No. 127273

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	On Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-18-0610
Respondent-Appellee,	
v.	There on Appeal from the Circuit Court of the Ninth Judicial Circuit, Knox County, Illinois No. 93-CF-39
ROBERT M. CLARK,	The Honorable Scott Shipplett,
Petitioner-Appellant.	Judge Presiding.

BRIEF AND APPENDIX OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Petitioner appeals the appellate court's judgment affirming the Knox County Circuit Court's denial of his motion for leave to file a successive postconviction petition. A13.[1] An issue is raised on the pleadings: whether petitioner's motion made a *prima facie* showing of cause and prejudice under 725 ILCS 5/122-1(f).

ISSUE PRESENTED

Whether the trial court properly denied petitioner leave to file a successive postconviction petition raising a claim under article I, section 11, of the Illinois Constitution (the penalties provision) because he did not satisfy the cause-and-prejudice test.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. This Court allowed leave to appeal on September 29, 2021.

STATEMENT OF FACTS

I. Petitioner's Crime, Indictment, and Partially Negotiated Plea

In February 1993, at age 24, petitioner robbed and killed 89-year-old Nona Catlin. C134; SC9. The grand jury testimony and police reports were made part of the court file, and described the circumstances of the crimes. C37, 39; R2-8; SC2-8.

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[1] "C__" refers to the common law record; "SC__" to the secured common law record; "R__" to the report of proceedings; "Pet. Br. __" and "A__" to petitioner's brief and appendix; and "SA__" to this brief's appendix.

Catlin lived with other seniors in an apartment complex. R4-6; SC3-4, 7, 30. One day, she got off the elevator and saw petitioner (who sometimes visited Gerald Young, another resident of the apartment complex, R9-10; SC3-4, 7) near the door of her apartment. R13, 22-23. He asked to use her phone, and Catlin let petitioner into her apartment, where he went to the phone, dialed, then immediately hung up, saying that the people he was calling were not home. R13. Although Catlin suspected that petitioner was lying, they sat and talked for about 15 to 20 minutes before petitioner left her apartment; during this conversation, Catlin noticed that petitioner kept eyeing her purse. *Id.*

About a month later, Catlin was murdered. R5-6, 12-13, 22. Petitioner was at the complex visiting Young at the time of the murder. R10, 22. Around 7 p.m., petitioner left Young's apartment to smoke a cigarette. R10. When he returned about 30 minutes later, he was in a big hurry; he grabbed his coat and gloves, and left. R10-11. Catlin was later found on her bed with her throat cut from ear to ear, R6; SC5; her legs were spread, and she was wearing a shirt and skirt but no underwear, SC5. Later that night, petitioner told someone that he had a hundred dollars in cash and used it to buy cocaine, R7-8, 15-16; further, items stolen from Catlin's apartment were subsequently sold by petitioner or found in his apartment, R7-9, 14-19. Other residents reported having seen petitioner around the doors to their apartments in the weeks before Catlin's murder. R22-23.

Petitioner was charged with first degree murder, armed robbery, and robbery of a person over age 60, and he was provided notice that he could be sentenced to death if convicted of murder. C63. On the day of his arraignment, petitioner stripped off all of his clothing, threw it out of his cell, and refused to go to court, stating that he would "take as many officers with him as he c[ould] before [he would] voluntarily come to court." R33-34. About three months later, in June 1993, he set two fires at the jail, for which the People separately charged him with aggravated arson. *See* R134, 149-53; SC41, 52.

While preparing for trial on the charges arising from Catlin's murder, petitioner's attorney investigated petitioner's background, including his mental health, medical, family, educational, and criminal history. *See generally* C9-97, 107-131; R97-136, 150-51. Counsel also requested that petitioner be evaluated to determine his fitness to stand trial and mental state at the time of the offenses. C94-95; R97-102, 134-35. Clinical psychologist Eric Ward evaluated petitioner for possible fetal alcohol syndrome, SC9; and psychiatrist Robert Chapman evaluated petitioner for fitness, C96-97; R102. Based in part on Ward's assessment, Chapman found that petitioner suffered from antisocial personality disorder, borderline intellectual disability, borderline personality disorder, and fetal alcohol syndrome, but that these disorders did not render petitioner unfit. SC20-24.

In December 1993, the trial court reviewed the experts' reports and found petitioner fit to stand trial. C133; R134-37; SC9-29. The parties then informed the court that they had reached a partially negotiated plea agreement, R137-38: petitioner would plead guilty but mentally ill to first degree murder and robbery; in exchange, the People would dismiss the aggravated robbery and aggravated arson charges, and they would not seek the death penalty. R149-53.

The trial court read the charges to which petitioner had agreed to plead guilty and informed him of the potential penalties for each offense, *i.e.*, that (1) first degree murder carried a penalty of 20 to 60 years in prison (or up to natural life if certain aggravating factors were found); (2) robbery carried a penalty of 4 to 15 years in prison (or up to 30 years if certain aggravating factors were found); and (3) petitioner would be required to serve the sentences consecutively. R139-48; *see* 730 ILCS 5/5-8-1(a), 5-8-2(a), 5-8-4(a) (1993). Petitioner confirmed that he understood the charges, the possible penalties, and his rights, and that his plea was voluntary and not the result of any threats or pressure. R146-49.

The trial court then considered the factual basis for the plea. R153-54; *see* C134. The evidence would show that petitioner entered 89-year-old Catlin's apartment with the intent to rob her, cut her throat when she confronted him, and forcibly stole her money, police scanner, and keys. C134. In addition, Chapman would testify, in accordance with his report, about

petitioner's mental disorders. C134; R153-56. The trial court found the factual basis sufficient, R155-56, and entered petitioner's plea of guilty but mentally ill, C135; R158.

II. Sentencing

At the February 1994 sentencing hearing, the trial court heard testimony from nine witnesses, including four mental health experts (Chapman, Ward, and psychologists James Tiller and Charles Farrar), R168-303, and received seven victim impact statements, R166-67; SC30-38. The trial court also reviewed Chapman and Ward's written reports, R325-26; SC9-29, and the presentence investigation (PSI) report, R164-66; SC39-57, which contained an additional psychological report that had been prepared when petitioner was 15 years old, SC55-57. Petitioner was 25 years old at the time of sentencing, R162; SC39, and the evidence provided the following information.

A. Petitioner's childhood

Petitioner displayed symptoms of alcohol withdrawal at birth due to his mother's daily drinking during pregnancy. R224-25; SC12, 18-19. His biological mother abandoned him at the hospital twice in the first two months of his life, and he was placed with his adoptive family when he was four months old. R261, 289; SC19. Petitioner showed speech delays when he was 18 months old, but otherwise met developmental milestones. SC19.

Petitioner's adoptive mother tried her best to care for him, but his adoptive father was an alcoholic who verbally and physically abused him. R210-12, 266-74, 276-78, 289-90; SC18-20, 42-43. From a young age, petitioner was "involved in many social agencies" and in a special education program due to "his extremely aggressive behavior in the school setting." SC17, 20, 55. According to his adoptive mother, by the time he was 11 years old, petitioner refused to do chores, listen to authority figures, or acknowledge the negative consequences of his misbehavior; was "vengeful"; "did not seem to feel remorse for any wrong doing"; "showed a tendency to be destructive" and lie; and had a history of "fire setting escapades." SC19. In addition, petitioner had been expelled from school, placed in a behavior disorder program, and referred to Tiller, the psychologist, for counseling. R207-09; SC17-19, 43-45, 55-56.

In early 1981, Tiller diagnosed then 12-year-old petitioner with conduct disorder, undersocialized aggressive type. R207-09. Tiller explained at the sentencing hearing that this diagnosis is reserved for children and characteristically most similar to the adult diagnosis of antisocial personality disorder (APD), with features that are also associated with fetal alcohol syndrome (FAS), a diagnosis that did not exist when Tiller evaluated petitioner in 1981. R209-10, 215-16. Although some children with conduct disorder remediate with maturity, development, and education, remediation is "much more difficult" when the child remains in a chaotic or abusive

environment, and it is "doubly difficult" for a child with FAS to develop social skills in abusive families. R215-19. Tiller believed that petitioner made some progress with behavioral self-control during counseling but saw no progress in the abusive family situation. R217-18.

Petitioner's behavioral troubles continued as he grew older and led to court interventions and placements in a variety of special education programs. SC19-20, 40-41, 55-56. In late 1981, while at a residential placement program, petitioner violated curfew and received court supervision. SC40, 55. He was then involved in a burglary and agreed to participate in supervision as part of a juvenile diversion program; he successfully completed his supervision term in 1983. SC45.

Sometime in 1983, petitioner was terminated from the residential placement program and enrolled in a disability program at the local high school. SC55. However, petitioner "had difficulty controlling his behavior [at school] and many problems were noted." *Id.* For example, petitioner had difficulty following directions and doing independent work, which resulted in behavior problems. SC56. The school attempted "[m]any alternatives . . . to control [petitioner]'s behavior," but "none were effective." *Id.* "After many attempts and much cooperation from [petitioner's mother]," the school placed petitioner in an interim homestudy program, which petitioner attended for about a month before he became bored and refused to participate. *Id.*

In January 1984, when petitioner was 15 years old, testing showed that his intellectual functioning was in the "borderline" range, but petitioner was apathetic and unmotivated during portions of the assessment, which the school psychologist suspected could be related to substance abuse issues. *Id.* The psychologist noted that "the prognosis for [petitioner]'s return to a public school placement [wa]s poor because of the duration and significance of his particular problems," SC57, and the school's multidisciplinary team recommended that he be placed in a residential program "designed for students who have serious behavior disorder problems," SC56-57.

The following month, petitioner started a fire in his bedroom, was adjudicated delinquent for criminal damage to property, and was sentenced to one year of probation plus counseling. SC40, 45. Due to "severe family conflicts and a variety of school problems including aggressive, defiant, and threatening behavior toward teachers," petitioner stayed at a children's home during the probationary period. R257-58; SC20, 43. There, he "had difficulty establishing trust and accepted little responsibility for his behavior," which "included physical abuse against the staff, threats against other children and problems with 'spacing out' in school." SC20. Petitioner's probation officer testified that petitioner was inconsistent in reporting to her while on probation, and that she believed that his family situation "was a very large contributing factor to his lack of success [on probation]." R258-59.

Petitioner left the children's home in September 1985, when he was arrested for possession of 30 to 500 grams of cannabis. SC40, 43, 45. A child psychiatrist diagnosed him with conduct disorder, undersocialized aggreessive type, and psychological testing at that time "did not show psychosis but a very weak impulse control and low ego strength." SC20. Petitioner was adjudicated delinquent and placed on probation, but later transferred to another county for supervision and to live with his sister. SC40, 43, 45.

In September 1986, three months before his supervision term expired, then 17-year-old petitioner was arrested for criminal damage to property and placed on court supervision for six months. SC40. During that six-month period, he committed multiple offenses. In early October 1986, petitioner unlawfully possessed cannabis and criminally trespassed to a residence. *Id.* Later that month, he left the scene of an accident where someone was injured, and the next day he illegally consumed alcohol. *Id.* In November 1986, petitioner was caught speeding and driving without a license. SC40-41.

B. Petitioner's history as an adult before he killed Catlin

In January 1987, petitioner (then 18 years old) again drove without a license. SC41. The next month, he was convicted of theft and sentenced to 10 days in jail and one year of probation. *Id.* While on probation, petitioner drove while his license was revoked and was sentenced to seven days in jail. *Id.* In May 1987, petitioner committed burglary; he later pleaded guilty but

mentally ill and was sentenced to three years in prison. SC41, 45. He was released on parole in November 1988. SC41, 45.

In early 1989, Farrar evaluated then 20-year-old[2] petitioner to determine whether he qualified for social security disability benefits. R193-94. Farrar diagnosed petitioner with borderline intellectual disability,[3] alcohol dependency syndrome, and APD. R194-95, 199. Farrar observed that petitioner was unable to get along with coworkers and supervisors; and concluded that due to his APD, petitioner was unable to hold steady employment because he gave up whenever he became uncomfortable. R198-99.

In March 1989, while he was still on parole, petitioner committed residential burglary; he pleaded guilty but mentally ill and was sentenced to four years in prison. SC41, 45. He was placed in the prison psychiatric unit, SC45, where he was diagnosed with Adjustment Disorder to Adult Life and APD, SC20. While in prison, petitioner was disciplined for misconduct, including setting fire to his jacket; he also attempted suicide. SC45. Petitioner was released on parole in January 1992 at the age of 23. SC41, 45.

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[2] Farrar testified that petitioner was 21 years old in early 1989, R195, but that is incorrect because petitioner was born in December 1968, SC15.

[3] The record uses the term "mental retardation." R194, 199. Because mental health experts now use the term "intellectual disability," *see Hall v. Florida*, 572 U.S. 701, 704-05 (2014), this brief uses the updated term where feasible.

When Farrar evaluated petitioner again in April 1992, "nothing substantial" had changed in petitioner's condition. R199-200. That same month, petitioner committed criminal damage to property and was sentenced to one year of conditional discharge. SC41. Petitioner's parole agent noted that petitioner "very seldom called him as directed," "did not report his address changes," and failed to "abide by the parole agreement[,] which included seeking counseling for alcohol and drug abuse." SC45.

In January 1993, while still on parole for the residential burglary and serving his sentence for criminal damage to propery, then 24-year-old petitioner committed disorderly conduct by discharging an air rifle. R165-66; SC41, 45-46. Ten days after he was fined for that charge, petitioner entered Catlin's home and killed her. SC41.

C. Petitioner's behavior during pretrial custody

Following his arrest in February 1993, petitioner was "quite disruptive" while in pretrial custody at the jail. SC42. In late March, he tore up a mattress and threatened to start a fire unless he was placed in the alcoholic unit (where jail personnel placed individuals who are intoxicated, combative, uncontrollable, or suicidal). R169-70, 184, 189. On two occasions in April, petitioner set fire to towels. SC48, 52.

At the end of April, petitioner attempted suicide and was placed in the alcoholic unit. SC51. While there, he ripped a light fixture from the ceiling and used it to damage the unit, including by breaking bulletproof glass.

R169-70, 184-86, 190-91; SC48. Petitioner refused to let go of the light fixture, even after he was sprayed with mace. R185-86, 190-92, 280-85. Eventually, officers calmed petitioner down and took him to a holding cell, where he vowed to "damage the jail as much as he could," threatened to "kill everyone," and stated that he "had killed that old lady so he wasn't worried about taking one of [the officers] out." R170-71, 185-86; SC49.

A few days later, while at the hospital for stitches, petitioner bit an officer during a failed attempt to escape. R172-73. Shortly after that, petitioner attempted suicide with a razor blade. R171-72; SC51. In June 1993, he set fire to a bedsheet, R173-75; he was then taken to a holding cell, where he set fire to his jail uniform, SC52. In January 1994, after learning the breakfast menu, petitioner broke the window of his cell door and threw his food down the hallway. SC47.

D. Petitioner's mental health condition

Ward evaluated petitioner while he was in pretrial custody. SC9. Petitioner had a full scale IQ of 79, which was in the borderline level of intelligence, placed him in the 8th percentile for adults, and predicted a mental age of 14. R229; SC9-10, 12. Ward explained that intellectual disability begins at an IQ of 70, and that individuals with lower IQs than petitioner's are able to work and function in the community. R246. However, petitioner's adaptive behavior composite score revealed that he functioned as a seven-year-old in the domains of communication, daily living, and

socialization, R233-42; SC11-12, placing him in the lowest one percentile for an adult, R245-46.

Ward noted that petitioner's history was "replete with examples of poor impulse control, poor social judgment, [and] inability to think ahead to future consequences." SC14. Ward also found "substantial evidence" that petitioner responded poorly to discipline and other corrective techniques "from his earliest ages and throughout his life-span" in environments ranging from his home to school to "highly structured private and public residential treatment and correctional programs," SC14, which demonstrated petitioner's lack of empathy and inability to learn from consequences, R252-55.

Ward concluded that petitioner's history and test results were consistent with him suffering from FAS,[4] attention deficit hyperactivity disorder (ADHD), and lower intelligence, R242-43, 246-47; SC13-14, and noted that, as a child, petitioner showed symptoms of oppositional defiant disorder, conduct disorder, and untreated ADHD, SC13. Ward explained that not all individuals with FAS "are violent," but that "we do see a lot of violence in [such individuals]," R243-44; *see also* R215 (Tiller's similar testimony that an individual with FAS is "not necessarily" violent). And because individuals with FAS "don't seem to grow out of [it]," R243, they "appear to require life

[4] Ward could not provide a conclusive diagnosis of FAS because there had not been a medical assessment of petitioner's physical characteristics. R227; SC13-14.

long supervision and attention," R247. Ward opined that petitioner's prognosis was "poor." R253.

Chapman provided a similar prognosis, opining that petitioner suffered from multiple mental disorders that can neither be cured nor treated to "substantially minimize" their effects. R296-301; *see* SC23. Specifically, Chapman diagnosed petitioner with APD, borderline intellectual disability, borderline personality disorder, and FAS. R296-99; SC23.[5] Chapman had a "high degree of confidence" that petitioner suffered from APD, which is characterized by "a pattern of social irresponsibility, exploitive and guiltless behavior evident in the tendency to fail to conform to the law, to sustain consistent employment, to exploit and manipulate others for personal gain, to deceive, and to fail to develop stable relationships." SC23.

Petitioner also suffered from borderline personality disorder. R297, SC23. This disorder is "the most malignant and most severe of the personality disorder[s]," R297, "characterized by a pattern of intense and chaotic relationships with emotional instability, fluctuating and extreme attitudes toward other people, impulsivity, directly or indirectly self-destructive behavior, and lack of a clear or certain sense of identity, life plan, or values," SC23; *see* R298. Chapman diagnosed petitioner with this disorder based on petitioner's "demonstrate[d] impulsiveness, emotional instability,

[5] Chapman made the FAS diagnosis with a moderate degree of certainty due to insufficient evidence about petitioner's physical characteristics as a child. R300.

inappropriate intense anger, lack of control of anger, history of recurrent suicide gestures and behavior, and recurring chronic feeling of emptiness and boredom," as well as "persistent identity disturbance and uncertainty about longterm goals, career choice, type of friends desired, and preferred values." SC23; *see* R298.

Chapman expected petitioner's "pattern of intense anger, explosive behavior and violence" to continue, R302, noting that petitioner has "great difficulty in learning from his experiences," R303. He opined that for the protection of petitioner and others, R303, the most appropriate environment for petitioner "would be one in which he's [in a] protected state," *i.e.*, not free in society, R301, with a prison psychiatric unit "the closest available to the setting that would be proper for [petitioner]," R303.

Farrar, who had previously diagnosed petitioner with borderline intellectual disability, alcohol dependency syndrome, and APD, R194-95, 199, testified that "[t]here is really very little that can be done" for persons with petitioner's disorders, R200. This is because (1) persons with borderline intellectual disability "have a great deal of difficulty being able to learn"; (2) the prospect for treatment of alcoholism is unclear "especially with someone who has relatively low intelligence"; and (3) "the change in personality for someone with [APD] is virtually impossible." *Id.* Farrar opined that petitioner "tends to be exceptionally explosive so he will need some kind of custodial care." R200-01.

E. Victim impact statements

Seven family members submitted statements describing Catlin and the impact of her murder on their family, and asking the trial court to impose a life sentence. SC30-38. According to the statements, Catlin was a person who reached out to those in need, SC33, "always feeding people and letting them stay at [her] house," SC36. They noted that petitioner "could have easily taken" Catlin's belongings without harming her, as she could barely walk without help and posed "no threat to him." SC37. Acknowledging petitioner's history and mental disorders, Catlin's family emphasized that he was on parole when he killed Catlin and that prior efforts to rehabilitate him had failed, and asked the court to sentence him to life in prison. SC30-38.

F. Parties' arguments and trial court's sentencing determination

The prosecutor asked the court to sentence petitioner to natural life in prison because petitioner killed Catlin in the course of a robbery. R312-13 (citing 730 ILCS 5/5-8-1(a)(1)(b)). He emphasized the impact that Catlin's murder had on her family members, R305-10, and noted that the mental health experts "uniform[ly] conclu[ded] . . . that there is no cure" for petitioner's conditions and that "a restrictive structured environment" was necessary based on their "clear prediction of future dangerousness," R312. In summary, the prosecutor argued, "Given the enormity of [petitioner's] crime, its terrific impact on not only the family members but our society in general and the lack of potential for rehabilitation, which I know the Court always

considers, for this particular defendant the State would recommend natural life without the possibility of parole." R313.

Petitioner's attorneys argued that "there [we]re many mitigating factors in [petitioner]'s life, both statutory and nonstatutory." R314. Petitioner's biological mother left him "impaired" and "brain damaged," R319-21, and the government then "failed him" by placing him in an abusive home, R315-18, 320-23. "[T]hrough no fault of his own," petitioner was "emotion[less]," was unable to empathize with others, lacked "impulse control," and was "forever damaged." R319-21, 325. Petitioner's attorneys emphasized that petitioner had a "lifetime history of minimum functioning [and] borderline range of intelligence," which resulted in a diminished "understanding of social situations" and inability "to maintain relationship responses," even when Farrar saw him "when he was a 21 year old boy." R315. Petitioner's intellectual disability coupled with his FAS to create "a recipe for disaster." R323. Petitioner's attorneys "strongly urge[d]" the trial court to consider "this young man's background [and] the tragedy of his first 20 some years on this planet" in "fashioning a just sentence." R324-25. Petitioner declined to make a statement in allocution. R325.

After considering the sentencing guidelines and alternatives, and "all of the information which ha[d] been provided," including the PSI, the expert reports and testimony, and other evidence, R330-31, the trial court found that petitioner qualified for an extended term based on Catlin's age when he

killed her, and sentenced him to consecutive prison terms of 90 years for murder and 15 years for robbery, R334-37; *see* C147-48. (Petitioner is entitled to day-for-day credit, so would be eligible for release after 52.5 years. 730 ILCS 5/3-3-3(c), 3-6-3(a)(2), 5-8-7(b) (1994); *see generally People v. Dorsey*, 2021 IL 123010, ¶¶ 48-51.)

The trial court explained that "the nature of the individual defendant . . . is crucially important" in determining a proper sentence. R332. The court found that petitioner's intellectual disability was a mitigating factor, R328, but noted the expert testimony that despite attempts to teach him, petitioner has "not learn[ed] from consequences" due to his "inadequacies . . . in comprehension," R335-36, and that "there was no treatment that would be likely to cure or to substantially minimize the effect of" his mental disorders, R336. In aggravation, the court found that petitioner killed Catlin shortly after being released on parole for residential burglary, R328, 332-33, and had a "significant history of prior criminal activity," R328, 335. These factors were "of considerable importance" because they showed that petitioner was unable to "conform his actions" to society's rules except for a "very little time," R332, 335-36. After considering all the information, the court found that petitioner's sentence was "necessary for the protection of the public and that any lesser sentence would deprecate the seriousness of this defendant's conduct and would be inconsistent with the ends of justice." R333.

The trial court also stressed that the Department of Corrections (DOC) must "ha[ve] the information concerning the nature and exten[t] of [petitioner's] mental illness" so that it could "fashion a situation of incarceration" that would ensure both petitioner's safety and that of other inmates. R336-37. Noting that DOC was statutorily required to periodically examine "the nature, extent, continuance and treatment of" petitioner's mental illness, the court invited petitioner's counsel to prepare a document for its signature that would provide DOC with any guidance or information that would facilitate petitioner's treatment while incarcerated. R329-30.[6]

III. Petitioner's Motion to Reconsider Sentence

Petitioner asked the court to reconsider his sentence, claiming that it was "excessive" because, in addition to having an intellectual disability (which the court had considered as a statutory mitigating factor), petitioner suffered from APD, borderline personality disorder, and FAS. C150, 360-61. Petitioner acknowledged that these mental disorders "had no cure," but argued that his behavior was affected by his abusive family environment and that he "could exist in a supportive environment." C150, 361.

The trial court denied the motion. C151; R343-44. It explained that it had "consider[ed] the testimony of the mental health experts," and found that

[6] The record does not show whether any such document was ever prepared or signed by the court.

petitioner's lengthy sentence was appropriate for both petitioner and society, due to his serious offense and need for "a supportive environment." R343-45.

IV. Direct Appeal

On appeal, petitioner challenged his first degree murder sentence on two grounds: (1) the trial court improperly considered as a sentencing factor that his conduct caused or threatened serious physical harm, SA13; and (2) the sentence was "excessive," SA14, because "the trial court failed to give adequate consideration to his background and the possibility of future rehabilitation," SA17; *see also* C164, 169.[7] In support of his second claim, petitioner relied on the penalties provision, its language requiring a court to consider rehabilitation as a sentencing objective, and this Court's admonition that "punishment 'should fit the offender and not merely the crime.'" SA15-17 (quoting *People v. LaPointe*, 88 Ill. 2d 482, 495 (1981)). Petitioner likened his case to *People v. Smith*, 178 Ill. App. 3d 976 (3d Dist. 1989), which held that the trial court had not adequately considered "the defendant's age, lack of prior criminal record, . . . mental retardation, [and] . . . rehabilitative potential," as required by the penalties provision. SA14 (describing *Smith*, 178 Ill. App. 3d at 985). He contended that his relative youth, severe emotional problems, abusive background, and mental disorders warranted a

[7] A copy of petitioner's opening brief on direct appeal, *see* Pet. Br., *People v. Clark*, No. 3-94-0148 (Ill. App. Ct.), is included in this brief's appendix, *see* SA1-31. This Court may take judicial notice of the contents of that brief. *See People v. Mosley*, 2015 IL 115872, ¶ 16 n.6; *People v. Mata*, 217 Ill. 2d 535, 539-40 (2006).

lesser sentence, and asked the appellate court to reduce his murder sentence to 60 years in prison. SA14-17.

The appellate court affirmed. C164. It found that any weight the trial court may have placed on Catlin's death as a sentencing factor was insignificant and harmless. C168. And it concluded that the trial court properly considered the aggravating and mitigating factors, PSI, mental health expert evidence, and petitioner's prior criminal activity, before imposing a sentence within the statutory range. C169. The court noted that the evidence "indicated that [petitioner] suffered from psychological disorders which would make rehabilitation difficult," and that petitioner's "prior criminal record weighed heavily against him in sentencing, especially since [he] had been on parole for residential burglary when he robbed and killed Catlin." *Id.* Thus, the appellate court found, the trial court did not abuse its discretion in sentencing petitioner to 90 years in prison for first degree murder. *Id.* Petitioner did not seek review from this Court.

V. Initial Postconviction Petition

In 2001, petitioner filed a pro se postconviction petition. C179. As amended by appointed counsel in October 2005, C273, the petition repeated petitioner's first claim from direct appeal — that the trial court improperly considered the Catlin's death as an aggravating factor — and raised various claims related to his plea and sentence, but did not argue that his sentence was disproportionate under the penalties provision. C273-77. The trial court

denied the petition as untimely and meritless, C300-01, and the appellate court affirmed, C338-43.

VI. Second Postconviction Petition

In December 2010, petitioner filed a second pro se postconviction petition without seeking leave of court. C409. The trial court appointed counsel, C420, 438, who filed an amended petition in October 2011, C449. Petitioner then filed another pro se postconviction petition in July 2012, C464, and counsel filed a second amended petition the next month, C491. Collectively, the petitions repeated petitioner's claims from his initial postconviction proceedings, and added a claim that initial postconviction counsel provided unreasonable assistance. C409-11, 449-51, 464-74, 491-95. The trial court dismissed the petitions, C504, and the appellate court affirmed, C530-35.

VII. Motion for Leave to File Third Postconviction Petition

In September 2018, petitioner filed a pro se motion for leave to file a third postconviction petition. C551. As to cause and prejudice, petitioner stated that he was "rel[ying] on a new rule of constitutional law made retroactive by both the United States Supreme Court and the Illinois Supreme Court, respectively." C552. Petitioner then alleged that he had received a *de facto* life sentence, and that sentence violates the penalties provision because scientific evidence showed that his brain was not fully developed at the time of his offenses. C552-53. Petitioner "base[d] his

constitutional challenge on" *People v. House*, 2015 IL App (1st) 110580, *People v. Harris*, 2016 IL App (1st) 141744, and *People v. Williams*, 2018 IL App (1st) 151373,[8] and repeated the arguments made by the appellate court in *House* for extending *Miller v. Alabama*, 567 U.S. 460 (2012), which barred mandatory life sentences for juvenile homicide offenders, to young adult offenders. C552-53. He claimed that he "was not psychologically developed to the point of being considered a fully mature adult" at the time of Catlin's murder because, although he "was not a juvenile at the time of the offense, his young age of 24 places him squarely in the age range announced in the articles" discussed in *House*. C553-54. Citing Chapman's report and *Roper v. Simmons*, 543 U.S. 551 (2005), petitioner asserted that his FAS symptoms are "also traits associated with underdeveloped brains of young adults," and that his "offense is indicative of the poor impulse control associated with" both FAS and underdeveloped young adult brains. C554-55.

In support of his motion, petitioner attached his own affidavit, in which he averred that (1) he was 24 years old at the time of the offense, (2) he was diagnosed with FAS before trial, (3) "[FAS] was responsible for [his] early maladjustment, [his] poor impulse control, [his] poor memory, [his] inablity to learn from [his] experiences, and [his] inability to engage in

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[8] Since petitioner filed his motion, each of these decisions has been reversed or vacated. *See People v. Harris*, 2018 IL 121932; *People v. House*, No. 122134 (Ill. Nov. 28, 2018); *People v. Williams*, No. 123694 (Ill. Nov. 28, 2018).

abstract reasoning," and (4) he did not have the articles that he cited in his motion, but each of them was referenced in *House*. C556.

The trial court denied leave to file because petitioner failed to satisfy the cause and prejudice test. A11-12. The court explained that it "was well aware of," "had ample opportunity to consider," and "did so" consider petitioner's mental state, including the "matters brought forward in th[e] petition (diminished capacity, youth, [FAS], etc.)[, which] were all fully explored by experts" at the time of sentencing. *Id.* The court found "no new 'constitutional principle' . . . that suggests that [petitioner]'s lengthy sentence was unconstitutional," and that petitioner's claim amounted to a request "for a re-weighing of the factors in mitigation within the existing constitutional sentencing framework." A12. But "[t]his not only *could have* been done on direct appeal and in a first post-conviction petition, it *was* done." *Id.* (emphasis in original).

VIII. Appellate Court's Decision

The appellate court affirmed the trial court's judgment. A13, ¶ 1. The court found that "the case law [petitioner] cite[d] to satisfy the cause requirement does not apply to him" because he "was 24 years old when he committed first degree murder," and thus fell "outside the consideration of [*People v. Leon*] *Miller*, 202 Ill. 2d 328 [2002], *Miller*, 567 U.S. [at] 460, and other related case law finding that a natur[al] life sentence without parole is unconstitutional when applied to defendants who were in their teens when

they committed their offenses." A18, ¶ 14. Petitioner also failed to show prejudice because, as in *People v. Coty*, 2020 IL 123972, petitioner's "intellectual disabilities limit his rehabilitative potential and increase his likelihood of reoffending," thus supporting his life sentence. A17, ¶¶ 12-13.

Justice McDade dissented. Citing *Miller* and *House*, she would have found that petitioner had shown cause because "the law has changed both substantially and substantively since [petitioner's] sentencing and prior postconviction filings," such that petitioner "could not raise [his] specific claim during his initial postconviction proceedings." A19, ¶ 22. And Justice McDade would have found that petitioner "ha[d] shown prejudice by stating a claim, based on new case law, that his sentence is unconstitutional and violated due process." A19, ¶ 24. She reasoned that, unlike in *Coty*, petitioner's claim did "not fail as a matter of law" because petitioner "was roughly half of Coty's age when [he] committed [his] offense[], and he [wa]s not a sex offender subject to a specific sentencing mandate as Coty was." A19, ¶ 25. Based on these findings, Justice McDade would have "tak[en] no position on the underlying petition itself," reversed the trial court's denial of leave to file a successive postconviction petition, and remanded "for first-stage postconviction proceedings." A19, ¶ 26.

STANDARD OF REVIEW

This Court reviews the denial of a motion for leave to file a successive postconviction petition *de novo*. *People v. Dorsey*, 2021 IL 123010, ¶ 33.

ARGUMENT

On direct appeal, the appellate court upheld petitioner's sentence under the penalties provision because the trial court had considered extensive evidence regarding petitioner's background, intellectual disability, and mental disorders, including evidence from four mental health experts, before it sentenced him to a total of 105 years in prison, with eligibility for release after 52.5 years, for murdering an elderly woman in her bed during the course of a robbery when he was 24 years old. Petitioner filed a postconviction petition challenging his sentence on other grounds, then a second postconviction petition renewing those challenges, and finally sought leave to file a third postconviction petition to again raise his claim that his sentence is excessive under the penalties provision due to his intellectual disability and relative youth.

The trial court properly denied petitioner leave to file that third postconviction petition because his claim is procedurally barred on two grounds. First, it is barred under the common law doctrine of *res judicata* by the appellate court's rejection of the claim on direct appeal. Second, it is barred by the Post-Conviction Hearing Act's waiver bar, 735 ILCS 5/122-3, because, although petitioner raised his penalties provision claim on direct appeal, he did not raise it in his initial postconviction proceedings.

Both procedural bars may be lowered if petitioner shows that his claim rests on a new constitutional right that applies retroactively to him. But

petitioner fails to satisfy that hurdle because his claim — that his sentence is excessive under the penalties provision due to his relative youth and intellectual disability — rests on no new retroactive right under the penalties provision, and instead relies on the same legal standards that the appellate court applied when it adjudicated his claim on direct appeal and that were well-established at the time that he was sentenced in 1994. Accordingly, the trial court properly denied petitioner leave to file a successive postconviction petition to relitigate the same claim that the appellate court rejected on direct appeal.

I. Petitioner Faces Significant Procedural Hurdles to Obtaining Leave to File His Successive Postconviction Petition.

The Post-Conviction Hearing Act (Act) allows a criminal defendant to assert in a petition that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1). But because "[p]ostconviction proceedings are collateral to proceedings on direct appeal," *Dorsey*, 2021 IL 123010, ¶ 31, and "the State has a legitimate interest in preserving the finality of" a judgment of conviction affirmed on direct appeal, *People v. Owens*, 129 Ill. 2d 303, 316 (1989), proceedings under the Act "'focus on constitutional claims that have not and could not have been previously adjudicated,'" *Dorsey*, 2021 IL 123010, ¶ 31 (quoting *People v. Holman*, 2017 IL 120655, ¶ 25). Accordingly, "the doctrine of *res judicata* bars issues that were raised and decided on direct

appeal," *id.*, and a petitioner "cannot obtain relief under the [Act] by rephrasing previously addressed issues in constitutional terms in his petition," *People v. Neal*, 142 Ill. 2d 140, 148 (1990) (quotation marks and citation omitted). Similarly, "forfeiture precludes issues that could have been raised [on direct appeal] but were not." *Dorsey*, 2021 IL 123010, ¶ 31.

When a petitioner files an initial postconviction petition, the common law doctrine of *res judicata* that would otherwise bar claims that were previously adjudicated on direct appeal may be "relaxed where fundamental fairness dictates otherwise." *People v. Ikerd*, 47 Ill. 2d 211, 212-13 (1970); *see also People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002); *Neal*, 142 Ill. 2d at 146. For example, the Court has lowered the *res judicata* bar where the constitutional "right relied on has been recognized for the first time after the direct appeal," and where that right has been "held to apply retroactively." *Ikerd*, 47 Ill. 2d at 212-13 (citing *People v. Strader*, 38 Ill. 2d 93, 95-97 (1967)).

But when a petitioner seeks to file a successive petition, the claims that may be raised are subject to an additional statutory bar. Because the Act contemplates the filing of a single postconviction petition, it requires a petitioner to obtain leave of court to file a successive postconviction petition and imposes "'immense procedural default hurdles [to] bringing'" that petition, which "are lowered only in very limited circumstances so as not to

impede the finality of criminal litigation." *Dorsey*, 2021 IL 123010, ¶ 32 (quoting *People v. Davis*, 2014 IL 115595, ¶ 14).

Specifically, the Act provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended [postconviction] petition is waived." 725 ILCS 5/122-3. To clear this statutory waiver bar, the petitioner must "demonstrate 'cause' for the failure to raise the claim in the initial petition and that 'prejudice' resulted from that failure." *Dorsey*, 2021 IL 123010, ¶ 32; *see* 725 ILCS 5/122-1(f); *see also Pitsonbarger*, 205 Ill. 2d at 455-60 (fundamental unfairness necessary to overcome statutory waiver bar shown through satisfaction of cause-and-prejudice test). A petitioner "shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f). And a petitioner establishes "prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.* Absent this showing of cause and prejudice, the trial court must deny leave to file a successive postconviction petition. *Dorsey*, 2021 IL 123010, ¶ 33 (trial court must deny leave "when it is clear from a review of the successive petition and supporting documents that the claims raised fail as a matter of law or are insufficient to justify further proceedings").

To be sure, the Act is silent as to whether a petitioner may ever relitigate a claim that he previously adjudicated to final resolution. But where a petitioner alleges cause and prejudice based on a change in the law, a legal change that would satisfy the cause-and-prejudice test would also warrant relaxing the *res judicata* bar. *Compare, e.g.*, *Davis*, 2014 IL 115595, ¶¶ 42-43 ("*Miller*'s new substantive rule constitutes 'cause' because it was not available earlier to counsel, and constitutes prejudice because it retroactively applies to defendant's sentencing hearing."), *with Ikerd*, 47 Ill. 2d at 212-13 (*res judicata* bar lowered where new constitutional right was announced after direct appeal and that right applied retroactively to cases on collateral review).[9] In such circumstances, it would be sufficient to evaluate only whether the petitioner made a showing of cause and prejudice to determine whether he cleared both the *res judicata* and statutory waiver bars.

II. The Trial Court Properly Denied Petitioner Leave to Raise His Penalties Provision Claim in a Third Postconviction Petition.

The trial court properly denied petitioner leave to raise his penalties provision claim in a successive postconviction petition because the claim is

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[9] The reason is that a claim properly premised on a new legal right would have a different legal basis than the claim previously litigated, *see Pitsonbarger*, 205 Ill. 2d at 461, and the fact that the right did not exist earlier would be the "objective factor that impeded [the petitioner's] ability to raise [the] specific claim during [the] initial post-conviction proceedings," thus satisfying the Act's cause requirement, 725 ILCS 5/122-1(f). In other words, there would be no *res judicata* bar at all because the specific claim is based on a new right and was not previously litigated. *See Pitsonbarger*, 205 Ill. 2d at 461-62.

barred by the common law doctrine of *res judicata* and the statutory waiver bar, and petitioner failed to establish that he can overcome these bars.

A. Petitioner's claim is barred by *res judicata* and waived.

First, petitioner already litigated his claim that his sentence is excessive under penalties provision in light of his relative youth and intellectual disability, and so he is barred from renewing that claim by the common law doctrine of *res judicata*. On direct appeal, petitioner recited the penalties provision, cited the established standards for reviewing his claim, and argued that his first degree murder sentence was excessive because the trial court failed to adequately consider his mental disorders, abusive upbringing, and rehabilitative potential. SA14-17; *see infra*, Part II.B.1.a-b (describing established standards governing penalties provision claim). The appellate court rejected the claim, C164, 169, and petitioner did not seek review in this Court. Thus, the doctrine of *res judicata* precludes petitioner from relitigating his penalties provision claim in a successive postconviction petition. *See Dorsey*, 2021 IL 123010, ¶ 73 (juvenile offender's penalties provision claim barred by *res judicata* because he litigated it on direct appeal); *Davis*, 2014 IL 115595, ¶¶ 4-5, 45 (same).

Second, petitioner waived his claim by not raising it in his initial postconviction petition. 725 ILCS 5/122-3. Although he challenged his sentence on various other grounds in his initial postconviction proceedings,

he did not claim that his sentence violates the penalties provision. Accordingly, petitioner waived his claim.

B. Petitioner fails to overcome these procedural bars.

As discussed in Part I, *supra*, because petitioner here asserts that he should be permitted to file a successive petition based on a change in the law, *see* Pet. Br. 11, the Court need evaluate only whether he made a *prima facie* showing of cause and prejudice to determine whether he clears both the *res judicata* and statutory waiver bars. He did not. As the trial court correctly found, petitioner failed to establish cause because his claim is not based on any newly recognized right under the penalties provision. A12. Rather, it relies on the same right that petitioner invoked when he raised the claim on direct appeal and the same legal standard that the appellate court previously applied when it rejected the claim. And because petitioner's sentence still comports with the penalties provision, he cannot show prejudice.

1. Petitioner cannot show cause because his claim does not rest on a newly recognized right under the penalties provision.

To establish "cause" based on a change in the law, petitioner must establish that his "'constitutional claim is so novel that its legal basis [wa]s not reasonably available to [counsel]'" during his initial postconviction proceedings. *Pitsonbarger*, 205 Ill. 2d at 461 (quoting *Reed v. Ross*, 468 U.S.

1, 16 (1984)).[10] "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." *Smith v. Murray*, 477 U.S. 527, 536-37 (1986); *see People v. Guerrero*, 2012 IL 112020, ¶ 19 ("mere fact that a defendant or his counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default" (citing *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986));

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[10] *Reed*'s holding is in tension with the United States Supreme Court's later holding in *Teague v. Lane*, 489 U.S. 288 (1989), that a decision announcing a new constitutional rule — *i.e.*, one not dictated by prior precedent — generally does not apply retroactively to cases on collateral review. *See, e.g., Daniels v. United States*, 254 F.3d 1180, 1194-95 (10th Cir. 2001) (collecting cases questioning continuing viability of *Reed* and observing that "if one has cause for not raising a constitutional claim in earlier petitions because it is sufficiently 'novel,' that same novelty ensures that the claim is barred from application on collateral review as a new rule under *Teague* (unless one of two exceptions applies)"); *see also People v. Flowers*, 138 Ill. 2d 218, 237-39 (1990) (adopting *Teague* framework for determining whether new decisions apply retroactively on collateral review). The Seventh Circuit has held that only legal changes that qualify as retroactive under *Teague* may constitute cause. *See, e.g., Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018); *McKinley v. Butler*, 809 F.3d 908, 912 (7th Cir. 2016); *cf. Reed*, 468 U.S. at 17-20 (finding cause where new constitutional rule applied retroactively). This Court, instead, requires that the new right be retroactive as a condition to showing prejudice, not cause. *See Davis*, 2014 IL 115595, ¶ 42 (holding that juvenile offender sentenced to mandatory life established cause under *Miller* and prejudice because *Miller*'s rule is retroactive and therefore outside of *Teague*'s prohibition). Practically, under either formulation, a petitioner cannot satisfy the cause-and-prejudice test based on a change in the law without showing *both* that his claim rests on a newly recognized constitutional right and that the right applies retroactively to his case. Otherwise, the *Teague* nonretroactivity doctrine would be rendered meaningless. *See United States v. Vargas-Soto*, 35 F.4th 979, __, 2022 U.S. App. LEXIS 15297, at *28-29 (5th Cir. June 2, 2022).

Bousley v. United States, 523 U.S. 614, 623 n.2 (1998) (no cause "'where the basis of a claim is available, and other defense counsel have perceived and litigated that claim'" (quoting *Engle v. Isaac*, 456 U.S. 107, 134 (1982)).[11] Thus, even if the "law [wa]s against him" or there was a "lack of precedent for [the] position," a petitioner cannot show "'cause' for failing to raise" a claim if its legal basis was reasonably available at the time that he filed the initial postconviction petition. *Guerrero*, 2012 IL 112020, ¶ 20 (citing *People v. Leason*, 352 Ill. App. 3d 450, 454-55 (1st Dist. 2004), and *People v. Johnson*, 392 Ill. App. 3d 897 (1st Dist. 2009)). In sum, a petitioner must rely on a new constitutional right to establish cause and cannot invoke novelty "where he was legally able to make the putatively novel argument" in a prior pleading. *Vargas-Soto*, 2022 U.S. App. LEXIS 15297, at *24-25.

Petitioner argues that he established cause to raise his claim that his sentence was excessive under the penalties provision because he "could not have raised a sentencing issue based on his intellectual disability or his youth in his direct appeal or his prior post-conviction petitions." Pet. Br. 15. Specifically, petitioner contends that "[t]he law on sentencing intellectually disabled people and emerging adults [*i.e.*, adults between the ages of 18 and

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[11] "[T]his [C]ourt has in the past relied on [federal] *habeas* case law in interpreting and applying the Act," and specifically the cause-and-prejudice test for filing a successive postconviction petition. *People v. Hodges*, 234 Ill. 2d 1, 12 (2009) (citing *People v. Flores*, 153 Ill. 2d 264, 278-79 (1992), which relied on *McClesky v. Zant*, 499 U.S 467 (1991), in defining the cause-and-prejudice test).

25] has changed significantly since [his] sentencing in 1994 and his prior collateral proceedings." *Id.* at 11. Petitioner is mistaken because the penalties provision, the legal standards governing his claim that his discretionary sentence is disproportionate under that provision, and the historical facts upon which his claim relies — his relative youth and intellectual disability — were "known to all concerned" since before even the time of petitioner's direct appeal. *People v. LaPointe*, 2018 IL App (2d) 160903, ¶ 55; *accord Dorsey*, 2021 IL 123010, ¶¶ 73-74. Thus, as the trial court correctly found, A12, petitioner's claim does not rest on a new right under the penalties provision, and he cannot show cause for his failure to raise the claim in his initial postconviction proceedings.

a. The legal standards governing petitioner's penalties provision claim were established at the time he was sentenced and have not changed.

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. I, § 11. Since its enactment, this Court has consistently held that a sentence within statutory limits comports with this directive unless "'it is greatly at variance with the purpose and spirit of the law or manifestly'" disproportionate "'to the nature of the offense,'" *People v. Barrios*, 114 Ill. 2d 265, 277 (1986) (quoting *People v. Fox*, 48 Ill. 2d 239, 251-52 (1971)); *accord People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010), *i.e.*, when the sentence

fails to "reflect[] the seriousness of the offense and give[] adequate consideration to the rehabilitative potential of the defendant," *People v. Heflin*, 71 Ill. 2d 525, 545 (1978) (citing Ill. Const. 1970, art. I, § 11). Although a court must sentence an offender with the objective of restoring him to useful citizenship, *People v. Clemons*, 2012 IL 107821, ¶¶ 29-30; *People v. Young*, 124 Ill. 2d 147, 156-57 (1988), "'[a] defendant's rehabilitative potential . . . is not entitled to greater weight than the seriousness of the offense,'" *Alexander*, 239 Ill. 2d at 214 (quoting *People v. Coleman*, 166 Ill. 2d 247, 261 (1995)); *see also People v. Coty*, 2020 IL 123972, ¶ 24 ("there is no indication in our constitution that the possibility of rehabilitating an offender was to be given greater weight and consideration than the seriousness of the offense in determining a proper penalty" (cleaned up)); *Young*, 124 Ill. 2d at 156 (rejecting suggestion that penalties provision requires court to give greater weight to rehabilitation than seriousness of offense); *People v. LaPointe*, 88 Ill. 2d 482, 493 (1981) (penalties provision does not "require[] the trial court to make specific findings concerning the defendant's rehabilitative potential" or "detail for the record the process by which [it] concluded that the penalty [it] imposed was appropriate").

More than a decade before petitioner was sentenced, this Court explained that fashioning a sentence that strikes the proper balance between the two constitutional objectives is a "'difficult task,'" *LaPointe*, 88 Ill. 2d at 492 (quoting *People v. Cox*, 82 Ill. 2d 268, 280 (1980)), because the sentencing

court must "consider 'all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding,'" *People v. Fern*, 189 Ill. 2d 48, 55 (1999) (quoting *People v. Barrow*, 133 Ill. 2d 226, 281 (1989)); *see also LaPointe*, 88 Ill. 2d at 497 ("'Highly relevant — if not essential — to [a court's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.'" (quoting *Williams v. New York*, 337 U.S. 241, 246-51 (1949)). Relevant factors have long included (and continue to include) the "'general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, [and] the stimuli which motivate his conduct.'" *People v. Dukett*, 56 Ill. 2d 432, 452 (1974) (quoting *People v. McWilliams*, 348 Ill. 333, 336 (1932)); *accord Alexander*, 239 Ill. 2d at 213.

b. Intellectual disability and youth were considered relevant mitigating factors under the penalties provision before petitioner was sentenced.

More specifically, the factors upon which petitioner rests his penalties provision claim — his relative youth and intellectual disability — have long been among the myriad factors that a court must consider under the penalties provision when determining the appropriate sentence. *See, e.g.*, *People v. Murphy*, 72 Ill. 2d 421, 426-27, 429-30, 439 (1978) (no penalties

provision violation where trial court considered defendant's age of 19 years and severe intellectual disability before determining the sentence).

Indeed, the potentially mitigating effect of a defendant's intellectual disability was well established in 1994, when petitioner was sentenced. Intellectual disability was added to the statutory mitigating factors in 1990, *see* 730 ILCS 5/5-5-3.1(a)(13) (1990),[12] but Illinois courts considered, and defendants argued, intellectual disability as a mitigating factor long before then, *see, e.g.*, *Murphy*, 72 Ill. 2d at 426-27, 439 (court considered defendant's "limited mental acuity" at sentencing); *People v. Henderson*, 83 Ill. App. 3d 854, 869-70 (1st Dist. 1980) (defendant argued that sentence was excessive because he was young and "the mitigating factor of mental retardation was present"); *People v. Chambers*, 112 Ill. App. 2d 347, 355-56 (1st Dist. 1969) (same); *People v. Johnson*, 68 Ill. App. 2d 275, 278-79 (2d Dist. 1966) (defendant argued intellectual disability as mitigating factor at sentencing).

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[12] This addition followed the United States Supreme Court's recognition that intellectual disability diminishes a person's moral culpability because the person is "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry v. Lynaugh*, 492 U.S. 302, 322-23 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that Eighth Amendment prohibits capital punishment for intellectually disabled offenders); *see Coty*, 2020 IL 123972, ¶ 34 (observing that *Atkins* did not abrogate the part of *Penry* that described the relevance of a defendant's intellectual disability at sentencing); *see also Heller v. Doe*, 509 U.S. 312, 321-29 (1993) (describing characteristics of intellectual disability). As this Court explained in *Coty*, "[p]resumably, our own legislature considered those intellectual deficits" when it "add[ed] 'intellectually disabled' to the list of mitigating factors to be considered in sentencing." 2020 IL 123972, ¶ 33 (noting that section 5-5-3.1(a)(3) was amended in 2012 to substitute "intellectually disabled" for "mentally retarded").

Youth was similarly well-established as a mitigating factor when petitioner was sentenced in 1994. This Court "ha[s] long held that age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance." *Holman*, 2017 IL 120655, ¶ 44. Thus, courts have held for "decades" that "the [penalties provision] require[s] the sentencing court to take into account the defendant's 'youth' and 'mentality.'" *People v. Haines*, 2021 IL App (4th) 190612, ¶ 43 (citations omitted). Accordingly, young adults have long offered their youth as a mitigating factor at sentencing. *See, e.g.*, *People v. Griggs*, 126 Ill. App. 3d 477, 482-83 (5th Dist. 1984) (sentencing court considered 18-year-old offender's age in mitigation); *People v. Bartik*, 94 Ill. App. 3d 696, 700 (2d Dist. 1981) (same for 21-year-old). And reviewing courts have reduced sentences based in part on a young adult defendant's relative youth and correspondingly greater potential for rehabilitation. *See, e.g.*, *People v. O'Neal*, 125 Ill. 2d 291, 300 (1988) (defendant was 19 years old); *People v. Brown*, 243 Ill. App. 3d 170, 176 (1st Dist. 1993) (defendant was 20); *People v. Maldonado*, 240 Ill. App. 3d 470, 484-86 (1st Dist. 1992) (same); *People v. Center*, 198 Ill. App. 3d 1025, 1033-35 (1st Dist. 1990) (defendant was 23); *People v. Treadway*, 138 Ill. App. 3d 899, 905 (2d Dist. 1985) (defendant was 24); *People v. Nelson*, 106 Ill. App. 3d 838, 846-47 (1st Dist. 1982) (defendants were 20 and 26); *People v. Gibbs*, 49 Ill. App. 3d 644, 648-49 (1st Dist. 1977) (defendant was 19); *People v. Mitchell*, 12 Ill. App. 3d 960, 968 (1st Dist. 1973) (defendant was 20); *People*

v. Adams, 8 Ill. App. 3d 8, 13-14 (1st Dist. 1972) (defendant was 18); *cf. People v. Lillie*, 79 Ill. App. 2d 174, 176-80 (5th Dist. 1967) (under prior constitutional provision, reducing sentence for 23-year-old to reflect seriousness of offense and rehabilitative potential). Thus, the penalties provision has always recognized the significance of youth as a mitigating factor.

Moreover, the statutory sentencing scheme that applied to petitioner required the trial court to give "due regard for the character of the offender, the nature and circumstances of the offense and the public interest," 730 ILCS 5/5-5-3.1(b) (1994), and consider mitigating factors that not only relate to his rehabilitative potential, *see LaPointe*, 88 Ill. 2d at 493 (recognizing that presence of statutory mitigating factors may "indicate[] a potential for rehabilitation"), but to the mitigating characteristics of youth in particular. For example, the court was statutorily obligated to consider whether petitioner's conduct was induced or facilitated by another; his crime was the result of circumstances unlikely to recur; and his character and attitudes indicated that he was unlikely to commit another crime. 730 ILCS 5/5-5-3.1(a)(4)-(5), (8)-(9) (1994). These statutory factors encompass many of the characteristics that give youth its mitigating effect, such as its transience, *see id.* § 5-5-3.1(a)(8)-(9), and the ways in which it renders one inordinately susceptible to peer pressure, *id.* § 5-5-3.1(a)(5), and environmental pressures, *id.* § 5-5-3.1(a)(8)-(9).

In sum, by the time defendant was sentenced in 1994 (as well as when he filed his initial postconviction in 2001 or when his attorney amended that petition in 2005), in addition to the statutory mandate requiring consideration of his intellectual disability and factors related to youth, decades of Illinois precedent had interpreted the penalties provision as requiring sentencing courts to consider an offender's age, mentality, and rehabilitative potential. And defendants had raised penalties provision claims based on a trial court's failure to comport with that directive, and courts had granted relief on those claims by reducing sentences where appropriate. Indeed, petitioner *himself* raised the claim on direct appeal. *See, e.g.*, SA14, 17 (petitioner's argument that sentence was "excessive" under penalties provision because "the trial court failed to give adequate consideration to his background and the possibility of future rehabilitation"). Accordingly, because the legal basis for petitioner's claim was reasonably available at the time of both his sentencing and his initial postconviction proceedings, he failed to show "cause."

c. Changes in Eighth Amendment law do provide cause for petitioner to raise his penalties provision claim.

Petitioner relies on cases announcing new rights under the Eighth Amendment — *Miller v. Alabama*, 567 U.S. 460 (2012), and *Atkins v. Virginia*, 536 U.S. 304 (2002) — to establish cause for his failure to raise his penalties provision claim in his initial postconviction proceedings. Pet. Br.

12-13, 15.[13] But these Eighth Amendment cases are "insufficient to establish 'cause'" to allow him to raise a penalties provision claim. *Dorsey*, 2021 IL 123010, ¶ 74; *see also People v. Hemphill*, 2022 IL App (1st) 201112, ¶¶ 25, 30-31 (applying *Dorsey* to similar claim); *Haines*, 2021 IL App (4th) 190612, ¶¶ 23, 39-47 (same); *People v. Shief*, 2022 IL App (1st) 1210302-U, ¶ 10 (same); *People v. Caballero*, 2022 IL App (1st) 181747-U, ¶¶ 31-38 (same). Although both the Eighth Amendment and the penalties provision apply "to direct actions by the government to inflict punishment," *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006), they afford different protections and are governed by distinct standards, *see Davis*, 2014 IL 115595, ¶¶ 42-45 (separately analyzing Eighth Amendment and penalties clause claims); *Clemons*, 2012 IL 107821, ¶¶ 35-42 (explaining differences between claims).

Recognizing these differences, in *Davis*, this Court held that the new Eighth Amendment rule announced in *Miller* constituted cause for a juvenile offender to raise an Eighth Amendment challenge to his mandatory natural-life sentence in a successive postconviction petition. *Davis*, 2014 IL 115595, ¶¶ 5-10, 42-43. But, this Court further held, *Miller*'s new Eighth Amendment rule was not cause to allow the juvenile offender to raise a penalties provision claim in a successive petition because the law governing that state law claim

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[13] Petitioner's argument that *Atkins* provides cause is forfeited because he did not include it in his motion for leave to file, C552-54, and instead raised it for the first time on appeal. *Dorsey*, 2021 IL 123010, ¶ 70; *People v. Jones*, 213 Ill. 2d 498, 505, 509 (2004). Forfeiture aside, *Atkins* does not provide cause for the reasons discussed in the text.

was unchanged; Illinois law already recognized "the special status of juvenile offenders" before *Miller* and that status did not categorically prohibit a sentence of natural life without parole under the penalties provision. *Id.* ¶ 45.

The Court recently reaffirmed this holding in *Dorsey*, explaining that "*Miller*'s announcement of a new substantive rule under the eighth amendment does not provide cause for a defendant to raise a claim under the" penalties provision. 2021 IL 123010, ¶ 74. The Court reasoned that "'[a] ruling on a specific flavor of constitutional claim may not justify a similar ruling brought pursuant to another constitutional provision.'" *Id.* (quoting *People v. Patterson*, 2014 IL 115102, ¶ 97, which cited *Davis*, 2014 IL 115595, ¶ 45)). And the Court reiterated that "Illinois courts have long recognized the differences between persons of a mature age and those who are minors for purposes of sentencing," and concluded that "*Miller*'s unavailability prior to 2012 at best deprived [the petitioner] of 'some helpful support' for his state constitutional law claim, which is insufficient to establish 'cause.'" *Id.* (quoting *LaPointe*, 2018 IL App (2d) 160903, ¶ 59).

Accordingly, as in *Dorsey*, petitioner cannot rely on the new Eighth Amendment rules announced in *Miller* and *Atkins* to establish cause to raise a penalties provision claim in a successive postconviction petition. As discussed in Part II.B.1.a-b, *supra*, Illinois law recognized the constitutional relevance of petitioner's youth and intellectual disability at the time of his

sentencing, and petitioner raised a penalties provision claim based on that law on direct appeal. Although *Miller* and *Atkins* arguably provide some helpful support for petitioner's state constitutional claim, they are "insufficient to establish 'cause,'" *Dorsey*, 2021 IL 123010, ¶ 74, and petitioner's reliance on appellate court decisions holding to the contrary before *Dorsey*, Pet. Br. 13-17, is misplaced.

Moreover, petitioner's arguments incorrectly presume that *Miller* and *Atkins* effectuated legal changes that are relevant to his case. *Miller*'s new Eighth Amendment rule prohibiting mandatory life without parole for juvenile homicide offenders, 567 U.S. at 465, is inapposite because petitioner was not a juvenile and did not receive a mandatory life sentence. Petitioner's contrary contention is premised on the mistaken belief, first, that *Miller* applies to non-juvenile offenders and, second, that *Miller* applies to offenders who, like him, received discretionary sentences. But even if *Miller* could be extended to non-juveniles (which it cannot, *see People v. Harris*, 2018 IL 121932, ¶¶ 54-61), petitioner's view that *Miller* establishes that "a sentence of life without parole, or its functional equivalent, is unconstitutional for a juvenile offender unless the sentencing court considers in mitigation the transient attributes of youth and finds that the particular defendant was the rare juvenile whose crime reflected 'irreparable corruption,'" Pet. Br. at 13-14, was rejected by the United States Supreme Court in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

In *Jones*, the Supreme Court held that for purposes of *Miller*, "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient," *Jones*, 141 S. Ct. at 1313, to "ensure individualized consideration of a [juvenile] defendant's youth," *id.* at 1321, and that a "factual finding of permanent incorrigibility is not required," *id.* at 1313. Thus, *Miller* is satisfied where the sentencing court had discretion to consider youth and impose a sentence of less than life without parole, and did not refuse to consider those circumstances as a matter of law. *Id.* at 1313, 1316, 1320 & n.7; *see People v. Jones*, 2021 IL 126432, ¶¶ 1, 17, 27-29 (applying *Jones v. Mississippi*); *Dorsey*, 2021 IL 123010, ¶¶ 40-41, 65 (*Jones v. Mississippi* "found that the eighth amendment allows juvenile offenders to be sentenced to life without parole as long as the sentence is not mandatory and the sentencing court had discretion to consider youth and attendant characteristics but that no factfinding by the sentencer is required"); *Haines*, 2021 IL App (4th) 190612, ¶ 26 ("A discretionary sentencing procedure is all that *Miller* demands.").

The Illinois Constitution has long required this individualized procedure for all discretionary sentences. *See supra*, Part II.B.1.a-b; *Haines*, 2021 IL App (4th) 190612, ¶¶ 42-47. And because petitioner's statutory minimum sentence provided him an opportunity for release after he served 12 years in prison, the trial court had discretion to impose a sentence that is less than life without parole. Accordingly, *Miller* is inapposite for two

reasons: petitioner was not a juvenile offender and he did not receive a mandatory life sentence.

Similarly, *Atkins*'s rule prohibiting capital punishment for intellectually disabled offenders, 536 U.S. at 321, is irrelevant because petitioner was not sentenced to death. "[D]eath is different," *Miller*, 567 U.S. at 481 (citation omitted), and "whether a defendant is subject to execution is a very different issue than whether a . . . life sentence is constitutionally permissible for an adult," *Coty*, 2020 IL 123972, ¶¶ 33 & n.8, 41. Petitioner admits that intellectual disability was a statutory mitigating factor, but argues that *Atkins* nevertheless changed the law in Illinois because it "observed that there is no evidence that intellectually disabled individuals are more likely to engage in criminal conduct than others." Pet. Br. at 13. But this Court has repeatedly rejected this broad interpretation of *Atkins*.

As the Court recently reiterated, *Atkins* "did not dispute the [United States Supreme] Court's observation [in *Penry*] that the defendant's [intellectual disability] represented a 'two-edged sword' that 'diminish[ed] his blameworthiness for his crime even as it indicate[d] that there is a probability of' future dangerousness." *Coty*, 2020 IL 123972, ¶ 34. To the contrary, the Supreme Court "reiterated" this observation after *Atkins*, *id.* (citing *Brewer v. Quarterman*, 550 U.S. 286, 288-89 (2007)), and "this [C]ourt has held that future dangerousness of an intellectually disabled adult is a factor properly considered as an aggravator in sentencing, given an

appropriate evidentiary basis," *id.* ¶ 35 (discussing *People v. Heider*, 231 Ill. 2d 1, 20-21 (2008)). Thus, *Atkins* did not change the law in any way relevant to petitioner such that it could establish cause.

Moreover, *Atkins* could not constitute cause because it was decided before petitioner's counsel amended his initial postconviction petition, yet petitioner failed to raise an *Atkins*-based claim in that amended petition (and in his second postconviction petition). *See supra*, pp. 21-22. Petitioner and the appellate court dissent suggest that it is not *Atkins* alone, but *Atkins* and *Miller* together, that changed the law for young, intellectually disabled offenders. Pet. Br. 13-15; A19-20, ¶¶ 22-25. But *Miller*'s substantive rule prohibiting mandatory life without parole for juvenile offenders is irrelevant because, as discussed above, petitioner was not a juvenile when he murdered Catlin and did not receive a mandatory natural-life sentence.

Additionally, as explained in *Coty*, the rationale supporting *Miller*'s rule does not apply to intellectually disabled offenders: "[t]he factors identified in *Atkins* logically impair rehabilitative potential, and, unlike a juvenile, whose mental development and maturation will eventually increase that potential, the same cannot generally be said of the intellectually disabled over time." 2020 IL 123972, ¶ 37. Intellectual disability "'is a permanent, relatively static condition,'" such that "'a determination of dangerousness may be made with some accuracy based on previous behavior.'" *Id.* ¶ 38 (quoting *Heller*, 509 U.S. at 323). Indeed, the

characteristics of intellectual disability manifest before age 18, and although their "severity levels may change over time" with "[e]arly and ongoing interventions," they are "generally lifelong" after early childhood. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 37, 38-39 (5th ed. 2013); *see also Atkins*, 536 U.S. at 318; *Heller*, 509 U.S. at 321-23. In contrast, the characteristics that make juveniles less culpable are typically transient, *i.e.*, they will change naturally with time and ordinary intellectual, neurological, and psychosocial development, *Coty*, 2020 IL 123972, ¶¶ 39-40; *Miller*, 567 U.S. at 471-73, 476. Therefore, "[t]he enhanced prospect that, as the years go by and neurological development occurs, deficiencies will be reformed — is not a prospect that applies to" intellectually disabled adults. *Coty*, 2020 IL 123972, ¶ 40.[14]

In sum, the new Eighth Amendment rules announced by *Miller* and *Atkins* do not provide cause for petitioner's failure to raise his penalties provision claim in his initial postconviction petition.

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[14] Significantly, like the defendant in *Coty*, 2020 IL 123972, ¶ 45, petitioner does not dispute that courts across the country that have addressed the issue have declined to extend *Atkins* to noncapital sentences or *Miller* to the intellectually disabled. *See, e.g.*, *People v. Brown*, 2012 IL App (1st) 091940, ¶¶ 62-73 (finding no cases that have invalidated mandatory natural-life sentence for an intellectually disabled adult); *Commonwealth v. Jones*, 90 N.E.3d 1238, 1251 (Mass. 2018) (observing that no court has extended *Atkins* and *Miller* to "disallow mandatory sentences of life without parole for people with intellectual or developmental disabilities"); *State v. Ryan*, 396 P.3d 867, 880-81 (Or. 2017) (Balmer, C.J., concurring) (no court has held that "imprisonment for a term of years (mandatory or not) is unconstitutionally cruel or disproportionate" for intellectually disabled adults).

2. Petitioner fails to show prejudice because, even assuming that his alleged legal changes qualify as "cause" and could be considered retroactive, they do not apply to render petitioner's sentence unconstitutional under the penalties provision.

Applying the established standards governing challenges to sentences as excessive under the penalties provision, *see supra*, Part II.B.1.a-b, the appellate court on direct appeal rejected petitioner's claim that his sentence violates the penalties provision because the trial court purportedly failed to give adequate consideration to his severe emotional problems, abusive background, mental disorders, "and the possibility of future rehabilitation," SA14-17; *see also* C164, 169. Petitioner's prejudice contention rehashes those previously rejected arguments, adding only that "the brain is not fully developed until approximately age 25, and this wisdom is spreading to the legal community," Pet. Br. 17, such that a sentencing court "might view [his] culpability and rehabilitative potential in a different light" today, *id.* at 18. But even assuming that petitioner's alleged legal changes suffice to show "cause" and those changes could be considered retroactive, petitioner fails to establish that they render his sentence unconstitutional under the penalties provision. *See Davis*, 2014 IL 115595, ¶ 14 ("'Prejudice' refers to a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process.'").

The sentencing record contains evidence concerning virtually "'every aspect of [petitioner's] life,'" *Fern*, 189 Ill. 2d at 55-56 (citation omitted),

including his intellectual disability and relative youth. That evidence reveals a pattern of aggressive and antisocial behavior, "replete with examples of poor impulse control, poor social judgment, inability to think ahead to future consequences" or learn from consequences already imposed, and a lack of empathy, SC14; R252-55, which persisted "from his earliest ages and throughout his life-span in both his home, in school, and even in the highly structured private and public residential treatment and correctional programs he ha[d] been involved with," SC14. Indeed, petitioner robbed and murdered Catlin while on parole for residential burglary and was unable to control his behavior while in pretrial custody, setting multiple fires, breaking glass, and fighting with officers. *See supra*, pp. 11-12.

Furthermore, petitioner was 24 years old when he murdered Catlin, 25 years old at the time of sentencing, and the expert testimony established that his condition was unlikely to change. The mental health experts expected petitioner's "pattern of intense anger, explosive behavior and violence" to continue, R302 (Chapman); *see* R200-01 (Farrar); R243, 247, 253 (Ward), determined that his prognosis was poor due to the static nature of his mental disorders, R200-01 (Farrar); R243, 253 (Ward); R301 (Chapman), and recommended that he be removed from society, R200-01 (Farrar); R301, 303 (Chapman), or at a minimum receive lifelong supervision and care, R253 (Ward). Thus, petitioner's deficiencies in impulse control, social judgment, ability to assess consequences, and empathy resulted not from "the *transient*

characteristics of youth," *Coty*, 2020 IL 123972, ¶ 39 (emphasis in original), but from "his predominantly static" mental disorders, *id.* ¶ 42, which mitigate his culpability somewhat but also "make him less likely to be rehabilitated and thus more likely to reoffend," *id.* In other words, although the evidence showed that petitioner's "mental disabilities resulted in him thinking and behaving like a juvenile at the time of his offenses," Pet. Br. 17; *see* SA16, it also established that this juvenile thinking and behavior had not improved even as he grew older and was unlikely to improve in the future. Accordingly, "[t]he rehabilitative prospects of youth" — "that, as the years go by and neurological development occurs, deficiencies will be reformed" — "do not figure into the sentencing calculus for [petitioner]." *Coty*, 2020 IL 123972, ¶ 40.

The trial court's determination that petitioner should be incapacitated for most, if not the rest, of his life was not only supported by petitioner's lack of rehabilitative potential, but also by the seriousness and nature of his crimes. Petitioner's actions were deliberate and intentional. In the weeks before he murdered Catlin, petitioner was seen loitering by the doors to her and other elderly residents' apartments. He gained access to Catlin's apartment by pretense, learned where she kept her purse and other items, and returned weeks later to rob her. Thus, petitioner's crimes were the product of weeks of deliberation, not a momentary impulse.

Petitioner's actions were also "heinous." Pet. Br. 18. During the robbery, he sliced 89-year-old Catlin's throat in her home while she lay in her bed, for no apparent reason other than to prevent her from identifying him. *Cf., e.g., People v. Adkins*, 239 Ill. 2d 1, 68 (2010) (upholding capital sentence where defendant with criminal history of residential burglaries and arson "killed a helpless woman, who could not have prevented him from fleeing the scene," to avoid risk "that she might be able to identify him").

"[I]n terms of moral depravity and of the injury to the person and to the public" murder cannot be compared to other serious violent offenses. *Kennedy v. Louisiana*, 554 U.S. 407, 428 (2008) (quotation marks and citations omitted). Sentencing an adult homicide offender to life imprisonment is certainly not novel. *See Miller*, 567 U.S. at 482; *id.* at 495 (Roberts, C.J., dissenting); *People v. Taylor*, 102 Ill. 2d 201, 208-09 (1984). In fact, both this Court and the United States Supreme Court have upheld *mandatory* natural-life sentences for adults who commit crimes less serious than murder. *See, e.g., Coty*, 2020 IL 123972, ¶¶ 43-44 (upholding mandatory natural life for intellectually disabled adult convicted of second predatory criminal sexual assault of a child); *People v. Huddleston*, 212 Ill. 2d 107, 110-11, 145 (2004) (similar); *Harmelin v. Michigan*, 501 U.S. 957, 1002-05 (1991) (Kennedy, J., concurring in part and concurring in judgment) (upholding mandatory life without parole for possession of large quantity of cocaine where offender had no prior felony convictions); *see also Graham v.*

Florida, 560 U.S. 48, 59-60 (2010) (Justice Kennedy's opinion in *Harmelin* is controlling opinion).

Consistent with this precedent, courts in Illinois and other jurisdictions have routinely upheld life-without-parole sentences for young adult homicide offenders. *See Harris*, 2018 IL 121932, ¶¶ 59-61 (citing cases and observing that challenges to such sentences "have been repeatedly rejected"); *People v. Wooters*, 188 Ill. 2d 500, 502-03, 505-09 (1999) (three-justice opinion upholding life sentence for 20-year-old with no criminal history convicted of murdering child under age 12); *People v. Handy*, 2019 IL App (1st) 170213, ¶ 40 (citing cases upholding life sentences for young adult offenders who actively participate in homicide).[15] Indeed, the General Assembly continues to mandate life imprisonment for certain young adult offenders. *People v. House*, 2021 IL 125124, ¶ 66 (Burke, J., concurring in part, dissenting in part).[16] And "there is a paucity of authority nationwide

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[15] *See also, e.g.*, *In re Rosado*, 7 F.4th 152, 159-60 (3d Cir. 2021); *United States v. Sierra*, 933 F.3d 95, 97-99 (2d Cir. 2019); *United States v. Bernard*, 762 F.3d 467, 482-83 (5th Cir. 2014); *Zebroski v. State*, 179 A.3d 855, 860-63 (Del. 2018); *Janvier v. State*, 123 So. 3d 647, 647-48 (Fla. Dist. Ct. App. 2013); *State v. Lyle*, 854 N.W.2d 378, 403 (Iowa 2014); *State v. Ruggles*, 304 P.3d 338, 344-46 (Kan. 2013); *Commonwealth v. Johnson*, 155 N.E.3d 690, 705-06 (Mass. 2020); *State v. Barnett*, 598 S.W.3d 127, 131-32 (Mo. 2020); *State v. Nolan*, 870 N.W.2d 806, 828 (Neb. 2015); *State v. Berget*, 826 N.W.2d 1, 27-28 (S.D. 2013); *Nicodemus v. State*, 392 P.3d 408, 413-17 (Wyo. 2017).

[16] To be sure, this area of the law continues to evolve in the legislature. *See, e.g.*, 730 ILCS 5/5-4.5-105 (eff. Jan. 1, 2016) (separate sentencing scheme for juvenile offenders only); 730 ILCS 5/5-4.5-115(b) (eff. June 1, 2019) (parole review for certain individuals who were under age 21 at the time of their offenses and are sentenced after statute's effective date).

holding that a young adult offender could ever be exempted from a mandatory life without parole sentencing scheme based on a proportionate-penalties argument." *Id.* ¶ 71 (Burke, J., concurring in part, dissenting in part).

Given this broad consensus that life without parole is a permissible sentence for young adults convicted of first degree murder, the nature and seriousness of petitioner's crimes, and the ample evidence demonstrating petitioner's future dangerousness and lack of rehabilitative potential, petitioner's sentence is not manifestly disproportionate to his murder and robbery of 89-year-old Catlin, or against the spirit and purpose of the sentencing law. *Cf., e.g., Holman*, 2017 IL 120655, ¶¶ 3, 10-13, 48-50 (natural-life sentence for intellectually disabled juvenile offender convicted of murdering 83-year-old woman constitutional under Eighth Amendment). Petitioner's bare assertions that "the trial court did not consider either his intellectual disability or his youth as mitigating evidence," Pet. Br. 9, and "did not give sufficient weight to [his] age, still-developing brain, or intellectual disability," *id.* at 20, simply assert that petitioner would have weighed the aggravating and mitigating factors differently, not that the trial court abused its discretion by failing to consider the objectives of the penalties provision, *see Alexander*, 239 Ill. 2d at 212-15; *Taylor*, 102 Ill. 2d at 205-06.

Petitioner's attempts to distinguish *Coty* — which recently upheld a mandatory life sentence for an intellectually disabled adult convicted of a nonhomicide offense — are also unavailing. Although petitioner is correct that his circumstances are not identical to those in *Coty*, his legal conclusion that the differences are sufficient to show prejudice, Pet. Br. 18-19, is not. Unlike the offender in *Coty*, petitioner committed the most serious crime of intentional murder. As the United States Supreme Court has repeatedly observed, serious nonhomicide offenses, including sex crimes against children, are "devastating in their harm but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability." *Graham*, 560 U.S. at 69 (cleaned up); *accord Kennedy*, 554 U.S. at 435-38; *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977). For that reason, the transient qualities of youth do not prohibit a life sentence for a juvenile who commits homicide, *see Jones*, 2021 IL 126432, ¶ 27, even as they preclude a life sentence for a juvenile who does not, *Graham*, 560 U.S. at 74-75 (holding that Eighth Amendment bars life without parole for juvenile nonhomicide offenders). Thus, the law continues to distinguish between murder and serious nonhomicide offenses, and petitioner's aggregate sentence for first degree murder and robbery is not manifestly disproportionate merely because he is not a sex offender.

Similarly, although petitioner was not a "twice convicted sexual offender," Pet. Br. 18, "the frequency of criminal conduct [is not] the only

factor that determines whether an offender is capable of rehabilitation." *Wooters*, 188 Ill. 2d at 508 (three-justice opinion); *see LaPointe*, 88 Ill. 2d at 493 (statutory mitigating factors pertain to assessing defendant's rehabilitative potential). But even if it were, the evidence demonstrated that petitioner is a recidivist felony offender with immutable characteristics that give him diminished prospects for rehabilitation and render him a danger to the public, R200-01, 243-44, 253, 300-03; SC14, as the appellate court explained when it affirmed his sentence on direct appeal, C169. *Coty* reaffirmed that a trial court may properly conclude that a "'defendant should be given a greater prison sentence in the interest of protecting the public'" where his intellectual disability results in diminished impulse control and that reduced control renders him a future danger to the community. 2020 IL 123972, ¶ 35 (quoting *Heider*, 231 Ill. 2d at 20-21); *see also People v. McNeal*, 175 Ill. 2d 335, 370-71 (1997) (psychological disorders resulting in lack of empathy for illegal or antisocial behaviors may be viewed as aggravating at sentencing). And here, as discussed above, petitioner's mental disorders resulted in a lack of impulse control, empathy, and other characteristics that render him a future danger to the community.

Moreover, petitioner is correct that Coty was not a young adult, Pet. Br. 18, but as discussed above, the evidence demonstrates that petitioner's age of 24 does not alter the sentencing calculus, *see, e.g.*, *Holman*, 2017 IL 120655, ¶¶ 10-13, 48-50 (rejecting argument that youth and intellectual

disability rendered juvenile offender's discretionary life sentence cruel and unusual). Thus, although the facts of *Coty* may differ, its rationale applies to defeat petitioner's assertion of prejudice.

Finally, petitioner's reliance on *House*, 2021 IL 125124, *see* Pet. Br. 16-17, is misplaced. *House* reversed the appellate court's decision to *grant* relief on a penalties provision challenge to a *mandatory* life sentence, which the young adult defendant alleged in an *initial* postconviction petition filed in 2001 and amended in 2010. *House*, 2021 IL 125124, ¶¶ 1-3, 7-13, 21-32; *People v. House*, 2015 IL App (1st) 110580, ¶¶ 31-34. This Court agreed that the appellate court erred in granting postconviction relief, but split on whether the case should be remanded for second-stage postconviction proceedings. *House*, 2021 IL 125124, ¶¶ 26-32; *id.* ¶¶ 47-58 (Burke, C.J., concurring in part, dissenting in part); *id.* ¶¶ 60-73 (Burke, J., concurring in part, dissenting in part). In deciding that remand was the appropriate remedy, the majority focused on the unique procedural posture of the case, which included a prior supervisory order issued by this Court and the parties' joint request that the case be remanded for second-stage proceedings. *Id.* ¶¶ 11-12, 21-32.

None of those facts is present here. Most significantly, petitioner's case arises from the denial of leave to file a *successive* postconviction petition, which requires that he overcome the statutory waiver bar. *See Dorsey*, 2021 IL 123010, ¶ 32. Petitioner's claim also rests on legal principles that have

been established under the penalties provision for 50 years, and his sentence passes constitutional muster under the penalties provision notwithstanding the changes in Eighth Amendment jurisprudence since the time he was sentenced. Accordingly, as both the trial and appellate courts correctly found, petitioner fails to overcome the procedural bars to filing a successive postconviction petition, and this Court should decline to allow him leave to reopen his judgment of conviction.

CONCLUSION

This Court should affirm the appellate court's judgment.

July 11, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

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. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14,195 words.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

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NO. 3-94-0148

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Ninth Judicial Circuit, Knox County, Illinois.
Plaintiff-Appellee,	)	
vs.	)	No. 93-CF-39
ROBERT M. CLARK,	)	Honorable Stephen C. Mathers, Judge Presiding.
Defendant-Appellant.	)	

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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POINTS AND AUTHORITIES

I.

THE TRIAL COURT IMPROPERLY CONSIDERED THAT THE DEFENDANT'S CONDUCT CAUSED OR THREATENED SERIOUS PHYSICAL HARM TO ANOTHER PERSON, WHERE THE HARM WAS IMPLICIT IN THE MINIMUM SENTENCE FOR FIRST DEGREE MURDER.

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II.

THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING ROBERT CLARK TO NINETY YEARS' IMPRISONMENT FOR MURDER WHERE THE DEFENDANT SUFFERS FROM FETAL ALCOHOL SYNDROME, HAS A VERY LOW IQ, AND WHERE IN THE FUTURE THERE MAY BE SOME TREATMENT FOR HIS CONDITION.

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NATURE OF THE CASE

Following a guilty plea, the defendant-appellant, Robert Clark, was convicted of first degree murder (Count I), armed robbery (Count II), and robbery (Count III) and was sentenced to fifteen years' imprisonment for robbery to be served consecutive to an extended term of ninety years' imprisonment for first degree murder. The defendant appeals his sentences. No issues are raised concerning the pleadings.

ISSUES PRESENTED FOR REVIEW

I.

Whether the trial court improperly considered that the defendant's conduct caused or threatened serious physical harm to another person, where the harm was implicit in the minimum sentence for first degree murder.

II.

Whether the trial court abused its discretion in sentencing Robert Clark to ninety years' imprisonment for murder where the defendant suffers from fetal alcohol syndrome, has a very low IQ, and where in the future there may be some treatment for his condition.

JURISDICTION

The defendant's appeal is from a final judgment of conviction entered upon a plea of guilty, pursuant to Illinois Supreme Court Rules 603, 604(d) and 606. The defendant pleaded guilty to first degree murder (Count I), armed robbery (Count II), and robbery (Count III). (C. 16) The sentence was imposed on February 11, 1994 (R. 164); a motion to reduce sentence was timely filed on February 16, 1994 (C. 168); and the motion was denied on February 16, 1994. (R. 344) The defendant's notice of appeal was timely filed on February 24, 1994. (C. 172)

STATEMENT OF FACTS

Robert Clark was charged in Knox County No. 93-CF-39 with first degree murder (Count I), armed robbery (Count II), and robbery (Count III) on February 17, 1993. (C. 16) A guilty plea hearing and fitness hearing were held on December 13, 1993. (R. 132) The defendant waived a jury hearing on the issue of fitness. (R. 134) The trial court stated it had reviewed the medical reports and found Mr. Clark fit to stand trial. (R. 136) The defendant was advised as to the maximum possible sentences, including the death penalty or natural life for first degree murder. (R. 140-45) There was a plea agreement that the State would not pursue the death penalty, but would pursue natural life without parole at the sentencing hearing. (R. 149-50) The State also agreed to dismiss an unrelated arson charge and Count II, armed robbery, in the present case. In return, the defendant agreed to plead guilty but mentally ill to robbery and first degree murder. (R. 150)

A written factual basis was submitted to the court. (C. 123, R. 153) The factual basis was:

> The State's evidence would show that on February 15, 1993, defendant Robert M. Clark entered the apartment of Nona B. Catlin, the victim, Apartment 310, 19 East Tompkins Street, Galesburg, Knox County, Illinois, with the intent to rob the victim. When confronted by her, the defendant, without lawful justification and with the intent to kill Nona B. Catlin, cut her in the throat with a sharp object thereby causing her death. The evidence would further show that Nona B. Catlin was 89 years' old at the time of her death. The evidence would further show that at the time of the killing defendant took money, a police scanner, and keys of the victim from her presence by the use of force. The State's evidence would include the testimony of Dr. Robert Chapman, a qualified psychiatrist, as reflected in his report dated November 11, 1993, previously made a part of this record.
>
> (C. 123)

Dr. Chapman's letter included a psychiatric history of the defendant. (C. 107-13) The letter also included his diagnosis that, on the day of this incident, Mr. Clark was borderline mentally retarded with an IQ of 79, and suffered from anti-social personality disorder, borderline personality disorder, and fetal alcohol syndrome. (C. 115; R. 154) The trial court found that Mr. Clark's plea was voluntarily made and that a factual basis for the plea of guilty but mentally ill had been presented. (R. 156-58)

The presentence report was filed on January 14, 1994. (C. 141) The sentencing hearing was held on February 11, 1994. (R. 164) Written victim impact statements were submitted to the court. (R. 167) Robert Morse, the Knox County Jail Administrator, testified that Mr. Clark broke a light fixture and a door glass in the Knox County Jail on April 27, 1993. (R. 169) On May 9, 1993, the defendant attempted suicide with a razor blade. (R. 171) On April 30, 1993, Mr. Clark cut himself and, while being transported to the hospital for stitches, became very irate and tried to escape. Mr. Clark bit Robert Morse in the side, drawing blood. (R. 172) On June 30, 1993, Mr. Clark started a fire in the Knox County Jail, causing some smoke damage. (R. 174) Mr. Morris believed that Mr. Clark's mental condition provoked him into being combative. (R. 176) Mr. Clark did not seem to respond to the jail staff when he had a certain look in his eyes. (R. 177) Mr. Clark even destroyed the locking mechanisms on several pair of handcuffs. (R. 178) Mr. Clark had calm periods during which he would read and not cause any trouble. He seemed to go through cycles. (R. 178) Mr. Clark was prescribed Librium and Thorazine but requested not to take the Thorazine. The defendant was initially affected by the medication, but the doses had to be increased when he grew tolerant of the medication. (R. 179) The

calm periods did not seem related to the medication. During the calm periods, Mr. Clark could be with the other inmates and would cause no problems. (R. 180)

Donald Shamblin, a Knox County Jail officer, testified that, on March 8, 1993, he tried to coax Mr. Clark out of his cell for a court appearance. (R. 182) The guards were forced to take him out physically and cover him with a sheet because he refused to wear any clothing. (R. 183) On March 27, 1993, Mr. Clark tore up his mattress and threatened to start a fire. He was transferred to the alcohol unit, where combative and uncontrollable people are placed. (R. 184) On April 27, 1993, the defendant broke the light fixture and damaged the door. (R. 185-86) The door had bullet proof glass, and this was the first time an inmate had broken that type of glass. (R. 190) It took several attempts with mace to get Mr. Clark away from the door. (R. 191-92)

Dr. Charles Farrar, a psychologist, testified he first met Mr. Clark in January of 1989, when Mr. Clark had applied for social security disability, and Dr. Farrar was asked to interview Mr. Clark. Dr. Farrar also saw Mr. Clark in February of 1989 and April of 1992. (R. 194) Mr. Clark is moderately mentally retarded and has the intellectual ability of a thirteen year old. Mr. Clark is chemically dependent. (R. 195) According to Dr. Farrar, Mr. Clark has an anti-social personality. (R. 195) Dr. Farrar found that Mr. Clark would be unable to get along with other workers or a supervisor. (R. 198) There is little that can be done for Mr. Clark's borderline retardation and this has caused him to have difficulty learning. The prospect for his treatment for alcoholism is bleak because of his low intelligence, and it is virtually impossible to change the personality of someone with an anti-social personality. (R. 200)

Dr. James Tiller, licensed clinical psychologist, testified that he first met Mr. Clark when Mr. Clark was eleven years' old. Mr. Clark was referred to him for counseling by the Galesburg Mental Health Center. (R. 208) Dr. Tiller counseled Mr. Clark and his adoptive family. Dr. Tiller diagnosed Mr. Clark as being under-socialized aggressive. (R. 209) In 1981, the diagnosis of fetal alcohol syndrome was not commonly used. (R. 210) Mr. Clark told Dr. Tiller about his adoptive family. His adoptive father, Edward Clark, was an alcoholic who was sometimes violent. (R. 210) On one occasion, Mr. Clark had to defend himself against his father's violence by hitting him in the jaw with a baseball bat. (R. 211) Edward Clark denied having any substance abuse problem. Eventually, Mr. Clark's adoptive mother, Geneva Clark, admitted that her husband had an alcohol problem, but she was resistant to taking any action. (R. 212) A person with fetal alcohol syndrome is not necessarily violent. (R. 215) If a person suffering from fetal alcohol syndrome lives in an abusive home, it will be more difficult for that child to develop social skills. The child will have difficulty with planning and impulse control. (R. 218) Throughout Dr. Tiller's counseling of Mr. Clark from 1981 to 1984, the Clark family setting was chaotic and abusive. (R. 219)

Dr. Eric Ward, a licensed clinical psychologist, testified his specialty is attention deficit hyperactivity disorder. (R. 220) Dr. Ward spoke with Geneva Clark, and the defendant's natural mother, Lois Moore, who had been a patient of his for ten years, regarding the parenting of her younger children. (R. 61) Ms. Moore had twelve children. Ms. Moore told Dr. Ward that, while she was pregnant with Mr. Clark, she liked to drink whiskey and beer together. Ms. Moore sometimes drank until she passed out. She was drunk when she went to the hospital for Mr. Clark's birth. (R. 224) The hospital knew

she was drunk but did nothing. Ms. Moore told Dr. Ward that she was drinking so much prior to Mr. Clark's birth that alcohol was coming out of her pores. (R. 225) Geneva Clark told Dr. Ward about the defendant's development. According to Dr. Ward, Mr. Clark has the intellectual skills of a fourteen year old and the interpersonal skills of a seven year old. (R. 235) His ability to react is that of a six year old. (R. 237) His ability to empathize is that of a three year old. (R. 240) The manifestations of the physical and psychological problems of a person suffering from fetal alcohol syndrome will be affected by the environment in which the child is reared. (R. 244) Mr. Clark should be treated for attention deficit hyperactivity disorder with medication in order to help with his concentration and impulse control. (R. 245-46) The prognosis for people with severe fetal alcohol syndrome is poor. (R. 246) Research is continuing. (R. 247)

Rose Medin, a Knox County probation officer, first met Mr. Clark in 1984 when he was on juvenile probation. Mr. Clark's adoptive father was an alcoholic and the family was troubled. (R. 257) The family problems were a large factor in Mr. Clark's lack of success on probation. (R. 258)

Millicent Bess testified that Geneva Clark was her husband's sister. (R. 259) Mr. Clark was taken from his natural family as a baby because of neglect and abuse. He did not appear normal and was malnourished. (R. 260) At the age of two, his right eye was removed because of tumors. (R. 261) He had difficulty as a child understanding why people treated him the way they did and why they did not understand him. Mr. Clark had disciplinary and learning difficulties in school. (R. 264) His adoptive parents did not understand how many problems Mr. Clark had. (R. 265) Once, when Edward Clark

was drinking, he told Mr. Clark his puppy would have to go and proceeded to throw the puppy outside. When Mr. Clark had trouble understanding why this was done, Edward Clark told Mr. Clark that if he did not like it, he could go also. The weather was bad but Edward Clark forced Mr. Clark out of the house. Mr. Clark stayed beneath the porch because his father would not allow him back into the house. (R. 105) Edward Clark was very verbally abusive to the defendant and other family members. When Mr. Clark was ten years old, Edward Clark hit him with a baseball bat. (R. 268) Ms. Bess has seen Edward Clark slap the defendant on other occasions. Mr. Clark is especially fearful of people on his blind side. (R. 275) Edward Clark would frequently throw the defendant out of the house. (R. 269) Mr. Clark would sleep in cars, under bridges, and in vacant houses even in the winter. (R. 269-70) Edward Clark ran the house like it was a concentration camp. (R. 271) Edward Clark was emotionally cruel to the defendant and would discourage Mr. Clark whenever Mr. Clark had something to be happy about. (R. 276-77) The abuse was an every day occurrence. (R. 277) The Department of Children and Family Services was contacted. (R. 273)

Dr. Robert Chapman, a psychiatrist, testified that the defendant's history was consistent with fetal alcohol syndrome. (R. 299) He also testified consistently with his written report. (R. 295-300) Mr. Clark needs to in a protected environment because he is vulnerable to abuse and exploitation. (R. 300)

The prosecutor read from the victim impact statements. Following argument, the trial court stated that the only statutory factor in mitigation was that Mr. Clark was mentally retarded. (R. 327) In aggravation, the trial court found that "the defendant's conduct has caused or threatened serious physical harm and the defendant has a

history of prior delinquent and criminal activity . . ." (R. 327-28) The court also found that the victim was older than sixty years of age, but was not considering that as a general factor in aggravation. (R. 328) The court said it had reviewed all the information provided, including the presentence reports and the written reports of Dr. Ward and Dr. Chapman. (R. 329) The court considered particularly important the defendant's sentences to the Department of Corrections for burglary in 1987 and for residential burglary in 1989, and, especially, that Mr. Clark was on parole for a residential burglary at the time of the present offenses. (R. 331) The court found that the offense resulted in personal injury. The court found that the defendant qualified for an extended term sentence based on the age of the victim pursuant to 730 ILCS 5/5-3.2(B)(4)(ii) (West 1992) and 730 ILCS 5/5-8-2 (West 1992). (R. 332) The court also found that consecutive sentences were required pursuant to 730 ILCS 5/5-8-4 (West 1992). (R. 334) The court then sentenced the defendant to fifteen years' imprisonment for robbery to be served consecutively to an extended term of ninety years' imprisonment for first degree murder. (R. 336) Count II and the charge of aggravated arson in 93-CF-154 were dismissed. (R. 336)

A motion to reduce sentence was filed on February 16, 1994. (C. 168) A hearing on the motion was held on February 17, 1994. (R. 339) The motion was denied. (R. 344) Notice of appeal was filed on February 24, 1994. (C. 172) The Office of the State Appellate Defender was appointed as counsel on appeal. (C. 174)

ARGUMENT

I.

THE TRIAL COURT IMPROPERLY CONSIDERED THAT THE DEFENDANT'S CONDUCT CAUSED OR THREATENED SERIOUS PHYSICAL HARM TO ANOTHER PERSON, WHERE THE HARM WAS IMPLICIT IN THE MINIMUM SENTENCE FOR FIRST DEGREE MURDER.

In sentencing Mr. Clark to ninety years' imprisonment for first degree murder, the trial court improperly considered that, "the defendant's conduct has caused or threatened serious physical harm . . ." (R. 327) This was an improper factor for the trial court to take into consideration because threat of harm is inherent in murder. The legislature already took this factor into consideration in establishing the penalty for this crime. People v. Conover, 84 Ill.2d 400, 419 N.E.2d 906 (1981); People v. Rhodes, 141 Ill.App.3d 362, 490 N.E.2d 169 (4th Dist. 1986).

In People v. Saldivar, 113 Ill.2d 256, 269, 497 N.E.2d 1138, 1143 (1986), the Supreme Court held that a sentencing court should not consider as an aggravating factor an element that is inherent in the crime for which defendant is to be sentenced. The threat of death is inherent in murder and cannot vary from offense to offense.

Although the degree of risk to the victim might vary for case to case, here, the trial court did not state that it was considering the nature and extent of the defendant's acts to effectuate the murder. See People v. O'Toole, 226 Ill.App.3d 974, 590 N.E.2d 950 (4th Dist. 1992).

Here, no physical harm was threatened or caused in this case greater than that presumed in a murder. Therefore, the trial court improperly considered this as a factor in sentencing the defendant. This Court should vacate the defendant's sentence for murder and remand this cause for a new sentencing hearing.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING ROBERT CLARK TO NINETY YEARS' IMPRISONMENT FOR MURDER WHERE THE DEFENDANT SUFFERS FROM FETAL ALCOHOL SYNDROME, HAS A VERY LOW IQ, AND WHERE IN THE FUTURE THERE MAY BE SOME TREATMENT FOR HIS CONDITION.

A reviewing court has the power under Supreme Court Rule 615(b)(4) to reduce a defendant's sentence. People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344 (1981). Even when sentences are within the statutory limits of the offense charged, such sentences should be reversed, if an abuse of discretion is found. People v. Gonzalez, 151 Ill.2d 79, 600 N.E.2d 1189, 1194 (1992); People v. Rayburn, 258 Ill.App.3d 331, 630 N.E.2d 533, 601 (3d Dist. 1994). Here, Mr. Clark pled guilty to murder and robbery and was sentenced to an excessive term of ninety years' imprisonment for murder to be served consecutive to a fifteen year sentence for robbery.

The Illinois Constitution demands "all penalties should be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." People v. Smith, 178 Ill.App.3d 976, 533 N.E.2d 1169, 1174 (3d Dist. 1989), quoting, Ill. Const. 1970, art. I, §11. The Illinois State Constitution requires the sentencing court to "actually consider rehabilitation as an objective of the sentence." Id. at 1175; see also People v. Gibbs, 49 Ill.App.3d 644, 364 N.E.2d 491 (1st Dist. 1977).

In Smith, this Court remanded for resentencing after noting several factors were not given proper consideration by the sentencing court. These factors included the defendant's age, lack of prior criminal record, and his mental retardation, as well as the defendant's rehabilitative potential. Finally, this Court considered the lower court's erroneous suggestion that this had been a gang related crime when "there is no evidence that the defendant intended to shoot the

victim because he was a member of the gang." People v. Smith, 533 N.E.2d at 1175.

In People v. Nelson, 106 Ill.App.3d 838, 436 N.E.2d 655, 661 (1st Dist. 1982), the Court enunciated it "will not disturb a sentence on review generally unless it greatly diverges from the purpose and spirit of the law or is highly disproportionate to the nature of the offense." Nevertheless, the Court pronounced it would not hesitate in reducing a sentence when appropriate.

Here, the sentencing court never adequately considered the many mitigating factors. In LaPointe, the Illinois Supreme Court stated, when implementing punishment, such punishment "should fit the offender and not merely the crime, . . ." LaPointe, 431 N.E.2d at 350. In People v. Nelson, 436 N.E.2d at 661, the Court reiterated that penalties should be "determined according to the 'seriousness of the offense and the objective of restoring the offender to useful citizenship.'" Ill. Const. 1970, art. I, §11; see People v. Gibbs, 49 Ill.App.3d 644, 364 N.E.2d 491 (1st Dist. 1977).

The trial court considered the defendant's severe emotional problems which exhibited themselves at the time of the offense, but failed to give them adequate weight. See generally People v. Mott, 204 Ill.App.3d 573, 561 N.E.2d 1380, 1384 (4th Dist. 1990). Dr. Robert Chapman and Dr. Eric Ward testified as a psychiatric experts.

Dr. Ward, a licensed clinical psychologist, testified his specialty is attention deficit hyperactivity disorder. (R. 220) Dr. Ward spoke with Mr. Clark's adoptive mother, Geneva Clark, and his natural mother, Lois Moore, who had been a patient of his for ten years, concerning the parently of her younger children. (R. 61) Ms. Moore had twelve children. Ms. Moore told Dr. Ward that, while she was pregnant with Mr. Clark, she sometimes drank until she passed

out. She was so drunk when she went to the hospital for his birth, that alcohol was coming out of her pores. (R. 225) According to Dr. Ward, Mr. Clark has the intellectual skills of a fourteen year old and the interpersonal skills of a seven year old. (R. 235) His ability to react is that of a six year old. (R. 237) His ability to empathize is that of a three year old. (R. 240) The manifestations of the physical and psychological problems of a person suffering from fetal alcohol syndrome will be affected by the environment in which the child is reared. (R. 244) Mr. Clark should be treated for attention deficit hyperactivity disorder with medication in order to help with his concentration and impulse control. (R. 245-46) The prognosis for people with severe fetal alcohol syndrome is poor, however, research is continuing. (R. 247)

Robert Clark had been subjected to fetal alcohol abuse by his natural mother, and the abuse in his life continued even after he was removed from his natural mother and placed by the Department of Children and Family Services with the Clark family. The defendant's father, Edward Clark, was very physically, verbally, and emotionally abusive to the defendant and the rest of his family. It was said that Edward Clark ran his family like a concentration camp. The public school system, the Department of Children and Family Services, and his family gave the defendant little support. On many occasions, the defendant was forced to sleep on the streets. His right eye was removed due to a tumor when he was a toddler. He has difficulty with his intellectual, visual, and emotional perceptions.

Mr. Clark's personality and values are in large part based on his having been abused while in the womb and during his childhood and youth by his birth mother, his adoptive family, and by the neglect of the Department of Children and Family Services and the public school

system. The trial court failed to give adequate consideration to his background and the possibility of future rehabilitation by sentencing him to 105 years' imprisonment.

Therefore, this Court should reduce Mr. Clark's sentence for murder to sixty years' imprisonment.

CONCLUSION

For the foregoing reasons, Robert Clark respectfully requests that this Court vacate his sentence for murder and remand this cause for a new sentencing hearing. In the alternative, it is requested that this Court reduce the defendant's sentence for first degree murder to sixty years' imprisonment.

Respectfully submitted,

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APPENDIX TO THE BRIEF

NOTICE OF APPEAL

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff	)	
-vs-	)	NO. 93-CF-39
ROBERT M. CLARK, Defendant	)	

NOTICE OF APPEAL

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

1. COURT TO WHICH APPEAL IS TAKEN: Appellate Court of Third Appellate District, Ottawa, Illinois.

2. NAME OF APPELLANT AND ADDRESS TO WHICH NOTICES SHALL BE SENT:

NAME: Robert M. Clark
ADDRESS: c/o Illinois Department of Corrections, Joliet, Illinois.

3. NAME AND ADDRESS OF APPELLANT'S ATTORNEY ON APPEAL:

NAME: None.
ADDRESS:

IF APPELLANT IS INDIGENT AND HAS NO ATTORNEY, DOES HE WANT ONE APPOINTED? Appellant is indigent and has no attorney on appeal, and desires the appointment of the Office of the State Appellate Defender, Third Appellate District, Ottawa, Illinois, as his attorney on appeal.

4. DATE OF JUDGMENT OR ORDER: February 11, 1994, (Sentencing) and February 17, 1994 (Motion to Reconsider Sentence).

5. OFFENSE OF WHICH CONVICTED: First Degree Murder and Robbery.

6. SENTENCE: Ninety (90) years for First Degree Murder and Fifteen (15) years for Robbery.

FILED
KNOX CO., IL
FEB 24 1994
MARY M. STEIN
Clerk of the Circuit Court
Dawn L. Deputy

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7. IF APPEAL IS NOT FROM A CONVICTION, NATURE OF ORDER APPEALED FROM: Appellant is appealing from sentence imposed as excessive, and is also appealing Motion to Reconsider Sentence, held on February 17, 1994.

ROBERT M. CLARK, Defendant

BY James H. Harrell

JAMES H. HARRELL,
Knox County Public Defender
Knox County Courthouse
Galesburg, Illinois 61401
Phone: 309/345-3876

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT OF ILLINOIS

KNOX COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. ROBERT M. CLARK, Defendant.	)	Case No. 93-CF-39

SENTENCE ORDER

This case coming before the Court for a sentence hearing on February 11, 1994, the State's Attorney of this County present, the defendant present in person and by his attorneys, the defendant having been previously adjudged guilty of the offenses of 1st Degree Murder (Count I) and Robbery (Count III) by the Court.

The pre-sentence investigation and report hereafter referred to as Report is on file. An opportunity is provided to the defendant and his attorney to review the Report, and the defendant and his attorney acknowledges they have had a sufficient opportunity to thoroughly examine the report and its contents. The defendant advises that the content of the Report is correct and no changes or amendments are necessary.

The State is afforded an opportunity to present evidence in aggravation. The defendant is afforded an opportunity to present evidence in mitigation. Closing arguments of counsel are heard.

The defendant is given the opportunity to make any further statements which he wishes before the sentence is imposed.

The Court having examined the Report, and having heard evidence on the offense, if any received, and having heard and received evidence, if any, as to the moral character, life, family, occupation, and past record of the defendant, and having considered such evidence and information in aggravation and mitigation of the offense, and the defendant having nothing further to say;

THE COURT FINDS as follows:

1. In accordance with Ill. Rev. Stat., Ch. 38, par. 1005-5-3.1, the following factors of MITIGATION are present:

[Other mitigating factors, if any, considered by the Court]

the defendant is mentally retarded.

2. In accordance with Ill. Rev. Stat., Ch. 38, par. 1005-5-3.2 (a), the following factors of AGGRAVATION are present:

The defendant's conduct caused or threatened serious harm.

The defendant has a history of prior delinquency or criminal activity.

The sentence is necessary to deter others from committing the same crime.

The Court finds that the defendant's presumption for probation is overcome by the evidence presented.

The Court hereby sentences the defendant to the Illinois Department of Corrections for a determinate term of 15 years for robbery (Count III) consecutive to 90 years for 1st degree murder (Count I), for a total of 105 years.

The defendant is further Ordered to pay the costs of this proceeding.]

The defendant is given credit for time served in the County Jail.

Pursuant to Supreme Court Rule 605b, the defendant is advised as follows:

[1] That he has a right to appeal.

[2] That prior to taking an appeal, he must file in the trial court, within 30 days of the date on which sentence was imposed, a written Motion asking to have the Judgment vacated and for leave to withdraw his plea of guilty, setting forth his grounds for the Motion.

[3] That if the Motion is allowed, the plea of guilty, Sentence and Judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;

[4] That upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for a trial;

[5] That if he is indigent, a copy of the transcript of the proceedings at the time of his plea of guilty and sentence will be provided without cost to him and counsel will be appointed to assist him with the preparation of the Motions; and

[6] That in any appeal taken from the Judgment on the plea of guilty any issue or claim of error not raised in the Motion to vacate the Judgment and to withdraw his plea of guilty shall be deemed waived.

The defendant is remanded to the custody of the Sheriff of this County, and the Clerk of the Circuit Court is directed to issue a Mittimus to the Sheriff for the conveyance of the defendant to the Illinois Department of Corrections to undergo the sentence herein imposed.

Dated: Feb. 14, '94

Stephen C Mathers

JUDGE

FILED
KNOX CO., IL
FEB 14 1994
MARY M. STEIN
Clerk of the Circuit Court
Deputy

C 166

STATE OF ILLINOIS)
)
COUNTY OF Knox)

IN THE CIRCU. COURT OF THE
Ninth JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS)
VS)
)
Robert Clark)
Defendant)

Case No. 93CF39

ORDER FOR FREE TRANSCRIPT AND APPOINTMENT OF THE OFFICE OF THE STATE APPELLATE DEFENDER AS COUNSEL ON APPEAL

It appearing to the Court that the above named defendant desires to appeal from the order entered by the Court on 2/11/94 & 2/12/94, and the defendant is indigent and requests the appointment of counsel in accordance with Supreme Court Rule 607(a), and that he requests a report of proceedings in accordance with Supreme Court Rule 60/(b).

IT IS THEREFORE ORDERED THAT:

Robert Agostinelli
Deputy Defender
Office of the State Appellate Defender
Third Judicial Circuit
628 Columbus St. Suite 308
Ottawa, IL 61350
(815) 434-5531

is hereby appointed to represent the above named defendant for purposes of appeal.

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and file a Notice of Appeal on behalf of the above named defendant, and shall send a copy of the Notice of Appeal to the defendant's counsel.

IT IS FURTHER ORDERED that the Official Shorthand Reporter of this Court shall:

(a) Forthwith transcribe an original and a copy of all the notes taken of the proceedings in the above entitled cause;
(b) Without charge to the defendant and within forty-nine days from the date of the Notice of Appeal is filed, file the original of the Report of Proceedings with the Clerk of the Court and on the same day mail or deliver the copy of the Report of Proceedings to the defendant

IT IS FURTHER ORDERED that the Clerk of this Court shall:

(a) Send a copy of this order to the defendant and to defendant's counsel;
(b) Prepare and certify the Record on Appeal pursuant to Supreme Court Rules 324 and 608;
(c) File the Record on Appeal in the reviewing court within sixty-three days from the date the Notice of Appeal is filed, or file a Certificate in Lieu of Record pursuant to Supreme Court Rule 325 and send the Record on Appeal to the defendant's counsel.

DATED: FILED
KNOX CO., IL
FEB 28 1994
MARY M. STEIN
Clerk of the Circuit Court
Deputy

JUDGE

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NO. 3-94-0148

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Ninth Judicial Circuit, Knox County, Illinois.
Plaintiff-Appellee,	)	
vs.	)	No. 93-CF-39
ROBERT M. CLARK,	)	Honorable Stephen C. Mathers, Judge Presiding.
Defendant-Appellant.	)	

NOTICE AND PROOF OF SERVICE

TO: State's Attorney's Appellate Prosecutor
628 Columbus Street, Suite 300
Ottawa, IL 61350

Mr. Robert M. Clark
Register No. N-73161
Box 99
Pontiac, IL 61764

Please take notice that I have mailed six copies of the brief and argument for defendant-appellant to the Clerk of the above Court and that I am serving the SAAP with three copies and the defendant with one copy of the brief by depositing the copies in the mail in Springfield, Illinois, in envelopes with sufficient prepaid postage and addressed as indicated above on this 21st day of September, 1995.

Subscribed and sworn to before me on this 21st day of September, 1995.

Evelyn A. Edwards
NOTARY PUBLIC

OFFICIAL SEAL
EVELYN A. EDWARDS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 9-23-95

Debra S. Sokolis
DEBRA S. SOKOLIS
Legal Secretary

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 11, 2022, the **Brief and Appendix of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email address:

Brett C. Zeeb
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 North LaSalle Street, 24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us

Counsel for Petitioner-Appellant

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General