the fact that he will likely receive the day-for-day credit for which he is eligible.

¶ 30 The cases cited by defendant in support of his claim that his sentence is "functionally equivalent to life without parole,"—namely *Pearson*, 836 N.W.2d 88 (Iowa 2013) and *Bear Cloud*, 334 P.3d 132, ¶ 37 (Wyo. 2014)—are from out of state authorities, and therefore are not binding on this court. See *People v. Reese,* 2015 IL App (1st) 120654, ¶ 70, *appeal allowed*, 48 N.E.3d 1096 (2016). Nonetheless, we do not find them to be persuasive.

¶ 31 The juvenile defendant in *Pearson* was convicted of two counts of first-degree robbery and two counts of first-degree burglary, based on a "crime spree" that the defendant committed with her boyfriend, which culminated in the boyfriend pushing one victim into a doorframe and fracturing her shoulder during a robbery. The defendant was sentenced to fifty years in prison

with a seventy-percent mandatory minimum, making her ineligible for parole until she served thirty-five years. *Pearson*, 836 N.W.2d at 89 (Iowa 2013). Although the defendant in *Pearson*'s sentence was similar to defendant's here in that they are both eligible for release in their "early fifties" (see *Pearson*, 836 N.W.2d at 102 (Iowa 2013), (Mansfield, J., dissenting)), the convictions that support those respective sentences are very different. As stated, the defendant in *Pearson* was convicted of robbery and burglary; here, by contrast, defendant was convicted of first-degree murder and two counts of attempted first-degree murder. Even more importantly, however, the *Pearson* court was interpreting Article I, section 17 of the Iowa Constitution, and, as such, its analysis is of little value to this court. Moreover, *Pearson* was a highly contested 4–3 decision by the Iowa Supreme Court, and is an outlier in its analysis of *Miller*. As the *Pearson* dissent states, "[N]o other appellate court has adopted the majority's reading of [*Miller*]. The Iowa Supreme Court stands alone." *Pearson*, 836 N.W.2d at 103 (Mansfield, J., dissenting).

¶ 32 We also find *Bear Cloud* to be unsupportive of defendant's position. In *Bear Cloud*, the Supreme Court of Wyoming determined that a juvenile defendant's aggregate sentence of life with the possibility of parole after 45 years, constituted a *de facto* life sentence with no meaningful opportunity for release, when he would not be eligible for parole until he was 61 years old. *Bear Cloud*, 334 P.3d 132, ¶ 37 (Wyo. 2014). However, the defendant in *Bear Cloud* received a longer sentence—life with the possibility of parole at age 61—than defendant did here. Additionally, in *Sen v. State*, the Supreme Court of Wyoming rejected a similar challenge from Bear Cloud's codefendant, where the codefendant would be eligible for parole at 50 years old, finding that the sentence was "not a *de facto* life sentence and does not violate the Eighth Amendment." *Sen v. State*, 390 P.3d 769, 777 (Wyo. 2014). Defendant's challenge, based a

sentence which provides him the opportunity for release at age 53, is more similar to the sentence at issue in *Sen*, than the one in *Bear Cloud*.

¶ 33 Defendant next contends that, even if he receives day-for-day credit, his sentence amounts to a *de facto* life sentence, based on his projected release date at 53 years old. Defendant asks us to find his sentence to be a *de facto* life sentence, citing a number of statistics to contend that his life expectancy is 63.8 years or less, based on his birth-year, sex, and race. Defendant also contends that various factors contribute to accelerated aging for individuals who are incarcerated. Defendant asserts that these statistics show that "there is no guarantee that [he] will live long enough to be released from prison."

¶ 34 We note, however, that none of the evidence was presented at any point before the circuit court, and we believe that this court needs guidance from either our State's highest court, or the legislature as to what qualifies as a *de facto* life sentence, and what are appropriate considerations in making that determination, before we may consider such evidence. As another panel of this court has thoughtfully opined:

> "[i]f an Illinois court was going to hold that a *de facto* life sentence qualifies for consideration under Miller, then we would need a consistent and uniform policy on what constitutes a de facto life sentence. Is it simply a certain age upon release? If so, is it age 65 *** or 90? Should the age vary by ethnicity, race or gender? If we are going to consider more than age, what societal factors or health concerns should impact our assessment of a *de facto* life sentence. These are policy considerations that are better handled in a different forum." *People v. Jackson*, 2016 IL App (1st) 143025, ¶¶ 57.

¶ 35 Nevertheless, this court has found no Illinois case, nor has defendant pointed us to any Illinois case, which has concluded that a defendant, projected to be released at the age of 53 or younger, received a *de facto* life sentence. In fact, this court has rejected similar challenges, in circumstances where the defendants would be even older at the time of their scheduled release than defendant will be in this case. See *People v. Evans*, 2017 IL App (1st) 143562 (finding that a 90-year sentence imposed on a 17-year-old defendant, who was eligible for day for day credit and could be released at age 62, was not a *de facto* life sentence); *People v. Applewhite*, 2016 IL App (1st) 142330 (17-year-old defendant's 45-year sentence was not a *de facto* life sentence when he would be eligible for release at the age of 62); *Jackson*, 2016 IL App (1st) 143025 (rejecting the defendant's claim that his 50–year sentence was a *de facto* life sentence unconstitutional under *Miller* when defendant was 16 years old at the time of the offense).

¶ 36 Moreover, the instances that the Illinois courts have found *de facto* life sentences, all concern defendants who would be significantly older than this defendant at their respective release dates. See *People v. Reyes*, 2016 IL 119271, ¶¶ 10, 12 (where the juvenile defendant's sentence ensured that he would remain in prison "until at least the age of 105," the sentence was a "*de facto* life-without-parole sentence."); *People v. Buffer*, 2017 IL App (1st) 142931 (the defendant's 50–year sentence was a *de facto* life sentence in violation of *Miller* where he would be 66 years old on his projected parole date, and 69 years old on his projected discharge date); *People v. Morris*, 2017 IL App (1st) 141117 (a 16–year–old defendant's 100–year sentence was a *de facto* life sentence in violation of *Miller* when he would be eligible for release, at the earliest, at age 109); *People v. Ortiz*, 2016 IL App (1st) 133294 (a 15–year–old defendant's 60–year sentence was "effectively a life sentence without parole" because the defendant would "not be eligible for release until he is 75 years old[.]"); *People v. Nieto*, 2016 IL App (1st) 121604 ¶ 42

(finding juvenile defendant's sentence 78 year sentence to be a *de facto* life sentence, "[g]iven that defendant will not be released from prison until he is 94 years old[.]"); *People v. Sanders*, 2016 IL App (1st) 121732–B, ¶¶ 1–2 (reversing the denial of leave to file a successive petition under *Miller* where the 17–year–old juvenile defendant received a 100–year sentence); *People v. Harris*, 2016 IL App (1st) 141744, ¶ 54 (finding a 76-year sentence to be a *de facto* life sentence, when, "at best, [the defendant] would be released at age 89.")

¶ 37 In light of the foregoing authority, and without any additional guidance from our legislature or higher courts, this court cannot find defendant's sentence, under which he will be eligible for release at 53-years-old, to constitute a *de facto* life sentence. Therefore, the requirements of *Miller* are inapplicable to this matter, and the trial court properly denied defendant leave of court to file a successive postconviction petition because "it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law." *People v. Smith*, 2014 IL 115946, ¶ 35; see also *Evans*, 2017 IL App (1st) 143562, ¶ 18 ("Since [the defendant] is not serving a *de facto* life sentence, the new protections elucidated by *Miller* and its progeny do not apply to him. So the trial court correctly ruled that [the defendant] had not shown 'prejudice' to justify filing a successive postconviction petition.").

¶ 38 Defendant next contends that, even if his sentence does not constitute a *de facto* life sentence, his lengthy sentence "still undermines the Supreme Court's reasoning in *Miller*" and is "unconstitutionally disproportionate under *Miller* and its progeny." We disagree.

¶ 39 As the above authorities make clear, the rationale of *Miller* applies "only in the context of the most severe of all criminal penalties," namely capital punishment, natural life imprisonment, or *de facto* life imprisonment. *Patterson*, 2014 IL 115102, ¶ 110; *People v. Thomas*, 2017 IL

App (1st) 142557, ¶ 26 (noting that our supreme court has held that the reasoning of *Miller*, *Graham* and *Roper* apply only in the context of the most severe of all criminal penalties); *Reyes*, 2016 IL 119271, ¶ 9. In the present case by contrast, the defendant did not receive the "most severe of all criminal penalties." *Patterson*, 2014 IL 115102, ¶ 110. He did not receive natural life imprisonment without parole, and, as we have previously concluded, he did not receive a *de facto* life sentence. As such, the rationale of *Miller* does not extend to his sentence.

¶ 40 Finally, defendant contends that his sentence is also unconstitutional under *Miller*, because "he was subject to a sentencing scheme that required the imposition of consecutive sentences, and thus a mandatory minimum adult sentence of 32 years." Defendant cites the Iowa Supreme Court in *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014), which held that "mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause." Defendant acknowledges that other courts have "adopt[ed] a contrary viewpoint[,]" but contends that, "[b]ecause [his] sentence is, at minimum, a long term-of-years sentence based on a mandatory minimum sentencing scheme designed for adults, the principles of *Miller* apply here."

¶ 41 Similar constitutional challenges to mandatory minimum sentencing schemes have been rejected by Illinois courts, (see *Applewhite*, 2016 IL App (1st) 142330, ¶ 23; *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 58 ("The Supreme Court did not hold in *Roper, Graham,* or *Miller* the eighth amendment prohibits a juvenile defendant from being subject to the same mandatory minimum sentence as an adult, unless the mandatory minimum sentence was death or life in prison without the possibility of parole")), and we are unpersuaded by defendant's reliance on out of state authority (see *Lyle,* 854 N.W.2d at 400 (Iowa 2014)). As stated previously, the decisions of foreign courts are not binding on Illinois courts (see *Reese,*

2015 IL App (1st) 120654, ¶ 70, *appeal allowed*, 48 N.E.3d 1096 (2016)), especially where, like in *Lyle*, the decision was based on an interpretation of the foreign court's own state's constitution. As another panel of this court has noted, the Iowa Supreme Court has interpreted *Miller* more broadly than our courts (*People v. Wilson*, 2016 IL App (1st) 141500, ¶ 44), and we decline to follow it here.

¶ 42 Based on the foregoing, we find no error in the summary dismissal of defendant's postconviction petition. Accordingly, the judgment of the circuit court is affirmed.

¶ 43 Affirmed.

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

THE PEOPLE OF THE STATE OF ILLINOIS)
v.)
Derrell Dorsey)
Defendant/Appellant

No. 96 CR-21035-01

Notice of Appeal

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

(1) Court to which appeal is taken:
Circuit Court of Cook County First District

(2) Name of appellant and address to which notices shall be sent:
Name: Derrell Dorsey Prose
Address: 2650 South California, Room 526 Chicago IL 60608

(3) Name and address of appellant's attorney on appeal:
Name: Derrell Dorsey Pro Se
Address: Hills Cor Center P.O. Box 1700 Galesburg IL 61401
If appellant is indigent and has no attorney, does he want one appointed?
Yes He request that an attorney represent him

(4) Date of judgment or order: Feb 20 2015 ✓

(5) Offense of which convicted: First Degree Murder and Two Attempted First Degree Murder

(6) Sentence: 46 years

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

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

No. 123010

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DERRELL DORSEY Petitioner-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-15-1124. There on appeal from the Circuit Court of Cook County, Illinois , No. 96 CR 21035. Honorable William G. Lacy, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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

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

Mr. Derrell Dorsey, Register No. K68001, Lawrence Correctional Center, 10930 Lawrence Road, Sumner, IL 62466

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 3, 2020, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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