No. 126461

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- TORY S. MOORE, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0528. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 97-CF-1660. Honorable Thomas E. Griffith, Judge Presiding.

No. 126932

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- MARVIN WILLIAMS, Petitioner-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 2-18-0526. There on appeal from the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County, Illinois, No. 97-CF-1081. Honorable Joseph G. McGraw, Judge Presiding.

CONSOLIDATED REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Petitioners Tory Moore and Marvin Williams have each sufficiently pleaded a *prima facie* case of cause and prejudice to allow them to raise, in successive post-conviction petitions, constitutional challenges to their life sentences for crimes committed at age 19.

A. Limits to the Question Raised on Appeal.

Initially, the State's brief is only minimally responsive to petitioners' argument. Petitioners' opening brief focused on pleading standards, that is, on what materials must be produced by *pro se*, successive post-conviction petitioners raising the emerging adult sentencing claim to entitle them to further proceedings. (See Pt. Br. 16). The primary theme of the State's brief is whether the emerging adult sentencing claim is viable as a matter of law. (See St. Br. 23-24). It addresses petitioners' argument in a single footnote:

> [Because the "cause-and-prejudice standard is 'higher' than 'the first-stage frivolous or patently without merit standard' governing initial post[-]conviction petitions"], petitioners' suggestion that a finding that their claims are "not frivolous as a matter of law" satisfies the cause-and-prejudice test so long as the claims are supported by sufficient documentation, Pet. Br. 16, is incorrect.

(St. Br. 25, n.6). This footnote suggests that petitioners are conflating the first-stage standard with the cause-and-prejudice test. This is incorrect.

It is true that the cause-and-prejudice test is a higher standard than the first-stage "frivolous and patently without merit" standard. *People v. Smith*, 2014 IL 115946, ¶ 35. "Frivolous" in this context means "no arguable basis in law or fact." *People v. Hodges*, 234 Ill. 2d 1, 11-16 (2009). Conversely, a claim is "not frivolous" if it is based on "legal points arguable on their merits[.]" *Id.* at 11, 15. However, a claim meets the "frivolous and patently without merit" standard whenever it sets out the "gist" of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). It requires only a limited amount of detail, and does not require that claims be set out in their entirety or include legal arguments or legal citations. *Id.* at 244.

In contrast to the "gist" standard, "the cause-and-prejudice test is the analytical tool

that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 so that a claim raised in a successive petition may be considered on its merits." *Smith*, 2014 IL 115946, ¶ 34 (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)) (internal quotation marks omitted). It is similar to the cause-and-prejudice standard that applies to ineffective assistance claims, in which "a defendant must *allege facts demonstrating*" both deficient performance and prejudice from counsel's errors. *Smith*, 2014 IL 115946, ¶ 34 (quoting *People v. Patterson*, 192 Ill. 2d 93, 107 (2000)) (emphasis in original). "[A] defendant's *pro se* motion for leave to file a successive post[-]conviction petition will meet the section 122-1(f) cause and prejudice requirement if the motion *adequately alleges facts demonstrating cause and prejudice*." *Id.* at ¶ 34 (emphasis added). The petitioner must "submit enough in the way of documentation to allow a circuit court to make that determination." *Id.* at ¶ 35 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010)). Accordingly, *Smith* held:

> that leave of court to file a successive post[-]conviction petition should be denied when 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.

Smith, 2014 IL 115946, ¶ 35 (citing *Pitsonbarger*, 205 Ill. 2d at 463, *Tidwell*, 236 Ill. 2d at 161, and *People v. Edwards*, 2012 IL 111711, ¶ 24).

Thus, this Court's cause-and-prejudice cases focus on whether the pleadings are sufficient to justify further proceedings on the merits of the claim. Because a claim is not frivolous if it is based on legal points that are arguable on their merits, and because those cases defer the merits of the claim to later stages, the phrase "frivolous as a matter of law" carries its ordinary sense synonymous with "not cognizable." That is, the threshold inquiry under cause-and-prejudice asks (1) is the claim "frivolous as a matter of law?" and (2) is there enough documentation in the petition to justify further proceedings? The first question addresses whether the claim

is cognizable, while the second question addresses whether the petition adequately alleges facts demonstrating cause and prejudice. Consequently, a finding that these claims are "not frivolous as a matter of law" does indeed satisfy cause and prejudice, so long as the claims are supported by sufficient documentation establishing both prongs of that test.

As discussed in petitioners' opening brief, this Court has already addressed the threshold question in prior cases, and has concluded that "emerging adult defendants between 18 and 19 years of age are not foreclosed from 'as-applied proportionate penalties clause challenges to life sentences based on the evolving science on juvenile maturity and brain development." (Def. Br. 14-15); *People v. Thompson*, 2015 IL 118151, ¶ 44; *People v. Harris*, 2018 IL 121932, ¶ 48; *People v. House*, 2021 IL 125124, ¶¶ 26-32; see also *People v. Clark*, 2023 IL 127273.[1] In *Clark*, this Court recently reaffirmed that *Harris* and *Thompson* remain good law and recognized the viability of the constitutional challenges that the 19-year-old petitioners raise here, which are "*Miller*-based" claims seeking the opportunity to develop a record showing that, based on the recent science identified in *Miller*, their 19-year-old brains were functionally equivalent to a typical 17-year-old brain.[2] *Clark*, 2023 IL 127273, ¶¶ 87-88 ("defendant is correct that this Court has not foreclosed 'emerging adult' defendants between 18 and 19 years old from raising as-applied proportionate penalties clause challenges to life sentences based

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[1] *Clark* was decided on February 2, 2023, after the State filed its brief. On February 8, 2023, the State filed a motion to cite *Clark* as additional authority.

[2] While this Court's opinion in *Clark* indicates that the "*Miller*-based" constitutional challenge in *Thompson* arose in the context of an initial petition, (2023 IL 127273, ¶88) in fact, the petitioner raised the issue on appeal from a successive collateral proceeding. See *Thompson*, 2015 IL 118151, ¶¶ 3-13. This Court in *Thompson* explicitly invited the petitioner to file a further successive petition raising the claim. *Thompson*, 2015 IL 118151, ¶ 44 ("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.").

on the evolving science of juvenile maturity and brain development."). As such, this Court has repeatedly made clear that "*Miller*-based" sentencing challenges for emerging adults under 21 are a cognizable claim in Illinois. As will be set out more fully below, there is no reason to change that conclusion here.

With the first threshold question answered, the question on appeal here is about pleading standards, that is, whether the petitioners have sufficiently pleaded the emerging adult sentencing claim, such that they have established cause and prejudice. Petitioners have extensively briefed the question. The State provides no response as to the actual pleadings. Nor has the State argued harmless error, that is, that the sentencing judges in these cases adequately considered the factors set out in *Miller*. See *People v. O'Neal*, 104 Ill. 2d 399, 407 (1984) (waiver applies to the State as well as the defendant in a criminal case). Therefore, this Honorable Court should hold that petitioners sufficiently pleaded cause and prejudice when they pleaded recent developments in the law as cause, and pleaded facts sufficient to make a *prima facie* case as to prejudice.

B. Tory Moore and Marvin Williams each sufficiently pleaded a *prima facie* showing of "cause" because the legal basis for their constitutional claims did not exist at the time of their respective sentencing hearings and original post-conviction petitions.

The State argues that petitioners cannot make a *prima facie* showing of cause for either their Eighth Amendment or proportionate penalties clause challenges because: (1) *Miller* did not announce a new rule of Eighth Amendment law that categorically applied to them, and (2) the significance of youth as a mitigating factor was always known and available to them for purposes of the proportionate penalties clause. (St. Br. 23). Petitioners are not raising facial constitutional challenges or relying on a categorical rule. Rather, their claims are as-applied constitutional challenges based on the principles of *Miller* and its progeny. See *Thompson*, 2015 IL 118151, ¶ 37 (facial and as-applied constitutional challenges are distinct actions).

Contrary to the State's position that no new rule or standard governs these constitutional

claims (St. Br. 23), this Court has already repeatedly acknowledged that potentially viable, as-applied constitutional challenges are newly-available to emerging adults based on the principles of *Miller*. *Thompson*, 2015 IL 118151, ¶ 37 (19-year old petitioner not precluded from raising his as-applied constitutional challenges to his sentence under *Miller* in a successive petition); see also *Harris*, 2018 IL 121932, ¶ 61 (recognizing the viability of as-applied, *Miller*-based constitutional challenges for emerging adults under both the Eighth Amendment and the proportionate penalties clause); *Clark*, 2023 IL 127273, ¶ 87 (affirming the viability of "*Miller*-based" constitutional challenges for 18 and 19 year old defendants "raising as-applied proportionate penalties clause challenges to life sentences based on the evolving science on juvenile maturity and brain development.").

Proportionate Penalties

The State argues that petitioners cannot show cause because: the standards governing proportionate penalties clause challenges; the significance of youth as a mitigating factor; and the historical facts upon which petitioners' claims rest were known and understood at the time of their sentencing hearings. (St. Br. 23). Each of the State's arguments lacks merit. First, this Court has found cause exists where a critical factual basis for a petitioner's claim did not yet exist and was thus unavailable to the petitioners at the time of their initial petitions. See *People v. Blalock*, 2022 IL 126682, ¶ 45. Second, this Court has rejected the notion that a petitioner's own knowledge of the historical facts underlying his claim will defeat a finding of cause where the claim is otherwise lacking necessary evidentiary support. *Id.* at ¶ 41. Finally, the State's position that there is not a novel legal basis for petitioners' Eighth Amendment and proportionate penalties clause constitutional challenges misapprehends the "novelty" standard in the post-conviction context. *Pitsonbarger*, 205 Ill. 2d at 461-62.

First, petitioners have established cause to bring their proportionate penalties clause

challenges where recent judicial decisions and legislative changes in the law governing juveniles and young adults provide a necessary factual basis for their legal claims that was not reasonably available to them at the time of their initial petitions. (Pet. Br. 18). Specifically, these judicial and legislative changes provide objective evidence reflecting our society's evolving standards on youth sentencing. A showing of cause under the Post-Conviction Hearing Act is not limited to a showing that a "new rule" governs the claim. (St. Br. 23). The Act states that a defendant may establish "cause" "by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2016). While what constitutes cause will necessarily depend on the unique circumstances of each case, this Court has observed "that a showing that *the factual or legal basis* for a claim was not reasonably available to counsel" will constitute cause. *Blalock*, 2022 IL 126682, ¶ 39 (citing *Pitsonbarger*, 205 Ill. 2d at 460) (internal quotation marks omitted) (emphasis added).

In the context of a constitutional challenge under the proportionate penalties clause, a critical factual element is a determination of the community's then-current standards of decency. In conducting an analysis under this constitutional provision, this Court reviews the gravity of the defendant's offense in connection with the severity of the statutorily mandated sentence "within our community's evolving standard of decency." *People v. Leon Miller*, 202 Ill. 2d 328, 338 (2002); *People v. Rizzo*, 2016 IL 118599, ¶ 38 ; Ill. Const. 1970, art. 1, sec. 11.

Thus, an as-applied constitutional challenge under the proportionate penalties clause is distinct from a claim that a particular mitigating factor such as "relative youth" was not sufficiently considered by the court at sentencing. (St. Br. 39, 42). Part of the factual basis for a proportionate penalties clause claim is objective evidence of the community's evolving standards of decency. Under the principle announced in *Leon Miller*, which recognizes that concepts of disproportionate sentencing evolve as society evolves, reported decisions, such

as the *Roper/Graham/Miller* triad and their progeny in Illinois courts, are not merely helpful support. (See St. Br. 34, 47). Rather, they are critical evidence of the evolving standards of decency in sentencing young people. So too are recent legislative acts that increase protections for young people. See *Leon Miller*, 202 Ill. 2d at 339-340 (under analogous Eighth Amendment jurisprudence, "evolving standards" should be informed by objective factors as much as possible) (citing *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (identifying legislation as the "clearest and most reliable objective evidence of contemporary values")). Because both this Court's decisions and the legislature's sentencing enactments are part of the "factual basis" that define a defendant's rights under the proportionate penalties clause, the State's position characterizing a proportionate penalties challenge as having been viable even without such support is flawed.

Indeed, in their opening brief, petitioners cited decisions demonstrating that Illinois courts before 2006 affirmatively rejected challenges to young adult sentences under Illinois's proportionate penalties clause, because there was no societal recognition at that time that a life sentence or otherwise lengthy sentence for a young adult shocks the conscience, such that it would be ripe for challenge under the Illinois Constitution. (Pet. Br. 19-20) (citing *People v. Griffin*, 368 Ill. App. 3d 369, 379 (1st Dist. 2006), *People v. McCoy*, 337 Ill. App. 3d 518, 523 (1st Dist. 2003), and *People v. Winters*, 349 Ill. App. 3d 747, 750 (1st Dist. 2004)). Notably, the State fails to acknowledge these decisions. However, they represent the reality that a key factual basis for petitioners' current claims – evolving societal concern about a lack of proportionality in youth sentencing – was indisputably unavailable to the petitioners at the time of their initial petitions.

Objective, factual support is especially critical in the context of an as-applied proportionate penalties challenge where, recognizing the fact that community standards are ever-evolving, this Court has historically refused to provide a static definition of what kind of punishment is so disproportionate as to shock the moral sense of the community. See *Leon Miller*, 202

Ill. 2d at 338-42 ("We have never defined what kind of punishment constitutes 'cruel,' 'degrading,' or 'so wholly disproportioned to the offense as to shock the moral sense of the community.' This is so because, as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community."); *Rizzo*, 2016 IL 118599, ¶ 38 (same). Thus, there is no merit to the State's assertion that *Miller* and this Court's subsequent decisions in *House*, *Harris*, and *Thompson* are merely "some helpful support" for petitioners' current proportionate penalties challenges, rather than a critical part of the factual basis of the claim. (St. Br. 48-49).

The State's additional arguments that petitioners cannot show cause (1) because the legal standards governing proportionate penalties clause claims were already established at the time of their respective sentencing and initial petitions, and (2) because the historical facts of their claim were known to them and have not changed, also lack merit. (St. Br. 39). These arguments are inconsistent with this Court's recent decision in *Blalock,* which recognized that the existence of a legal framework for a certain claim, or of historical facts known to a defendant, do not defeat "cause" where a critical factual basis of a legal claim was unavailable.

In *Blalock,* the defendant filed a motion seeking leave to file a second successive post-conviction petition challenging his conviction for murder. *Blalock*, 2022 IL 126682, ¶ 1. Defendant alleged that newly-discovered evidence showed that the police officers who interrogated him had engaged in a pattern and practice of police brutality and that his confession was the product of police coercion. *Id*. Defendant argued in his petition that, although he filed two prior post-conviction petitions, his evidence of a "pattern and practice" of police abuse was newly-discovered and, therefore, the factual basis of his abuse and coercion claim was not reasonably available to him during the prior post-conviction proceedings, establishing cause. *Id.*

This Court agreed, reasoning that at the time of his initial petition defendant did not possess, and could not reasonably have been expected to obtain, evidence of this pattern and

practice of abuse at the hands of the detectives who secured his confession. He thus lacked any record to raise the coercion claim in his initial petition. *Id.* at ¶ 45 (citing *People v. Brandon*, 2021 IL App (1st) 172411¶ 65). This Court concluded that, because evidence of a pattern and practice of police misconduct is *part of the factual basis* of a coerced confession claim, its prior unavailability establishes cause, notwithstanding that the legal framework for the claim previously existed or that defendant himself was aware of the factual basis. *Blalock*, 2022 IL 126682, ¶¶ 45-47 (internal citation omitted) (emphasis added); see also *People v. Wrice*, 2012 IL 111860, ¶ 49 (both this Court and the State recognized that the discovery of new, previously-unavailable corroborating evidence showed "cause" for a police torture claim).

The same result is warranted here. Illinois law requires post-conviction claims to be supported with evidence. 725 ILCS 5/122-2 (West 2016). Thus, the unavailability of certain evidence during the initial post-conviction proceedings shows "cause" for why a claim based on those facts could not have been raised in the first petition. 725 ILCS 5/122-1(f). Just as this Court determined in *Blalock* that the defendant's objective "pattern and practice" evidence constituted cause for a police coercion claim, this Court should conclude that the objective evidence of recent legislative and judicial changes to the law governing youth sentencing establishes cause for emerging adults to raise new proportionate penalties sentencing claims. These changes reflect necessary, objective evidence of evolving standards of decency within our community that (1) is a critical part of the factual basis of a proportionate penalties challenge, and (2) was not available to petitioners in 2001 and 2006. Further, *Blalock* rejected the notion that the factual basis of the defendant's claim was simply "his own personal knowledge of the alleged police brutality," and was thus available to defendant from the time of his interrogation. *Blalock*, 2022 IL 126682, ¶ 41. This Court should therefore reject the similar argument made by the State that petitioners cannot show cause here, because the "standards governing" their proportionate penalties clause challenges, and the "historical facts" upon which their claims

rest – their relative youth – were previously known to them. (St. Br. 23, 39).

Finally, this Court should reject the State's argument that there is no new rule supporting petitioners' claims under either the Eighth Amendment or the proportionate penalties clause because "relative youth" has always been mitigating. (St. Br. 34). The State's "novelty" analysis begins from the fallacy that petitioners' constitutional challenges are traditional arguments that youth is mitigating, the standards for which were well-established at the time of the petitioners' sentencing hearings. Yet, these are not traditional claims.

As set out in the opening brief, these are *as-applied* claims that the brain development of a particular petitioner at the time of the offense was so like that of a juvenile that the reasoning behind *Miller* applies with similar force, and therefore, such a petitioner is entitled to consideration of the *Miller* factors. See, *e.g.*, *Thompson*, 2015 IL 118151 (recognizing the potential viability for an as-applied Eighth Amendment challenge based on the principles of *Miller*); *People v. Harris*, 2018 IL 121932, ¶ 61 (same). The constitutional claims here are *Miller*-like, but do not directly apply the holding of *Miller*. See *e.g.*, *Clark*, 2023 IL 127273, ¶ 87 (recognizing the viability of "*Miller*-based" sentencing challenges by "emerging adult" defendants between 18 and 19 years old raising as-applied proportionate penalties clause challenges to life sentences based on the evolving science on juvenile maturity and brain development.). To the extent that cause can be equated with novelty, the emerging adult issue is literally novel in that it is a new species of as-applied constitutional claim featuring different elements than traditional Eighth Amendment and proportionate penalties claims. Contrary to the State's assertion that petitioners could have raised their current constitutional challenges at the time of their sentencing hearings or in their respective initial petitions in 2001 and 2006 (St. Br. 34), where this Court has previously identified the nature of the claim raised by the petitioners here as a "*Miller*-based" constitutional challenge, it is axiomatic that these precise claims could not have been raised prior to *Miller*.

Moreover, the concept of novelty in this context is based on analogies to federal habeas rules as set out in *Reed v. Ross*, 468 U.S. 1 (1984). See *People v. Pitsonbarger*, 205 Ill. 2d 444, 461-62 (2002) (citing *Reed*). The *Reed* standard is generous. In discussing cause to excuse procedural default in federal habeas practice, the United States Supreme Court in *Reed* focused on the principle that "defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct[.]" *Reed*, 468 U.S. at 13-14. In light of this anti-stonewalling policy,

> the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met. If counsel has no reasonable basis upon which to formulate a constitutional question, setting aside for the moment exactly what is meant by "reasonable basis," see infra, at 2910, it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort.

Reed, 468 U.S. at 14-15 (footnote omitted). *Reed* rejected a narrow view of novelty, expressing significant concerns about the viewpoint adopted by the State here. See *Reed*, 468 U.S. at 15-16 ("Despite the fact that a constitutional concept may ultimately enjoy general acceptance, . . . when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a *truly* novel issue is not likely to serve any functional purpose. . . . In addition, if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition.") (emphasis added).

Additionally, while prior futility is insufficient to establish cause where new authority is "merely helpful" to the petitioner's position, this proposition has recognized limits. "True futility," defined as adverse decisional law from the highest court of review, *does* establish cause, while "merely helpful" typically refers to developments in case law that undermine

adverse decisions of lower courts of review. See, *e.g.*, *Gatewood v. United States*, 979 F.3d 391 (6th Cir. 2020). Neither condition describes a truly novel issue, one that the legal community as a whole has failed to apprehend, for which no case law exists.

While age has always been a sentencing factor in Illinois, counsel in the early 1990's could not reasonably have been expected to anticipate that the United States Supreme Court would constitutionalize youth in the way it did in *Miller* and *Montgomery*. Rather, to defeat cause, *Reed* requires that the issue be reasonably available. A supported claim that a young adult sentence was constitutionally impermissible – based on developments in brain science – was not reasonably available. Had it been, the legal community thirty years ago would have apprehended the issue and practitioners of the time would have been raising it as such. Accordingly, this Court should reject the notion that petitioners' current constitutional claims – specifically, "*Miller*-based," as-applied constitutional challenges based on evolving science on juvenile maturity and brain development – are not novel. See *Clark*,2023 IL 127273 ¶ 87.

This Court's recision decision in *Clark* does not compel a different conclusion. In *Clark*, this Court held that the 24-year-old defendant, who suffered from significant mental impairments, could not show cause to raise a claim that "the circuit court failed to give *sufficient weight* to the characteristics of his *intellectual disabilities* and his *young age* as mitigation factors weighing in favor of a lesser sentence." *Clark*, 2023 IL 127273, ¶ 2 (emphasis added). In doing so, this Court distinguished "*Miller*-based" constitutional challenges like those raised by petitioners here, and found that Clark was merely asking this Court to "revisit" an excessive sentencing argument based on his permanently fixed mental impairments and relative youth that had already been adjudicated on direct appeal. *Clark*, 2023 IL 127273, ¶¶ 21, 42. This Court noted that the significant evidence in *Clark* that his *permanent* intellectual disabilities meant that Clark's brain did *not* have the developmental capabilities of a juvenile brain. *Id.* at ¶¶ 96-97 (citing *People v. Coty*, 2020 IL 123972).

This Court correctly recognized that Clark's claim was not based on evolving brain science. There has been no new research suggesting that 24-year-old defendants suffering from fetal alcohol-related intellectual disabilities have more rehabilitative potential than previously believed. By contrast, petitioners here are seeking leave to file a successive petition for the very purpose of presenting new, previously unavailable scientific evidence and develop a record to show how the evolving science on juvenile maturity applies to their specific facts and circumstances. See *House*, 2021 IL 125124,¶ 31 (quoting *Harris*, 2018 IL 121932, ¶ 26).

In sum, substantial changes to the law governing sentencing of juveniles over the last decade, which have recently been extended to individual members of a class of under-21- year-olds known as emerging adults, establish cause, because these changes provide both a factual and legal basis for petitioners' current constitutional challenges that was previously unavailable to them. Therefore, under the principle announced by this Court in *Leon Miller*, the concepts of disproportionate sentencing evolve as society evolves. As such, reported decisions – such as the *Roper/Graham/Miller* triad and their progeny in Illinois courts – establish cause for petitioners to bring their *Miller*-based constitutional challenges and present evolving science on brain development in a successive post-conviction petition.

C. Moore and Williams each pleaded a *prima facie* showing of "prejudice" where their petitions raised viable as-applied constitutional challenges to their natural life sentences imposed for offenses committed when they were 19 years old.

Jones v. Mississippi

Much of the State's prejudice argument is premised on the notion that *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), changed the law by modifying *Miller* and *Montgomery*, such that *any* discretionary sentencing scheme is constitutionally adequate, and thus, that Illinois cases interpreting *Miller, et al.*, are no longer good law. (See, *e.g.*, St. Br. 29-30 & n.8). This Court adopted the same reading of *Jones* in *Clark*, 2023 IL 127273, ¶¶ 54, 71. See also *People v.*

Robert Jones, 2021 IL 126432, ¶¶ 27-28. Respectfully, this premise is a misreading of *Jones*.

The United States Supreme Court granted *certiorari* in *Jones* to resolve a split of authority on the question of whether a sentencing judge "must make a separate factual finding that [a juvenile homicide] defendant is permanently incorrigible" in order for that defendant to be constitutionally eligible for a life sentence. *Jones*, 141 S. Ct. at 1313. The Court answered the question in the negative, reasoning that, "[i]n *Montgomery*, the Court unequivocally stated that '*Miller* did not impose a formal factfinding requirement' and added that 'a finding of fact regarding a child's incorrigibility . . . is not required.' " *Id.* at 1313 (quoting *Montgomery*, 577 U.S. at 211). In doing so, the *Jones* Court rejected three arguments put forward by the defendant: (1) that incorrigibility is an "eligibility criterion," (2) that *Montgomery* assumed that a separate factual finding was necessary, and (3) that a separate factual finding was necessary in order to achieve the goals set by *Miller* and *Montgomery*. *Jones*, 141 S. Ct. at 1315, 1316, 1318. It also rejected the defendant's argument that an "implicit finding" of incorrigibility was necessary to ensure that a sentencing judge considers the defendant's youth. *Id.* at 1319.

Critically, however, despite its sometimes expansive language suggesting that any discretion whatsoever is "constitutionally sufficient" (see *id.* at 1313), the *Jones* Court was clear that its holding was limited to the question of specific factual findings. See *id.* at 1321, 1322 ("We simply have a good-faith disagreement with the dissent over how to interpret *Miller* and *Montgomery*. . . . Notwithstanding our disagreement about whether *Miller* and *Montgomery* require a finding of permanent incorrigibility, we and the dissent both recognize that *Miller* and *Montgomery* have been consequential."). It rejected the dissent's claim that it was overruling *Miller* or *Montgomery* and "instead rel[ied] on what *Miller* and *Montgomery* said – that is, their explicit language addressing the precise question before us and definitively rejecting any requirement of a finding of permanent incorrigibility." *Id.* at 1321.

Miller also featured explicit language addressing what a constitutionally compliant

"discretionary system" looks like, rendering "discretionary" in this context a term of art:

> Although we do not foreclose a sentencer's ability to make that judgment [*i.e.*, to impose juvenile life sentences] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Miller, 567 U.S. at 480. Thus, a State is not constitutionally allowed, for example, to apply a discretionary sentencing scheme that allows youth to be treated as both a mitigating factor and an aggravating factor, though arguments could surely be invented to do so. In fact, *Jones* treats youth as inherently mitigating (see *Jones*, 141 S. Ct. at 1319), glossing over the fact that it is the specific neurological and biological attributes of youth identified in *Miller* that render youth a mitigating factor. *Miller*, 567 U.S. at 471-73. That is, chronological youth is not the primary value protected by *Miller*. Instead, being young means that it is more likely that the parts of one's brain responsible for behavioral control are underdeveloped, leading to a similarly underdeveloped sense of responsibility and, in turn, giving rise to what is likely transient immaturity, recklessness, and impetuosity. Because these attributes associated with youth undermine the penological justifications for life sentences, it is *those attributes* that must be balanced against other sentencing factors to determine whether the defendant is that rare example of incorrigibility deserving of a life sentence. *Id.* at 471-73, 474-78, 479-80.

Jones is thus a "magic words" case. Its holding is an acknowledgment that "the Court has never required an on-the-record sentencing explanation or an implicit finding regarding . . . mitigating circumstances" when entering a sentence. *Jones*, 141 S. Ct. at 1320. A judge need not utter "magic words" in the form of specific findings, either explicit or implicit, before sentencing a juvenile or emerging adult to life imprisonment. But *Jones* limits itself to what a *Miller*-compliant sentencing hearing is *not*. It does not mean that a judge can avoid considering the attributes associated with youth in these circumstances, nor that any incidental mention of youth complies with *Miller*. Indeed, because *Jones* uses "discretionary" as a term of art

for "*Miller*-compliant," it does not even foreclose the application of *Miller* to discretionary life sentences. Consequently, this Court's pronouncements on *Miller*, *et al.*, including the conclusions in *Holman* that *Miller* applies to discretionary life sentences and requires consideration of (but not findings of fact on) specific youth-attendant factors, do not conflict with *Jones*. See generally *Holman*, 2017 IL 120655.

Even this Court in *Clark* suggested as much, explaining that,"The reasoning in *Miller* does not apply to discretionary life sentences under proportionate penalties clause standards *where the circuit court does consider all relevant mitigating factors at sentencing and the circuit court's exercise of discretion is supported by the evidence in the record*." *Clark*, 2023 IL 127273, ¶ 72 (emphasis added). Thus, the State's argument that Moore's sentence falls outside the bounds of *Miller*, where Moore's life sentence was not compelled by statute, is misplaced. (See St. Br. 30). To the extent that *Clark* reads *Jones* to hold otherwise, respectfully, *Clark* was incorrect. See *Clark*, 2023 IL 127273, ¶¶ 54, 71, 93.

Eighth Amendment

The State's argument against prejudice in the Eighth Amendment context is based on the notion that our values and "the wider national community's moral judgment and mores" approve of life sentences for emerging adults. Evolving social attitudes are undoubtedly a key factor of both the *Miller* decision and our proportionate penalties jurisprudence, and as argued above, legislation and case law related to youth sentencing are important evidence of that factor. However, the *Miller* majority rejected a purely mathematical analysis of the "objective indicia of society's standards[.]" *Miller*, 567 U.S. at 482-87 (internal quotations omitted). A mere tally of the jurisdictions that allowed the practices *Miller* banned "do[es] not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment." *Id.* at 484. More than half the States imposed mandatory juvenile life sentences before *Miller*, and even more allowed life-without-parole sentences for juveniles not convicted of homicide before

that practice was banned in *Graham*. *Id.* at 482, 483. In response to criticism from a dissent, which argued the absurdity of pointing to the large number of jurisdictions approving of the practice of mandatory juvenile life sentences as evidence that the practice was unusual, the *Miller* majority replied, "That description in no way resembles our opinion."

> We hold that the sentence violates the Eighth Amendment because, as we have exhaustively shown, it conflicts with the fundamental principles of *Roper*, *Graham*, and our individualized sentencing cases. We then show why the number of States imposing this punishment does not preclude our holding, and note how its mandatory nature (in however many States adopt it) makes use of actual sentencing numbers unilluminating.

Id. at 485 n.11. That is, the existence of legislative enactments and cases upholding life sentences for murders committed by emerging adults are not determinative of whether or not a sentencing practice complies with the Eighth Amendment, particularly in these as-applied cases in which the numbers are necessarily "unilluminating" in light of the fact-specific nature of the issue.

Proportionate Penalties

The gist of the State's argument against prejudice in the proportionate penalties context is two-fold. First, it re-frames petitioners' argument as "rest[ing] on the mistaken belief that their sentences are *now* shocking to our community's moral sense," pointing to legislative pronouncements enacted after *Miller* and *Montgomery* that continue to allow for their sentences. (St. Br. 54-56) (emphasis in original). But this is just another version of the argument it put forward against the Eighth Amendment. Again, the existence of legislative enactments is important evidence of society's standards, but is not determinative of the constitutionality of a sentencing practice. The enactments the State refers to here are particularly "unilluminating" because, again, these are as-applied claims, and a precise counting of scenarios to which the emerging adult issue might reveal them to be unconstitutional as applied to an individual is not practicable. While these enactments are relevant to the question of our community's moral sense, they are not determinative of that moral sense, and are certainly not determinative of our community's

moral sense with regard to individuals who were biologically young adults, but functionally children, at the time of their offenses. *Rizzo*, 2016 IL 118599, ¶ 37 ("the fact that the legislature 'has authorized a designated punishment for a specified crime' itself says something about the 'general moral ideas of the people' with respect thereto, though obviously that designation is not determinative.").

Additionally, these legislative enactments are not as simple as the State makes them out to be. One takeaway from *Miller*'s critique against tallying legislative pronouncements is that legislatures are often lagging indicators of the community's sentiment. Illinois is no different. For example, Section 5-4.5-115 of the Code of Corrections, which the State highlights as approving of these sentences (St. Br. 55), imposes an accelerated MSR hearing schedule for defendants who were under the age of 21 at the time of their offenses, but currently excludes first-degree murder defendants serving natural life sentences. 730 ILCS 5/5-4.5-115(b) (West 2022). However, it also contains a subsection that disapproves of the use of the statute as a sword against defendants, all but acknowledging that the statute is not an exclusive statement of the community's moral sentiment. See 730 ILCS 5/5-4.5-115(o) (West 2022) ("Nothing in this Section shall be construed as a limit, substitution, or bar on a person's right to sentencing relief, or any other manner of relief, obtained by order of a court in proceedings other than as provided in this Section."). And while this litigation has been pending, the legislature passed H.B. 1064, which eliminates the exclusion of natural life sentences from the new parole-eligibility scheme. See H.B. 1064, 102d Gen. Assem. (sent to the Governor, February 7, 2023). Rather than being evidence that petitioners' sentences are constitutional, the legislative pronouncements highlighted by the State are evidence of a significant shift in moral attitudes towards young adult offenders.

Second, the State summarizes petitioners' argument as being that they do not need to show prejudice at all because "they are seeking to raise claims that . . . depend on extra-record

evidence that they cannot develop without the assistance of counsel." It equates this to "rewrit[ing]" the cause-and-prejudice test such that "every young adult offender sentenced to life imprisonment" must be permitted to raise the emerging adult sentencing claim. (St. Br. 59-60). This is simply not true. Rather, as petitioners point out in their opening brief (Pt. Br. 25), the leave-to-file stage is a non-adversarial "preliminary screening." *People v. Bailey*, 2017 IL 121450, ¶ 24. Because the Act contemplates further proceedings, successive petitioners at this gate keeping, "pre-pleading" stage need not definitively establish cause and prejudice. *People v. Smith*, 2014 IL 115946, ¶¶ 28-29, 33. Instead, they must make a *prima facie* case of cause and prejudice by pleading sufficient documentation to allow the post-conviction court to determine whether or not "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." *Bailey*, 2017 IL 121450, ¶ 24; *Smith*, 2014 IL 115946, ¶ 35. The post-conviction court must review those pleadings without input from the State, who must wait for second-stage proceedings to challenge a petitioner's showing of cause and prejudice. *Bailey*, 2017 IL 121450, ¶¶ 20, 26.

Thus, petitioners here are neither seeking to diminish the cause-and-prejudice test, nor are they attempting to open floodgates through which any young offender may wade. They are attempting to establish the precise pleading standards – what information and documentation must be provided – for an issue this Honorable Court has already held is cognizable. The issue is an as-applied constitutional challenge. Those potential petitioners who cannot meet the pleading standard this Court decides on here will not be allowed to further develop their records. Without a preliminary, *prima facie* showing that the individual petitioner had a brain that functioned like that of a juvenile, that petitioner will fail at this pre-pleading stage. Those that can make that *prima facie* showing, however, are entitled to further proceedings under the Act.

CONCLUSION

For the foregoing reasons, Tory S. Moore, petitioner-appellant and Marvin Williams, petitioner-appellee, respectfully requests that this Court reverse the appellate court's judgment in *People v. Moore*, affirm the appellate court's judgment in *People v. Williams*, and remand both cases for further post-conviction proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- TORY S. MOORE, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0528. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 97-CF-1660. Honorable Thomas E. Griffith, Judge Presiding.

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- MARVIN WILLIAMS, Petitioner-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-18-0526. There on appeal from the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County, Illinois, No. 97-CF-1081. Honorable Joseph G. McGraw, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 10, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioners in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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