Illinois Official Reports

Appellate Court

People v. Horshaw, 2021 IL App (1st) 182047

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KIRK HORSHAW, Defendant-Appellant.
District & No.	First District, Fourth Division No. 1-18-2047
Filed	September 30, 2021
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 07-CR-25180; the Hon. Mary Margaret Brosnahan, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	James E. Chadd, Douglas R. Hoff, Brian E. Koch, and Joshua M. Bernstein, of State Appellate Defender's Office, of Chicago, for appellant. Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Christine Cook, and Clare Wesolik Connolly, Assistant State's Attorneys, of counsel), for the People.
Panel	JUSTICE LAMPKIN delivered the judgment of the court, with opinion. Justices Rochford and Martin concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Kirk Horshaw was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2002)) and attempted murder (*id.* §§ 8-4(a), 9-1(a)(1)) for crimes that he committed at age 18[1] and for which he received an aggregate minimum sentence of 66 years' imprisonment. Defendant moved for leave to file a successive petition for postconviction relief challenging the constitutionality of his sentence under both the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and article I, section 11, of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), commonly referred to as the proportionate penalties clause.

¶ 2 For the following reasons, we reverse and remand for further postconviction proceedings.

¶ 3 I. BACKGROUND

¶ 4 This appeal arises from the denial of defendant's motion for leave to file a successive petition for postconviction relief. The evidence leading to defendant's convictions and history of this case has been previously discussed in our decisions affirming defendant's convictions on direct appeal (*People v. Horshaw*, 2013 IL App (1st) 111072-U (*Horshaw I*)) and in affirming the dismissal of defendant's initial petition for postconviction relief (*People v. Horshaw*, 2016 IL App (1st) 140829-U (*Horshaw II*)). We set out those facts pertinent to defendant's motion for leave to file a successive petition for postconviction relief necessary for an understanding of the issue and our resolution thereof.

¶ 5 Following a bench trial in 2011, defendant was convicted of the first degree murder of Aaron Crawford (720 ILCS 5/9-1(a)(1) (West 2002)) and attempted murder of Daniel Wesley (*id.* §§ 8-4(a), 9-1(a)(1)). The evidence at defendant's trial showed that Jamaine Williams, Crawford, and Wesley were members of the Black Disciples street gang and that defendant and codefendant were members of a rival gang, the Gangster Disciples. The two gangs were involved in a war and would shoot each other on sight.

¶ 6 On May 7, 2002, Williams was walking along 71st Street in Chicago when he saw Crawford and Wesley on one side of the street, while defendant, codefendant, and a third man were standing in a vacant lot across the street. An argument ensued between the two groups, and Williams heard Crawford say, "You all going to shoot, shoot." Williams jogged toward Crawford, and when he was near Crawford and Wesley, defendant and codefendant pulled out their guns and fired multiple shots. Crawford ran in one direction, and Williams and Wesley ran in another, taking shelter in a building. Defendant and codefendant then fled the area. When Williams looked out, he saw Crawford lying on the ground. Williams and Wesley took Crawford to the hospital, but he died of a gunshot wound. Williams spoke to the police shortly after the incident and told them defendant and codefendant shot Crawford. He identified both men in a photo array. Williams did not see Crawford or Wesley with a gun during the shooting.

¶ 7 Daniel Wesley, who was incarcerated in Minnesota for aggravated robbery and had two prior convictions in Illinois for unlawful use of a weapon, testified that, on the day of the

[1]Defendant's motion for leave to file a successive petition for postconviction relief alleged that he was 19 years of age at the time of this offense; however, the trial court's order denying leave to file his successive petition found defendant to be eight months beyond his eighteenth birthday when these offenses were committed based on records maintained by the Illinois Department of Corrections. The trial court also found that defendant would be 85 years old at the time of his projected parole date.

shooting, he had been smoking marijuana and drinking. At about 9 p.m. on the night in question, he was outside on 71st Street when he heard shots and saw Crawford on the ground. Wesley ran and took shelter. When the shooting stopped, Wesley and Williams lifted Crawford into a car and accompanied him to the hospital. Wesley and Williams returned to a restaurant near the scene of the shooting, where police saw them. Wesley told the police he did not know anything, but the police took them to the police station. The detectives separated Wesley and Williams, and Wesley testified the police forced Wesley to identify the shooters from a photo array. Wesley acknowledged that he identified defendant and codefendant but explained "it was script" and that he was drunk, high, did not know what he was saying, and was just trying to leave the station.

¶ 8 Wesley had previously given a written statement, grand jury testimony, and testimony at codefendant's trial, in which he identified defendant and codefendant as the shooters. His prior statement and testimony were consistent with each other and similar to Williams's account of the shooting. During codefendant's trial, Wesley testified that Crawford did not have a gun during the shooting. The written statement, grand jury testimony, and testimony at codefendant's trial were admitted as substantive evidence at trial.

¶ 9 Karen Luckett testified that she lived next to the site of the shooting. She saw two men get out of a car and identified defendant as one of them. Although she did not see the shooting, she heard the gunshots.

¶ 10 Tiffany Vining, also known as Tiffany Morgan, testified that, at the time of the shooting, she was on drugs and she did not remember the incident. However, Vining's July 2002 written statement to an assistant state's attorney and a police detective, which was admitted as substantive evidence, indicated that at 9 p.m. on the night in question she saw Crawford arguing with defendant, codefendant, and a third man she did not know. Codefendant pulled out a gun and "acted like he was going to shoot [Crawford]." After defendant, codefendant, and the third man crossed the street toward a vacant lot, defendant also pulled out a gun, and he and codefendant started shooting at Crawford. Crawford never had a gun in his hands.

¶ 11 Donnell Russell testified that he was arrested for possession of cannabis in 2004 and, while at the police station, he told officers he had information about the May 7, 2002, shooting. In particular, he told detectives that on September 6, 2002, he and defendant were driving around searching for marijuana to buy. Russell had not seen defendant for a while and asked where he had been. Defendant responded that he had been "laying low" because he and codefendant were involved in a shooting near 71st Street and Paxton Avenue. Defendant told him that he "caught somebody who shot at him earlier."

¶ 12 Detective John Fassl testified that he and his partner interviewed Wesley and Williams at the police station on the night of the shooting. Both men identified defendant and codefendant as the shooters from a photo array. Detective Fassl denied that Wesley was given any kind of "script" or that he was told who to identify.

¶ 13 Officer Ware testified that on the day after the shooting he and his partner saw a car that was reported to have been involved in the shooting and attempted to pull it over. A chase followed, during which defendant and codefendant jumped out of the car. The car crashed, and the driver, Ricardo Martin, jumped out. Officer Ware and his partner pursued and arrested Martin because he was seen discarding a gun. Defendant and codefendant were subsequently arrested.

¶ 14 Defendant presented four alibi witnesses in his defense at trial: defendant's stepdaughter Jasmine Brooks, family friend Charles Parks, defendant's sister-in-law Clarissa Greer, and defendant's wife Erica Horshaw. All four witnesses testified that defendant was in Georgia on the date of the shooting and served as a pallbearer for a funeral that took place the following day. The defense introduced into evidence a program from the funeral, which listed the date and named defendant as a pallbearer.

¶ 15 After defendant was convicted of the first degree murder of Crawford and the attempted first degree murder of Wesley, a sentencing hearing was held before the trial court on April 7, 2011. Neither side called witnesses or presented any evidence. The presentence investigation report (PSI) established the following: defendant had one prior felony conviction from the state of Georgia, for which he received a seven-year sentence in the Georgia Department of Corrections, and two Illinois juvenile convictions for possession of a controlled substance. Defendant described his upbringing as "fair" and denied that he was abused or neglected as a child. Defendant lived with his mother and saw his father with regularity until his father died when defendant was 12 years old. Defendant's older brother had a criminal history. Defendant was married and had two children with whom he resided. Defendant attended high school for two years, during which time he was a member of the football and basketball teams and received average grades. He dropped out of high school because "it was too far." Defendant had not completed his general equivalency diploma (GED) and was never previously employed. Defendant was supported by his mother and his wife. Defendant denied a history of alcohol abuse but admitted that he began smoking marijuana by age 15 and spent "an unlimited amount of money daily" on his marijuana usage. Defendant was never evaluated or treated for drug usage. Defendant was in good health, was not under a doctor's care, and was not taking prescription medications. Defendant was a member of the Gangster Disciples street gang from ages 13 to 22. He held no role or rank in the structure. In his free time defendant enjoyed writing letters and playing chess. The PSI contained no psychological or physiological information and only indicated that defendant denied being diagnosed with a behavioral or learning disorder.

¶ 16 At sentencing, the State's entire argument consisted of the following:

> "THE STATE: Judge, in aggravation, as you can see from the pre-sentence investigation, the defendant has a prior conviction in Fulton County, Georgia, for possession of cocaine with intent to distribute; and he also has two juvenile adjudications for PCS.
>
> The facts of this case, Judge, this was a gang war, and, you know, the defendant's gang was shooting at the victim's gang members across the track, and we believe the facts of this case are sufficient."

¶ 17 Defense counsel stated the following:

> "DEFENSE COUNSEL: In mitigation, Your Honor, as your Honor is aware, the defendant is 27 years old. He's married with two children. He has one prior conviction, and that was alluded to. As your Honor may recall from the evidence, it was a conviction where some drugs were involved in an apartment with he and his wife. He ended up pleading guilty to that charge down in Georgia, although the evidence, in my estimation, was insufficient, but he decided to take the plea of guilty in order to avoid his wife from being incarcerated.

He is a young man who, I believe, if given a chance, will become a productive member of society. I'll ask your Honor to impose a minimum sentence that is consistent with—as the co-defendant, Judge. Under these circumstances we're asking the Court to consider imposing the minimum sentence."

¶ 18 Defendant made the following statement in allocution:

"THE DEFENDANT: I have a letter in my pocket. I just want to address the Court today humbly, in all due respect, and send my condolences and prayers out to the victim and his family. I know losing a loved one is one of the hardest things to do in life, and I pray God to guide them through this whole ordeal.

My prayers goes out to me and my family for going through this whole ordeal, and I pray that God will give us justice for the proceedings. My family is also losing a loved one.

Over the last five years that I've been incarcerated I really grew and learned how a man is supposed to live, and I know if given the chance again, I could and will be a trusted man in my community and the society as a whole. I'm asking for mercy of the Court and hope that you find it in your heart.

Thank you."

¶ 19 In imposing sentence, the trial court made the following findings:

"THE COURT: As I said, I'm considering all of the statutory factors in aggravation and mitigation as enumerated in the statute. In this particular case, under [section 5-8-4(d) of the Unified Code of Corrections (730 ILCS 5/5-8-4(d))], based on the two counts that the defendant was convicted of, the sentences are mandatorily consecutive under the law.

With respect to Count III, which is first degree murder, the defendant was found guilty [of] personally discharging a firearm. The minimum sentence is 20 years plus the add-on penalty for the personal discharge. So, the minimum on Count III is a 40-year sentence. Count I, II, and IV are all merging into Count III.

So that is the sentence. As to Count No. III, first degree murder, personal discharge of a firearm, it's 40 years which includes the add-on penalty.

Count No. V and VII will merge into Count No. VI. As to Count No. VI, the offense of attempt first degree murder, that had to do with the victim Daniel Wesley. The minimum on that charge would be six years, plus the personal discharge of a firearm has an additional 20. So the minimum on that count is 26. So I am going to sentence the defendant to the minimum sentence under the law, which is 40 for Count No. III, plus 26 for Count No. VI. So the total is 66 years in the Department of Corrections."

¶ 20 We affirmed the trial court's judgment on direct appeal. *Horshaw I*, 2013 IL App (1st) 111072-U. On December 11, 2013, defendant filed a *pro se* postconviction petition in which he alleged multiple claims of ineffective assistance of counsel at trial and that the evidence was insufficient to prove his guilt beyond a reasonable doubt. This court affirmed the trial court's dismissal of defendant's postconviction petition on August 9, 2016. *Horshaw II*, 2016 IL App (1st) 140829-U.

¶ 21 On September 12, 2016, 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 2016)), seeking to vacate the 20-year firearm enhancement that accompanied his attempted first degree murder

sentence. In a written order, on December 8, 2016, the trial court dismissed defendant's petition. Defendant did not appeal the ruling.

¶ 22 Defendant filed a motion for leave to file a successive petition on February 14, 2018. Defendant brought his challenge under the eighth amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution. Defendant alleged both cause and prejudice for not raising this claim in his initial petition. His motion relied on "previously unavailable science and social science research that has brought about a 'change in law' regarding sentences of youthful offenders when there is evidence of 'immature brain development' associated with youth."

¶ 23 Defendant also relied on the United States Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016); the science and social science research discussed in those cases; and additionally, this court's decisions in *People v. House*, 2015 IL App (1st) 110580 (*House I*), *People v. Sanders*, 2016 IL App (1st) 121732-B, and *People v. Harris*, 2016 IL App (1st) 141744, in support of his claim. Defendant alleged that "[l]ike *Harris*, who just turned (18) years old just a few months before the shooting, [defendant] has a plausible argument of immaturity." Defendant clarified that his as-applied challenge was "fact specific" to his circumstances and should have been considered in imposing sentence "to effectuate the constitutional mandate of restoring petitioner to useful citizenship like *Harris* and *House*."

¶ 24 Defendant further averred that his sentence exceeded his "life expectancy" and was imposed "without taking into consideration petitioner's age, adolescent brain deficiencies, significant head trauma's [*sic*], attendant characteristics, family and support, education, peer pressures, maturity and rehabilitative potential together with other mitigating factors." Defendant claimed that he "suffered most, if not all of the mitigating factors and characteristics of youth and immaturity as described in *Miller*, *Roper*, *Graham*, *House* and *Harris*" and that there was a reasonable probability that he would have received a lesser sentence within his life expectancy had the trial court been able to consider his individualized characteristics.

¶ 25 Defendant also attached multiple "emerging adult" articles regarding brain development and certificates of participation in various classes since being committed to the Department of Corrections. Finally, defendant's motion alleged:

> "The Court *now is* in a 'unique-position' to be able to review significant evidence that the petitioner *had not* developed 'entrenched patterns of problem behavior or criminality,' *in fact*, just the opposite, petitioner is a 'text-book[']' case of 'proof' of the '*Science* and *Social Science*[']' studies validated by the years go by [*sic*] and Neurological Development occur, petitioners immature juvenile traits and brain deficiencies *were reformed* and he clearly exhibits evidence of rehabilitation." (Emphases in original.)

¶ 26 Defendant's motion for leave to file a successive petition references "mitigating evidence" consisting of "individual characteristics" that he included in his "attached" successive petition, which itself is referenced five times within his motion. The successive petition, however, is not contained in the record on appeal.[2]

[2]On July 28, 2021, we issued an order directing the parties to prepare a supplemental record containing a copy of defendant's successive petition or, if no petition was filed, submit a supplemental

¶ 27 On August 3, 2018, the trial court issued a written order denying defendant's motion. The court rejected defendant's eighth amendment claim, noting that *Miller* does not apply to offenders over 17 years of age. With respect to defendant's proportionate penalties challenge, the court distinguished this court's holding in *House I* based on the fact that unlike in *House I*, defendant, in this case, was an active participant and fired a gun. The court also distinguished this court's decision in *Harris*, finding that defendant failed to "offer anything fact-specific that argues for his rehabilitative potential" but "merely asks the Court to grant him relief because he was 18 and received a lengthy sentence." As such, the court found that defendant failed to establish cause and prejudice and denied him leave to file his successive postconviction petition.

¶ 28 Defendant filed a timely notice of appeal from that decision on August 30, 2018. We have jurisdiction over this appeal pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rule 651(a) (Ill. S. Ct. R. 651(a) (eff. Feb. 6, 2013)), governing appeals from final judgments in postconviction proceedings.

¶ 29 II. ANALYSIS

¶ 30 Defendant alleges that he made a sufficient showing of cause and prejudice to require that the court grant him leave to file his successive postconviction petition in which he claimed that his 66-year aggregate sentence was a *de facto* life sentence that was unconstitutional as applied to him under both the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. U.S. Const., amend. VIII; Ill. Const. 1970, art. I, § 11.

¶ 31 At the time of his sentencing hearing, an aggregate sentence of 66 years was the mandatory minimum sentence available to the court where the sentencing statutes mandated that (1) the trial court add firearm enhancements to both his murder and attempted murder sentences, (2) the murder and attempted murder sentences be served consecutively, and (3) defendant serve the entire murder sentence and 85% of the attempted murder sentence.

¶ 32 The State maintains that leave to file was properly denied where (1) the eighth amendment protections of *Miller* do not apply to nonjuveniles, (2) defendant is barred from raising an as-applied constitutional challenge to his sentence where it was "discretionary," and (3) defendant has failed to make a *prima facie* showing of prejudice to allow the filing of his successive petition.

¶ 33 A. The Requirements of the Post-Conviction Hearing Act

¶ 34 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)) provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights under the United States Constitution or the Illinois Constitution or both. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998); 725 ILCS 5/122-1 (West 2018). A defendant may raise a constitutional challenge to both his conviction and his sentence. *People*

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brief clarifying the situation. In response to our order, both in his supplemental brief and at oral argument, defense counsel stated that he investigated this matter further but that such investigation did not reveal the existence of a successive petition.

v. Davis, 2014 IL 115595, ¶ 13. The Act, however, contemplates the filing of a single petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002); 725 ILCS 5/122-1(f) (West 2018).

¶ 35 Successive petitions are highly disfavored, and the statutory bar will be relaxed only when fundamental fairness requires it. *People v. Holman*, 2017 IL 120655, ¶ 25. A successive filing requires leave of court. *People v. Lusby*, 2020 IL 124046, ¶ 27; 725 ILCS 5/122-1(f) (West 2018). For leave to be granted, defendant must make a *prima facie* showing of both "cause" and "prejudice" by submitting sufficient pleadings and documentation to permit the circuit court to make an independent determination on the legal question raised. *People v. Bailey*, 2017 IL 121450, ¶ 24. The "cause and prejudice" test for successive postconviction pleadings is a higher burden than the "frivolous or patently without merit" standard for initial pleadings. *People v. Edwards*, 2012 IL 111711, ¶¶ 24-29.

¶ 36 The cause-and-prejudice test is a procedural prerequisite to obtaining further review of a defendant's claim. *People v. Bland*, 2020 IL App (3d) 170705, ¶ 9. To show cause, a defendant must identify an objective factor that impeded his ability to raise the claim in his initial petition. *Davis*, 2014 IL 115595, ¶ 14. To show prejudice, a defendant must demonstrate that the claim so infected the trial that the resulting conviction or sentence violated due process. *Id.* As with initial postconviction filings, all well-pleaded facts in the petition and affidavits must be taken as true. *Edwards*, 2012 IL 111711, ¶ 25.

¶ 37 We review the denial of leave to file a successive petition *de novo*. *Bailey*, 2017 IL 121450, ¶ 13. Under the *de novo* standard, a reviewing court performs the same analysis that the trial court would perform, making the question on review whether the trial court's decision was correct as a matter of law. *People v. McDonald*, 2016 IL 118882, ¶ 32. Leave to file a successive petition should only be denied where "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 or where the successive petition with supporting documentation is insufficient to justify further proceedings." *People v. Smith*, 2014 IL 115946, ¶ 35. When the requirements for leave to file are met, the successive petition is docketed directly for second-stage proceedings. *People v. Sanders*, 2016 IL 118123, ¶¶ 25, 28.

¶ 38 With the rules that attend successive petitions now in place, we turn our attention to the substance of defendant's claims under both the eighth amendment and the proportionate penalties clause.

¶ 39 B. Defendant's Eighth Amendment Claim

¶ 40 Our discussion begins by considering the eighth amendment principles that apply to juvenile and young adult offenders. In *Roper*, 543 U.S. at 578-79, the Supreme Court held that the eighth amendment categorically prohibits death sentences for juvenile defendants. Next, in *Graham*, 560 U.S. at 82, the Court determined that the eighth amendment likewise categorically bars sentences of natural life in prison for juveniles who commit crimes other than homicide. Then, in the seminal decision of *Miller*, 567 U.S. at 470, 489, the Court held that a mandatory sentence of life without the possibility of parole violates the eighth amendment when imposed for a murder committed as a juvenile. While declining to consider whether the eighth amendment required a categorical prohibition on sentences of life without parole for juvenile murder defendants, the Court suggested that such sentences would be appropriate in rare cases, provided that the sentencer took into consideration "how [juveniles]

are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 479-80.

¶ 41 The rationale underlying the Court's holdings in *Miller*, *Graham*, and *Roper* is that juveniles have unique characteristics that give them both "diminished culpability and greater prospects for reform" compared to adult defendants. *Id.* at 471 (citing *Graham*, 560 U.S. at 68). These characteristics include a lack of maturity, recklessness, impulsiveness, and vulnerability to negative influences from family or peers. *Id.* (citing *Roper*, 543 U.S. at 569). In addition, because a juvenile defendant's "character is not as 'well formed' as an adult's," his or her conduct is "less likely to be 'evidence of irretrievabl[e] deprav[ity].' " *Id.* (quoting *Roper*, 543 U.S. at 570). While recognizing that these characteristics "do not disappear when an individual turns 18" (*Roper*, 543 U.S. at 574), the Court limited its holdings to juveniles, *viz*., defendants who were under the age of 18 when they committed their crimes. *Miller*, 567 U.S. at 465; see also *People v. Harris*, 2018 IL 121932, ¶ 56 (noting that the United States "Supreme Court has never extended its reasoning to young adults age 18 or over").

¶ 42 Our supreme court then held that *Miller* applied retroactively to cases on collateral review in *Davis*, 2014 IL 115595, ¶¶ 39, 42. The United States Supreme Court reached the same conclusion two years later in *Montgomery*, 577 U.S. at 212.

¶ 43 In *Davis*, the court also rejected the defendant's facial challenge to section 3-3-3(d) of the Unified Code of Corrections (730 ILCS 5/3-3-3(d) (West 1992)), finding that it could be validly applied to adults and to minors provided that the sentence imposed on a minor was discretionary rather than mandatory. *Davis*, 2014 IL 115595, ¶¶ 30, 43.

¶ 44 In *People v. Reyes*, 2016 IL 119271, ¶¶ 9-10, our supreme court extended the application of *Miller* to apply to *de facto* life sentences imposed on juveniles.

¶ 45 Next, in *Holman*, 2017 IL 120655, ¶¶ 20, 44, the court held that *Miller* applied to both mandatory and discretionary sentences of life without parole for juveniles. *Holman* held that *Miller* requires consideration of youth and its attendant characteristics and prohibits the imposition of a sentence of life imprisonment without parole unless the sentencer determines that the defendant's conduct displayed "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id.* ¶ 46.

¶ 46 *Holman* also noted that *Davis* created a "very narrow exception" to the requirement that a defendant present an as-applied constitutional challenge to the trial court in order to create a sufficiently developed record on appeal. *Id.* ¶ 32. Where all of the facts and circumstances required to consider the defendant's claim that his sentencing hearing was noncompliant with *Miller* were contained in the record, the court chose to address the merits of the defendant's claim in the interests of judicial economy. *Id.* The court concluded that the defendant's sentence passed "constitutional muster under *Miller*" where the court had before it some evidence related to the *Miller* factors and found that the defendant's conduct placed him beyond rehabilitation. *Id.* ¶ 50.

¶ 47 In *Harris*, the court explicitly rejected the defendant's claim that mandatory life sentences for defendants under 21 years of age violated the eighth amendment prohibition against cruel and unusual punishment, holding:

> "We agree with those decisions and our appellate court that, for sentencing purposes, the age of 18 marks the present line between juveniles and adults. As an 18-year-old, defendant falls on the adult side of that line. Accordingly, defendant's facial challenge

to his aggregate sentence under the eighth amendment necessarily fails." *Harris*, 2018 IL 121932, ¶ 61.

¶ 48 In *People v. Buffer*, 2019 IL 122327, ¶¶ 27, 40-41, our supreme court defined a *de facto* life sentence for a juvenile as a sentence in excess of 40 years' imprisonment.

¶ 49 Since the filing of the parties' briefs in this matter, the United States Supreme Court considered the scope of *Miller* and *Montgomery* in *Jones v. Mississippi*, 593 U.S. ___, ___, 141 S. Ct. 1307, 1323 (2021). In *Jones*, at age 15, the defendant killed his grandfather and received a mandatory sentence of life without parole. *Id.* at ___, 141 S. Ct. at 1312. After a *Miller* remand for resentencing, the defendant was resentenced to life imprisonment without parole after the trial judge determined that this remained an appropriate sentence. *Id.* at ___, 141 S. Ct. at 1312-13.

¶ 50 On appeal, the defendant alleged that the imposition of a sentence of life without parole required that the sentencer make a separate factual finding of permanent incorrigibility or provide an on-the-record sentencing explanation that established an "implicit finding" of permanent incorrigibility. *Id.* at ___, 141 S. Ct. at 1313. The Court disagreed, holding that *Miller* only mandated that the sentencer consider an offender's youth and attendant characteristics before imposing a life-without-parole sentence. *Id.* at ___, 141 S. Ct. at 1314 (citing *Miller*, 567 U.S. at 483). The Court held that permanent incorrigibility is not an eligibility criterion for the imposition of a natural-life sentence of imprisonment. *Id.* at ___, 141 S. Ct. at 1315. The eighth amendment only required that the sentencer have the opportunity to consider the defendant's youth and discretion to impose a different punishment than life without parole. *Id.* at ___, 141 S. Ct. at 1316. The Court held:

> "In short, *Miller* followed the Court's many death penalty cases and required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence. *Miller* did not require the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence. And *Montgomery* did not purport to add to *Miller*'s requirements." *Id.* at ___, 141 S. Ct. at 1316.

¶ 51 The Court also rejected the defendant's contention that a sentencer must, at the very least, provide an on-the-record sentencing explanation that supports an implicit finding of permanent incorrigibility. *Id.* at ___, 141 S. Ct. at 1319.

¶ 52 Additionally, the Court noted that its eighth amendment holding

> "does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All those options, and others, remain available to the States. [Citation.] Indeed, many States have recently adopted one or more of those reforms. [Citation.] But the U.S. Constitution, as this Court's precedents have interpreted it, does not demand those particular policy approaches." *Id.* at ___, 141 S. Ct. at 1323.

¶ 53 On July 29, 2021, in *People v. Dorsey*, 2021 IL 123010, ¶ 48, our supreme court held that a sentence imposed under a statutory scheme that provides a juvenile an opportunity to be

released from prison after serving 40 years or less of the term imposed is not a *de facto* life sentence. Thus, the defendant's 76-year aggregate term of imprisonment that was subject to day-for-day good-conduct credit was not a *de facto* life sentence. *Id.* ¶ 53. While not overruling its prior decision in *Holman* extending *Miller* to discretionary life sentences without parole, the court found "[t]his holding is questionable in light of *Jones*." *Id.* ¶ 41.

¶ 54 The State correctly notes, and defendant's reply brief concedes, that the defendant's eighth amendment claim was explicitly rejected in *Harris*, 2018 IL 121932, ¶ 61. Our supreme court alone can overrule and modify its previous opinion. *People v. Ellis*, 2020 IL App (1st) 190774, ¶ 26. *Harris* remains the controlling law, and we are obligated to follow it. *People v. Artis*, 232 Ill. 2d 156, 163 (2009). We therefore reject defendant's eighth amendment challenge.

¶ 55 C. Defendant's Proportionate Penalties Claim

¶ 56 1. Illinois Supreme Court Precedent

¶ 57 We next consider whether defendant's claim brought under the proportionate penalties clause compels a different conclusion. The proportionate penalties clause of the Illinois Constitution 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. 1, § 11. A sentence violates the proportionate penalties clause if "the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *People v. Miller*, 202 Ill. 2d 328, 338 (2002). The proportionate penalties clause provides broader protections than those provided in the eighth amendment. *People v. Gipson*, 2015 IL App (1st) 122451, ¶¶ 69-78; *People v. Clemons*, 2012 IL 107821, ¶ 36.

¶ 58 In *People v. Thompson*, 2015 IL 118151, ¶ 17, the defendant appealed the denial of his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The defendant, at age 19, shot and killed his father and his stepmother and was found death-penalty-eligible but received a sentence of natural-life imprisonment for murdering more than one victim under section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1994)).

¶ 59 Although not raised in the defendant's section 2-1401 petition, on appeal, the defendant asserted both a facial and an as-applied challenge to the constitutionality of his sentence under the eighth amendment and the proportionate penalties clause. *Thompson*, 2015 IL 118151, ¶ 17. To support his claim, the defendant relied on his age, his lack of any prior criminal history, and his assertion that he committed the crime as an impulsive response to having suffered abuse at the hands of his father for many years. *Id.*

¶ 60 The appellate court rejected the defendant's claims and determined that he could not raise an as-applied challenge to his sentence on appeal from the dismissal of his section 2-1401 petition when he failed to raise it before the trial court. *Id.* ¶ 18. After his petition for leave to appeal was granted, the defendant requested that the matter be remanded to the appellate court for substantive review of his undecided as-applied challenge. *Id.* ¶ 22. The defendant maintained that "it makes no sense to allow a facial constitutional challenge to a sentence at any time, but not an as-applied constitutional challenge." (Internal quotation marks omitted.) *Id.* ¶ 35.

¶ 61 The supreme court disagreed, holding:

> "By definition, an as-applied constitutional challenge is dependent on the particular circumstances and facts of the individual defendant or petitioner. Therefore, it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *Id.* ¶ 37.

¶ 62 Where the record contained neither information about how the evolving science applied to the circumstances of the defendant's case nor any factual development of whether the rationale in *Miller* should be extended to young adults, the court rejected the defendant's request that the matter be remanded to the appellate court. *Id.* ¶ 38. Nevertheless, the court stated, "[u]ndoubtedly, the trial court is the most appropriate tribunal for the type of factual development necessary to adequately address defendant's as-applied challenge in this case." *Id.*

¶ 63 While disallowing the defendant from positing a previously unraised as-applied constitutional challenge to his sentence on appeal from the dismissal of his section 2-1401 petition, the court held:

> "defendant is not necessarily foreclosed from renewing his as-applied challenge in the circuit court. To the contrary, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) is expressly designed to resolve constitutional issues, including those raised in a successive petition. See *Davis*, 2014 IL 115595, ¶¶ 13-14 (detailing the procedural framework of the Act). Similarly, section 2-1401 of the Code permits either a legal or factual challenge to a final judgment if certain procedural and statutory requirements are satisfied. See *Warren County*, 2015 IL 117783, ¶¶ 37-51 (discussing and comparing standards between factual and legal challenges in section 2-1401 proceedings). Of course, we express no opinion on the merits of any future claim raised by defendant in a new proceeding." *Id.* ¶ 44.

¶ 64 Following *Thompson*, in *Harris*, 2018 IL 121932, the supreme court granted leave to appeal to review the appellate court's determination that the defendant's 76-year aggregate sentence violated the proportionate penalties clause where he committed the crimes when he was 18 years and 3 months old, despite his failure to raise this claim before the trial court. *Harris*, 2016 IL App (1st) 141744, ¶¶ 54, 58.

¶ 65 Our supreme court reversed, reiterating that an as-applied challenge is dependent on facts and circumstances that relate to the individual bringing the challenge and that review of those facts required a sufficiently developed record. *Harris*, 2018 IL 121932, ¶ 39. Relying on *Thompson*, the court held:

> "[A] court is not capable of making an 'as-applied' determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact. [Citation.] Without an evidentiary record, any finding that a statute is unconstitutional 'as-applied' is premature." (Internal quotation marks omitted.) *Id.*

¶ 66 The court rejected the defendant's attempt to distinguish *Thompson* where *Thompson* concerned a collateral proceeding, finding:

> "The critical point is not whether the claim is raised on collateral review or direct review, but whether the record has been developed sufficiently to address the defendant's constitutional claim. As we have emphasized, a reviewing court is not capable of making an as-applied finding of unconstitutionality in the 'factual vacuum'

created by the absence of an evidentiary hearing and findings of fact by the trial court." *Id.* ¶ 41.

¶ 67 The court also rejected the defendant's reliance on *Holman*, 2017 IL 120655, to support his claim that the record was sufficiently developed to permit the court to find that the defendant's life sentence was unconstitutional as applied to him, where the *Miller* factors were not considered. *Harris*, 2018 IL 121932, ¶ 42. The court noted that the claim in *Holman* fell within a "very narrow exception" where the record was sufficiently developed to consider defendant's previously unraised as-applied *Miller* claim. *Id.* ¶ 43. The defendant in *Holman* "fell squarely under *Miller* because he was a juvenile when his crime was committed," and the case involved the purely legal issues of whether *Miller* applied to discretionary life sentences for juveniles and defining the *Miller* factors to be considered in sentencing. *Id.* ¶ 44. The final issue in *Holman* was determining whether the "cold record" established that the trial court adequately considered the *Miller* factors when imposing sentence. *Id.*

¶ 68 The court likewise rejected the defendant's request that his case be remanded for an evidentiary hearing while the court retained jurisdiction, observing that the defendant's claim was "more appropriately raised" under the Act. *Id.* ¶ 48.

¶ 69 The impact of the supreme court's holdings in *Thompson* and *Harris* has been to permit young adult offenders to bring successive postconviction claims alleging that their sentences in excess of 40 years imposed without consideration of the *Miller* factors are unconstitutional as applied to them under the proportionate penalties clause.

¶ 70 In reviewing these claims, the appellate court's consideration of whether a litigant has made a *prima facie* showing of cause and prejudice to allow the successive petition to be filed has resulted in a wide split of authority, which we now proceed to discuss.

¶ 71 2. The Split in Authority

¶ 72 a. Prefatory Note/*People v. House*

¶ 73 We begin by noting that we limit our examination to those cases that are procedurally apposite, *viz.*, those cases in which the appellate court has reviewed the denial of a motion to file a successive petition filed by a young adult offender (18 to 21 years old) who raised an as-applied challenge to the imposition of a sentence in excess of 40 years.

¶ 74 We acknowledge that the parties' briefs devote much attention to this court's decision in *People v. House*, 2019 IL App (1st) 110580-B (*House II*), which has been fully briefed and argued and awaits a ruling from our supreme court. To briefly recount, in *House II*, the defendant, who acted as a "lookout" when he was 19 years old, was convicted of two murders and received a mandatory sentence of life imprisonment. *Id.* ¶ 33. Relying on the court's earlier decision in *Miller*, 202 Ill. 2d 328, the philosophical and scientific underpinnings of *Miller v. Alabama* and its progeny, recent research and articles concerning young adult brain development, and recently enacted legislation, the appellate court found the defendant's natural-life sentence was unconstitutional as applied to him. *House II*, 2019 IL App (1st) 110580-B, ¶ 63. The appellate court ordered a new sentencing hearing for the trial court to consider the *Miller* factors in tailoring an appropriate sentence and allow the court to potentially decline to impose a mandatory sentence of natural-life imprisonment. *Id.* ¶ 72.

¶ 75 Unlike this case, however, *House* reviewed the trial court's dismissal of the defendant's postconviction petition at the second stage. We have reviewed the appellate court's opinion in

House and the briefs and arguments of the respective parties before our supreme court and believe that the court's ultimate ruling is unlikely to resolve the current split of authority involving successive petitions. The current split in authority directly implicated in this case concerns (1) the pleading requirements under the cause-and-prejudice test for successive petitions asserting as-applied challenges by young adult offenders, (2) whether the imposition of a discretionary life sentence legally disables a young adult offender from raising such a challenge, (3) whether a young adult offender who acted as a principal is unable to establish prejudice under the cause-and-prejudice test, and (4) whether *Holman* is properly considered in determining whether a young adult offender has made a *prima facie* showing of prejudice. None of these questions are raised in *House II*.

¶ 76 Short of our supreme court changing course and, for example, adopting the position of the brief of *amici curiae* by extending the *Miller* protections to all young adult offenders between the ages of 18 and 21, the court's decision will likely leave the issues presented in this case in a state of flux. For this reason, we find that prudence dictates that we limit our discussion to procedurally apposite cases in which the trial court has denied leave to file a successive petition asserted by a young adult (18 to 21 years of age) who has received a natural-life sentence (*de jure* or *de facto*, mandatory or discretionary) and who claims that his sentence was imposed without consideration of the *Miller* factors, making his sentence unconstitutional as applied to him under the proportionate penalties clause of the Illinois Constitution.[3] We now turn to a discussion of the cases on both sides of the divide.

¶ 77 b. Authority Supporting the State's Position

¶ 78 The State's position finds support in the following cases: *People v. Croft*, 2018 IL App (1st) 150043; *People v. Handy*, 2019 IL App (1st) 170213; *People v. White*, 2020 IL App (5th) 170345; *People v. Moore*, 2020 IL App (4th) 190528; *People v. Carrion*, 2020 IL App (1st) 171001; and *People v. Gomez*, 2020 IL App (1st) 173016.

¶ 79 In *Croft*, the defendant received concurrent sentences of life in prison for murder and a 45-year sentence for aggravated criminal sexual assault and a 10-year sentence for aggravated kidnapping for offenses committed when he was 17 years old. *Croft*, 2018 IL App (1st) 150043, ¶¶ 1, 4. The court found that the defendant's claim was not barred by *res judicata* where *Davis* made *Miller* retroactive to cases on collateral review, where *Reyes* applied *Miller* to *de facto* life sentences, and where *Holman* applied *Miller* to discretionary life sentences. *Id.* ¶¶ 18-20.

¶ 80 The court then applied the analysis utilized in *Holman* and determined that the "cold record" established that the trial court considered evidence of the defendant's youth and attendant characteristics and that the defendant had an opportunity to present evidence to show that his conduct resulted from immaturity as opposed to incorrigibility. *Id.* ¶¶ 24-29. The court concluded that under *Holman* the defendant's resentencing hearing complied with *Miller*. *Id.* ¶ 33.

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[3]We do not consider the court's decisions in (1) *People v. Ybarra*, 2016 IL App (1st) 142407, ¶ 1, where that case involved a direct appeal, (2) *People v. Ruiz*, 2020 IL App (1st) 163145, ¶ 44, where the defendant's 40-year sentence was not a *de facto* life sentence under *Buffer*, and (3) *People v. Savage*, 2020 IL App (1st) 173135, ¶ 67, where the 22-year-old defendant was not a "young adult offender at the time of the commission of the offenses."

¶ 81 In *Handy*, at age 18½, the defendant committed multiple offenses, including armed robbery, home invasion, residential burglary, aggravated battery of a senior citizen, kidnapping, aggravated criminal sexual assault, and possession of a stolen motor vehicle. *Handy*, 2019 IL App (1st) 170213, ¶ 20. After receiving an initial maximum aggregate sentence of 120 years' imprisonment, the defendant's sentence was ultimately converted to a 60-year sentence based on a portion of the sentencing code being ruled in violation of the single-subject rule. *Id.*

¶ 82 The appellate court found that the defendant failed to establish prejudice where his sentence was discretionary and imposed after the trial court considered mitigating evidence and where the facts established that the defendant actively invaded the victims' house, held a gun to one victim's head, attacked the family and kidnapped a young daughter, and actively participated in the gang rape. *Id.* ¶¶ 40-41.

¶ 83 In *White*, at age 20, the defendant killed his grandmother and her friend, resulting in the imposition of two sentences of life imprisonment. *White*, 2020 IL App (5th) 170345, ¶¶ 4-5. The court found that allegations relating to the defendant's family history did not provide a compelling reason for advancing his petition to the second stage and that the defendant's petition was defective where it failed to allege "how he was particularly affected by any immaturity, and it is undisputed that he did not suffer from any cognitive or developmental impairments." *Id.* ¶ 24. Where the facts established that the defendant planned and elicited the aid of his younger brother in executing the victims, beat his grandmother to death with a hammer, helped his brother to beat the friend to death with the same hammer, developed an alibi, staged a purported discovery of his grandmother's body, and attempted to frame a friend for the murder, the defendant's mandatory sentence of natural-life imprisonment did not violate the proportionate penalties clause of the Illinois Constitution. *Id.* ¶ 29.

¶ 84 In *Moore*, at age 19, the defendant and two codefendants kidnapped three victims at gunpoint, whereupon the defendant shot one victim in the head and, after being convicted, was sentenced to natural life without the possibility of parole. *Moore*, 2020 IL App (4th) 190528, ¶¶ 4-5. While finding that the defendant established cause under *Davis*, the court found that the defendant failed to establish prejudice where his motion did not specify how the defendant's immaturity or individual circumstances provided a compelling reason for allowing him to file a successive postconviction petition. *Id.* ¶¶ 35, 40. The defendant's claim that he may have been influenced by his difficult upbringing where his father abandoned him at a young age and where his mother struggled with drug addiction and keeping the defendant and his siblings fed were not contained in his motion and therefore not properly pled. *Id.* ¶ 40.

¶ 85 In *Carrion*, at age 19, the defendant committed a residential burglary at the home of the 69-year-old victim, then murdered her, and was later found death-penalty-eligible but ultimately sentenced to 55 years' imprisonment on the murder charge to be served concurrently with a term of 15 years' imprisonment on the residential burglary charge. *Carrion*, 2020 IL App (1st) 171001, ¶¶ 4, 16. The appellate court affirmed the trial court's denial of leave to file the defendant's successive petition, finding that the defendant failed to establish prejudice where his sentence did not shock the moral sense of the community and was not cruel or degrading but adequately represented his personal culpability. *Id.* ¶ 30.

¶ 86 Additionally, the appellate court found that the defendant's sentencing hearing was *Miller*-compliant under *Holman*. *Id.* ¶ 32. The court also criticized the defendant for failing to include in the record an "advocacy mitigation report," which the trial court found to be "thorough" and

"exhaustive." *Id.* ¶ 33. Finally, the court held that the defendant's pleading was legally insufficient, where he failed to state how he was particularly affected by any immaturity or any special circumstances that would provide a compelling reason to advance his petition. *Id.* ¶ 38.

¶ 87 In *Gomez*, the defendant was convicted of murder and sentenced to 50 years in the Illinois Department of Corrections for crimes that he committed when he was 18 years old. *Gomez*, 2020 IL App (1st) 173016, ¶¶ 5, 11, 17. The defendant's successive petition alleged that his sentence was unconstitutional as applied to him where his brain was still developing but the trial court failed to consider the *Miller* factors. *Id.* ¶ 25. The court affirmed the trial court's denial of leave to file the defendant's successive petition where, although the defendant was convicted under a theory of accountability, he was an active participant in the offense and made earlier threats that evening while in possession of a gun and where the crime was "cruel and cold blooded." *Id.* ¶ 37. Under such circumstances, the court found that the defendant's 50-year sentence was not cruel, degrading, or wholly disproportionate to the offense such that it shocked the moral sense of the community. *Id.* ¶ 38.

¶ 88 c. Authority Supporting Defendant's Position

¶ 89 Supporting defendant's position are this court's decisions in *People v. Johnson*, 2020 IL App (1st) 171362, *People v. Minniefield*, 2020 IL App (1st) 170541, *People v. Daniels*, 2020 IL App (1st) 171738, *Bland*, 2020 IL App (3d) 170705, *People v. Franklin*, 2020 IL App (1st) 171628, *People v. Glinsey*, 2021 IL App (1st) 191145, and *People v. Jones*, 2021 IL App (1st) 180996.

¶ 90 In *Johnson*, at age 19, the defendant committed multiple offenses related to the execution-style murder of his boss, including abducting her, ordering her into the trunk of his car, robbing her, and shooting her twice in the head. *Johnson*, 2020 IL App (1st) 171362, ¶ 6. The trial court imposed a discretionary life sentence for murder; concurrent 60-year sentences for aggravated kidnapping, armed robbery, and aggravated vehicular hijacking; and a concurrent 10-year sentence for concealment of a homicidal death.

¶ 91 The court rejected the State's claim that *Miller* protections were inapplicable to the defendant where he received a discretionary sentence. *Id.* ¶ 18. The court also rejected the State's claim that the defendant received a *Miller*-compliant sentencing hearing under *Holman*, finding that this inquiry does not occur until after a defendant establishes that *Miller* applies to him*:* "[t]he *Holman* factors undoubtedly lie ahead of him, but only if he can make that first showing." *Id.* ¶ 21. The court articulated the analysis to be utilized in reviewing a trial court's denial of leave to file a successive petition:

> "(i) under *Harris*, a young adult defendant must plead, and ultimately prove, that his or her individual characteristics require the application of *Miller*;
>
> (ii) if, and only if, the young adult makes this showing, then the trial court considers whether the initial sentencing hearing complied with *Miller*, following our supreme court's guidance in *Holman* and the analysis in *Croft*; and
>
> (iii) if the initial sentencing hearing was *Miller*-compliant, then the trial court can reject the defendant's claim (as the courts did in *Holman* and *Croft*); or if the initial sentencing hearing was not *Miller*-compliant, then the trial court should order resentencing." *Id.* ¶ 25.

¶ 92 The defendant's motion alleged that "his mentality and level of maturity at the time [of his offense] made him more similar to adolescents than fully mature adults," and he supported this claim with an affidavit in which he described his childhood turmoil about his racial identity, which led to peer pressure that ultimately transformed him into a "thug." (Internal quotation marks omitted.) *Id.* ¶ 29. The defendant's "street friends" encouraged him to purchase marijuana to make money. *Id.* An "immature, irrational cycle" contributed to the defendant's actions. *Id.* ¶ 30. The defendant's association with individuals involved in street gangs and participation in violence and drug hustling were more "natural" to his "immature mind" than ending them. *Id.* The defendant's "immature mind did not have the fortitude to executively pull out of the plan." (Internal quotation marks omitted.) *Id.*

¶ 93 The defendant also relied on recent neuroscience research and supported his claim with an article titled "Young Adults in Conflict with the Law: Opportunities for Diversion." *Id.* ¶ 31.

¶ 94 Based on the foregoing, the court found that the defendant's allegations were well pled and remanded the matter for further postconviction proceedings. *Id.* ¶¶ 34-35.

¶ 95 The dissent disagreed, maintaining that the defendant had a *Miller*-compliant sentencing hearing *under Holman*, 2017 IL 120655, ¶ 49, and *Croft*, 2018 IL App (1st) 150043, ¶ 12. *Johnson*, 2020 IL App (1st) 171362, ¶¶ 41-42 (Pierce, J., dissenting). The dissent maintained that "prejudice" must be shown in order for leave to file to be granted and that prejudice is not established when the "cold record" establishes that no constitutional error occurred. *Id.* ¶ 48.

¶ 96 In *Minniefield*, the defendant was 19 years old when he committed a murder for which he received an aggregate sentence of 50 years in the Illinois Department of Corrections. *Minniefield*, 2020 IL App (1st) 170541, ¶ 1. In support of his motion for leave to file his successive petition, the defendant relied on *Miller*, *Davis*, *House*, and *Harris*. *Id.* ¶ 20. The defendant attached to his motion scholarly and news articles and numerous certificates of completion for courses taken while in the Illinois Department of Corrections. *Id.* ¶ 21. The defendant alleged that the policy concerns of *Miller* should apply with equal force to him where he was 19 years old. *Id.* Relying on its earlier holding in *People v. Carrasquillo*, 2020 IL App (1st) 180534, ¶ 109, the court found "[d]efendant has shown prejudice by establishing a 'catch-22'—without a developed record, he cannot show his constitutional claim has merit, and without a meritful claim, he cannot proceed to develop a record." (Internal quotation marks omitted.) *Minniefield*, 2020 IL App (1st) 170541, ¶ 44.

¶ 97 The court distinguished *Holman* on two bases: (1) the defendant in *Holman* was 17 years old and, as such, did not have to establish *Miller*'s applicability to him, and (2) the record in *Holman* contained a presentence report and psychological reports and established that the defendant could not be rehabilitated, a conclusion with which the trial court agreed. *Id.* ¶ 45.

¶ 98 In remanding for further second-stage postconviction proceedings, the court relied on the supreme court's observation in *Harris*, 2018 IL 121932, ¶ 41, that "a reviewing court is not capable of making an as-applied finding of unconstitutionality in the 'factual vacuum' created by the absence of an evidentiary hearing and findings of fact by the trial court." (Internal quotation marks omitted.) *Minniefield*, 2020 IL App (1st) 170541, ¶ 47. Where the record contained only basic information from the PSI and no evidence about the evolving science and its impact on the defendant's case, the defendant would be permitted to "fill this factual vacuum." *Id.*

¶ 99 In *Daniels*, at age 18, the defendant committed a capital murder and pled guilty in exchange for a negotiated sentence of life imprisonment without parole. *Daniels*, 2020 IL App (1st)

171738, ¶ 1. The defendant's motion for leave to file a successive petition claimed that his natural-life sentence was unconstitutional under the proportionate penalties clause and relied on *Harris*, 2016 IL App (1st) 141744, and *House I*, 2015 IL App (1st) 110580, in support of his claim. The defendant alleged that he demonstrated cause where such cases permitted young adult offenders to raise as-applied challenges under the proportionate penalties clause and that, based on post-*Miller* caselaw, he could now demonstrate that his natural-life sentence was unconstitutionally disproportionate. *Daniels*, 2020 IL App (1st) 171738, ¶ 9.

¶ 100 The court began by rejecting the State's claim that the defendant's guilty plea affirmatively waived his right to have the trial court consider any mitigating circumstances before imposing a sentence. *Id.* ¶ 19. The court then noted that *Thompson* and *Harris*

> "opened the door for a young-adult offender to demonstrate, through an adequate factual record, that his or her own specific characteristics were so like those of a juvenile that imposition of a life sentence absent the safeguards established in *Miller* was 'cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community. [Citation.]' " *Id.* ¶ 25.

¶ 101 The court also rejected the notion that a young adult offender could be estopped from bringing an as-applied challenge to his sentence based on (1) his degree of participation in the offense or (2) having received a discretionary sentence. *Id.* ¶ 31. The court concluded that,

> "[o]n remand, Mr. Daniels may or may not be able to make a substantial showing to support his claim. Evidence he points to in the record certainly indicates that he had an unusually harsh childhood and suffered from a number of psychological conditions that could have inhibited his development and caused him to act impulsively. We acknowledge that Mr. Daniels can no longer rely on this court's decision in *People v. Coty*, 2018 IL App (1st) 162383, ¶ 69, in which we held that, for purposes of analyzing sentencing challenges under the proportionate penalties clause, intellectually disabled individuals should be treated similarly to juveniles. During the pendency of this appeal our supreme court reversed that decision, making clear that though such individuals may be less culpable, they are also less likely than juveniles to outgrow the conditions that may have contributed to their crimes. *People v. Coty*, 2020 IL 123972, ¶¶ 36, 39-40. However, unlike the defendant in *Coty*, Mr. Daniels may be able to make a showing that his mental health conditions are of a nature that he can and will outgrow them and that he was the functional equivalent of a juvenile because of those conditions." *Id.* ¶ 33.

¶ 102 In *Bland*, at age 19, the defendant committed armed robbery and first degree murder and was sentenced to an aggregate sentence of 71 years in the Illinois Department of Corrections. *Bland*, 2020 IL App (3d) 170705, ¶ 3. The court found that the defendant established cause where *Miller* was decided 10 years after he was convicted, where the suggestion that *Miller* could be applied to those 18 years of age and older was not made until 2015 in *Thompson*, 2015 IL 118151, and where *Miller* was later extended to *de facto* life sentences in *Reyes*, 2016 IL 119271. *Bland*, 2020 IL App (3d) 170705, ¶ 10.

¶ 103 With respect to prejudice, the State maintained that the defendant could not, as a matter of law, prevail where he was not a juvenile when he committed the crime and where *Holman* applied since the trial court considered both aggravating and mitigating factors, including rehabilitation in imposing sentence. *Id.* ¶ 11.

¶ 104 The defendant maintained that he was convicted under a theory of accountability and had been previously diagnosed with an antisocial personality disorder that exhibited symptoms similar to characteristics of juveniles. *Id.* ¶ 14. He also relied on the juvenile studies cited in *House* in support of his claim. *Id.*

¶ 105 Based on the foregoing, the court determined the defendant pled enough facts to require further proceedings on his as-applied challenge to the constitutionality of his sentence where the record did not indicate that the trial court considered the defendant's youth and its attendant characteristics in imposing sentence. *Id.*

¶ 106 In *Franklin*, the defendant, at age 17, killed his six-month-old son. *Franklin*, 2020 IL App (1st) 171628, ¶ 2. The trial court declined to impose the death penalty, instead sentencing him to natural-life imprisonment without the possibility of parole. *Id.* ¶ 33.

¶ 107 In reviewing the trial court's judgment denying the defendant leave to file his successive postconviction petition, the court found that the defendant established cause where he could not have raised this claim until *Miller*, *Harris*, and *House II* were decided. *Id.* ¶ 46.

¶ 108 With respect to prejudice, the defendant alleged that, where he was five months past his eighteenth birthday at the time of the offense and where his mental health and other issues made him the functional equivalent of a juvenile, his natural-life sentence was unconstitutional as applied to him. *Id.* ¶ 50.

¶ 109 The court agreed that the defendant established prejudice to require second-stage proceedings where the record showed that the trial court did not consider the defendant's age or the other attendant characteristics of youth. *Id.* ¶ 66. The defendant had no prior convictions as an adult or as a juvenile and an alternative sentencing report established that the defendant repeated the ninth grade, was hospitalized for two separate head injuries where he lost consciousness, often complained of headaches and dizzy spells, used crack cocaine twice a week to deal with "inner turmoil," suffered from auditory hallucinations, and was diagnosed as having "low average/borderline range intelligence." *Id.* ¶¶ 33-34. Mitigation evidence also showed that the defendant's stepfather was abusive and had moved the family 20 times in 15 years. *Id.* ¶ 36. Based on these facts and in the absence of any evidence concerning the evolving science and its impact on the defendant's case, the court reversed and remanded for additional second-stage proceedings. *Id.* ¶¶ 72-73.

¶ 110 The dissent disagreed that the defendant satisfied the cause-and-prejudice test where he acted alone; was solely responsible for the burning, scratching, biting, and beating death of his six-month-old son; and where his discretionary sentence was imposed after the trial court considered his PSI in addition to a "Client Specific Sentencing Report," which included the defendant's age, familial, educational, and criminal background, and potential for rehabilitation. *Id.* ¶ 94 (Burke, J., dissenting). The dissent concluded that the sentencing guidelines of *Miller* do not extend to adult offenders under the proportionate penalties clause and that the defendant failed to establish the necessary cause and prejudice for the filing of his successive petition. *Id.* ¶ 96.

¶ 111 In *Ross*, the defendant was sentenced to an aggregate term of 50 years' imprisonment for first degree murder and attempted armed robbery committed when he was 19 years old. *People v. Ross*, 2020 IL App (1st) 171202, ¶ 3. The defendant relied on *Harris*, 2016 IL App (1st) 141744, and *House I*, 2015 IL App (1st) 110580, to claim that his sentence was unconstitutional as applied, where he was 19 years old at the time of the offense, did not have a history of violent crimes, grew up with an alcoholic and drug-addicted father, and became a

drug addict himself. *Ross*, 2020 IL App (1st) 171202, ¶ 7. The defendant's petition alleged that he could be rehabilitated if given an opportunity to do so and might be able to restore himself to useful citizenship. *Id.*

¶ 112 The court found that the defendant established cause where his claim only became mature when the supreme court decided that *Miller* applied to *de facto* life sentences in *People v. Reyes* and then when the court defined a sentence in excess of 40 years as a *de facto* life sentence in *Buffer*. *Id.* ¶ 21.

¶ 113 With respect to prejudice, the court found that the defendant satisfied the pleading requirements of the Act where his petition alleged that at age 19 his brain was more akin to a juvenile's brain than that of an adult, where evolving science showed that his brain was still developing, where he was raised with a father who was a drug addict and an alcoholic, and where the defendant too struggled with drug addiction. *Id.* ¶ 26.

¶ 114 Next, the court rejected the State's claim that the trial court adequately considered the defendant's youth in imposing the 50-year sentence in 2012, where the record did not show that the trial court considered the specific mitigating factors related to the defendant's youth and developing brain at the time of the offense. *Id.* ¶ 27. The court also agreed with *Daniels* that the defendant's status as a principal did not preclude him from raising an as-applied challenge to the constitutionality of his sentence. *Id.* ¶ 28.

¶ 115 In *Glinsey*, the defendant was convicted of a murder committed 11 days past his eighteenth birthday, for which he was sentenced to serve 45 years in the Illinois Department of Corrections. *Glinsey*, 2021 IL App (1st) 191145, ¶ 2. The State conceded that the defendant's sentence was a *de facto* life sentence and that he demonstrated cause for not raising his claim sooner but maintained that he was unable to demonstrate prejudice where his sentence was discretionary. *Id.* ¶ 3. The sentencing range for the defendant's crime was 20 to 60 years. *Id.* ¶ 19.

¶ 116 The court disagreed, finding that the defendant's petition met "the very low threshold required for filing a successive petition" and reversed and remanded for second-stage proceedings. *Id.* ¶ 4. The defendant's PSI indicated no adult convictions and only one juvenile conviction for drug possession. The defendant resided with his parents, who were both employed and were married throughout his life. There was no physical or sexual abuse in the home, and until his arrest the defendant attended high school and was a below-average student. The defendant reported no physical or mental health problems and denied drug and alcohol use. Prior to his arrest, the defendant was employed at a fast-food restaurant. *Id.* ¶ 17.

¶ 117 The defendant admitted that he had been a member of the Gangster Disciples since he was a 12-year-old. *Id.* ¶ 18. The defendant was on juvenile probation at the time that he committed this offense. At sentencing, defense counsel made no arguments regarding the defendant's age and did not offer any arguments concerning age-related factors. *Id.* ¶ 20. The trial court found that the codefendant, and not the defendant, was the motivating force behind this crime. *Id.* ¶ 21.

¶ 118 The appellate court found that, where the defendant was "a mere 11 days past his eighteenth birthday," was not the main "motivating" actor behind the offense, and was a member of a gang and potentially subject to peer pressure, he would be permitted to "fill in the blanks" for the trial court to consider whether, as applied to him, his sentence of 45 years without the possibility of parole violated the proportionate penalties clause. *Id.* ¶¶ 50-52. The court found that the defendant established prejudice where *Harris* created a "catch-22" situation where,

"without a developed record, he cannot show his constitutional claim has merit, and without a meritful claim, he cannot proceed to develop a record." (Internal quotation marks omitted.) *Id.* ¶ 55.

¶ 119 The dissent observed that the defendant asserted nothing about his specific facts and circumstances that made his discretionary sentence "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." (Internal quotation marks omitted.) *Id.* ¶ 60 (Martin, J., dissenting). The dissent also concluded that the defendant's discretionary sentence was imposed after the trial court considered the PSI, which included information about the defendant's age, background, and related circumstances and where the defendant had the opportunity to present *Miller* evidence. *Id.* ¶ 61. The dissent also noted that the record showed that the trial court noted that the defendant "actively *** gleefully involved[d] himself in a plot to go and kill other human beings." (Internal quotation marks omitted.) *Id.*

¶ 120 With the foregoing discussion in place, we turn to the question of whether defendant has made a *prima facie* showing of cause and prejudice.

¶ 121 3. Cause

¶ 122 The State does not dispute that defendant has established cause based on the retroactive application of *Miller* to cases on collateral review. The State maintains, however, that defendant cannot establish cause where an as-applied challenge is legally unavailable because his sentence was discretionary. We consider these two distinct questions in turn.

¶ 123 a. Defendant Made a *Prima Facie* Showing of Cause Based on Caselaw Decided After He Filed His Initial Postconviction Petition

¶ 124 Defendant's initial postconviction petition was filed in 2013. We find that defendant established cause for not bringing this claim in his initial petition, where *Miller* was made retroactively applicable to cases on collateral review by *Davis*, 2014 IL 115595, ¶ 42, and where our supreme court opened the door to extending *Miller* to young adults in *Thompson* in 2015. *Miller* was then extended to apply to discretionary *de facto* life sentences in *Holman* in 2017 (*Holman*, 2017 IL 120655, ¶ 40), while *Buffer* established that a sentence over 40 years constitutes a *de facto* life sentence in 2019 (*Buffer*, 2019 IL 122327, ¶¶ 27, 40-41). Accordingly, we find that defendant's motion for leave to file a successive postconviction petition established a *prima facie* showing of cause by identifying an objective factor that impeded his ability to raise this claim previously. See 725 ILCS 5/122-1(f) (West 2018); *Bland*, 2020 IL App (3d) 170705, ¶ 10; *Ross*, 2020 IL App (1st) 171202, ¶ 21.

¶ 125 b. Defendant's Mandatory Minimum Sentence of 66 Years Is Not a "Discretionary Sentence" That Precludes Him From Raising an As-Applied Challenge to the Constitutionality of His Sentence

¶ 126 The State maintains that defendant is unable to establish cause where "the *Miller* protections discussed in *Harris* and *Thompson* do not apply to adult defendants who receive discretionary sentences." We reject the State's contention.

¶ 127 At the outset, we note that the rejection of the discretionary/mandatory dichotomy in *Holman*, 2017 IL 120655, ¶ 44, was recently called into question by our supreme court's decision in *People v. Dorsey*, 2021 IL 123010, ¶ 41, where the court observed:

> "Following the decisions in *Miller* and *Montgomery*, some state courts limited the Supreme Court's holdings in those cases to only *mandatory* life without parole sentences. See *Holman*, 2017 IL 120655, ¶ 40 (collecting cases). This court in *Holman*, however, held that *Miller* and *Montgomery* apply to *discretionary* life without parole sentences as well. *Id.* This holding is questionable in light of *Jones*." (Emphases in original.)

¶ 128 *Dorsey* did not, however, overrule *Holman*, and as the United States Supreme Court recognized in *Jones*, states remain free to expand the protections provided by *Miller* and its progeny. *Jones*, 593 U.S. at ___, 141 S. Ct. at 1323. Whether our supreme court will resurrect the mandatory/discretionary dichotomy for juveniles or retain it for as-applied constitutional challenges brought by young adult offenders remains to be seen. Insofar as valid reasons may support redrawing that line in general, or at least maintaining it in cases involving as-applied challenges by young adult offenders, there is no justification for applying it to the facts before us.

¶ 129 Put plainly, we cannot regard defendant's 66-year minimum sentence as "discretionary." While it is true that the trial court exercised its discretion by not imposing a far higher sentence as it could have, defendant still received a mandatory minimum sentence of 66 years in the Illinois Department of Corrections, which will require him to be incarcerated until he is 85 years old. If committed by a juvenile, this sentence is undeniably a *de facto* life sentence. *Buffer*, 2019 IL 122327, ¶¶ 27, 40-41.

¶ 130 While the State's claim might warrant serious consideration in a case where the trial court had at its disposal a minimum sentence of less than 40 years yet decided to impose a sentence in excess of that term,[4] that is not the case here. In *Jones*, when discussing *Miller*, the United States Supreme Court described a "discretionary" sentencing procedure as one "where the sentencer can consider the defendant's youth *and has discretion to impose a lesser sentence than life without parole*." (Emphasis added.) *Jones*, 593 U.S. at ___, 141 S. Ct. at 1318 (citing *Miller*, 567 U.S. at 483 n.10). Again, the trial court, in this case, did not have a sentence less than life imprisonment without parole at its disposal.

¶ 131 The State maintains that the law is not yet settled as to whether a sentence in excess of 40 years imposed on an adult is fairly regarded as a *de facto* life sentence. The State's argument, however, misapprehends the fact that, if a young adult offender is actually able to show that he is akin to a juvenile, then his 66-year sentence would be properly regarded as a *de facto* life sentence under *Buffer*.

¶ 132 4. Prejudice

¶ 133 Next, we consider whether defendant has made a *prima facie* showing of prejudice to support his request that he be given leave to file his successive petition and that this matter be advanced to the second stage. We necessarily return to the split in authority that our supreme court has yet to address. As we have discussed, our court's decisions have relied on a myriad

[4]Two such examples are found in this court's prior holdings in *Croft*, 2018 IL App (1st) 150043, ¶¶ 24-29, 32, and *Handy*, 2019 IL App (1st) 170213, ¶ 20.

of factors in determining whether defendant successfully established a *prima facie* showing of prejudice to allow his successive postconviction petition to be filed. This lack of uniformity leaves trial courts in the unenviable position of having no clear guidance for determining whether or not to grant a defendant's motion for leave to file a successive petition. A clear and consistent rule of law is sorely needed to avoid what could possibly be viewed as an *ad hoc* body of case law dependent on the vagaries of a case-by-case approach. Prudence dictates that we now refocus our attention on the fundamental legal principles that apply to successive petitions.

¶ 134 First, we are reminded that, as our court has made pellucidly clear, the pleading requirements for successive postconviction petitions are higher than the pleading requirements for initial postconviction petitions. *Smith*, 2014 IL 115946, ¶ 35; *People v. Robinson*, 2020 IL 123849, ¶ 43. This higher standard operates in tandem with "the well-settled rule that successive postconviction actions are disfavored by Illinois courts." *Edwards*, 2012 IL 111711, ¶ 29.

¶ 135 In adhering to these established rules, we reject the notion that *Harris* eliminated the prejudice pleading requirements of the Act by creating a "catch-22 situation" where a defendant is, as a practical matter, unable to satisfy the requirements of the Act. We believe the "catch-22" argument fundamentally misapprehends the court's ruling in *Harris*. In *Harris*, the court rejected the defendant's reliance on *Holman* to excuse his failure to wage an as-applied challenge in the trial court, finding:

> "The record, however, includes only basic information about defendant, primarily from the presentence investigation report. An evidentiary hearing was not held, and the trial court did not make any findings on the critical facts needed to determine whether *Miller* applies to defendant as an adult. As in *Thompson*, the record here does not contain evidence about how the evolving science on juvenile maturity and brain development that helped form the basis for the *Miller* decision applies to defendant's specific facts and circumstances. Accordingly, defendant's as-applied challenge is premature." *Harris*, 2018 IL 121932, ¶ 46.

¶ 136 At its core, the foregoing language simply clarifies what a defendant must show to mount a fully developed as-applied challenge. *Harris* neither explicitly nor impliedly eliminated the pleading requirements of the Act to excuse a defendant seeking leave to file a successive petition from making a *prima facie* showing of prejudice, thereby eviscerating the distinction between initial petitions and successive petitions. Unless and until our supreme court explicitly holds this to be the case, we believe that the pleading requirements for any issue requiring a showing of cause and prejudice are identical and require that a defendant make a *prima facie* showing of prejudice based on the pleadings and attached documentation. *Bailey*, 2017 IL 121450, ¶ 24.

¶ 137 Thus, we consider whether defendant's pleadings and supporting documentation submitted to the court made a *prima facie* showing of prejudice to warrant second-stage proceedings and enable him to attempt to establish that his 66-year sentence required consideration of the *Miller* factors. In answering this question, we take as true all well-pled allegations in the petition that are not positively rebutted by the trial record and reject those allegations that are positively rejected by the trial record. *Robinson*, 2020 IL 123849, ¶ 45. *De novo* review consists of a "preliminary screening to determine whether defendant's *pro se* motion for leave to file a

successive *** petition adequately alleges facts demonstrating cause and prejudice." *Bailey*, 2017 IL 121450, ¶ 24.

¶ 138 We note that the requirement that our "preliminary screening" focus on the contents of defendant's motion and supporting documentation was properly emphasized in *People v. Evans*, where the court stated:

> "Although, the law has undoubtedly continued to trend in the direction of increased protections for young adult offenders, with postconviction proceedings being the proper vehicle for them to seek such protections, they must still plead *specific and individual characteristics* as related to them. This is the only way to establish that they are entitled to the protections provided by *Miller* and its progeny as interpreted by the Illinois Supreme Court." (Emphasis in original.) *People v. Evans*, 2021 IL App (1st) 172809, ¶ 21.

¶ 139 Having recentered the focus of our inquiry, we reject the State's reliance on defendant's status as a principal as a basis for finding that he has not established prejudice. It strikes us as illogical to rely on this factor as a disqualifier for an otherwise valid pleading where, in both *Harris* and *Thompson*, the defendants acted as principals. If the principal/accountable dichotomy were a valid basis for disqualifying a defendant from bringing an as-applied challenge to the constitutionality of his sentence under the Act, we cannot see how our supreme court would have extended an invitation to the defendants in *Thompson* and *Harris* to proceed in that very manner.

¶ 140 To be clear, the egregiousness of the defendant's conduct and the nature of his crime will undoubtedly be highly relevant in deciding whether the defendant can successfully prove that he should be regarded as akin to a juvenile for claiming entitlement to consideration of the *Miller* factors. Such considerations, however, appear to us to be largely irrelevant in determining whether or not defendant established a *prima facie* showing of prejudice.

¶ 141 Thus, we consider whether defendant's motion and attached documentation contained sufficient specific and individual characteristics to establish a *prima facie* showing of prejudice. As we have previously noted, defendant has conceded that our review is necessarily limited to his motion for leave to file where no successive petition appears in the record on appeal. Nevertheless, we find that our task remains the same with or without that additional pleading. Our determination is guided by our supreme court's decision in *Smith*, 2014 IL 115946. In *Smith*, our supreme court considered what standard is to be utilized in determining whether a petitioner's motion for leave to file a successive petition should be granted, *i.e.*, whether a petitioner must actively "plead" cause and prejudice or actually "prove" it. *Id.* ¶ 28. The court found it inappropriate to require that a petitioner "prove" cause and prejudice where this greater burden would potentially render the three-stage postconviction process superfluous. *Id.* ¶ 29. The court concluded that a petitioner's motion for leave to file a successive petition should be allowed where the motion adequately alleges facts demonstrating cause and prejudice. *Id.* ¶ 34. Consistent with the clearly articulated standard outlined in *Smith*, we consider whether the well-pled allegations in defendant's motion and attached documentation, taken as true, established prejudice such that defendant should have been granted leave to file a successive petition.

¶ 142 The State maintains that defendant's motion was deficient to show that *Miller* applied to his particular circumstances where it only relied on his age and his 66-year sentence. We disagree.

¶ 143 Defendant's motion relied on "previously unavailable science and social science research that has brought about a 'change in law' regarding sentences of youthful offenders when there is evidence of 'immature brain development' associated with youth." Defendant relied on the United States Supreme Court's decisions in *Roper*, 453 U.S. 551, *Graham*, 560 U.S. 48, *Miller*, 567 U.S. 460, *Montgomery*, 577 U.S. 190, and the science and social science research discussed in those cases as well as this court's decisions in *House I*, 2015 IL App (1st) 110580, *Sanders*, 2016 IL App (1st) 121732-B, and *Harris*, 2016 IL App (1st) 141744, in support of his claim.

¶ 144 Defendant alleged that "Like *Harris*, who just turned (18) years old just a few months before the shooting, [defendant] has a plausible argument of immaturity ***." Defendant clarified that his as-applied challenge was "fact specific" to his circumstances and that such circumstances should have been considered "to effectuate the constitutional mandate of restoring petitioner to useful citizenship like *Harris* and *House*."

¶ 145 Defendant further averred that his sentence exceeded his "life expectancy" and was imposed "without taking into consideration petitioner's age, adolescent brain deficiencies, significant head trauma's [*sic*], attendant characteristics, family and support, education, peer pressures, maturity and rehabilitative potential together with other mitigating factors." Defendant claimed that he "suffered most, if not all of the mitigating factors and characteristics of youth and immaturity as described in *Miller*, *Roper*, *Graham*, *House* and *Harris*" and that there was a reasonable probability that he would have received a lesser sentence within his life expectancy had the trial court been able to consider his individualized characteristics. Defendant also attached multiple "emerging adult" articles regarding brain development and certificates of participation in various classes since being committed to the Department of Corrections.

¶ 146 Defendant's motion further averred,

> "[t]he Court now is in a 'unique-position' to be able to review significant evidence that the petitioner had not developed 'entrenched patterns of problem behavior or criminality,' in fact, just the opposite, petitioner is a 'text-book[']s case of 'proof' of the 'science and social science studies[']s validated by the years go by [*sic*] and Neurological development occur, petitioners immature juvenile traits and brain deficiencies were reformed and he clearly exhibits evidence of rehabilitation."

¶ 147 The record does not positively rebut the allegations in the motion and, therefore, must be taken as true. *Edwards*, 2012 IL 111711, ¶ 25.

¶ 148 Additionally, defendant's PSI established that defendant described his upbringing as "fair." Defendant's older brother had a criminal history, and after defendant's father died when defendant was 12 years old, defendant joined a gang at age 13 but never held office within the ranks of the gang. Defendant began smoking marijuana by age 15 and spent "an unlimited amount of money daily" on his marijuana usage but was never evaluated or treated for drug usage. The PSI contained no psychological or physiological information and only indicated that defendant denied being diagnosed with a behavioral or learning disorder.

¶ 149 In its discussion of what is required in order for defendant to make the necessary *prima facie* showing of prejudice, the State's brief indicated that the pleadings must show that defendant's "own specific brain development at the time of the crime was akin to that of a minor's brain development. This cannot be proven by age alone or generalities based on articles; rather, it would be proven, for example, by experts who examined the defendant and

were able to ascertain his specific development." At oral argument, the State clarified that it was not suggesting that a defendant is required to retain an expert in order to satisfy the pleading requirements of the Act but that all postconviction petitioners seeking leave to file successive petitions must satisfy the cause and prejudice test regardless of the nature of their claim.

¶ 150 As has been previously discussed, we agree with the State that the cause-and-prejudice test is designed to narrow the number of postconviction petitions that will be advanced to the second stage and is more arduous than the frivolous-or-patently-without-merit standard applied at the first-stage review of a defendant's initial petition. *Smith*, 2014 IL 115946, ¶ 35. We believe, however, that defendant's pleading is sufficiently detailed to meet this higher standard. Defendant's motion was not a "flat allegation as to evolving science on juvenile maturity and brain development" (*Carrion*, 2020 IL App (1st) 171001, ¶ 38) but sufficiently alleged that defendant could establish the existence of facts personal to him that warranted consideration of the *Miller* factors in fashioning an appropriate sentence and that the failure to do so made his 66-year sentence unconstitutional as applied to him under the proportionate penalties clause. While we agree with the State that defendant, as an adult, must present "evidence about how the evolving science on juvenile maturity and brain development that helped form the basis for the *Miller* decision applies to defendant's specific facts and circumstances" (*Harris*, 2018 IL 121932, ¶ 46), we believe that defendant's motion contained sufficient specificity to require that the matter be advanced to second stage, at which time he will have an opportunity to substantiate his claim further. We express no opinion as to whether defendant will be able to meet the burdens that lie ahead and establish a constitutional infirmity in his 66-year aggregate sentence. At this juncture, however, we believe that he has made a sufficient showing to require further second-stage proceedings. Accordingly, we reverse the trial court's judgment and remand the matter to that court for further second-stage proceedings.

¶ 151 5. *Holman* Does Not Apply

¶ 152 As a final matter, we note that we have considered our court's decision in *Holman* but find that it does not alter our conclusion. In contradistinction to the court's holding in *Johnson*, 2020 IL App (1st) 171362, we believe that *Holman* provides a proper basis for affirming a trial court's denial of leave to file a successive petition when the requirements of *Holman* are satisfied. We do not construe *Holman* so narrowly as to preclude it from being relied on to affirm the trial court's denial of leave to file a successive petition if the "cold record" establishes that the sentencing hearing was *Miller*-compliant. Again, our conclusion is based on the legal parameters of the Act, which require that claims raised in successive petitions be "well pled." *Pitsonbarger*, 205 Ill. 2d at 467.

¶ 153 A claim is not well pled in two circumstances: where the petition and supporting documentation are insufficient to justify further proceedings or where the claims alleged by the petitioner fail as a matter of law. *Smith*, 2014 IL 115946, ¶ 35. We interpret *Holman* as providing a narrow legal basis for a reviewing court to affirm the circuit court's denial of leave to file the successive petition regardless of the defendant's status as a juvenile or a young adult offender. A contrary holding does not comport with our *de novo* review of what remains a "highly disfavored" pleading. *Holman*, 2017 IL 120655, ¶ 25. It also creates an absurd result where a young adult potentially receives more procedural protections under the Act than a

juvenile, where the young adult offender's motion for leave to file a successive postconviction may not be dismissed at the leave-to-file stage but a juvenile offender's motion could.

¶ 154 Having found *Holman* potentially applicable to this case, we nevertheless hold that it does not mandate a different outcome where we agree with defendant that the record provides no support for us to find that defendant's sentence was *Miller*-compliant. The trial court's imposition of the mandatory minimum sentence does not alter our conclusion, where it only establishes that the trial court imposed the minimum sentence authorized in 2011. It does not make defendant's resulting sentence *Miller*-compliant. In conclusion, the record, in this case, does not support affirmance of the trial court's order under *Holman*.

¶ 155 III. CONCLUSION

¶ 156 For the foregoing reasons, we reverse the circuit court's judgment and remand this case for further proceedings consistent with this opinion.

¶ 157 Reversed and remanded.