No. 129767

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. SEDRICK WHITE, Petitioner-Appellant.	) Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0385)) There on Appeal from the Circuit Court of Cook County, Illinois, No. 98 CR 2438301)) The Honorable Patrick Coughlin, Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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TABLE OF CONTENTS

Page(s)

POINTS AND AUTHORITIES

NATURE OF THE CASE

Petitioner entered an open guilty plea to a charge of first degree murder, and the trial court sentenced him to 40 years in prison. R9-10; R47.[1] Petitioner did not appeal. Over 20 years later, in 2019, petitioner filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401(f) (2-1401 petition), which alleged that his sentence was constitutionally disproportionate. C13-108. The trial court denied the petition. C314. The appellate court affirmed, and petitioner has appealed that judgment. A9, ¶ 1. A question is raised on the pleadings, namely whether petitioner sufficiently pleaded a claim under § 2-1401.

ISSUE PRESENTED FOR REVIEW

Whether the trial court properly denied petitioner's 2-1401 petition where § 2-1401 is not the proper vehicle to bring a legal claim like petitioner's proportionate penalties claim, and, in any event, petitioner cannot satisfy the requirements of § 2-1401 because he failed to allege facts showing both that he has a meritorious claim and that he exercised due diligence in raising the claim.

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[1] Citations to the common law record, report of proceedings, supplemental common law record, secured common law record, supplemental report of proceedings, petitioner's brief, and the appendix to petitioner's brief appear as "C__," "R__," "Sup. C __," "Sec. C __," "Sup. R__," "Pet. Br. __," and "A__," respectively.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On September 27, 2023, this Court allowed petitioner's petition for leave to appeal.

STATEMENT OF FACTS

I. Petitioner's Guilty Plea

In 1998, petitioner, who was 20 years old at the time, was charged with three counts of first degree murder and one count of home invasion after he entered an apartment and fatally shot 44-year-old Arnel Adamore. Sup. C 5-8; R5. Following a plea conference pursuant to Supreme Court Rule 402, R3, the trial court found a 40-year sentence would be appropriate, *see* R46-47.[2] Petitioner rejected the proposed plea deal, telling the court that he wished instead to enter a blind plea to "redeem [him]self and try to show" the court that he did not "deserve 40 years." R4-5. In return for petitioner's guilty plea to one count of first degree murder, the People agreed to *nol pros* the remaining charges. R4.

Before accepting the plea, the trial court admonished petitioner of, and petitioner said he understood, his rights, the charge, and the applicable sentencing range. R5-9. Petitioner then confirmed that he wished to waive trial and plead guilty. *Id.* The court repeated the admonishments and

[2] Although the Rule 402 conference was not recorded, the trial court described the proceedings and proposal at petitioner's subsequent sentencing hearing. R46-47.

petitioner again stated that he understood. R10-13. Petitioner agreed that he was pleading guilty of his own free will and confirmed that he had not been promised anything in exchange for his plea and had not been threatened or coerced into pleading guilty. R13.

The People then provided a stipulated factual basis for the plea. R14-18. The evidence would show that while petitioner was working as "security for a drug operation," R14, 18, he decided to visit his girlfriend in a nearby building and recruited Grant Kelly to "watch his post" while he was away, R14-15. Kelly, however, left the post to seek medical attention for an injured child. R15. When petitioner learned that Kelly had left his post, he struck Kelly in the face. *Id.* Kelly hit petitioner back and fled to another building. *Id.* Petitioner pulled out a handgun, chambered a round, and chased after Kelly. R15-16. Kelly entered a second-floor apartment where his friend Adamore was staying, told Adamore that petitioner was "coming after him," and hid by hanging from the living room window. R16. Petitioner "pound[ed] on the door," saying "open the door you punk mother fucker," then entered the apartment and confronted Adamore, demanding to know where Kelly was. *Id.* When Adamore did not tell him, petitioner pushed him to the ground, aimed his gun at him, and repeated his demand. R17. Adamore did not comply, so petitioner placed the gun to Adamore's head and fired, killing him. *Id.* Petitioner then fled to Indiana, explaining that he had "just shot a mother fucker and he had to leave." *Id.*

The court found a factual basis for the plea. R18. It also found that petitioner's plea was knowing and voluntary, and then accepted it. *Id.*

II. Sentencing Hearing

The trial court held a sentencing hearing. R19. The parties agreed to adopt a pretrial investigation as the presentence investigation (PSI). *Id.* The report stated that petitioner was raised by his grandmother and mother in Chicago and had no contact with his father since the age of eight. Sec. C7. Petitioner had one child, whom he saw frequently, and was expecting another child with his girlfriend at the time of sentencing. *Id.* Petitioner left high school after his junior year to seek employment. Sec. C8. He had one juvenile adjudication for unlawful use of a weapon. Sec. C6.

The prosecution presented two documents in aggravation: petitioner's written statement to police and the medical examiner's report, both of which were substantially consistent with the proffered factual basis. R19-29.

In mitigation, petitioner's grandmother testified that petitioner was "a sensitive child," followed her house rules, and was very supportive of his family. R33-34. She asked the court for leniency so petitioner could be present in his son's life. R35.

The prosecution asked for a 60-year sentence. R36-39. It argued that petitioner had grown up in a nurturing family environment but had chosen to leave school and work as security for a drug operation. R36-39. Moreover, petitioner went after Kelly to seek retribution because Kelly endangered the

drug operation by leaving his "post" and, when he could not find Kelly, he shot the unarmed Adamore. R38-39.

Defense counsel asked for a sentence less than 60 years, arguing that petitioner was not the same man he was when he killed Adamore and was "extremely, extremely sorry for what he had done." R39-40. Counsel described the killing as "an aberration" and the result of petitioner getting "caught up" in the drug operation. R40-41.

Petitioner spoke in allocution. R42. He told the court that he knew what he did was wrong but he "got caught up in the wrong place," he "didn't mean to do that," "it was an accident," "[i]t was something that just happened," and he was "not a killer." R42-43. He apologized to the victim's family and asked the court for mercy for the sake of his family. R43.

After considering the facts of the case, information discussed at the Rule 402 conference, the PSI, and the statutory factors in mitigation and aggravation, the trial court sentenced petitioner to 40 years in prison. R43-47. In response to petitioner's arguments for a lesser sentence, the court explained that although petitioner said he wished to take responsibility for his actions, he attempted to diminish his responsibility by claiming his deliberate actions were an accident. R45. In addition, although petitioner claimed he was not a "killer," he was by definition a killer because he had killed the victim. *Id.* Responding to petitioner's request for mercy on behalf

of his children, the court explained that petitioner had caused his family's misery by his own choices. R46-47.

The court further found that the facts of the case "probably" warranted a 60-year sentence, but it had found 40 years to be appropriate at the Rule 402 conference. R46-47. And nothing at the sentencing hearing warranted a further reduction of that 40-year sentence. *Id.* The court concluded, "What is a fair sentence in this case is what I said before. And it is what I am giving him now." *Id.*

The court then admonished petitioner regarding his appellate rights, but inadvertently used the admonishments intended for defendants found guilty following a trial. *See* R48; Sup. R5. Eleven days later, the trial court *sua sponte* re-admonished petitioner. Sup. R5. The court informed petitioner, in relevant part, that if he wished to challenge his sentence, he had to file a written motion to reconsider within 30 days or he would lose his right to appeal. Sup. R5-6. Defense counsel filed a timely motion to reconsider sentence, in which he claimed that petitioner's sentence was excessive. Sup. C12. The trial court denied the motion. R55-56. Petitioner did not appeal.

III. Petitioner's 2-1401 Petition

On May 7, 2019,[3] over 20 years after his conviction, petitioner filed a *pro se* 2-1401 petition with an attached memorandum, which together alleged several constitutional claims against his plea and sentence. C13. Relevant here, petitioner alleged that his discretionary 40-year sentence was a *de facto* life sentence that violated the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012). C34-45. Petitioner further alleged that his sentence violated the proportionate penalties clause of the Illinois Constitution because the trial court did not consider his age and its attendant characteristics. C42-45. Petitioner explained that he had not brought his claims earlier because neither *Miller* nor appellate court precedent extending *Miller* to young adult offenders existed at the time of his sentencing. C35, 38-40.

The People did not file a response to the petition, C312, and the trial court denied the petition *sua sponte*, C314. The court held that *Miller* applies only to juvenile offenders, not young adult offenders, *id.*, and, even if the proportionate penalties clause were construed to prohibit discretionary *de facto* life sentences for young adult offenders, petitioner's 40-year sentence was not *de facto* life, C314-15.

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[3] For reasons not evident from the record, no action was taken on petitioner's initial petition. He refiled the petition on September 29, 2020, and proceedings commenced. *See* C110-143.

IV. Appellate Court Decision

On appeal, petitioner argued that the trial court erred in denying his 2-1401 petition because he raised a meritorious claim that his sentence violated the proportionate penalties clause. A19, ¶ 26.[4] The appellate court affirmed, holding that petitioner had waived any challenge to his sentence by pleading guilty. A24, ¶ 36.

STANDARD OF REVIEW

The *sua sponte* denial of a 2-1401 petition is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 13 (2007).

ARGUMENT

The trial court did not err in denying petitioner's 2-1401 petition because his claim that his sentence is disproportionate under the proportionate penalties clause is not cognizable in a 2-1401 petition, and his petition failed to establish the necessary elements of a 2-1401 claim.

A 2-1401 petition is not the proper vehicle for petitioner's claim that his sentence is constitutionally disproportionate in light of his age and alleged rehabilitative potential. Section 2-1401 allows for the vacatur of judgments based on errors of fact, but petitioner's claim alleges only an error of law. Moreover, petitioner's claim does not rely on any facts that were

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[4] Petitioner also raised a claim that the trial court erred in failing to recharacterize his 2-1401 petition as a postconviction petition, which he has abandoned in this Court. A10, ¶ 2; *see also* Pet. Br.1. Petitioner did not raise any of the other claims in his 2-1401 petition before the appellate court or in this Court. *See* A10, ¶ 2.

unknown to the trial court and parties at the time of petitioner's sentencing. Indeed, petitioner does not allege that the trial court was unaware of his age during sentencing; rather, he argues that the trial court failed to give his age proper mitigating weight. Such a claim was known at the time of petitioner's sentencing, and he cannot use a 2-1401 petition as a substitute for his failure to file an appeal or postconviction petition raising the claim.

But even if petitioner's proportionate penalties claim were cognizable under § 2-1401, the trial court properly denied relief because petitioner failed to allege facts showing both that he has a meritorious claim and that he exercised due diligence in raising the claim. Although the appellate court was incorrect that his plea waiver barred his claim, petitioner's 40-year sentence is not manifestly disproportionate to the seriousness of his fatal shooting of Adamore, and thus does not violate the proportionate penalties clause.

Moreover, petitioner cannot show diligence in either bringing his claim at the time of sentencing or filing his 2-1401 petition. He waited 20 years to raise his proportionate penalties claim. And his sole excuse for delay, that *Miller* and subsequent cases did not exist, is unavailing because he has abandoned his reliance on *Miller* on appeal and, in any event, *Miller* provides no excuse for a defendant's failure to raise the legally distinct proportionate penalties claim at sentencing. Furthermore, petitioner's petition includes no factual assertion explaining why he failed to act or what steps he took to

bring his claim, and he may not supply such explanations for the first time on appeal. Consequently, the trial court properly denied the 2-1401 petition.

The Trial Court Properly Denied Petitioner's 2-1401 Petition.

A. A 2-1401 petition is not the proper vehicle for petitioner's proportionate penalties claim.

The trial court properly denied relief from judgment because a 2-1401 petition is not the proper vehicle for petitioner's claim that his sentence is constitutionally disproportionate.

Section 2-1401 provides a statutory mechanism for vacating final judgments older than 30 days. *People v. Stoecker*, 2020 IL 124807, ¶ 18; *see also* 735 ILCS 5/2-1401. Although § 2-1401's remedy is civil in nature, it may apply to criminal cases in certain limited instances. *Stoecker*, 2020 IL 124807, ¶ 18; *see also Vincent*, 226 Ill. 2d at 8. Specifically, § 2-1401 provides a "forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition." *People v. Haynes*, 192 Ill. 2d 437, 461 (2000). Because relief under § 2-1401 is generally limited to correcting errors of fact, and not law,[5] it does not provide for review of trial errors or alleged constitutional violations in criminal cases. *People v. Pinkonsly*, 207 Ill. 2d 555, 565-67 (2003). Consequently, § 2-1401 is not a substitute for a direct appeal or a

[5] A narrow exception exists for challenges to void judgments, but it does not apply here. *See* Pet. Br. 41-43; *see also People v. Thompson*, 2015 IL 118151, ¶¶ 31-33 (describing the two types of voidness challenges).

collateral attack under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*.). *Pinkonsly*, 207 Ill. 2d at 565-67. And because principles of forfeiture and *res judicata* apply to 2-1401 petitions, claims that were or could have been raised earlier on direct appeal or other collateral proceedings cannot form the basis of a 2-1401 petition. *Haynes*, 192 Ill. 2d at 461.

Petitioner claims that his sentence is disproportionate under the proportionate penalties clause because the trial court did not adequately consider his age and rehabilitative potential. *See* Pet. Br. 42. Yet that claim alleges only a legal error, not a factual error cognizable under § 2-1401. Indeed, petitioner alleges no new facts unknown to the court and parties at the time of sentencing that would have precluded imposition of his sentence. Rather, his claim is premised on his youth, a fact that was known at the time of sentencing. And his claim is not that the court did not *know* the relevant circumstances (his age and attendant circumstances), but merely that the court did not adequately *weigh* those circumstances in imposing his sentence. As such, petitioner's claim is a legal claim not cognizable under § 2-1401. *See Pinkonsly*, 207 Ill. 2d at 565-67.

Putting aside that petitioner's proportionate penalties claim is a legal rather than a factual claim, and thus not properly brought under § 2-1401, relief on a 2-1401 petition may be based only on evidence that predates the challenged judgment, not evidence that arose after its rendition. *Haynes*, 192 Ill. 2d at 463. The scientific articles that petitioner cited in his petition, *see*,

e.g., C39-40, date from *after* his sentencing and "therefore could not have been presented to the trial court for its consideration during those proceedings"; thus, they "do[] not provide a proper basis for relief pursuant to a section 2-1401 petition." *Haynes*, 192 Ill. 2d at 463.

Moreover, even if petitioner intended to rely on the articles for their conclusions that there is a developmental difference between young adults and older adults such that the former have greater rehabilitative potential, this fact about human development was well known at the time of petitioner's sentencing, and thus did not add to the facts already available to the trial court. *See People v. Holman*, 2017 IL 120655, ¶ 44 ("We have long held that age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance."), *overruled on other grounds by People v. Wilson*, 2023 IL 127666, ¶ 42; *see also People v. Clark*, 2023 IL 127273, ¶¶ 5, 92 ("As is the case with juvenile offenders, Illinois courts were also aware [in 1994] that 'less than mature age can extend into young adulthood—and they have insisted that sentences take into account that reality of human development.'" (quoting *People v. Haines*, 2021 IL App (4th) 190612, ¶ 47)). Thus, the underlying conclusion cannot support § 2-1401 relief. *Haynes*, 192 Ill. 2d at 461.

Indeed, § 2-1401 is not the proper vehicle for petitioner's claim because it could and should have been brought on direct appeal. *See Clark*, 2023 IL 127273, ¶¶ 66-67 (describing the availability of proportionate penalties claim

on direct appeal). But petitioner forfeited his claim by not filing a direct appeal. *People v. Erickson*, 161 Ill. 2d 82, 87-88 (1994) (forfeiture bar reaches "all matters that could have been — not merely were not — earlier raised"); *People v. Mamolella*, 42 Ill. 2d 69, 71 (1969) (claims that could have been but were not raised on direct appeal are forfeited in § 2-1401 proceedings). Petitioner cannot now use a 2-1401 petition as a substitute for that direct appeal. *Pinkonsly*, 207 Ill. 2d at 565-67; *see Mamolella*, 42 Ill. 2d at 72 (§ 2-1401 not available to consider claims that "could have been presented in the trial court and on direct review of a conviction"). And if, as petitioner now suggests, *see* Pet. Br. 42-43, his counsel's inaction prevented him from raising the claim on appeal (though no such claim appears in his 2-1401 petition), then the proper vehicle for such an ineffective assistance claim is a postconviction petition, *Pinkonsly*, 207 Ill. 2d at 565-67 (claims of ineffective assistance in criminal cases not cognizable under § 2-1401). In sum, § 2-1401 is not the proper vehicle for petitioner's claim that his sentence is constitutionally disproportionate.

B. Alternatively, petitioner's 2-1401 petition is meritless.

Even if petitioner's proportionate penalties claim were cognizable under § 2-1401, the trial court properly denied his 2-1401 petition because his claim is meritless, and he cannot show diligence. To obtain relief under § 2-1401, the petitioner "'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious

defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.'" *Pinkonsly*, 207 Ill. 2d at 565 (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). Because the People did not file a response to petitioner's petition, all well-pleaded factual allegations must be taken as true. *Vincent*, 226 Ill. 2d at 9-10. Yet even taking petitioner's factual allegations as true, he has failed to establish any of the required elements.

1. Petitioner failed to plead a meritorious proportionate penalties claim.

Although the appellate court was incorrect that petitioner waived his proportionate penalties claim by entering an open plea of guilty, A24, ¶ 36, the trial court correctly denied petitioner's 2-1401 petition because his proportionate penalties claim is meritless.

a. Petitioner did not waive his claim by entering an open plea of guilty.

The appellate court was incorrect that petitioner waived his claim that his sentence was constitutionally disproportionate by entering an open guilty plea.

"It is well established that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). This waiver stems from the fact that a guilty plea, by its nature, absolves the People of their burden to prove the charged crime beyond a reasonable doubt and removes the matter from the

consideration of a jury. *People v. Jackson*, 199 Ill. 2d 286, 295 (2002). By agreeing to plead guilty and forgo a trial, a defendant waives any claim of evidentiary or constitutional error relating to the trial they agreed to avoid. The defendant's admission that he is in fact guilty of the crime charged also acts as a meaningful "break" in the criminal prosecution that cures any prior errors. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *see also People v. Phelps*, 51 Ill.2d 35, 37-38 (1972). Thus, a defendant who pleads guilty to a crime waives all errors, constitutional and otherwise, that are inherent in or prior to a jury trial and may attack only the validity of the plea itself. *Tollett*, 411 U.S. at 267.

But the right to a constitutional sentence is separate and not an inherent component of the right to a jury trial, as it follows the causal break created by a guilty plea. A defendant waives any sentencing error — including constitutional challenges to the sentence — by entering into a negotiated plea deal that involves an agreement as to sentence. *See People v. Wells*, 2023 IL 127169, ¶¶ 31, 33-34; *People v. Jones*, 2021 IL 126432, ¶¶ 20-26. The waiver stems from contract principles precluding a defendant from unilaterally altering the negotiated plea agreement, in which "the sentence is *inseparable* from the conviction." *Wells*, 2023 IL 127169, ¶ 33 (emphasis in original); *see People v. Evans*, 174 Ill. 2d 320, 332 (1996). Where, as here, a defendant has made no agreement as to sentence, the contract principles

barring later challenges to a sentence's length do not apply. *See People v. Johnson*, 2019 IL 122956, ¶¶ 30-32.

The fact that an open guilty plea does not waive sentencing claims is underscored by Supreme Court Rule 604(d), which expressly lays out the procedure a defendant must follow to preserve a sentencing challenge following an open guilty plea and does not require that the defendant move to withdraw the plea itself. Ill. S. Ct. R. 604(d); *see Johnson*, 2019 IL 122956, ¶ 31. If challenges to the length of a sentence were necessarily waived by an open guilty plea, Rule 604(d) would be superfluous. *See Johnson*, 2019 IL 122956, ¶ 31. Consequently, an open guilty plea does not waive a challenge to the length of a sentence, which includes petitioner's claim that his sentence is constitutionally disproportionate. The appellate court's rationale for finding petitioner's claim meritless was therefore incorrect.

Despite the appellate court's error, the Court need not remand this case to the appellate court for further review of petitioner's claim, as petitioner requests. Pet. Br. 37. "[W]hen an appeal is taken from a judgment of a lower court, '[t]he question before [the] reviewing court is the correctness of the result reached by the lower court and not the correctness of the reasoning upon which that result was reached.'" *People v. Johnson*, 208 Ill. 2d 118, 128 (2003) (citations omitted). Thus, it is well-established that "this [C]ourt is not bound by the appellate court's reasoning and may affirm for any basis presented in the record." *People v. Williams*, 2016 IL 118375, ¶ 33.

As discussed below, petitioner's claim is plainly meritless, so the Court may affirm the appellate court's judgment on this alternative basis. Although petitioner is correct that the Court has declined to address *claims* that were not ruled upon by the appellate court, *see People v. Prante*, 2023 IL 127241, ¶ 88, the appellate court here ruled on petitioner's proportionate penalties claim and no claims remain unconsidered. Consequently, remand is unwarranted.

b. Petitioner's claim is plainly meritless.

The trial court correctly denied petitioner's 2-1401 petition because his claim is meritless: petitioner's 40-year sentence is proportionate to his fatal shooting of the unarmed victim.

The proportionate penalties clause provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const., art. I, § 11. This constitutional mandate provides a check on the sentencing court, requiring the court to sentence an offender within statutory parameters and with the dual objectives of protecting the public and restoring him to useful citizenship. *People v. Clemons*, 2012 IL 107821, ¶¶ 29-30.

But the proportionate penalties clause does not require a court to give greater weight to an offender's rehabilitative potential than to the seriousness of the offense. *See People v. Alexander*, 239 Ill. 2d 205, 214 (2010); *accord People v. Hilliard*, 2023 IL 128186, ¶ 40. Nor does the

proportionate penalties clause require the sentencing 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." *People v. LaPointe*, 88 Ill. 2d 482, 493 (1981). Instead, the provision focuses only on "the sentencing outcome," not "the procedure by which the sentence was imposed," *Haines*, 2021 IL App (4th) 190612, ¶ 36, and forbids the imposition of a sentence that is "'so wholly disproportionate to the offense as to shock the moral sense of the community,'" *Clark*, 2023 IL 127273, ¶ 51 (quoting *People v. Leon Miller*, 202 Ill. 2d 328, 338 (2002)).

Petitioner's claim is meritless under this established standard. Recently, the Court upheld against a proportionate penalties challenge a 40-year sentence for an 18-year-old offender convicted of attempted murder, where the offender "chose to fire multiple shots at [the unarmed victim] at close range with no demonstrated provocation in an attempt to kill him." *Hilliard*, 2023 IL 128186, ¶ 40. In doing so, the Court distinguished *Leon Miller*, which held that a natural-life sentence for a 15-year-old offender convicted of two murders violated the proportionate penalties clause because it "grossly distort[ed] the factual realities of the case and [did] not accurately represent [the] defendant's personal culpability such that it shock[ed] the moral sense of the community." 202 Ill. 2d at 341; *see Hilliard*, 2023 IL 128186, ¶ 34. Miller, the Court explained in *Hilliard*, "had moments to decide whether to help the accomplices and stood as a lookout during the

subsequent shooting but did not touch a gun," while Hilliard "acted alone, made a deliberate choice to approach [the unarmed victim], and fired multiple rounds at him without provocation." 2023 IL 128186, ¶ 34. In addition, Miller was "a 15-year-old juvenile who received a mandatory life sentence, whereas [Hilliard] was an adult who received a partially discretionary sentence, and his total sentence did not amount to a life sentence." *Id.* And Hilliard shot the victim in a public housing complex, which enhanced the danger presented by firearms to innocent bystanders. *Id.*

As in *Hilliard*, petitioner's 40-year sentence is proportionate to his serious offense. Petitioner was 20 years old when he murdered Adamore — not a juvenile like Leon Miller — and two years older than Hilliard. Petitioner also was not an unarmed, passive lookout like Miller. Rather, petitioner armed himself and personally shot Adamore. Indeed, he attacked and then chased Kelly into an apartment building to punish Kelly for his failure to adequately protect the drug operation that employed petitioner. R14-15. When he could not find his intended target, petitioner knocked Adamore to the ground and placed a gun to his head. Petitioner then fatally shot Adamore when Adamore would not tell petitioner where Kelly was hiding. R17. Unlike Hilliard, petitioner actually killed his victim. In short, petitioner was the sole, principal offender in the murder and his actions showed a deliberate indifference to the value of human life.

Even assuming that petitioner's brain was not fully developed because he was 20 years old when he committed the murder and therefore he had rehabilitative potential, the trial court was not required to give "greater weight" to the possibility of rehabilitation than to "the seriousness of the offense." *Alexander*, 239 Ill. 2d at 214; *see Hilliard*, 2023 IL 128186, ¶ 40. Considering all the facts and circumstances of the case, petitioner cannot show that 40 years in prison is "'so wholly disproportionate to the offense as to shock the moral sense of the community.'" *Clark*, 2023 IL 127273, ¶ 51 (quoting *Leon Miller*, 202 Ill. 2d at 338). His sentence thus comports with the proportionate penalties clause.

Petitioner does not identify the governing standard for his proportionate penalties claim and makes no attempt to show that his sentence is substantively disproportionate. *See* Pet. Br. 42-43. Instead, he devotes the bulk of his argument to attacking the process by which the sentence was imposed. In particular, he argues that his sentence violates the proportionate penalties clause because the trial court either expressly refused, or simply failed, to consider his age and other mitigating factors. *Id.* But his argument is belied by the record: the trial court expressly considered all factors in mitigation and aggravation and all evidence presented at petitioner's sentencing hearing, which included his age and related circumstances. R43-44.

Petitioner's contention that the trial court found there was no evidence in mitigation, *see* Pet. Br. 43, takes the court's comment out of context. At sentencing, the trial court stated that it had previously told petitioner at the Rule 402 conference that a 40-year sentence was appropriate. R46-47. After hearing the evidence and argument at the sentencing hearing, the court stated that it had heard "nothing that would mitigate this." R47. The court explained, "What is a fair sentence in this case is what I said before. And it is what I am giving him now." *Id.* Thus, in context, the trial court did not find, as petitioner claims, that there was no evidence in mitigation, but only that the evidence presented at sentencing did not warrant a sentence of less than 40 years. Indeed, the court necessarily found some mitigation because it sentenced petitioner to 40 years despite finding that the People's request for a 60-year sentence was "probably" appropriate. R46.

Petitioner's suggestion that the trial court was hostile towards him because it did not believe his claims of remorse, Pet. Br. 40, is also incorrect. The trial court was not required to accept as sincere or credible petitioner's protestations of remorse. *See Alexander*, 239 Ill. 2d at 213 ("The trial judge has the opportunity to weigh such factors as the defendant's credibility."). And the trial court's finding that petitioner's expression of remorse was not credible is supported by the record. Petitioner's expressed reason for pleading guilty was not remorse or responsibility, but a desire to receive a lower sentence. R5. And despite nominally accepting responsibility in his

allocution, petitioner continued to minimize his actions, telling the court he "got caught up in the wrong place," he "didn't mean to do that," "it was an accident," and he was "not a killer." R42-43. Because petitioner did not express remorse for his intentional murder of Adamore and instead asserted excuses for his behavior, the trial court acted within its discretion in finding petitioner's expression of remorse unbelievable. *See People v. Ward*, 113 Ill. 2d 516, 527 (1986) ("[A] continued protestation of innocence and a lack of remorse may convey a strong message to the trial judge that the defendant is an unmitigated liar and at continued war with society.").

Finally, petitioner is mistaken that equitable considerations bear on whether he has pleaded a meritorious claim. The trial court may consider whether notions of justice or similar equitable considerations merit relaxing the *diligence* standard — which requires a petitioner to have a reasonable excuse for failing to raise a claim within the appropriate time — to reach a meritorious claim. *Airoom*, 114 Ill. 2d at 225; *see Warren Cnty. Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 51. But the merits of a claim are not a procedural bar that may be relaxed. A claim is either meritorious or not, and equity is not served by allowing petitioner to obtain relief on a meritless claim.

To summarize, petitioner's 40-year sentence does not shock the moral sense of the community given his extremely serious crime and his direct

culpability for the shooting. Accordingly, his proportionate penalties claim is plainly meritless, and the trial court did not err in denying his petition.

2. Petitioner cannot show diligence.

Even if petitioner had pleaded a meritorious claim — and he did not — the trial court correctly denied his 2-1401 petition because he has not shown that he acted diligently in both presenting the claim to the trial court in his original criminal case or in filing his 2-1401 petition.

A litigant seeking relief under § 2-1401 "must do so expeditiously." *Paul v. Gerald Adelman & Assocs., Ltd.*, 223 Ill. 2d 85, 101 (2006). No brightline rule governs whether an individual acted diligently under § 2-1401's requirements. *Id.* at 99. Instead, the inquiry judges the reasonableness of the individual's excuse for not acting sooner under the circumstances. *Id.* at 100.

Petitioner's 2-1401 petition failed to show that he acted diligently. To start, the petition made no factual assertions at all explaining his actions in the two decades between his sentencing and the filing of his 2-1401 petition. *See* C13-45. Petitioner was required to "affirmatively set forth specific factual allegations" to establish his diligence in raising his claim. *Pinkonsly*, 207 Ill. 2d at 565. His failure to explain his inaction is fatal to his 2-1401 petition.

Moreover, the petition provided a single excuse for the late filing of his claim: that *Miller* and appellate court decisions purporting to extend *Miller*

under the proportionate penalties clause did not exist at the time of sentencing. C35. But petitioner has now wisely abandoned any reliance on *Miller*, Pet. Br. 42, given the Court's recent precedent holding that *Miller* did not announce any new principles under the proportionate penalties clause and does not provide a basis to reopen an offender's discretionary sentence, *see People v. Moore*, 2023 IL 126461, ¶ 38; *Clark*, 2023 IL 127273, ¶¶ 67, 91-94; *People v. Dorsey*, 2021 IL 123010, ¶ 74; *see also Hilliard*, 2023 IL 128186, ¶ 28 (rejecting appellate court precedent as inconsistent with these cases).

Although petitioner now suggests that the trial court's admonishments during sentencing and/or trial counsel's inaction in filing an appeal excuse his 20-year delay, Pet. Br. 40-41, petitioner did not include these allegations in his petition, so the trial court cannot have considered them in denying relief. And the question before this Court is whether the trial court erred in denying the 2-1401 petition before it. *Vincent*, 226 Ill. 2d at 10. Petitioner cannot attempt to rehabilitate his petition on appeal by adding claims or factual assertions to cure its deficiencies. *See Thompson*, 2015 IL 118151, ¶ 39 (petitioners cannot raise claims not found in 2-1401 petition on appeal). Even if petitioner's new assertions could be considered for the first time on appeal, and even if they could be proven,[6] they address only why he failed to raise his claim at the time of sentencing. They do not explain why petitioner remained

[6] The People's decision not to respond accepts the truth only of the assertions petitioner actually pleaded in his petition. *See Vincent*, 226 Ill. 2d at 9-10.

silent for the next 20 years, and thus petitioner cannot show diligence in the *filing* of his 2-1401 petition. *See Pinkonsly*, 207 Ill. 2d at 565.

For similar reasons, petitioner's suggestion that equitable considerations support relaxing the diligence requirement, Pet. Br. 40-41, are unpersuasive. Petitioner's present allegations that trial counsel failed to preserve or press his proportionate penalties claim and that the trial court was biased against him are not alleged in his petition. *Compare* Pet. Br. 40-41 *to* C13-45. Nor have those constitutional claims been tested or scrutinized in postconviction proceedings. *See Pinkonsly*, 207 Ill. 2d at 565-67 (describing postconviction proceedings as proper vehicle for such claims). But even if petitioner's newfound allegations could be credited and found to provide an equitable basis to excuse his lack of diligence at the time of sentencing and direct appeal, it does not explain why those considerations would excuse his subsequent decades of inaction.

Finally, petitioner is incorrect that the People forfeited the question of whether petitioner was diligent in pursuing his claim. *See* Pet. Br. 39. The appellate court correctly held that the People forfeited the affirmative defense of timeliness by failing to file a response to the petition. A18-19, ¶¶ 24-25; *see also Pinkonsly*, 207 Ill. 2d at 564. But diligence is not an affirmative defense that can be forfeited. Diligence is an element that petitioner is required to prove. *Pinkonsly*, 207 Ill. 2d at 565. Even where a party fails to respond to a 2-1401 petition, the trial court must determine if

the facts alleged by petitioner, when taken as true, establish the necessary elements. *See Vincent*, 226 Ill. 2d at 9-10. Petitioner has not shown he acted diligently, and thus the trial court correctly denied his petition.

CONCLUSION

This Court should affirm the appellate court's judgment.

July 1, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 26 pages.

/s/ Nicholas Moeller
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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 1, 2024, the foregoing **Brief 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 e-mail addresses:

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