No. 126432

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. ROBERT CHRISTOPHER JONES, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-14-0573 There on Appeal from the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois, No. 99 CF 395 The Honorable H. Chris Ryan, Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE ACTION

Petitioner Robert Christopher Jones appeals from the appellate court's judgment affirming the circuit court's denial of his motion for leave to file a successive postconviction petition. A39.[1] An issue is raised on the pleadings: whether petitioner's motion made a prima facie showing of cause and prejudice under 725 ILCS 5/122-1(f).

ISSUES PRESENTED FOR REVIEW

1. Whether petitioner forfeited the claim that his 50-year sentence violates the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012), by not raising that claim in his successive postconviction petition.

2. Whether the appellate court properly denied petitioner leave to file a successive postconviction petition raising an Eighth Amendment challenge to his 50-year sentence under *Miller* because the sentence was not mandatory.

3. Whether the appellate court properly denied petitioner leave to file a successive postconviction petition raising an Eighth Amendment challenge to his 50-year sentence because he waived such challenge by pleading guilty pursuant to a fully-negotiated plea agreement.

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[1] Citations to the three volumes of the common law record appear as "CL1 at C__," "CL2 at C__," and "CL3 at C__"; to the report of proceedings as "R__"; to petitioner's brief as "Pet. Br. __"; to petitioner's appendix as "A__"; and to petitioner's appellant's brief below, which the People asked the appellate court to certify to this Court pursuant to Rule 318(c), as "Pet. App. Ct. Br. __."

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4. Whether, if petitioner's sentence violates the Eight Amendment and he did not waive the claim, the People may elect to either accept the loss of the benefit that they were to receive under their bargain with petitioner and agree to resentencing or void the plea agreement entirely and proceed with the original prosecution.

JURISDICTION

On November 18, 2020, this Court allowed petitioner's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

In October 1999, when he was 16 years old, petitioner entered the home of George and Rebecca Thorpe, stabbed them to death, and took Rebecca's purse and a lockbox. CL1 at C34-42; R58-61. Petitioner was charged with eight counts of first degree murder, 720 ILCS 5/9-1(a)(1), (3) (1998); two counts of armed robbery, 720 ILCS 5/18-2 (1998); one count of residential burglary, 720 ILCS 5/19-3 (1998); and one count of home invasion, 720 ILCS 5/12-11 (1998). CL1 at C34-42.

In May 2000, the parties told the trial court that they had reached a fully-negotiated plea agreement. R52-53. Under the terms of the agreement, petitioner agreed to plead guilty to one count of first degree murder for stabbing Rebecca to death, two counts of armed robbery, and one count of residential burglary. R52. In exchange, the prosecution agreed to dismiss

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the remaining charges, including those for murdering George, and to recommend concurrent sentences of 50 years for the murder, 30 years for each armed robbery, and 15 years for the burglary. *Id.*

The trial court admonished petitioner about the nature of the charges against him and the sentencing ranges for each charge. R54-56. The trial court also admonished petitioner that he did not have to plead guilty, but if he did there would be no trial and he would waive his rights to a jury and to confront the witnesses against him. R56-57; *see* Ill. S. Ct. R. 402(a).

The trial court then considered the factual basis for the plea. R58-61. The prosecution stated that the evidence would show that when petitioner was 16, he entered the home of 75-year-old George Thorpe and 80-year-old Rebecca Thorpe (whom he considered his great uncle and great aunt) armed with a knife. *See* R58-61. Petitioner stabbed George 17 times and stabbed Rebecca 11 times, then took Rebecca's purse and lockbox and left. R59-60.

At the conclusion of the factual basis, the trial court confirmed that petitioner was 16 at the time of the offenses. R61. It then questioned petitioner, who affirmed that his guilty pleas were voluntary. R62-63. After considering petitioner's prior criminal history, R63, the trial court stated that it would concur in the parties' plea agreement and impose the sentence to which petitioner had agreed, *id.* Petitioner pleaded guilty to one count of first degree murder, two counts of armed robbery, and one count of residential burglary, and the trial court sentenced him to concurrent prison

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terms of 50 years for murder, 30 years for each armed robbery, and 15 years for residential burglary. R64-65.

The trial court admonished defendant that he had the right to appeal, but that before doing so he would need to move to vacate the guilty pleas. R65-66. The trial court explained that if that motion were granted, "the sentence and judgments would be vacated, the pleas would be withdrawn, and trial dates would be set." R66. The trial court further explained that, "[u]pon the request of the State's Attorney, any charges that were dismissed as part of this plea agreement would be reinstated and also set for trial." R66. Petitioner did not move to vacate his guilty plea or appeal.

In 2002, petitioner filed a postconviction petition. CL2 at C443-46. The trial court denied relief, CL2 at C489; R121-24, and the appellate court affirmed, Rule 23 Order, *People v. Jones*, No. 3-02-0671 (Ill. App. Ct. February 5, 2004).

In 2014, petitioner sought leave to file a successive postconviction petition raising two claims. CL3 at C8-38. First, he claimed that the automatic transfer provision, under which 15- and 16-year-old homicide offenders were excluded from juvenile court, *see* 705 ILCS 405/5-130 (1999), violated the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012), because it subjected juvenile homicide offenders to prosecution and sentencing as adults without individualized consideration of their youth. CL3 at C17-30. Second, petitioner claimed that the truth-in-sentencing law,

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730 ILCS 5/3-6-3(a)(2) (1999), violated the Eighth Amendment as applied to juvenile homicide offenders who are sentenced as adults because it required that they serve 100% of their 20-to-60-year sentences and did not afford the sentencing court the discretion to exempt them from that requirement based on individualized consideration of their youth. CL3 at C33-37. Petitioner alleged that he was unable to raise these claims in his initial postconviction petition because *Miller* had not yet been decided. CL3 at C42-43. He did not argue that his 50-year sentence was an unconstitutional life sentence under *Miller*. *See* CL3 at C8-38. The trial court denied leave to file the successive postconviction petition, CL3 at C45, and petitioner appealed, CL3 at C47.

On appeal, petitioner argued that the trial court erred in denying him leave to file a successive petition that "alleged that the automatic-transfer provision of the Juvenile Code and the truth-in-sentencing provision requiring him to serve 100% of his murder sentence violated the principles set forth in [*Miller v. Alabama*, *Graham v. Florida*, and *Roper v. Simmons*]." Pet. App. Ct. Br. 11. Petitioner alleged that he could not have raised these challenges "because the line of cases on which he relied was not decided until after he was convicted and sentenced." *Id.* He argued that his successive postconviction petition "alleged the gist of a claim that an unconstitutional sentencing scheme was applied to him," *id.* at 12, but did not claim that his 50-year sentence was an unconstitutional life sentence under *Miller*, *see id.* at 2-13.

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The appellate court affirmed the denial of leave to file a successive postconviction petition. *People v. Jones*, 2016 IL App (3d) 140573-U, ¶ 19. The court did not address whether *Miller* constituted cause for petitioner's failure to raise Eighth Amendment challenges to the mandatory transfer provision and truth-in-sentencing law in his initial postconviction petition because it found *Miller* inapplicable altogether, such that petitioner "failed to establish 'prejudice.'" *Id.* ¶ 11. The court explained that "*Miller* and its progeny have no application to defendant's 50-year sentence" because *"Miller* holds that a *mandatory* life sentence for a juvenile violates the eighth amendment prohibition against cruel and unusual punishment," *id.* ¶ 12 (emphasis in original), and petitioner's 50-year sentence was neither mandatory nor a *de facto* natural life sentence, *id.* ¶¶ 13, 17. "As an aside," the appellate court noted that *Miller* does not "preclude[] the trial court from imposing a discretionary *de facto* life sentence." *Id.* ¶ 16.

Petitioner sought leave to appeal, requesting that this Court "resolve a unique issue — whether a juvenile defendant's negotiated plea to a term of years was irreparably tainted by a statutory sentencing scheme that has since been found to be unconstitutional." PLA, *People v. Jones*, No. 121579, at 2-3. Specifically, petitioner argued that he "agreed to the 50-year sentence for the sole purpose of avoiding a mandatory life sentence — a sentence that would now be unconstitutional." *Id.* at 9. Petitioner further argued that leave to appeal was warranted to resolve an appellate split regarding

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whether a 50-year sentence was *de facto* life under *Miller*. *Id.* at 3, 9-10. This Court denied the petition, but exercised its supervisory authority to direct the appellate court to vacate its judgment and reconsider whether petitioner had received a *de facto* life sentence in light of *People v. Buffer*, 2019 IL 122327, and determine whether a different result was warranted. *People v. Jones*, No. 121579 (Mar. 25, 2020).

On remand, the appellate court again affirmed the denial of leave to file a successive postconviction petition challenging the automatic transfer provision and truth-in-sentencing law. A3 at ¶ 5. The court found that petitioner had established cause for not challenging the sentencing scheme under *Miller* because "*Miller*, its progeny, and the recent changes in Illinois sentencing law were not established at the time he filed his first postconviction petition." *Id.* ¶ 14. But the appellate court held that petitioner once again failed to establish prejudice, since he had waived any Eighth Amendment challenge to his sentence by entering into the fully-negotiated plea agreement. *Id.* ¶¶ 14-17.

Petitioner asked this Court to grant leave to appeal to resolve an appellate split regarding whether a juvenile homicide offender who agreed to a *de facto* life sentence pursuant to a fully-negotiated plea agreement before *Miller* was decided has waived any challenge to that sentence as unconstitutional under *Miller*. PLA, *People v. Jones*, No. 126432, at 2, 8-11. This Court granted leave to appeal.

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ARGUMENT

I. Standard of Review

This Court reviews the denial of a motion for leave to file a successive postconviction petition de novo. *People v. Lusby*, 2020 IL 124046, ¶ 27.

II. Petitioner Forfeited the Claim that His 50-Year Sentence Is Excessive Under the Eighth Amendment Because He Did Not Raise It in His Successive Postconviction Petition.

The Post-Conviction Hearing Act requires that a petition "clearly set forth the respects in which the petitioner's constitutional rights were violated," 725 ILCS 5/122-2, and "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived," 725 ILCS 5/122-3. If a postconviction petition does not include a particular claim, the petitioner "may not raise the issue for the first time . . . on appeal." *People v. Jones*, 213 Ill. 2d 498, 508 (2004); *accord People v. Jones*, 211 Ill. 2d 140, 149-50 (2004) (holding "that defendant's contentions of constitutional error, not raised in her original petition, were forfeited on appeal from the circuit court's first-stage dismissal of the petition"). This is because "'[t]he question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act,'" *Jones*, 211 Ill. 2d at 148 (quoting and adding emphasis to *People v. Coleman*, 183 Ill. 2d 366, 388 (1998)). Accordingly, "any issues to be reviewed must be presented in the petition filed in the circuit court." *Id.* at 148; *see Jones*, 213 Ill. 2d at 508 (appellate court reviewing denial of postconviction petition may

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not excuse "an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition").

Petitioner forfeited his current claim that his 50-year sentence is a *de facto* life sentence that violates the Eighth Amendment under *Miller*, Pet. Br. 7-9, because he did not raise it in his successive postconviction petition in the circuit court. *See* CL3 at C8-38; *Jones*, 211 Ill. 2d at 149-50. Instead, he claimed that the automatic transfer and truth-in-sentencing statutes violated the Eighth Amendment under *Miller* because they required that juvenile homicide offenders be prosecuted as adults and serve 100% of their sentences without first requiring individualized consideration of the offenders' youth. CL3 at C17-30, C33-37. Even liberally construed, this claim did not challenge petitioner's particular sentence as a life-without-parole sentence imposed in violation of *Miller*.[2]

Petitioner's challenge to the transfer provision argued that "automatic exclusion from juvenile court jurisdiction and sentencing is constitutionally invalid after the United States Supreme Court's decisions in *Graham* and *Miller*," CL3 at C19, such that *no* adult sentence imposed after automatic

[2] Indeed, petitioner himself does not characterize his postconviction petition as having raised the claim he now presses. *See* Pet. Br. 5 ("[Petitioner] filed a successive *pro se* post-conviction petition alleging that the automatic-transfer provision for 16-year-olds such as himself and the truth-in-sentencing requirement that he serve every day of his 50-year sentence violated constitutional principles announced by the United States Supreme Court in *Miller v. Alabama*, *Graham v. Florida*, and *Roper v. Simmons*") (citations omitted).

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transfer would be constitutionally permissible, regardless of length, CL3 at C18 (arguing that he should not have been "automatically subject to a 20[-] to 60-year term of imprisonment"). Similarly, petitioner's challenge to the truth-in-sentencing law did not argue that he received an unconstitutional life-without-parole sentence, but that the Eighth Amendment requires that a sentencing court have discretion not only to sentence a juvenile homicide offender to between 20 and 60 years in prison, but to order that the offender serve that sentence at less than 100% as well. CL3 at 36-37. That is, petitioner did not argue that any particular sentence between 20 and 60 years was unconstitutional, but instead that the requirement that any sentence within that range be served at 100% violates the Eighth Amendment, CL3 at 37 (arguing that requiring juvenile homicide offenders to serve "an adult penalty of between 20 and 60 years at 100% time" violates *Miller*). Because petitioner did not raise his current claim in his postconviction petition, he forfeited review of that claim on appeal. *Jones*, 211 Ill. 2d at 149-50; *see People v. Thompson*, 2015 IL 118151, ¶ 39 (holding that as-applied *Miller* challenge raised for first time on appeal was forfeited because such challenge "is not one of those [challenges] recognized by this court as being exempt from the typical rules of forfeiture"). Therefore, the appellate court could not have erred by declining to grant relief on the claim. *See Jones*, 213 Ill. 2d at 507; *Jones*, 211 Ill. 2d at 149-50.

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This Court "has repeatedly stressed" that "the appellate court does not possess the supervisory powers enjoyed by this [C]ourt and cannot, therefore, reach postconviction claims not raised in the initial petition." *Jones*, 213 Ill. 2d at 507 (citations omitted). Nevertheless, the appellate court continues to reach *Miller* claims that petitioners raise for the first time on appeal, even though they could have raised them in their postconviction petitions but did not. *See*, *e.g.*, *People v. Nieto*, 2016 IL App (1st) 121604-B, ¶ 23 (holding that *Miller* claims are "not subject to forfeiture," even though petitioner "conceded on appeal that he did not raise this as-applied constitutional challenge in his petition, which was filed prior to *Miller*"); *People v. Warren*, 2016 IL App (1st) 090884-C, ¶¶ 48-49 (holding "the fact that defendant first raised this [*Miller*] challenge on appeal from the denial of leave to file his successive postconviction petition does not bar us from granting him relief"); *but see People v. Merriweather*, 2017 IL App (4th) 150407, ¶ 18 (disagreeing with First District precedent and holding that "defendant forfeited his as-applied challenge to his sentence under *Miller* by raising it for the first time on appeal" from denial of leave to file successive postconviction petition).[3] But *Miller* created a new basis to argue that a sentence is excessive under the

[3] In *People v. Holman*, this Court recognized the appellate court split but declined to resolve it. 2017 IL 120655, ¶ 32 n.5. Although the People ask this Court to review petitioner's forfeited claim under its supervisory authority, this Court should reaffirm that the appellate court lacks the same authority to review claims, including Eighth Amendment claims under *Miller*, that a petitioner did not include in the operative postconviction petition.

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Eighth Amendment; it did not endow the appellate court with the supervisory authority denied it by the Illinois Constitution. *See Jones*, 213 Ill. 2d at 507 (citing Ill. Const. 1970, art. VI, § 16). Nor did *Miller* allow the appellate court to excuse failures to comply with the statutory scheme governing how postconviction petitioners must raise their claims. *See* 725 ILCS 5/122-3. If a petitioner on appeal identifies a claim that he wishes to pursue but did not raise in his postconviction petition, he must seek leave in the trial court to file a successive postconviction petition raising the claim. *Jones*, 213 Ill. 2d at 509.

Although petitioner forfeited his claim by failing to raise it in his proposed successive postconviction petition, this Court should exercise its supervisory authority to reach the merits of the claim. *See People v. Wendt*, 163 Ill. 2d 346, 351 (1994). This Court's guidance regarding whether the Eighth Amendment requires a finding of permanent incorrigibility before a juvenile homicide offender may receive a discretionary life-without-parole sentence is necessary not only to clarify to the appellate court that no such finding is required, *see infra* § III.A, but to ensure that the appellate court follows United States Supreme Court precedent in matters of federal constitutional law. *See* U.S. Const., art. VI, cl. 2; *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (State may not interpret federal constitution to provide greater protection than that provided by the Supreme Court of the United States). Instruction on this latter point is particularly warranted because the

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appellate court has indicated reluctance to follow United States Supreme Court precedent absent ratification by this Court. In *People v. Ruiz*, the appellate court recognized that the United States Supreme Court recently "held that the eighth amendment creates no federal requirement that a trial court find a juvenile offender permanently incorrigible before imposing a life sentence," yet the appellate court stated that "until our supreme court tells us otherwise," it would "continue to require sentencing courts to . . . make a finding of permanent incorrigibility prior to imposing a life sentence." 2021 IL App (1st) 182401, ¶ 62 (citing *Jones v. Mississippi*, 141 S. Ct. 1307 (2021)). Therefore, this Court should exercise its supervisory authority to look past petitioner's forfeiture and reach the merits of his claim to "maintain a sound and uniform body" of Eighth Amendment precedent in Illinois. *People v. Jackson*, 2020 IL 124112, ¶ 118.

III. The Appellate Court Properly Denied Petitioner Leave to File a Successive Postconviction Petition Raising an Eighth Amendment Claim Under *Miller* Because Petitioner Cannot Show Prejudice from His Failure to Raise the Claim in His Initial Postconviction Petition.

Even if petitioner's successive postconviction petition had claimed that his 50-year sentence violates the Eighth Amendment under *Miller*, the appellate court properly affirmed the denial of leave to file the successive petition because petitioner cannot satisfy the cause-and-prejudice test. *See* 725 ILCS 5/122-1(f). To satisfy this test, petitioner must show "cause for his . . . failure to bring the claim in his . . . initial post-conviction proceedings and prejudice resulting from that failure," meaning that "the claim not raised

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during his . . . initial post-conviction proceedings so infected the trial that the resulting . . . sentence violated due process." *Id.*; *People v. Smith*, 2014 IL 115946, ¶¶ 23, 33.

Petitioner had cause for not claiming in his initial postconviction petition that his 50-year sentence is an unconstitutional life-without-parole sentence under *Miller* because *Miller* was unavailable when he filed his initial postconviction petition in 2002. *See People v. Davis*, 2014 IL 115595, ¶ 42. But he cannot show prejudice because the claim that his sentence violates the Eighth Amendment under *Miller* "fail[s] as a matter of law." *Smith*, 2014 IL 115946, ¶ 35. And to the extent petitioner challenges his sentence as otherwise excessive under the Eighth Amendment as applied to him, he cannot show prejudice because he waived any claim that his 50-year sentence was excessive by entering a fully-negotiated plea agreement.

A. Petitioner's *Miller* Claim Fails as a Matter of Law Because His 50-Year *De Facto* Life-Without-Parole Sentence Was Not Statutorily Mandated and the Trial Court Had Discretion to Impose a Sentence of Less than Life.

Miller "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. The United States Supreme Court recently clarified *Miller*'s scope in *Jones v. Mississippi*: "In a case involving an individual who was under 18 when he or she committed homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." 141 S. Ct. at 1313. The Court thus upheld a life-

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without-parole sentence imposed on a juvenile homicide offender "because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of [his] youth," *id.* at 1313, and rejected the argument that "a sentencer's discretion to impose a sentence less than life without parole does not alone satisfy *Miller*," *id.* at 1311.

The Supreme Court explained that "a separate factual finding of permanent incorrigibility is not required," *id.* at 1313, because "permanent incorrigibility is not an eligibility criterion" for a discretionary life-without-parole sentence, *id.* at 1315; *accord id.* at 1320 (reiterating that "an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility is not required by or consistent with *Miller*"). Rather, the "key point" is that, "in a case involving a murderer under 18, a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor." *Id.* at 1319-20. Thus, unless a sentencing court "expressly refuses as a matter of law to consider the defendant's youth (as opposed to, for example, deeming the defendant's youth to be outweighed by other factors or deeming the defendant's youth to be an insufficient reason to support a lesser sentence under the facts of the case)," *id.* at 1320 n.7, a discretionary sentence of life without parole for homicide is constitutional under *Miller* regardless of whether the record contains any particular evidence of youth or its attendant characteristics, *id.* at 1319-20, 1319 n.6. Even "in the highly unlikely scenario" that the record contains *no* evidence of

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the defendant's age, such that "the sentencer might somehow not be aware of the defendant's youth," a juvenile homicide offender who receives a discretionary life-without-parole sentence at most "may have a potential ineffective-assistance-of-counsel claim, not a *Miller* claim." *Id.* at 1319 n.6. The Supreme Court noted that States are free to "impos[e] additional sentencing limits" as a matter of state law, such as a categorical prohibition against life-without-parole sentences for offenders under 18, or a requirement that certain facts be found before such offenders may be sentenced to life without parole, but emphasized that "the U.S. Constitution . . . does not demand those particular policy approaches." *Id.* at 1323.

Accordingly, petitioner's 50-year sentence "complie[s] with [*Miller*] because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of [petitioner's] youth." *Id.* at 1322. Petitioner pleaded guilty to one count of first degree murder, R63; CL2 at C434, for which the sentencing range was 20 to 60 years, 730 ILCS 5/5-8-1(a)(1)(a) (1998). Although petitioner and the prosecution agreed that the appropriate sentence within that statutory range was 50 years, *see* R52-53, unlike a statutory mandate, their agreement did not deprive the trial court of its discretion to impose a lesser sentence, for "[s]entencing is a judicial function and not something which can be delegated to the parties," *People v. Iseminger*, 202 Ill. App. 3d 581, 594 (4th Dist. 1990). "If [the] judge, for whatever reason, believe[d] [the] proposed disposition to be inappropriate,

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whether too harsh or too lenient, then the judge ha[d] the option to reject the plea agreement." *Id.* at 595; *see People v. Henderson*, 211 Ill. 2d 90, 103 (2004) ("A circuit court may reject a plea in the exercise of sound judicial discretion."); *People v. Lambrechts*, 69 Ill. 2d 544, 556 (1997) (explaining that "[t]he judge was, of course, under no obligation to concur" with plea agreement); Ill. S. Ct. Rule 402(d) (providing that trial court has discretion to reject plea agreements).

Here, the trial court exercised its discretion to concur in the fully-negotiated plea agreement and imposed the agreed-upon sentence. Nothing in the record suggests that the trial court "expressly refuse[d] as a matter of law to consider [petitioner's] youth" before concurring in the plea agreement, accepting petitioner's guilty plea, and imposing the agreed-upon sentence. *Jones*, 141 S. Ct. at 1320 n.7, 1320-21. To the contrary, the record shows that the trial court considered the available evidence of petitioner's youth. *See* R10-11 (factual basis providing that petitioner was 16 when he murdered the victims), R12 (trial court confirming that petitioner was 16 when he murdered the victims and requesting information regarding petitioner's prior criminal history); *see also Jones*, 141 S. Ct. at 1319 (explaining that "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth") (emphasis in original); *People v. Thompson*, 222 Ill. 2d 1, 45 (2006) ("It is presumed that the circuit court considered any mitigating evidence before it, absent some indication to

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the contrary other than the sentence itself."); *People v. LaPointe*, 2018 IL App (2d) 160903, ¶ 55 (Illinois has recognized "the proposition that a defendant's youth is highly pertinent to determining the penalty for his crime" since at least the 19th century). Therefore, petitioner's 50-year sentence comports with the Eighth Amendment, *see Jones*, 141 S. Ct. at 1313, 1319-20, and the appellate court properly denied petitioner leave to raise an Eighth Amendment challenge to his 50-year sentence in a successive postconviction petition.

Petitioner attacks his 50-year sentence based on two challenges to the constitutionality of "the sentencing scheme in 1999": one against the discretionary sentencing scheme under which he was actually sentenced and the other against the mandatory sentencing scheme under which he would have been sentenced had he gone to trial and been convicted of murdering both victims. Pet. Br. 10-12. But both challenges are meritless; the former is foreclosed by *Jones* and the latter is counterfactual.

As to the first challenge, petitioner argues that the discretionary sentencing scheme under which he was actually sentenced — that is, the 20-to-60-year sentencing range for first degree murder, 730 ILCS 5/5-8-1(a)(1)(a) (1998) — violated the Eighth Amendment under *Miller* because "it allowed the judge to impose a *de facto* life sentence" without considering evidence of his youth and its attendant circumstance. Pet. Br. 10. Petitioner further argues that the 50-year sentence that he received under this discretionary

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scheme violated *Miller* because the trial court "made no findings" that he was permanently incorrigible. Pet. Br. 11-12; *see id.* at 14-15 (citing pre-*Jones* precedent, including *Buffer* and *Holman*, and arguing that "[u]nless the judge [makes a finding of permanent incorrigibility], he simply cannot impose a life or a *de facto* life sentence on a juvenile").

But *Jones* forecloses these arguments. To be sure, petitioner filed his opening brief before *Jones*, and relied on Illinois precedent that interpreted *Miller* before *Jones*. Specifically, petitioner relies on *Holman*, where this Court determined that *"Miller* contains language that is significantly broader than its core holding," *Holman*, 2017 IL 120655, ¶ 38, and, as a result, that *Miller* also "applies to discretionary sentences of life without parole for juvenile defendants*," id.* ¶ 40. *Holman* held that, under *Miller*, a trial court may impose a discretionary life-without-parole sentence "only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation," and that the trial court cannot make this determination without considering the youth-related factors that *Miller* cited when it prohibited mandatory life without parole for juveniles. *Id.* ¶ 46. *Holman* thus concluded that a discretionary life-without-parole sentence violates the Eighth Amendment if it is imposed in the absence of record evidence on the *Miller* factors. *Id.* ¶¶ 46-47. *Holman*'s construction of *Miller* was subsequently reiterated in *Buffer* and *People v. Lusby*. *See Lusby*, 2020

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IL 124046, ¶¶ 34-36 (retroactive application of *Miller* "looks back to the trial and the sentencing hearing to determine whether the trial court at that time considered evidence and argument related to the *Miller* factors" and "made an informed decision based on the totality of the circumstances that the defendant was incorrigible and a life sentence appropriate"); *People v. Buffer*, 2019 IL 122327, ¶ 27 (sentence violates *Miller* if juvenile homicide offender shows "(1) [he] was subject to a life sentence, mandatory or discretionary, natural or *de facto*, and (2) the sentencing court failed to consider youth and its attendant characteristics in imposing the sentence").

But this construction of *Miller* is invalid after *Jones*. *See Sullivan*, 532 U.S. at 772 (State may not interpret federal constitution to provide greater protection than that provided by the Supreme Court of the United States). As *Jones* clarified, *Miller* does not require that a sentencing court be presented with evidence of an offender's youth and its attendant circumstances for a discretionary sentence of life without parole to satisfy the Eighth Amendment. 141 S. Ct. at 1313, 1320-21. Nor does *Miller* require that a court make any finding that the juvenile homicide defendant is permanently incorrigible before it sentences the offender to discretionary life without parole. *Id.* at 1319-20, 1319 n.6. Rather, *Jones* explained, *Miller* requires only that a court have discretion to determine whether life without parole or a lesser sentence is appropriate for the juvenile homicide offender, and that the court not refuse as a matter of law to consider the offender's

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youth when exercising that discretion. *Id.* at 1313, 1319-20, 1320 n.7. Petitioner's sentence satisfies these requirements because the trial court had discretion not to impose a sentence greater than 40 years, *see Buffer*, 2019 IL 122327, ¶ 41 (prison terms longer than 40 years are *de facto* life-without-parole sentences for purposes of *Miller*); 730 ILCS 5/5-8-1(a)(1)(a) (1998), and the trial court considered the available evidence of petitioner's youth when exercising that discretion, *see* R59-63.

Second, petitioner argues that the sentencing scheme under which he *would have been* sentenced had he gone to trial and been convicted of murdering both victims is unconstitutional because the trial court "would have had no discretion to consider a sentence less than natural life." Pet. Br. 10. But the constitutionality of petitioner's hypothetical mandatory life-without-parole sentence under this counterfactual scenario is irrelevant to whether the discretionary sentence that the trial court actually imposed comported with *Miller*. Petitioner did not receive a mandatory life-without-parole sentence under 730 ILCS 5/5-8-1(a)(1)(c)(ii) (1998) for murdering two people; he received a discretionary *de facto* life-without-parole sentence under 730 ILCS 5/5-8-1(a)(1)(a) (1998) for murdering one person. And *that* sentence comports with *Miller* because the trial court imposed it only after considering petitioner's youth. *See* R59-60, R61, R63; *Jones*, 141 S. Ct. at 1313, 1319-20.

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B. The Appellate Court Correctly Held that Petitioner Waived the Claim that His 50-Year Sentence Is Excessive Under the Eighth Amendment When He Agreed to the Sentence by Entering a Fully-Negotiated Plea Agreement.

1. Petitioner waived any as-applied Eighth Amendment claim.

Because petitioner's claim fails as a matter of law under *Miller*, *see supra* § III.A, the only Eighth Amendment claim available is an as-applied claim that his agreed-to 50-year sentence is grossly disproportionate. *See Jones*, 141 S. Ct. at 1322 (sentences imposed under discretionary sentencing schemes, though constitutional under *Miller*, may potentially be subject to the usual "as-applied Eighth Amendment claim of disproportionality"). But by entering the fully-negotiated guilty agreement, petitioner agreed that a 50-year sentence was appropriate for the murder to which he was pleading guilty and therefore waived any challenge that his 50-year sentence was excessive. *See People v. Linder*, 186 Ill. 2d 67, 74 (1999); *People v. Doguet*, 307 Ill. App. 3d 1, 6 (2d Dist. 1999) (defendant who entered negotiated guilty plea "waived the argument that his sentence was excessive").

Fully-negotiated plea agreements are governed by contract principles. *People v. Absher*, 242 Ill. 2d 77, 87 (2011) (citing *People v. Evans*, 174 Ill. 2d 320, 332 (1996)). Where, as here, the People made sentencing concessions in exchange for a defendant's guilty plea, "the guilty plea and the sentence go 'hand in hand' as material elements of the plea bargain." *Evans*, 174 Ill. 2d at 332. Thus, by agreeing to plead guilty in exchange for the specific sentence recommendation of 50 years, petitioner effectively agreed not to

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challenge that sentence as excessive. *See id.* at 332-34; Ill. S. Ct. R. 604(d); *see also Linder*, 186 Ill. 2d at 74 ("By agreeing to plead guilty in exchange for a recommended sentencing cap, a defendant is, in effect, agreeing not to challenge any sentence imposed below that cap on the grounds that it is excessive."). To "allow [petitioner] to unilaterally modify the terms of [his] fully negotiated plea agreement" — that is, to allow him to "seek to unilaterally reduce his sentence while holding the State to its part of the bargain" — would "'fl[y] in the face of contract law principles.'" *Absher*, 242 Ill. 2d at 87 (quoting *Evans*, 174 Ill. 2d at 327). Defendants would be free to "negotiate with the State to obtain the best deal possible in modifying or dismissing the most serious charges and obtain a lighter sentence," only to turn around and "attempt to get that sentence reduced even further by reneging on the agreement." *Evans*, 174 Ill. 2d at 327-28. Therefore, pursuant to established principles governing plea agreements, petitioner waived any claim that his 50-year sentence is excessive as applied to him.

This waiver included his claim that his sentence violates the Eighth Amendment. *See Jones v. Commonwealth*, 795 S.E.2d 705, 714 (Va. 2017) (*Miller* claims not "immunized from waiver principles that govern all other constitutional challenges"). The Eighth Amendment bans "excessive punishment" based on "the basic precept that criminal punishment should be graduated and proportioned both to the offender and the offense." *Buffer*, 2019 IL 122327, ¶ 15; *see also Miller*, 567 U.S. at 469 ("The Eighth

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Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions."). Because this disproportionality analysis is conducted "according to the evolving standards of decency" rather than through "a historical prism," *Miller*, 567 U.S. at 469 (internal quotation marks omitted), the availability of relief on an Eighth Amendment excessiveness claim changes over time, such that sentences previously considered proportionate may later be deemed excessive under the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (death penalty "is excessive" when imposed on "a mentally retarded offender"); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) ("death penalty is disproportionate punishment for offenders under 18"); *Graham v. Florida*, 560 U.S. 48, 59, 74 (2010) (sentencing a juvenile nonhomicide offender to life without parole is excessive under Eighth Amendment); *Miller*, 567 U.S. at 465 ("mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"). But an Eighth Amendment claim — whether raised under *Roper*, *Atkins*, *Graham*, *Miller*, or any other new Supreme Court decision — remains a challenge to the excessiveness of a sentence and subject to waiver. *See Miller*, 567 U.S. at 465, 469.

Accordingly, petitioner cannot escape his waiver on the ground that his inability to predict future legal developments rendered the waiver less than a "voluntary relinquishment of a known right." *People v. Townsell*, 209 Ill. 2d

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543, 547 (2004) (internal quotation marks omitted). When he agreed that 50 years was the appropriate sentence for his crime, petitioner voluntarily relinquished his right to challenge that sentence as excessive under the Eighth Amendment. *See Linder*, 186 Ill. 2d at 74. That he did not know how our standards of decency would evolve in the decades to come does not render unknowing his relinquishment of his right to mount a future challenge to his sentence as excessive.

Petitioner argues that he cannot be bound by the terms of his plea agreement because he "did not knowingly stipulate to a *de facto* life sentence." Pet. Br. 13. That is, "he agreed to 50 years, but he did not do so with the knowledge that this Court, 19 years later, would find such a sentence to be the functional equivalent of a life sentence" and that *Miller* would prohibit mandatory life sentences for juvenile homicide offenders. *Id.* But that is the very nature of plea bargains; they are "a bet on the future," allowing "a defendant to gain a present benefit in return for the risk that he may have to forego future favorable legal developments." *Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016). When petitioner pleaded guilty to one count of first degree murder in exchange for a sentencing recommendation of 50 years, he got what he bargained for: the certainty of a 50-year sentence and the elimination of the possibility of a longer sentence if he went to trial and was convicted of one or both murders.

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At bottom, petitioner's claim is that his guilty plea was invalid because he could not know at the time of his plea how the law would change in the decades to come. *See* Pet. Br. 13 (arguing that petitioner did not "knowingly" agree to his sentence because it pre-dated *Miller* and *Buffer*), 18 (citing nonprecedential decision for proposition that juvenile offender's guilty plea was not knowing or voluntary because it pre-dated *Buffer*). But this claim is both forfeited because petitioner never challenged his guilty plea in his postconviction petition, *see* CL3 at C16; *Jones*, 213 Ill. 2d at 509; *Jones*, 211 Ill. 2d 149-50, and meritless because his guilty plea was knowing and voluntary when he entered it, *see Brady v. United States*, 397 U.S. 742, 757 (1970); *People v. Williams*, 188 Ill. 2d 365, 369-70 (1999); R54-55 (trial court's admonishments to petitioner about rights he would waive by pleading guilty and applicable sentencing ranges), R62-63 (trial court's questioning of petitioner and finding that his plea was voluntary). As the Supreme Court explained in *Brady*, "absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." 397 U.S. at 757 (internal citation omitted). Otherwise, every negotiated guilty plea would be potentially invalid because no defendant ever pleads guilty with full knowledge of how the law might change in the years before he completes his agreed-upon sentence. *See Dingle*, 840 F.3d at 175.

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Petitioner argues that *Brady* is "factually distinguishable" because the defendant there pleaded guilty to avoid an unconstitutional potential death sentence and petitioner here pleaded guilty to avoid an unconstitutional mandatory natural life sentence. Pet. Br. 15. But *Brady*'s holding did not turn on the uncertainty of the subsequently-invalidated punishment that the defendant pleaded guilty to avoid. *See* 397 U.S. at 757 (guilty plea "is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered"). Petitioner's factual distinction is therefore legally irrelevant.

2. The weight of authority does not support exempting as-applied Eighth Amendment excessiveness challenges from waiver.

Petitioner further argues that the appellate court's holding that he waived his sentencing challenge cannot withstand the "weight of authority" allowing postconviction petitioners to challenge the sentences to which they agreed in negotiated plea agreements as excessive under *Miller*. Pet. Br. 15-16. But petitioner's cases are either inapposite or wrongly decided, and one is not even precedential.

Petitioner's reliance on *United States v. Broce*, 488 U.S. 563 (1989), and *Class v. United States*, 138 S. Ct. 798 (2018), is misplaced because neither supports exempting Eighth Amendment excessiveness challenges

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from waiver. Petitioner cites *Broce* and *Class* for the proposition that there is an exception to the rule that a guilty plea forecloses collateral attack where the court "had no power to enter conviction or impose the sentence." Pet. Br. 16 (citing *Broce*, 488 U.S. at 569; *Class*, 138 S. Ct. at 803-05). But this exception does not apply to petitioner's Eighth Amendment claim. *Broce* held that "'[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.'" 488 U.S. at 574-75 (quoting and altering *Menna v. New York*, 423 U.S. 61, 62 (1975) (per curiam)). That is, if the People cannot constitutionally prosecute an individual for an offense, then the trial court cannot lawfully enter a judgment of conviction or impose a sentence for that offense. Accordingly, *Class* held that the defendant's guilty plea did not bar his "challenge [to] the Government's power to criminalize Class'[s] (admitted) conduct" because it "call[ed] into question the Government's power to constitutionally prosecute him." 138 S. Ct. at 805 (internal quotation marks omitted)); *see In re N.G.*, 2018 IL 121939, ¶ 36 (explaining that *Class* "applies where a conviction is invalid because it was based on a statute found to be unconstitutional on its face," meaning that "the conduct it prescribed was beyond the power of the state to punish"); *see also Menna*, 423 U.S. at 62 n.2 (guilty plea did not bar claim that charge violated double jeopardy because that claim alleged that "the charge is one

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which the State may not constitutionally prosecute"). But that principle does not apply here because petitioner's claim does not allege that the People lacked constitutional authority to prosecute him for his offenses in this case, such that the trial court lacked the power to enter judgment against him. *Broce* and *Class* are therefore inapposite.

Petitioner's reliance on *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), is misplaced for the same reason. *Malvo*'s waiver analysis rested, like petitioner's, on an overly broad reading of *Class* as exempting from waiver all claims that a sentence is unconstitutional "where on the face of the record the court had no power to enter the conviction or impose the sentence." *Malvo*, 893 F.3d at 277 (internal quotation marks and citations omitted). Because *Class* exempts from waiver only claims that a prosecution was unconstitutional from its inception, *see Class*, 138 S. Ct. at 805, *Malvo*'s holding that *Miller* claims are not subject to waiver is unfounded.

Petitioner's Illinois authority is similarly unpersuasive. First, petitioner relies on *People v. Applewhite*, Pet. Br. 16, which is inapposite because there the People "*agree[d]* that the defendant did not waive his right to challenge the constitutionality of his sentence notwithstanding that he entered a negotiated guilty plea." 2020 IL App (1st) 142330-B, ¶ 19 (emphasis added). Thus, *Applewhite* simply accepted the People's concession and granted the agreed-upon relief. *Id.* ¶¶ 19-20; *People v. Hunter*, 2017 IL 121306, ¶ 42 (explaining that prior decision remanding for particular remedy

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"does not lend support" for defendant's position that such remedy was proper because "the State apparently made no argument challenging the remand" based on now contested issue). The full extent of *Applewhite*'s independent evaluation of the issue appears to be a citation to *Class*, which, as discussed, does not exempt from waiver any claim that the trial court imposed a sentence it "had no power to impose." *See id.* ¶ 19 (citing *Class*, 138 U.S. at 803-805).

People v. Parker, 2019 IL App (5th) 150192, is even less persuasive than *Applewhite* because it does not address the question of waiver at all, even to note the parties' agreement. *See generally id.* Nor does *Parker* involve a juvenile homicide offender who sought to challenge a *de facto* life-without-parole sentence that he received pursuant to a negotiated guilty plea while still holding the People to their side of the bargain. 2019 IL App (5th) 150192, ¶ 18. The juvenile homicide offender in *Parker* had been sentenced to 35 years and sought to withdraw his guilty plea altogether on the ground "he would not have pled guilty to felony murder in exchange for a sentencing cap of 50 years if the guidelines set forth in *Buffer* were established at the time that he entered his guilty plea." *Id.* In addition, in ordering that the defendant be granted leave to file a successive postconviction petition, *Parker*

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did not recognize that the defendant's challenge to his guilty plea was barred by *Brady*'s rule or explain why the claim survived *Brady*.[4]

People v. Daniels, 2020 IL App (1st) 171738, is likewise both factually distinguishable and wrongly decided. *Daniels* concerned an 18-year-old homicide offender — one to whom the Eighth Amendment protections under *Miller* are inapplicable, *People v. Harris*, 2018 IL 121932, ¶ 61 — who entered a fully-negotiated guilty plea under which he pleaded guilty and the prosecution, which could have sought the death penalty, recommended a sentence of natural life. *Daniels*, 2020 IL App (1st) 171738, ¶ 5. *Daniels* held that the defendant did not waive a challenge to his sentence as excessive under the Proportionate Penalties Clause because the defendant "did not and could not have known at the time of his guilty plea that he could argue his natural-life sentence — a sentence he submitted to in order to avoid

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[4] *Parker* also rests on a fundamental misunderstanding of *Buffer*. *Parker* took the view that the defendant did not actually get any benefit from the bargain because the 50-year sentencing cap was *de facto* life without parole. 2019 IL App (5th) 150192, ¶ 18. But although a sentence of 50 years is equivalent to a sentence of life without parole for purposes of triggering *Miller*'s procedural protections, as is a sentence of 41 years, *see Buffer*, 2019 IL 122327, ¶¶ 41-42, sentences of 50 years, 41 years, and natural life are not *actually* all the same sentence because each requires the offender to serve a different length of time in prison, with only natural life requiring the offender to remain in prison until he dies. Significantly, *Buffer* rejected the People's request that it draw the *de facto* line based on survivability of the term of years and instead based the line on the minimum sentence that the General Assembly had provided for an offense that, if committed by an adult, would mandate natural life. *Id.* ¶¶ 39-40. Thus, a defendant who pleads guilty in exchange for a sentencing cap of 50 years to avoid a sentence of up to 60 years or natural life cannot be said to have received no benefit from the bargain.

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execution — was constitutionally disproportionate as applied to him" until *Harris* "recognize[d] the potential viability of youth-based claims made by young-adult offenders." *Id.* ¶ 18.[5] *Daniels* cannot be reconciled with *Brady*. In both cases, the defendant entered a fully-negotiated guilty plea to avoid the death penalty and sought to challenge that guilty plea as invalid due to a subsequent favorable legal development. *Compare id.*, *with Brady*, 397 U.S. at 756-57. Indeed, *Daniels* is wrongly decided even under petitioner's factually-specific reading of *Brady*, under which only guilty pleas entered "to avoid a potential death sentence" are immune from invalidation by later changes in the law. *See* Pet. Br. 15.

Finally, petitioner improperly relies on *People v. Hudson*, 2020 IL App (1st) 170463-U, Pet. Br. 18, an order entered under Rule 23 in 2020. Only orders entered under Rule 23 on or after January 1, 2021, "may be cited for persuasive purposes"; *Hudson*, like all other Rule 23 orders entered before that date, is "not precedential except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Ill. S Ct. R.

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[5] *Daniels* was incorrect that the petitioner could not have known that he could challenge his sentence as excessive under the Proportionate Penalties Clause until *Harris*. Defendants have always been able to challenge their sentences as excessive under that provision of the Illinois Constitution and young adults have long offered their relative youth in mitigation. *See*, *e.g.*, *People v. Griggs*, 126 Ill. App. 3d 477, 483 (5th Dist. 1984) (sentencing court considered 18-year-old offender's age in mitigation); *People v. Bartik*, 94 Ill. App. 3d 696, 700 (2d Dist. 1981) (sentencing court considered 21-year-old offender's age in mitigation); *accord Holman*, 2017 IL 120655, ¶ 44 (Illinois Supreme Court "ha[s] long held that age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance").

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23(e)(1). Petitioner asserts that he relies on *Hudson* only "'as an example of a court's reasoning and a reasonability check,'" not for persuasive purposes, Pet. Br. 18 (quoting *In re Estate of LaPlume*, 2014 IL App (2d) 130945, ¶¶ 23-24), but citing a case as an example of a court's reasoning is nothing if not citing the case for persuasive purposes; after all, petitioner would not offer *Hudson*'s reasoning if he did not hope this Court would find it persuasive. Accordingly, this Court should disregard petitioner's discussion of *Hudson*.

But even if *Hudson* were precedential, it would not be persuasive. *Hudson* relies on *Parker* to conclude that, "without the benefit of *Buffer*, which was decided while his appeal [from the denial of leave to file a successive postconviction petition] was pending, the petitioner could not have entered the plea knowingly or voluntarily." *Hudson*, 2020 IL App (1st) 170463-U, ¶ 27. Accordingly, like *Parker*, *Hudson* is wrongly decided under *Brady*. A defendant's guilty plea that was knowing and voluntary when it was entered is not rendered retroactively unknowing and involuntary because of a subsequent change in the law. *Brady*, 397 U.S. at 757.

* * *

Petitioner failed to establish prejudice because his claim that his sentence violates the Eighth Amendment under *Miller* is meritless as a matter of law and any claim that his sentence is excessive under the Eighth Amendment as applied to him is waived. Therefore, the appellate court

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properly denied him leave to file a successive postconviction petition raising an Eighth Amendment claim.

IV. In the Alternative, the Remedy for an Unconstitutional Sentence Imposed Pursuant to a Negotiated Plea Agreement Is to Allow the People to Elect Either to Agree to Resentencing or Void the Agreement Altogether.

Even if petitioner had not waived his claim, and could show that his sentence is excessive under the Eighth Amendment, he is incorrect that "all roads here lead to a new sentencing hearing," Pet. Br. 20, because this argument "ignores [the] basic principles of fairness governing the enforcement of plea agreements," *In re Derrico G.*, 2014 IL 114463, ¶ 99. Petitioner may not "seek[] to hold the State to its part of the bargain while unilaterally modifying the sentences to which [he] had earlier agreed" because to do so both "flies in the face of contract law principles" and is "inconsistent with constitutional concerns of fundamental fairness." *Evans*, 174 Ill. 2d at 327. Rather, if the fully-negotiated plea agreement is unlawful because the agreed-upon 50-year sentence violates the Eighth Amendment, then petitioner and the People must *both* be released from their obligations under the agreement. *See In re Derrico G.*, 2014 IL 114463, ¶ 99 ("[T]he enforceability of plea agreements is not a one-sided affair as the other half of the contractual equation is the benefit of the bargain accruing to the State.") (internal quotation marks omitted); *People v. McCutcheon*, 68 Ill. 2d 101, 107 (1977) ("Fairness for the interests of the People demands that the State not be bound by a plea agreement, once a condition of that agreement . . . is no

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longer valid."). For that reason, a defendant who seeks to reduce his negotiated sentence "c[an] obtain relief only by moving to withdraw his guilty pleas and vacate the judgment," *Evans*, 174 Ill. 2d at 334, so that, "in the event the motion is granted, the parties are returned to the *status quo*," *id.*; *see People v. Guerrero*, 2012 IL 112020, ¶ 23 (remedy for invalid guilty plea "is not to grant defendant the 'benefit of bargain,' but is limited to allowing defendant leave to file a motion to withdraw his plea"); *People v. Hare*, 315 Ill. App. 3d 606, 610 (2d Dist. 2000) ("when a trial court vacates an illegal sentence that it entered in accordance with a plea agreement, the illegality voids the entire agreement and not just the sentence" because "without proper consideration from both parties, a purported contract is illusory and cannot be enforced in either law or equity").

But where, as here, a defendant challenges his negotiated guilty plea years later based on the alleged unlawfulness of the agreed-upon sentence, withdrawal of his guilty plea may not return the People to their original position. Because "a post-conviction [petition] may be raised and ruled upon years after imposition of sentence, the [S]tate may no longer have the witnesses and other evidence necessary to pursue a trial after a defendant successfully has his judgment and sentence vacated." *Jolly v. State*, 392 So. 2d 54, 56 (Fla. Ct. App. 1981); *see People v. Donelson*, 2013 IL 113603, ¶ 19 (recognizing that consideration of "the benefit of the bargain accruing to the State . . . looms larger as the temporal gap between the commission of the

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offenses and attempts to withdraw the guilty plea widens"). Therefore, where a defendant does not seek to vacate his guilty plea but only to reduce his agreed-upon sentence, "the [S]tate should be given the option of either agreeing that both the judgment and sentence should be vacated and taking the defendant to trial on all original charges, or agreeing that only the excessive sentence should be vacated." *Jolly*, 392 So. 2d at 56; *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002) (where plea bargain was for illegal sentence, remedy was withdrawal of guilty plea "unless the government accepts a sentence reduced to the legal term").

Allowing the People to choose their remedy for a unilateral breach of a fully-negotiated guilty plea is not only consistent with basic fairness, but with contract principles as well. Under the frustration of purpose doctrine, if, "after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) of Contracts § 265 (1981); *see id.* § 152. This doctrine requires that the frustrated purpose "be so completely the basis of the contract that, as the parties understand, without it the transaction would make little sense." *Id.* § 265 cmt. a.

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If petitioner's 50-year sentence was retroactively rendered unconstitutionally excessive 19 years after it was imposed, then the frustration of purpose doctrine would apply here. The basic assumption underlying the plea agreement was that petitioner would serve a constitutionally valid 50-year prison term. *See Evans*, 174 Ill. 2d at 332 (sentence is "material element[] of the plea bargain"); *Hare*, 315 Ill. App. 3d at 610 ("Here, the infirmity affected an essential part of the plea agreement — the sentencing concession the State provided as a major element of the consideration for defendant's guilty plea."). A change in the law years later that relieved petitioner of his obligation to serve it was a risk that neither party could foresee[6] and that would undermine the People's basis for entering the plea agreement. With the underlying purpose of, and the People's basis for, entering into the agreement frustrated, the People's remedy therefore is "to either (1) 'perform according to the letter of the plea agreement'" — that is, agree to resentencing rather than insist that the defendant withdraw the guilty plea altogether — "or (2) 'seek discharge of its duties' and return the parties to the positions they occupied before defendant entered his negotiated guilty plea." *People v. Shinaul*, 2017 IL 120162, ¶¶ 36-38 (Theis, J., dissenting) (applying the frustration of purpose doctrine and quoting *United States v. Bunner*, 134 F.3d 1000, 1005 (10th Cir. 1998)).

[6] Indeed, petitioner relies upon the unforeseeability of a change in the law as cause for his failure to bring his claim earlier. *See* Pet. Br. 12.

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CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court affirm the appellate court's judgment.

June 30, 2021

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RULE 341(c) 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 containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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(a), is 38 pages.

/s/ Joshua M. Schneider
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PROOF OF FILING AND SERVICE

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 June 30, 2021, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served through the electronic filing system and by transmitting a copy from my e-mail address to the e-mail address of the person named below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail the original and nine copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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