No. 123972

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial District,
Plaintiff-Appellant,	)	No. 1-16-2383
v.	)	There on Appeal from the Circuit Court of Cook County, Illinois No. 04 CR 30062
WILLIAM COTY,	)	The Honorable Nicholas Ford,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

In 2006, a Cook County jury convicted defendant William Coty of predatory criminal sexual assault for acts he committed against six-year-old K.W. when he was forty years old. Because he had a prior conviction for aggravated criminal sexual assault of a nine-year-old girl, the trial court sentenced defendant to the legislatively mandated term of natural life in prison. The Illinois Appellate Court, First District, affirmed the judgment and this Court denied leave to appeal.

In February 2012, defendant filed a pro se petition for relief from judgment, *see* 735 ILCS 5/2-1401, asserting that his sentence was unconstitutional and void. Finding defendant's sentence constitutional, the circuit court dismissed the untimely petition. The First District reversed, vacated defendant's sentence, and remanded for resentencing, holding that the mandatory sentencing scheme "was disproportionate as applied to the defendant" because it precluded the trial court from considering his mild intellectual disability and the circumstances of his offense.

On remand, following a hearing, the trial court sentenced defendant to fifty years in prison, to be served at eighty-five percent. Defendant appealed, and the First District found the sentence unconstitutional and again remanded for resentencing. The People appeal that judgment. No question is raised on the pleadings.

ISSUE PRESENTED

Whether defendant's sentence comports with article I, section 11, of the Illinois Constitution.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612, and 615. On January 31, 2019, this Court allowed the People's petition for leave to appeal.

CONSTITUTIONAL PROVISION INVOLVED

Article I, section 11, of the 1970 Illinois Constitution provides, in relevant part, "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."

STATEMENT OF FACTS

I. Pre-trial, Trial, Sentencing, and Direct Appeal

In 2004, six-year-old K.W. was living in her grandparents' home with her grandparents, her parents, her cousin, and defendant, who was not a relative but whom K.W. knew as "Uncle Shakey." TR.X163-67, X181-83, X187-90.[1] Defendant had lived in the home with K.W. and her family for between two and three years. TR.X189-90.

One night during November 2004, K.W. sat on the couch in defendant's room watching television while her parents slept in a nearby room.

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[1] Citations appear as follows: "TC__" and "TR.__" refer to the direct appeal common law record and report of proceedings, respectively; "PRJ.C__" refers to the section 2-1401 common law record; "RC__" and "RR.__" refer to the

TR.X168-70. Defendant came in and sat down on the couch near K.W. TR.X170. Every time she scooted away, defendant moved closer, and she eventually reached the end of the couch. TR.X171-72. Defendant touched her arm, shoulder, and leg; he then pulled down K.W.'s underwear and inserted his finger into her vagina. TR.X170-75, X191. After some time, defendant moved away and directed K.W. not to tell anyone. TR.X174-75. K.W. left the room, woke her mother, and told her what defendant did. TR.X175-77. After seeing K.W. and her parents walk upstairs to K.W.'s grandparents' room, defendant left the house. TR.X177-78.

Defendant was later arrested. TR.Y7-8. He initially told police that K.W. came into his room, sat on his lap, and "rubbed around a little bit and . . . that's it." TR.Y14; *see* TC7. He later told police that K.W. removed her shorts and underwear and "grind[ed] her butt on his lap," after which he put his finger into her vagina, and K.W. said that it felt good. TR.Y63. According to defendant, K.W. then stood up, dressed herself, and left the room. TR.Y63-64. Upon seeing K.W. and her parents go into her grandparents' room, defendant went to his sister's house. TR.Y64.

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resentencing common law record and report of proceeding, respectively; and "A__" refers to this brief's appendix.

Pursuant to Rule 318(c), the People submitted copies of the appellate court briefs to this Court. Citations to defendant's opening brief appear as "Def. App. Ct. Br. __."

Defendant "felt bad that he touched the little girl" and knew that she was six years old. *Id.*

Defendant moved for a finding that he was unfit to stand trial and to suppress his statements to police. TR.E3, L3, U3. At the fitness and suppression hearings, TR.R8-122, V8-69, the trial court heard expert testimony that since 1988, defendant had consistently tested in the range of "mild mental retardation."[2] TR.R52-75 (defendant's expert); R34-39 (State's expert); *see also* TR.V27. Although defendant was capable of learning, incorporating, retaining, and reproducing new information, he had substantial difficulty with decision-making and independently functioning in society. TR.R34-37, R66-67. Defendant's intellectual disability would not change over time. TR.R38-40, R52-53. The trial court found defendant fit to stand trial, TR.R122, and denied defendant's suppression motion, TR.W9.

In October 2006, a Cook County jury convicted defendant of predatory criminal sexual assault, criminal sexual assault, and aggravated criminal sexual abuse. TC134-36. The latter two convictions merged into the predatory criminal sexual assault conviction. TR.CC9. Because defendant had a prior conviction for aggravated criminal sexual assault of a

[2] The record uses the term "mental retardation." Because psychiatrists and other 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.

nine-year-old girl, TC65; TR.Y76-77, CC6-8, his mandatory sentence was natural life in prison. 720 ILCS 5/12-14.1(b)(2) (2004).

Before imposing this term, the trial court reviewed a presentence investigation report (PSI), received aggravating and mitigating evidence, and heard the parties' arguments. TR.CC3-10. The PSI noted defendant's prior convictions for aggravated battery, attempted armed robbery, and aggravated criminal sexual assault. TC140. Defendant's arrest report also revealed that additional prior criminal charges — including aggravated assault, sexual delinquency, and lewd exposure — had been stricken with leave to reinstate. TC145-50.

As to defendant's educational and employment background, the PSI showed that defendant (1) was a learning-disabled student in the special education program from kindergarten through eighth grade; (2) did not attend high school; (3) could not read or write; (4) had no stable employment but sometimes did "odd labor jobs" and sold fruit with his uncle; and (5) received disability benefits and food stamps. TC138-43.

Defendant reported that his mother died when he was a toddler and that two older sisters raised him. TC141. Although both sisters were deceased, another sister, Irma Coty, handled his finances and helped him

with his daily routine. *Id.* Defendant had two teenaged children with whom he had "little contact." *Id.*

At the sentencing hearing, Irma testified that defendant was "sick," "need[ed] to be in a mental hospital," did not "know anything," did not "understand[] what [wa]s going on," and had "been retarded since he was a baby." TR.CC5-6. Citing evidence from the pretrial hearings, defense counsel argued that defendant was "mentally deficient" and "ha[d] a difficult time understanding and caring for himself." TR.CC8. For those reasons, counsel asked the trial court to order that defendant receive mental health treatment in prison. TR.CC8-9. The prosecutor emphasized that life imprisonment was the appropriate sentence because defendant was caring for himself at the time of his crime, and his actions — violating K.W. when her parents were asleep, directing K.W. not to report his crime, and fleeing upon realizing that she had reported him — demonstrated that he understood and appreciated the wrongfulness of his conduct. TR.CC7-8. Defendant declined to speak in allocution. TR.CC9.

Before sentencing defendant, the trial court found:

> Obviously the parties recognize that the Court's hands are tied because of the prior conviction for aggravated criminal sexual assault, which makes this conviction one for which [defendant] must receive a sentence of life imprisonment without parole. The facts of the case certainly warrant[] a substantial sentence here. It would not be the sentence that the Court is required to give had I any discretion, but I must follow the law nonetheless. The legislature has determined a second aggravated criminal sexual assault in one's lifetime means what they say it means. This case[] reflects a rather outrageous spectacle of preying

> upon children, a young girl, a child who is unable to protect herself in her own home, parents were asleep. The defendant having been given the grace of the parents to live there, to share a basement, a basement apartment, and this was the result.

TR.CC9-10. The court sentenced defendant to natural life in prison. TR.CC10. The appellate court affirmed, and this Court denied leave to appeal. PRJ.C13, C42.

II. Section 2-1401 Proceedings

In February 2012, defendant filed a pro se petition under 735 ILCS 5/2-1401, alleging that his sentence was void because the mandatory sentencing scheme violated the Eighth Amendment to the United States Constitution and article I, section 11 of the Illinois Constitution. PRJ.C61-68. The trial court found defendant's sentence constitutional and dismissed the untimely petition. PRJ.C40-47.

On appeal, the First District construed defendant's petition as asserting both facial and as-applied challenges to his mandatory sentence. A49-64. The court rejected defendant's facial challenge, finding that "there [wa]s no Illinois or United States Supreme Court decision that st[ood] for the proposition that a sentencing statute mandating life imprisonment without the possibility of parole for [intellectually disabled] individuals, without permitting the sentencer to take into account the defendant's mental capacity, is facially unconstitutional." A55-56. Nevertheless, the court vacated defendant's sentence and remanded for resentencing "before a court that has discretion to impose a term-of-years sentence." A64. The court held

that the "statutory scheme was disproportionate as applied to the defendant" under the Illinois Constitution because it precluded the trial court from considering defendant's intellectual disability and the circumstances of his offense. A59. The court emphasized that its holding was limited to "the very unique circumstances of this case, [where] the defendant, who is [intellectually disabled], should not have been sentenced to mandatory natural life imprisonment, without the trial court having had an opportunity to consider his mental capacity and the facts surrounding the commission of the offense." A63-64.

III. Resentencing

On remand, the parties appeared to agree that defendant was subject to a prison term of six to thirty years, 720 ILCS 5/12-14.1(b)(1) (2004); 730 ILCS 5/5-8-1(a)(3) (2004), and was eligible for an extended term of thirty to sixty years, 730 ILCS 5/5-5-3.2(d) & 5-8-2(a)(2) (2004) (providing discretion to impose extended term sentence where victim was under age eighteen). *See* A17; Def. App. Ct. Br. 34.

Before sentencing defendant, the trial court received a new PSI. As to his family background, defendant reported being the younger of two children born to his unmarried parents. RC113-14. Defendant also had three maternal step-siblings, including Irma. *Id.* Their mother died when defendant was a baby. *Id.* Defendant's father had died within the past two years, but defendant had not maintained a relationship with him. RC114.

After his mother's death, the children "were bounced from house to house," and defendant lived with various family members. RC113-14. According to defendant, he had a "normal childhood for his neighborhood," "all of his basic needs were met," and he never suffered any type of abuse or neglect. RC114. Defendant no longer "maintain[ed] a relationship with any of his siblings." RC113. He claimed that he had four children but did not know their names or ages. RC115.

As to his medical history, defendant stated that he was in good physical health, had "never been treated by a mental health professional," "ha[d] never taken any psychotropic medication," and "d[id] not feel the need to speak to a mental health professional." RC116. Defendant's report of his educational and employment background was consistent with his prior PSI, but he added that he had been receiving disability benefits "because of his illiteracy." RC114-15. As to his alcohol and drug use, defendant stated that he began drinking alcohol socially at age twenty-two and using marijuana about three times a week at age sixteen. RC116. Regarding defendant's attitude and values, the PSI stated that defendant's "previous behavior reflects a lack of social conformity," and that defendant "ha[d] a negative attitude towards his arrest and current legal situation." RC117.

At the new sentencing hearing, the prosecutor explained to the court that defendant's crime "was very disturbing and emotionally upsetting" for both the victim and her family, and that the victim's mother "felt that a

significant number of years [was] still appropriate" for defendant's crime against her six-year-old daughter. A70-71. The prosecutor argued that although defendant was intellectually disabled, his conduct during and after the crime demonstrated that he knew his actions were wrong. A71. For these reasons, the prosecutor suggested that a significant prison term was appropriate. *Id.*

Defendant presented no witnesses and offered nothing in allocution. A70, 73. Citing defendant's intellectual disability, the expert testimony from the pretrial proceedings, Irma's testimony from the original sentencing hearing, and the appellate court's decision finding defendant's mandatory sentence unconstitutional, defense counsel asked for "a term of years that allows [defendant] upon sufficient punishment to resume some sort of life following incarceration." A71-73.

Before sentencing defendant, the trial court stated that it was "familiar with the case" and defendant's "background." A69. The court expressly considered the "large volume of materials [tendered] by both the State and Defense," which "included, among other things, the transcript of the original trial," sentencing hearing transcript, and expert testimony concerning defendant's "intellectual difficulties or disabilities." A68-69. The trial court also examined the new PSI report; neither party had corrections or deletions to that report. A69. Upon considering this evidence, the statutory aggravating and mitigating factors, the parties' arguments, and the victim's

mother's statements, and finding that "this was a serious case" and defendant's second sexual assault of a child, the trial court sentenced defendant to fifty years in prison "to be served at 85 percent." A73-74.

Defendant filed a motion to reconsider, stating, in relevant part, "This sentence is excessive in view of the Defendant's background and the nature of his participation in the offense. People v. Williams, 196 Ill. App.[]3d 851 (1990). Ill. Const. Art. I, Sec. [11] (1970)." RC148. The motion presented no further argument and at the hearing on the motion, defense counsel rested on the motion. RC148-49; RR.W2.

IV. Resentencing Appeal

On appeal, citing Illinois Appellate Court cases involving juvenile offenders, and the "current average life expectancy for a male in the United States," defendant asserted that his fifty-year sentence was a *de facto* life sentence. Def. App. Ct. Br. 12-17. Based on this premise, defendant contended that his sentence (1) was excessive and an abuse of discretion; (2) violated the Eighth Amendment to the United States Constitution; and (3) violated article I, section 11, of the Illinois Constitution. *Id.* at 12-25, 28-33.

The First District rejected defendant's first argument because "the trial court acknowledged the defendant's intellectual disability [and] found that other factors warranted a 50-year prison term." A17. As to the State's argument that defendant failed to properly preserve his constitutional claims, the First District stated that it would consider only defendant's

Illinois constitutional claim because he had raised it in his motion to reconsider sentence, but noted that it "would reach the same result under both the federal and state constitutions." A18.

After discussing the evolution of Eighth Amendment jurisprudence concerning juvenile offenders, the court "unequivocally h[e]ld" that intellectually disabled adults must be treated the same as juveniles, and "the procedural safeguards originating with *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)], and created by *Miller* [*v. Alabama*, 567 U.S. 460 (2012),] and its progeny are applicable to intellectually disabled defendants under our constitution." A23-26. Relying on appellate court cases involving the Eighth Amendment and juvenile offenders, the court determined that defendant's "average [prison] life expectancy is at best 64" and that his fifty-year sentence is "equivalent to natural life imprisonment." A28-29. Because defense counsel had not presented current evidence of defendant's intellectual disability, the court found that the trial court had sentenced defendant "without the procedural safeguards of *Atkins*, *Miller*, and its progeny," thus rendering his fifty-year sentence unconstitutional. A30-32. The First District again remanded to the trial court for resentencing. A32.

STANDARD OF REVIEW

This Court reviews constitutional challenges to sentences *de novo*. *People v. Taylor*, 2015 IL 117267, ¶ 11.

SUMMARY OF ARGUMENT

The First District originally held that as applied to defendant, the legislatively mandated sentence of natural life violated article I, section 11, of the 1970 Illinois Constitution because it precluded the trial court from considering defendant's specific circumstances. On remand, after providing the parties an opportunity to present evidence, the trial court considered all record evidence, including evidence concerning defendant's intellectual disability and his crime, and sentenced defendant to fifty years in prison, a term within the legislatively authorized range for defendant's offense. On appeal, the First District found that the trial court properly exercised its discretion in sentencing defendant to this term. This finding alone demonstrates that defendant's sentence comports with the Illinois Constitution. *See People v. Taylor*, 102 Ill. 2d 201, 205-06 (1984) (penalties provision "is directed to the judiciary in that it requires courts not to abuse discretion in imposing sentences within the framework set by the legislature").

Yet the First District also found defendant's sentence unconstitutional. To reach that result, the court announced a new substantive rule of constitutional law under the Illinois Constitution's penalties provision by extending to intellectually disabled adults the Eighth Amendment's categorical bar against mandatory life without parole for juvenile offenders, and requiring trial courts to follow certain procedures before imposing a

discretionary sentence of life in prison. A23-26; *see Montgomery v. Louisiana*, 136 S. Ct. 718, 732-36 (2016). But this Court's longstanding precedent establishes that the penalties provision does not contemplate categorical rules barring penalties for classes of offenders. Rather, under the Illinois Constitution, the only basis for an as-applied challenge to a legislatively mandated sentence is that the sentence is disproportionate to a particular defendant's crime, *see*, *e.g.*, *People v. Rizzo*, 2016 IL 118599, ¶¶ 36-39, as the First District appeared to recognize in its initial decision, A61. The First District's subsequent decision thus lacks a constitutional foundation.

The court's novel rule also lacks any precedential or doctrinal support. Neither the First District nor defendant purported to establish a national consensus against mandatory life sentences for all intellectually disabled adults. Indeed, no court has extended *Atkins* to noncapital cases or *Miller* to intellectually disabled adults. And with good reason: incapacitation — a penological goal that the First District entirely failed to address — may justify the penalty. Moreover, even if the categorical analysis favors a proscription against *de jure* mandatory life without parole, given the differences between juveniles and adults, extending any categorical prohibition rule to *de facto* life without parole is unworkable and leads to absurd results. And defendant's sentence is constitutional even under *Miller* because the trial court imposed it only after considering evidence concerning defendant's intellectual disability.

ARGUMENT

I. Defendant's Sentence Is Constitutional Under This Court's Longstanding Standard of Review for Discretionary Sentences.

Illinois's penalties provision[3] is directed at both the judiciary and the legislature. *People v. Clemons*, 2012 IL 107821, ¶ 29. As to the judiciary, a trial court must sentence an offender within statutory parameters and with the dual objectives of protecting the public and restoring him to useful citizenship. *Id.* ¶¶ 29-30. To this end, the trial court must consider all available evidence pertinent to the constitutional and statutory factors, including the nature and circumstances of the crime; the offender's degree of participation in the crime; his rehabilitative potential; his remorse or lack thereof; and his personal history, including his age, general moral character, mentality, social environment, habits, demeanor, criminal history, and education. 730 ILCS 5/5-5-3.1 & 5-5-3.2 (2004); *People v. Holman*, 2017 IL 120655, ¶ 44; *People v. Fern*, 189 Ill. 2d 48, 53, 56 (1999); *People v. Ward*, 113 Ill. 2d 516, 527-28 (1986); *People v. La Pointe*, 88 Ill. 2d 482, 493-99 (1981). Considering all of these factors and fashioning a sentence that strikes the proper balance between the two constitutional objectives is a "'difficult task'" to which "a trial judge may well devote substantial amounts of time and thought. But [the penalties provision] does not require the judge to detail for

[3] Article I, section 11, of the 1970 Illinois Constitution requires that penalties be determined (1) according to the seriousness of the offense and (2) with the objective of restoring the offender to useful citizenship. This brief refers to both clauses as the "penalties provision."

the record the process by which he concluded that the penalty imposed was appropriate." *La Pointe*, 88 Ill. 2d at 493 (quoting *People v. Cox*, 82 Ill. 2d 268, 280 (1980)).

Instead, a trial court's sentencing decision is "'entitled to great deference and weight.'" *Id.* at 492-93 (citation omitted). For that reason, the standard for reviewing a constitutional challenge to "a sentence [a]s excessive is: Did the trial judge abuse its discretion in imposing that sentence?" *Id.* at 492 (citations omitted); *accord Taylor*, 102 Ill. 2d at 205-06; *Cox*, 82 Ill. 2d at 275; *People v. Perruquet*, 68 Ill. 2d 149, 153-56 (1977). A sentence within statutory limits is deemed excessive and the result of an abuse of discretion only if "it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000) (citing *Fern*, 189 Ill. 2d at 54). If the trial court did not abuse its discretion, the sentence comports with the penalties provision and a reviewing court may not disturb it. *See Taylor*, 102 Ill. 2d 205-06; *see also La Pointe*, 88 Ill. 2d at 487, 492-96.

Here, the First District found that the trial court did not abuse its discretion in sentencing defendant to fifty years in prison because it imposed that sentence only after considering the record evidence and "parties' arguments, both of which referenced defendant's [intellectual] disability," and found "that other factors warranted" the statutorily authorized term. A17; *see infra*, Part V. This conclusion necessarily means that defendant's

sentence is not excessive and comports both procedurally and substantively with the penalties provision. *See* A17 (citing *People v. Abrams*, 2015 IL App (1st) 133746); *see also Abrams*, 2015 IL App (1st) 133746, ¶¶ 30-36 (discussing abuse-of-discretion standard for reviewing challenges under the penalties provision). Accordingly, under this Court's longstanding interpretation of the penalties provision, defendant's sentence is constitutional and the First District's analysis should have gone no further.

II. Illinois's Penalties Provision Does Not Contemplate Categorical Rules Barring the Legislature from Enacting Mandatory Terms of Imprisonment for Classes of Offenders.

Notwithstanding that defendant's sentence is both procedurally and substantively consistent with this Court's established understanding of the penalties provision, the First District announced a new rule of Illinois constitutional law that prohibits the legislature from mandating *de jure* and *de facto* life-without-parole sentences for intellectually disabled adults. Illinois sentences must comport with the Eighth Amendment (and as explained in Parts III through V below, defendant's does so), but our penalties provision is not synonymous with the federal clause and does not categorically preclude the legislature from mandating terms of imprisonment for classes of offenders. The First District's new rule thus lacks any constitutional basis.

A. The Eighth Amendment

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." This ban "embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986) (citations omitted), including torture and other "inherently barbaric punishments," *Graham v. Florida*, 560 U.S. 48, 59 (2010) (citation omitted).

The Eighth Amendment also prohibits penalties that are disproportionate to the crime; these "fall within two general classifications." *Id.* The first classification "forbids only extreme sentences that are grossly disproportionate to the crime" and applies on a case-by-case basis to noncapital sentences. *Id.* at 59-60 (quotations marks and citation omitted); *see also id.* at 87 (Roberts, C.J., concurring). The threshold inquiry compares the gravity of the defendant's offense with the severity of the penalty. *Id.* at 60. Only if this comparison leads to an inference of gross disproportionality does a court then compare the defendant's sentence to those received by offenders in the same jurisdiction and to sentences imposed for the same crime in other jurisdictions. *Id.* If the subsequent comparisons validate the threshold inference of gross disproportionality, then the defendant's sentence violates the Eighth Amendment. *Id.*

The second classification "use[s] categorical rules to define Eighth Amendment standards." *Id.* Under this approach, the Supreme Court determines that a sentencing practice is cruel and unusual when imposed for specific offenses or on certain classes of offenders because there exists a national consensus against the sentencing practice, and the Supreme Court's independent judgment confirms that conclusion. *Id.* at 60-61.

B. Illinois's penalties provision is not synonymous with the Eighth Amendment.

The First District's conclusion rests in part on its erroneous belief that our penalties provision is always broader than the Eighth Amendment.[4] The provisions are "co-extensive," *People v. Patterson*, 2014 IL 115102, ¶¶ 101, 106, in that they apply only "to direct actions by the government to inflict punishment," *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006) (citations omitted). But, as this Court has held, the type of the protections they afford once they apply is different. *See Clemons*, 2012 IL 107821, ¶ 40.

Article I, section 11 of the 1970 Illinois Constitution provides, in relevant part, "All penalties shall be determined both according to the

[4] The Illinois Appellate Court has reached different conclusions concerning the protections our penalties provision provides vis-à-vis the Eighth Amendment. *See, e.g.*, *People v. Horta*, 2016 IL App (2d) 140714, ¶ 62 & n.4 (penalties provision provides protections at least as great as Eighth Amendment such that if challenge fails under state provision, it necessarily fails under federal one); *People v. Gipson*, 2015 IL App (1st) 122451, ¶¶ 69-73 (protections are different); *In re Shermaine S.*, 2015 IL App (1st) 142421, ¶ 31 (protections are equal such that if challenge fails under Eighth Amendment, it also fails under penalties provision). This Court should take this opportunity to clarify the relationship between the two provisions.

seriousness of the offense and with the objective of restoring the offender to useful citizenship." This constitutional mandate provides a check on the individual sentencing judge and "the legislature, which sets the statutory penalties in the first instance." *Clemons*, 2012 IL 107821, ¶ 29 (citations omitted).

The first requirement — that penalties shall be determined "according to the seriousness of the offense" — is often described "as the 'proportionate penalties clause,' a reference to the language contained in our earlier state constitutions." *Id.* ¶ 37 (citations omitted). The relationship between the proportionate penalties clause and the Eighth Amendment "is not entirely clear." *Id.* ¶ 40. But by prohibiting the legislature from enacting two different penalties for crimes with identical elements, the proportionate penalties clause offers at least one protection that the Eighth Amendment does not. *Id.* ¶¶ 30, 35, 41-46.

The second requirement — that penalties must be determined "with the objective of restoring the offender to useful citizenship" (the rehabilitation clause) — was new to the 1970 Constitution. *Clemons*, 2012 IL 107821, ¶ 39. This clause directs the trial court and legislature to "'look at the person who committed the act and determine to what extent he can be restored to useful citizenship.'" *Id.* ¶¶ 29, 39 (citation omitted)). The limitation of penalties in this clause "went beyond the framers' understanding of the eighth amendment and is not synonymous with that provision." *Id.* ¶ 40.

Although the rehabilitation clause "provide[s] a limitation on penalties beyond those afforded by the eighth amendment," *id.*, ¶ 39, it operates differently as to the judiciary and legislature. As discussed, the penalties provision requires courts to sentence an offender within statutory parameters and with the dual objectives of protecting the public *and* restoring him to useful citizenship. *See supra*, Part I. In this way, our penalties provision provides a protection that exceeds that afforded by the Eighth Amendment. *See Clemons*, 2012 IL 107821, ¶ 40; *cf. Ewing v. California*, 538 U.S. 11, 20-23 (2003) (plurality op.) (Eighth Amendment's "narrow proportionality principle" applies only in the "exceedingly rare" case where penalty is so harsh that it is "grossly disproportionate" to gravity of offense).

But as to the legislature, the penalties provision requires only that it consider both objectives when defining crimes and their penalties. *Taylor*, 102 Ill. 2d at 206. The legislature is not required to give greater weight to the rehabilitation objective, and may instead consider the severity of an offense and determine that no set of mitigating circumstances could permit an appropriate punishment less than a mandatory minimum. *Id.*; *see also Rizzo*, 2016 IL 118599, ¶ 39 (discussing *People v. Sharpe*, 216 Ill. 2d 481, 525 (2005)); *People v. Huddleston*, 212 Ill. 2d 107, 145 (2004); *People v. Dunigan*, 165 Ill. 2d 235, 244-45 (1995); *cf. People v. Hill*, 199 Ill. 2d 440, 447-49 (2002) (individualized sentencing is matter of public policy for legislature, not constitutional requirement), *overruled on other grounds by Sharpe*, 216 Ill. 2d

at 516-20. Thus, the legislature presumptively does not "'violate[] article I, section 11, when it enacts statutes imposing mandatory minimum sentences,'" even when the minimums are lengthy, *Rizzo*, 2016 IL 118599, ¶ 39 (quoting *Sharpe*, 216 Ill. 2d at 525); *Huddleston*, 212 Ill. 2d at 129, 145, or otherwise violate the Eighth Amendment's categorical rules, *cf. People v. Davis*, 2014 IL 115595, ¶¶ 4-5, 43-45 (finding juvenile's mandatory natural-life sentence unconstitutional under *Miller v. Alabama*, but rejecting Illinois challenge on *res judicata* grounds because penalties provision "does not necessarily prohibit" the mandatory sentence for all juveniles).

To be sure, Illinois courts must enforce the Eighth Amendment under the Supremacy Clause, even when there is no violation under Illinois's penalties provision. U.S. Const., art. VI, cl. 2; *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383-84 (2015) (States "must not give effect to state laws that conflict with federal laws"). But our penalties provision does not limit the legislature's sentencing authority in the same manner as the Eighth Amendment. *Clemons*, 2012 IL 107821, ¶ 40. Thus, it is inaccurate to say, as the appellate court did, that the penalties provision always provides broader protections than the Eighth Amendment. The more accurate description is that both provisions concern the proportionality of punishments, but they differ in the limitations they impose on the legislature and judiciary.

C. This Court recognizes only two grounds for challenging mandatory sentences under the penalties provision, neither of which contemplates categorical rules barring penalties for classes of offenders.

The bases for challenging mandatory sentences under the penalties provision further confirm that the Eighth Amendment provides different protections. The "ultimate issue" under the penalties provision "is whether the penalty attached to the offense has been set by the legislature 'according to the seriousness of the offense.'" *People v. Morgan*, 203 Ill. 2d 470, 486 (2003) (quoting Ill. Const. 1970, art. I, § 11), *overruled on other grounds by Sharpe*, 216 Ill. 2d at 516-22. Aside from an identical elements challenge — which is inapposite because it makes no subjective judgment about the severity of a particular penalty, *see Clemons*, 2012 IL 107821, ¶ 46; *supra*, Part II.B — the only basis for an as-applied challenge to a legislatively mandated sentence under the penalties provision is "that the penalty for a particular offense is too severe under the 'cruel or degrading' standard." *Rizzo*, 2016 IL 118599, ¶ 28 (quotation marks and citation omitted). Contrary to the First District's analysis, this standard does not contemplate categorical rules barring penalties for classes of offenders.

The "cruel or degrading" protection presumes that the designated punishment is proportionate, "'unless it is a cruel or degrading punishment, not known to the common law, or is a degrading punishment which had become obsolete in the State prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense

of the community.'" *Rizzo*, 2016 IL 118599, ¶¶ 36-37 (citations omitted). The first and second prohibitions track the Eighth Amendment's proscriptions against tortures and other barbaric methods of punishment. *See supra*, Part II.A. And like the Eighth Amendment, the third prohibition recognizes that "'our concepts of elemental decency and fairness which shape the 'moral sense' of the community'" are evolving and a penalty for a particular defendant may now be shocking to our community's moral sense, even though it was not at common law. *People v. Leon Miller*, 202 Ill. 2d 328, 339 (2002) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

But unlike the Eighth Amendment's categorical analysis, in determining whether the penalty for a crime is cruel or degrading, this Court reviews "'the gravity of the defendant's offense in connection with the severity of the statutorily mandated sentence within our community's evolving standard of decency.'" *Rizzo*, 2016 IL 118599, ¶ 38 (quotation marks and citation omitted). A facial claim under this standard requires the challenger to show "that the statute is unconstitutional under any set of facts, *i.e.*, the specific facts related to the challenging party are irrelevant." *Id.* ¶ 24 (citation omitted). If "there exists a situation in which the statute could be validly applied, a facial challenge must fail." *Id.* (citations omitted). Recognizing that the legislature may constitutionally determine that no set of mitigating circumstances warrants a penalty less than the mandatory minimum, this Court has consistently rejected facial challenges to statutes

fixing mandatory prison sentences under the cruel or degrading standard, *see supra*, Part II.B, including a challenge to the statute mandating life imprisonment for multiple predatory criminal sexual assault convictions, *see Huddleston*, 212 Ill. 2d at 145.

By contrast, an as-applied claim under the cruel or degrading standard — the claim presented here — depends on "the specific facts and circumstances of the challenging party." *People v. Harris*, 2018 IL 121932, ¶¶ 38-39 (citations omitted). This Court considers the particular offender and whether it shocks the moral sense of the community to apply the mandatory penalty to him, bearing in mind that the legislature's designated punishment for a specified crime *itself* represents the general moral ideas of our community. *Rizzo*, 2016 IL 118599, ¶ 37. Like the Eighth Amendment's gross disproportionality analysis, the inquiry focuses on whether the penalty is proportionate to the individual defendant's crime, not whether it can be applied to a class of offenders. *See Graham*, 560 U.S. at 61 ("comparison between severity of the penalty and the gravity of the crime does not advance [categorical] analysis" because that test applies only when "considering a gross proportionality challenge to a *particular* defendant's sentence"); *see also, e.g.*, *Huddleston*, 212 Ill. 2d at 132-47 (analysis of mandatory sentence under cruel or degrading standard); *Leon Miller*, 202 Ill. 2d at 339-43 (same).

For example, our society has long recognized the "special status" of children, but our penalties provision "does not necessarily prohibit a

[mandatory] sentence of natural life without parole where a juvenile offender actively participates in the planning of a crime that results in multiple murders." *Davis*, 2014 IL 115595, ¶ 45 (citing *Leon Miller*, 202 Ill. 2d at 341-42); *see also Holman*, 2017 IL 120655, ¶ 44; *Patterson*, 2014 IL 115102, ¶¶ 97-98, 109. This makes sense because this Court has never suggested that the cruel or degrading standard allows for categorical restrictions on the legislature's constitutional authority to fix penalties for crimes. To the contrary, an as-applied challenge under the cruel or degrading standard contemplates only case-by-case review of a particular defendant's sentence. *See Leon Miller*, 202 Ill. 2d at 341.

Accordingly, Illinois's penalties provision does not allow for categorical rules prohibiting term-of-years sentences for classes of offenders. The First District's decision therefore lacks a constitutional basis and should be rejected.

III. The Appellate Court's New Rule Lacks Precedential and Doctrinal Support.

Mandatory natural-life sentences for intellectually disabled adults are constitutional even under a categorical analysis. The Eighth Amendment's categorical rules prohibit (1) capital punishment for intellectually disabled adults, *Atkins*, 536 U.S. at 317-21,[5] (2) capital punishment for juvenile

[5] Whether an adult is intellectually disabled is a complicated question that requires an examination of myriad factors, which itself must be governed by statutory guidelines that do not currently exist in Illinois. *See People v.*

offenders, *Roper v. Simmons*, 543 U.S. 551, 594 (2005); (3) life without parole for juvenile nonhomicide offenders, *Graham*, 560 U.S. at 75; and (4) life without parole for juvenile homicide offenders whose crimes reflect the transient immaturity of youth, *Miller*, 567 U.S. at 479-80; *Montgomery*, 136 S. Ct. at 734-35. In contrast to youth, no precedent insists that intellectual disability matters in determining the appropriateness of natural-life sentences. *Cf. Miller*, 567 U.S. at 473 ("*Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole"); *Holman*, 2017 IL 120655, ¶ 44 (recognizing that in Illinois, youth has long carried "constitutional significance" at sentencing). To the contrary, neither the penalties provision nor the Eighth Amendment bars mandatory life sentences for adults. *See supra*, Part II; *Ewing*, 538 U.S. at 20-31.

Nevertheless, the appellate court combined *Atkins* with *Miller* and held that mandatory life without parole is disproportionate for all intellectually disabled adults, regardless of the number or nature of the crimes committed; and a trial court lacks discretion to sentence such an offender to a term that requires him to be in prison past age 64, absent a showing that the offender is "'irreparabl[y] corrupt[ ] beyond the possibility of rehabilitation.'" A23, A25-26 (citations omitted). This rule lacks precedential

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Pulliam, 206 Ill. 2d 218, 258-60 (2002) (legislature tasked with fashioning procedural and substantive standards for *Atkins* hearing).

and doctrinal support because there is no national consensus against the sentencing practice, and the practice may serve legitimate penological goals. *Graham*, 560 U.S. at 61. Accordingly, this Court should reverse the First District's judgment.

A. There is no national consensus against sentencing intellectually disabled adults to life imprisonment.

Courts across the country that have addressed the issue, including the First District, 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 intellectually disabled offenders); *Baxter v. State*, 177 So. 3d 423, 447 (Miss. Ct. App. 2014) (intellectual disability precludes capital punishment, not life without parole); *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); *State v. Moen*, 422 P.3d 930, 937-38 (Wash. Ct. App. 2018) ("it is not unconstitutional to sentence a defendant with mental deficits to prison for the remainder of his life"); *State v. Tuecke*, 2016 WL 1681524, at *8 (Iowa Ct. App. Apr. 27, 2016) (unpublished) (citing additional cases holding that *Atkins* does not extend to noncapital sentences). Neither the appellate court nor defendant cited any

case holding otherwise, and the People have found none. Moreover, the appellate court did not even attempt to engage in an analysis of nationwide legislation and practice or otherwise identify evidence to support a finding that a national consensus against sentencing intellectually disabled adults to life without parole has developed. The lack of evidence of a national consensus dooms any finding that mandating life imprisonment for intellectually disabled adults who commit serious crimes shocks the moral sense of the community.

B. Mandatory life imprisonment for intellectually disabled adults may serve legitimate penological goals.

No national consensus exists because the central premise of *Miller* — that children are constitutionally different from adults because their crimes generally reflect transient immaturity rather than irreparable corruption — does not apply to intellectually disabled adults. Contrary to the appellate court's finding, intellectually disabled adults cannot be equated to juveniles for purposes of sentencing. Intellectually disabled individuals have diminished culpability due to their "deficits in general mental abilities" and "impairment[s] in everyday adaptive functioning," characteristics that manifest before age eighteen and are "generally lifelong." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 37, 39 (5th ed. 2013); *Atkins*, 536 U.S. at 318; *Heller v. Doe*, 509 U.S. 312, 321-23 (1993); *see* Definition of Intellectual Disability, American Association on Intellectual & Developmental Disabilities, https://aaidd.org/intellectual-disability/definition

(2019).[6] In contrast, juveniles "have diminished culpability *and* greater prospects for reform" due to their youth and "'transient immaturity.'" *Miller*, 567 U.S. at 471, 479 (citations omitted). The dispositive distinction is that the deficiencies that make juveniles less culpable will change with time and ordinary intellectual, neurological, and psychosocial development. *Montgomery*, 136 S. Ct. at 733-34; *Miller*, 567 U.S. at 471-72, 476. The same is not true for the permanent mental deficits that diminish the culpability of intellectually disabled individuals.

Miller and *Atkins* therefore have "separate penological underpinnings," "were motivated by different justifications," and "are incompatible for any sort of constitutional hybridization." *United States v. Davis*, 531 F. App'x 601, 608 (6th Cir. 2013) (nonprecedential); *see also State v. Little*, 200 So. 3d 400, 403-04 (La. Ct. App. 2016) ("evolution in juvenile sentencing is based upon factors unique to juveniles," including a greater capacity for reform as they mature over time, that generally do not apply to intellectually disabled individuals). *Miller* and its progeny rested on the incompatibility of the death penalty and life imprisonment with a juvenile's transient immaturity and prospects for rehabilitation. *Davis*, 531 F. App'x at 608; *see also Roper*, 543 U.S. at 570 ("'relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient'"). *Atkins*, however, focused on the incompatibility of the death penalty with an intellectually

[6] All websites cited in this brief were last accessed on July 10, 2019.

disabled offender's mental impairment and the "corresponding diminution of culpability." *Davis*, 531 F. App'x at 608 (citation omitted); *see Atkins*, 536 U.S. at 317-20. The cases thus rest on different rationales and the rules applying to juveniles do not apply to intellectually disabled adults merely because *Roper* cited *Atkins* in reaching its decision, as the First District suggested, A23, 26. Indeed, *Atkins* analyzed only capital punishment; "death is different," and apart from the juvenile context, the Supreme Court has repeatedly refused to require individualized sentencing in noncapital cases. *Miller*, 567 U.S. at 481 (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)); *Harmelin*, 501 U.S. at 994-96 (discussing unique qualities of death penalty).

Moreover, *Atkins* emphasized that although intellectual disability diminishes the offender's culpability, it "do[es] not warrant an exemption from criminal sanctions." 538 U.S. at 318, 321. "Criminal punishment can have different goals, and choosing among them is within a legislature's discretion." *Graham*, 560 U.S. at 71 (citation omitted). Because intellectual disability is a "relatively static condition, [ ] a determination of dangerousness may be made with some accuracy based on previous [violent] behavior." *Heller*, 509 U.S. at 321-23; *see also Brewer v. Quarterman*, 550 U.S. 286, 288-89, 292-93 (2007) (intellectual disability is a "'two-edged sword[]' because 'it may diminish [the offender's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future'"); *People v. Heider*, 231 Ill. 2d 1, 20-21 (2008) (similar). As

discussed above, the same judgment cannot be made for juveniles who are unlikely to be a danger to society forever and have significant rehabilitative potential. *Graham*, 560 U.S. at 72-73.

Incapacitation therefore remains a legitimate and adequate penological justification for the legislature's decision to mandate life sentences for intellectually disabled adults who commit serious offenses, *see Brown*, 2012 IL App (1st) 091940, ¶ 79, and especially so for those who have committed multiple sex offenses against children, where public protection is of paramount importance due to the substantial risk of recidivism. *See People v. Minnis*, 2016 IL 119563, ¶ 37 ("'prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance'"); *Huddleston*, 212 Ill. 2d at 136-41 (upholding mandatory natural-life statute for second predatory criminal sexual assault of a child, and collecting cases showing that our country has "'grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class'" (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003))); *see also United States v. Rodriguez*, 553 U.S. 377, 385 (2008) (second or subsequent offense more serious because it portends greater future dangerousness and therefore warrants increased sentence to serve goal of incapacitation); *Ewing*, 538 U.S. at 20-31 (legislatures rationally may mandate life imprisonment to protect public from violent *and* nonviolent recidivist offenders). Indeed, our penalties provision allows the legislature to

enact mandatory sentences based solely on the seriousness of the offense and need for public protection. *See Sharpe*, 216 Ill. 2d at 284-85; *Hill*, 199 Ill. 2d at 447. Accordingly, this Court should reject the First District's analysis, which did not address incapacitation at all, and reverse its judgment. A24-25.

IV. Even If This Court Extends *Miller* to Intellectually Disabled Adults, It Should Not Apply *Miller*'s Rule to *De Facto* Life Without Parole Sentences.

The First District's rule prohibiting *de facto* life without parole sentences for intellectually disabled adults substantially undermines the legislature's power to enact *any* minimum sentence for such offenders. In any given case, a bar against *de facto* life without parole for an intellectually disabled adult may preclude application of the statutory sentencing range altogether. For example, under the First District's rule, the legislature cannot mandate that an intellectually disabled 45-year-old spend the statutory minimum of 20 years in prison for first degree murder, or that a 60-year-old spend the minimum of six years in prison for a class X felony, because those mandatory terms would exceed the offender's alleged prison life expectancy of "at best 64." A29. These absurd results demonstrate why wholesale application of juvenile sentencing jurisprudence to intellectually disabled adults is illogical. *Cf. Miller*, 567 U.S. at 477 (juveniles sentenced to

life without parole receive "a *greater* sentence than those adults will serve" for similar offenses (emphasis in original)).

Underscoring this conclusion is the lack of any reliable measurement of prison life expectancy for adults. Even if such a measurement exists for the narrow class of juveniles, any prediction for adults would obviously be flawed because it would not account for myriad factors distinguishing adult offenders, including age and other demographic characteristics, length and conditions of prior incarceration, health and medical history, and environmental conditions outside of prison. *See, e.g.*, *United States v. Mathurin*, 868 F.3d 921, 932-33 (11th Cir. 2017); Evelyn J. Patterson, *Incarcerating Death: Mortality in U.S. State Corr. Facilities, 1985-1998*, Demography, Vol. 47, No. 3, 587-607 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000056/pdf/dem-47-0587.pdf, at 587-88; Anne C. Spaulding, *et al.*, *Prisoner Survival Inside & Outside of the Institution: Implications for Health-Care Planning*, Am. J. Epidemiology, Vol. 173, No. 5, 479-487 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3044840/pdf/kwq422.pdf, at 480-85. Absent any reliable method for measuring how long a person will live in prison, it is virtually impossible to determine when a sentence amounts to life without parole.

In sum, extending *Miller*'s categorical rule for juveniles to *de facto* life without parole for adults is unworkable and leads to absurd results. If this

Court applies *Miller* to intellectually disabled adults, it should limit the rule's application to *de jure* life without parole, as *Miller* itself holds.

V. Even If *Miller* Applies to Intellectually Disabled Adults, Defendant's Sentence Is Constitutional.

Defendant's sentence is constitutional, even if it amounts to life without parole. *Holman* instructs that in assessing whether a juvenile offender's life sentence comports with *Miller*, a court must review "the cold record" and determine whether the trial court considered evidence of the offender's youth and its attendant characteristics at the original sentencing hearing. *Holman*, 2017 IL 120655, ¶ 47. Significantly, "[w]hether such evidence exists depends upon the state of the record in each case." *Id.* Assuming that the same analysis applies here, defendant's sentence comports with *Miller*.

The trial court resentenced defendant only after (1) reviewing the appellate court's prior decision, which explained the mitigating effect of defendant's intellectual disability, A52-64; (2) considering the entire record, including the presentence investigation report and transcripts of pretrial hearings during which defendant presented evidence of his intellectual disability, A17, 67-74; RC113-42; and (3) providing defendant the opportunity to present additional evidence, A69-70. And in finding no abuse of discretion at sentencing, the appellate court found that the trial court reviewed evidence of "defendant's intellectual disability but found that other factors warranted a 50-year prison term." A17. That defendant *chose* not to present

additional evidence at resentencing does not render the process used to sentence him unconstitutional, as the appellate court held. A30-32.

To the contrary, a sentencing court is (1) presumed to know and follow the law, *People v. Carter*, 2015 IL 117709, ¶ 19; (2) presumed to have "considered any mitigating evidence before it, absent some indication to the contrary other than the sentence itself," *People v. Thompson*, 222 Ill. 2d 1, 45 (2006) (citation omitted); and (3) not required to "detail for the record the process by which [it] concluded that the penalty [it] imposed was appropriate," *La Pointe*, 88 Ill. 2d at 493. *Miller* does not alter these settled presumptions; indeed, it imposes no formal factfinding requirement at all. *Holman*, 2017 IL 120655, ¶ 39. Given these established presumptions, any deficiencies in the record cut against, not in favor of, a finding of unconstitutionality. As in *Holman*, "defendant had every opportunity to present evidence" of his rehabilitative potential, but "[h]e chose to offer nothing." 2017 IL 120655, ¶ 49 (citation omitted).

Moreover, although defendant's intellectual disability reduced his culpability, it did not negate it. *Brown*, 2012 IL 091940, ¶ 77. Defendant was forty years old and knew that K.W. was only six. Yet he took advantage of her when her parents were asleep, directed her not to report his crime, and immediately fled upon discerning that she had not complied with that order. Defendant thus understood the wrongfulness of his conduct. Indeed, this was defendant's second sexual assault of a young child and his fourth conviction

for a violent offense. Given defendant's demonstrated lack of rehabilitative potential, the trial court reasonably concluded that defendant posed a substantial risk of recidivism, which warranted a prison term that served to protect the public by incapacitating him for life. *See supra*, Part III.B; *cf. Huddleston*, 212 Ill. 2d at 132-41 (describing long-term effects of sexual abuse on children, their families, and society, and upholding mandatory natural-life sentence for adult offender). Accordingly, defendant's sentence is constitutional.

CONCLUSION

This Court should reverse the appellate court's judgment.

July 11, 2019

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 pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 thirty-seven pages.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

APPENDIX

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2018 IL App (1st) 162383
No. 1-16-2383
Opinion filed August 8, 2018

THIRD DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)
	) Appeal from the Circuit Court
Plaintiff-Appellee,	) of Cook County, Illinois,
	) Criminal Division.
v.	)
	) No. 04 CR 30062
WILLIAM COTY,	)
	) The Honorable
Defendant-Appellant.	) Nicholas Ford,
	) Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court, with opinion.
Justices Howse and Lavin concurred in the judgment and opinion.

OPINION

¶ 1 After a jury trial, the defendant, William Coty, who is intellectually disabled,[1] was convicted, *inter alia*, of predatory criminal sexual assault of a minor. Because the defendant had a prior conviction for aggravated criminal sexual assault, pursuant to section 12-14.1(b)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-14.1(b)(2) (West 2004)),[2] the trial court had no discretion but to sentence him to mandatory natural life in prison without the possibility of parole. After his conviction and sentence were affirmed on appeal (see *People v. Coty*, 388 Ill.

[1]We acknowledge that the term "mentally retarded" was used in the initial appeal in this case, as that was the term used during the trial proceedings and in all relevant case law. However, because that term is no longer the preferred nomenclature, for purposes of this appeal we will use "intellectually disabled."

[2]We note that section 12-14.1(b)(2) was recodified as section 11-1.40(b)(2) (see 720 ILCS 5/11-1.40(b)(2) (West 2010)) and became effective July 1, 2011.

App. 3d 1136 (2009) (table) (unpublished order under to Supreme Court Rule 23) (hereinafter *Coty I*)), the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/2-1401 (West 2004)), alleging, *inter alia*, that his mandatory natural life sentence was (1) facially unconstitutional under the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and (2) unconstitutional as applied to him under the Illinois proportionate penalties clause (Ill. Const. 1970, art. I, § 11) due to his intellectual disability. After the trial court *sua sponte* dismissed the defendant's petition, the defendant appealed to this court.

¶ 2 On appeal, we affirmed in part and reversed in part, holding that, while the defendant had failed to establish that his mandatory natural life sentence was facially unconstitutional under the eighth amendment, that same sentence was unconstitutional as applied to him under the proportionate penalties clause. See *People v. Coty*, 2014 IL App (1st) 121799-U, ¶¶ 60-75 (hereinafter *Coty II*). We therefore vacated the defendant's sentence and remanded the cause to the trial court for resentencing. *Id.* ¶ 77.

¶ 3 On remand, the defendant, who was then 52 years old, was resentenced to 50 years' imprisonment. The defendant now appeals from that sentence contending that the trial court abused its discretion when it imposed an extended term sentence that was the equivalent of a natural life sentence. In the alternative, the defendant contends that his 50-year *de facto* life sentence is unconstitutional under both the federal and state constitutions, as applied to him, an intellectually disabled person. For the reasons that follow, we vacate the defendant's sentence and reverse and remand for a new sentencing hearing, with instructions.

¶ 4 I. BACKGROUND

¶ 5 Because we have already articulated the facts of this case in our prior two orders, we set forth only the facts and procedural history that are relevant to the resolution of this appeal.

¶ 6 A. Fitness Hearing

¶ 7 The defendant was arrested and charged on November 21, 2004. Prior to trial, the court held a fitness hearing to determine whether the defendant was fit to stand trial. At that hearing, the State called Dr. Debra Ferguson, a forensic clinical services psychologist from the forensic clinical services office of the circuit court. Dr. Ferguson testified that the defendant "had a very basic knowledge of most legal proceedings" and that the things "he was not familiar with, he was able to understand with an explanation and to retain and *** repeat it." According to Dr. Ferguson, for example, the defendant understood that a judge was the person who "sentences you," that he was the defendant in the case, and that the jury was "some crazy people that sit up in some room. They say what they say. They can't judge me." The defendant understood that jurors "talk about the case in a room and give a paper that read[s] guilty or not guilty." Dr. Ferguson acknowledged that the defendant did not know the role of the prosecutor but averred that, after she explained it, the defendant acknowledged that the prosecutor was not "on [his] side." Dr. Ferguson further opined that the defendant was aware of his charges, the allegations against him, and the possible penalties (which he described to her as, "I know I can get 6 to 30[.] I know that."). Dr. Ferguson further acknowledged that the defendant initially did not understand that he could choose whether to proceed with a bench or jury trial but instead believed that this was a decision reserved to the trial judge. Nonetheless, she averred that, after she explained, the defendant understood that it was his option. Dr. Ferguson opined that based on her examination the defendant was fit to stand trial.

¶ 8 On cross-examination, Dr. Ferguson was asked whether she was aware that the defendant was receiving Social Security disability based on his intellectual disability.[3] She acknowledged that she was aware of this fact but was unable to confirm the intellectual disability for which the defendant was receiving disability checks. She admitted that her office had requested this information from the Social Security office but then "gave up waiting for it and filed [the] report" attesting to the defendant's fitness.

¶ 9 On cross-examination, Dr. Ferguson further admitted that she did not perform any standardized tests to evaluate the defendant's intellectual disability but acknowledged that it was her understanding that his full scale IQ score was 65.

¶ 10 On redirect examination, Dr. Ferguson admitted that it was her opinion that the defendant was in fact mildly intellectually disabled[4] but testified that a diagnosis of intellectual disability does not "tell *** anything about whether an individual is fit or unfit" to stand trial.

¶ 11 In opposition, the defendant called Dr. Sandra Dawkins, who was qualified as an expert in clinical psychology. Dr. Dawkins testified that the defendant's full scale IQ was 55, which placed him in the "extremely low" range of intelligence when compared to normal adults, so as to make him unfit to stand trial. Dr. Dawkins explained that in coming to her conclusion she, *inter alia*, (1) interviewed the defendant on two occasions; (2) reviewed numerous documents, including his entire forensic clinical services record, court records, and police records; and (3) administered four scientifically recognized standardized tests to evaluate his cognitive ability,[5] his adaptive behavior,[6] his competency to understand *Miranda* warnings,[7] and his

[3]The term used was "mental retardation."
[4]Again the term "mentally retarded" was used.
[5]The Wechsler Adult Intelligence Scale (WAIS-III) (otherwise known as an IQ test)
[6]The Adaptive Behavior Assessment System-II (ABAS-II)
[7]The Assessing Understanding and Appreciation of Miranda Rights test

competency to stand trial as an intellectually disabled person.[8] Among other things, Dr. Dawkins opined that under the Social Security disability standards an individual is eligible for intellectual disability benefits with an IQ score of 59 or under. She stated that the results of the IQ test she administered on the defendant were consistent with the defendant receiving Social Security benefits. She pointed out that the defendant received a verbal score of 55, a performance score of 64, and a full scale IQ score of 55, which placed him in the "one percent of the population who retain IQ scores at that level."

¶ 12 Dr. Dawkins also testified regarding her interviews with the defendant and stated that the defendant's concentration level was variable, that he had a very short attention span, and that he had difficulty explaining similarities. In addition, while he knew where he was and what the date was, he could provide neither the day of the week nor the approximate time of day. When asked how he knew the date, he stated, "It is my court date. That is what I have been told."

¶ 13 Dr. Dawkins further averred that, throughout the interviews, the defendant's responses were very inconsistent. She explained that there were elements of his statements that would imply he had an understanding of the court system, but when any one particular concept was explored further it became apparent that the defendant did not, in fact, understand it. She stated that once she explained certain concepts to him, he would easily acquiesce to the point, accept her explanation, and regurgitate it. She explained that this allowed him to feel calmer and not worry. According to Dr. Dawkins, the defendant does "not accept that he is as cognitively limited as he is, so he projects an image that he knows more than what he actually knows." In that respect, he has acquired a lot of "street jargon" and "tries to portray himself as being more knowledgeable about the world around him than he actually is."

[8]The Competency Assessment to Stand Trial for the Mentally Retarded (CAST-MR)

¶ 14 In addition, Dr. Dawkins testified that she interviewed the defendant's sister and uncle as part of the adaptive behavior test. She opined that the results of that test showed that the defendant would have "a very, very difficult time functioning in society independently," and would require "support in the work world, at home, [and] caring for his personal decision making." She stated that the defendant "acts without considering the consequences of his actions" and is therefore "easily exploited," both because of his "low mental ability" and desire to "fit in."[9]

¶ 15 After hearing the evidence and arguments by both parties, the trial court found that, although it was undisputed that the defendant was intellectually disabled,[10] he was nevertheless fit to stand trial.

¶ 16 B. Motion to Suppress Confession

¶ 17 Prior to trial, the parties also litigated the defendant's motion to suppress inculpatory statements he had made to police. At a hearing on that motion, the following evidence was presented regarding the defendant's cognitive abilities. The State again called expert forensic psychologist Dr. Ferguson, who was now tasked with determining whether the defendant was capable of understanding his *Miranda* rights. Dr. Ferguson averred that, in order to assess this ability, she performed only one part of the four-part "Grisso scales" test on the defendant, specifically, the function of rights in interrogation part.[11] According to Dr. Ferguson, the

[9]Dr. Dawkins's report, which is part of the record on appeal, further notes that when she interviewed the defendant she was struck by the fact that although he was 41 years old, he was very small (approximately 5'5" in height at 120 lbs) and had a "childlike demeanor," so much so that he could be mistaken for a child, until one looked at his face. Dr. Dawkins's report further notes that throughout her interaction with the defendant, he exhibited noticeable shaking. When asked why he was shaking, the defendant stated that he "always had and that [this] was why his nickname was 'Shakey.' "

[10]The trial court used the term "mentally retarded."

[11]The "Grisso scales" test, otherwise knowing as the *Comprehension of Miranda Rights: Manual for Administration and Scoring*, provides four instruments by which mental health professionals may assess the capacity of individuals to appreciate and understand the significance of their *Miranda* rights.

defendant successfully applied the *Miranda* warnings he had received to a hypothetical situation and therefore passed this portion of the "Grisso scales" test. Dr. Ferguson also averred that, during her interview with the defendant, the defendant exhibited an understanding of his *Miranda* rights. In particular, Dr. Ferguson explained that the defendant had acknowledged to her that the police read him his *Miranda* rights. When asked to explain what those rights entailed, the defendant told Dr. Ferguson, "yeah I know they [*sic*] supposed to read you your rights *** I'm slow but I ain't that slow. They have to read you your rights. They can't just lock you up like that without reading you your rights."

¶ 18 In opposition to the State's testimony, the defendant called his own expert, Dr. Michael Fields. Unlike Dr. Ferguson, Dr. Fields testified that to determine the defendant's ability to understand *Miranda*, he administered the full Grisso scales test. Dr. Fields testified that the defendant scored poorly on all four parts of that test. In addition, he stated that during his interview with the defendant, the defendant could not name his *Miranda* rights. Based on the above, Dr. Fields opined that "there were significant doubts about [the defendant's] ability to understand *Miranda*." However, when questioned further, Dr. Fields acknowledged that he could not state with certainty that the defendant was categorically unable to understand those rights.

¶ 19 The trial court denied the defendant's motion to suppress his statements to police, noting that Dr. Ferguson's interview provided the stronger and better evidence of the defendant's capacity to understand *Miranda*. The court stated that Dr. Fields articulated an equivocal opinion that lacked certainty, and that his opinion was based more on testing than on a clinical interview of the defendant.

¶ 20 C. Jury Trial

These include (1) the comprehension of *Miranda* rights, (2) the comprehension of *Miranda* rights recognition, (3) the comprehension of *Miranda* vocabulary, and (4) the function of rights in interrogation.

¶ 21 At trial, the victim K.W. testified that she was six years old in November 2004 and that the defendant, whom she knew as "Shakey," lived as a boarder in her grandparents' house. The defendant lived in the basement, as did K.W.'s parents and siblings, and K.W. was allowed to sleep in the basement or upstairs with her grandparents. K.W. testified that on November 18, 2004, she was watching TV alone in the defendant's room in the basement, while her parents and cousin were asleep. She stated that she was wearing a T-shirt, skirt, and underwear. K.W. averred that the defendant came into the room and sat down on the couch with her. He then started to "scooch" toward her, and every time she moved away, he moved closer until she could no longer move. K.W. stated that the defendant then touched her arm, her shoulder, and her leg and then "started messing with me down there." She identified that part of her body as the "part that [she] use[s] to go to the bathroom with." K.W. then explained that the defendant had "not [touched her] with his hand, but with his tongue" and indicated that she was on the floor when he pushed her underwear to the side of her leg and did so. The defendant then told K.W., "you won't tell anyone." K.W. immediately went and woke her mother and told her that the defendant had "messed with her down there."

¶ 22 On cross-examination, K.W. denied telling the police that the defendant touched her vagina with his hand and insisted that she had told them that he had used his tongue. She similarly admitted that she did not tell the emergency room physician that the defendant had used his tongue. When asked to explain why she did not tell the emergency doctor that the defendant had licked her instead of touched her, K.W. stated that she forgot.

¶ 23 K.W.'s mother, Keafa W., next testified that, on the night in question at about 11 p.m., K.W. came into her room and told her "Shakey touched me," patting her vaginal area to show where she had been touched. Keafa woke her husband up, and they went upstairs with K.W. to

talk to K.W.'s grandparents. While they were upstairs, Keafa heard the front door close, and her husband observed the defendant leaving.

¶ 24 On cross-examination, Keafa admitted that K.W. never told her that the defendant licked her and that she only accused him of "touching her." Keafa also acknowledged that she did not call the police until the next afternoon, November 19, 2004, but stated she did not do so because she was waiting for K.W.'s grandparents to do so.

¶ 25 Pediatric emergency physician Dr. Gail Allen testified that she examined K.W. on November 21, 2004, and that, during that exam, K.W. pointed at her vagina and told her that the defendant had "touched her." Dr. Allen stated that K.W.'s physical examination was "normal" and that she found no signs of penetration, trauma, or "touching."

¶ 26 On cross-examination, Dr. Allen acknowledged that K.W. did not tell her that the defendant had touched her with his tongue. She also admitted that K.W.'s chart from the emergency room visit revealed that K.W. had told a resident that she was wearing shorts and not a skirt on the night of the incident.

¶ 27 Chicago police officer Donald Story next testified that at about midnight on November 21, 2004, he and his partner, Officer Elkins, arrested the defendant at his sister's home. Once in the police car, Officer Elkins informed the defendant of his *Miranda* rights and asked him if he wanted to answer the police officers' questions. According to Officer Story, the defendant agreed and asked what the arrest was about. Upon being told of the allegations, the defendant told the officers that K.W. "came into [his] room, sat on [his] lap, [and] rubbed around a little bit."

¶ 28 Assistant State's Attorney (ASA) Dean Fugate testified that on November 22, 2004, he spoke to the defendant at Area 1 police station in the presence of two detectives, Mirandized the

defendant and then took down his handwritten statement.[12] That statement was published to the jury. In the statement, the defendant confirmed that he was 40 years old and that, in November 2004, he rented a room in the basement of 7036 South Aberdeen Avenue in Chicago, where he shared the basement with K.W. and her family. The defendant stated that on November 18, 2004, he was changing his clothes in his bedroom with his door open when K.W. walked into the room. He told K.W. to leave, but she would not. The defendant finished changing his clothes behind a curtain and then sat on his couch. He averred that K.W. then sat on his lap and "began grinding her butt on his lap." The defendant stated that "his penis was hard" but claimed that he and K.W. were both clothed.[13] He placed his right hand underneath K.W.'s clothes, touched her vagina, and "inserted his finger into [K.W.'s] vagina up to the first joint." The defendant stated that he did not move his finger inside of K.W.'s vagina and that he kept it inside only for "one minute." The defendant averred that K.W. said, "that feels good."

¶ 29 In his statement, the defendant further added that K.W. pulled her shorts and panties down to her knees before sitting on his lap. The defendant also stated that after K.W. got off his lap and pulled her pants up, she left the room and went upstairs with her parents into her grandparents' room. The defendant then left the house out of the front door and went to his sister's house. He also stated that he "felt bad that he touched the little girl."

¶ 30 In his statement, the defendant also indicated that he understands and writes English but that he cannot read.

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[12]Because the defendant was illiterate, ASA Fugate handwrote the statement for the defendant, and the defendant "signed" each page.

[13]ASA Fugate acknowledged that the defendant initially said that the victim's pants were on throughout the incident. ASA Fugate subsequently claimed, however, that while giving the handwritten statement, the defendant changed his story and averred that the victim removed her pants during the incident.

¶ 31 After the defendant's statement was read into the record, the State rested. The defense presented no witnesses, and the parties proceeded with closing arguments. The jury returned a verdict of guilty.

¶ 32 D. Original Sentencing Hearing

¶ 33 On November 17, 2006, the trial court held a sentencing hearing, wherein the defendant's sister, Irma Coty, testified regarding his cognitive disabilities. Irma testified that the defendant has been intellectually disabled since he was born, does "not understand what is going on," and needs psychiatric treatment. The original presentence investigation report (PSI), which was admitted into the record, revealed that the defendant attended special education classes in the Chicago public school system up until the eighth grade and that he received Social Security disability from the State of Illinois because of his mental health. The original PSI noted that the defendant had undergone a behavioral clinical examination (BCX) as part of his evaluation for his fitness to stand trial and that the BCX was part of the court record. In addition, the original PSI revealed that the defendant could not read or write. The original PSI further revealed that the defendant's sister Irma "takes care of him, handles his finances and helps him with his daily routine."

¶ 34 Despite the aforementioned evidence, based upon the defendant's prior conviction for aggravated criminal sexual assault in case No. 88 CR 12137,[14] the court sentenced the defendant to natural life in prison, pursuant to the mandates of section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)). In doing so, the trial judge noted that he would not have sentenced the defendant to natural life but that he was bound by statute to do so. As the court explained:

[14]The defendant committed this crime in 1988 when he was 24 years old. The victim in that case was nine. The defendant was sentenced to, and served, six years in prison.

> "[T]he parties recognize that the court's hands are tied because of the prior conviction for aggravated criminal sexual assault, which makes this conviction one for which he must receive a sentence of life imprisonment without parole. The facts of the cause certainly warrant a substantial sentence here. It would not be the sentence that the court is required to give, had I any discretion, but I must follow the law nonetheless. The legislature has determined a second aggravated criminal sexual assault in one's lifetime means what they say it means."

¶ 35 E. Direct Appeal

¶ 36 The defendant subsequently appealed his conviction, arguing that (1) he was denied his due process right to notice, (2) the testimony of Dr. Allen was inadmissible hearsay and violated his right to confrontation, (3) he was denied his right to a fair trial because of improper prosecutorial comments, and (4) he was denied his right to effective representation of counsel where counsel failed to object to the prosecutor's comments and failed to impeached K.W.'s trial testimony with her prior inconsistent statements. See *Coty I*, slip order at 1. On March 27, 2009, this court affirmed the defendant's conviction and sentence. *Id.* at 25. His petition for leave to appeal to the Illinois Supreme Court was denied on September 30, 2009. See *People v. Coty*, 233 Ill. 2d 571 (2009).

¶ 37 F. Petition for Relief from Judgment

¶ 38 On March 8, 2012, the defendant filed a *pro se* section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)), alleging that his mandatory natural life sentence was unconstitutional because the trial court was prohibited from considering his individual characteristics (namely his intellectual disability) and the circumstances of the offense in ordering that sentence. The defendant acknowledged that his petition was untimely under the

statute (*id.*) but claimed that his sentence was void and that therefore he could challenge it at any time. The defendant asked the trial court to vacate his sentence and remand for resentencing in the 6-to-30-years range. The State did not file any response to the defendant's petition.

¶ 39 On May 10, 2012, the trial court *sua sponte* dismissed the defendant's petition. In its written order, the court first held that the petition was untimely because it was filed over five years after the defendant's conviction on October 11, 2006, which was contrary to the mandate of the statute that it be filed within two years after the entry of final judgment. See *id.* The court also found that the defendant had failed to establish that the sentencing scheme under which he was sentenced to life imprisonment was unconstitutional.

¶ 40 G. Appeal and Remand

¶ 41 The defendant appealed the dismissal of his section 2-1401 petition to this court. On appeal, we affirmed in part, reversed in part, and remanded for further proceedings. See *Coty II*, 2014 IL App (1st) 121799-U, ¶ 78. In doing so, we first found that the trial court erred in *sua sponte* dismissing the defendant's petition on the basis of timeliness. *Id.* ¶¶ 35-42. We then considered the merits of the defendant's petition and held that, while the defendant had failed to properly state a facial challenge to the mandatory sentencing scheme under which he was sentenced to natural life in prison, that same scheme was unconstitutional as applied to him, under the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because of his intellectual disability and corresponding diminished culpability. *Coty II*, 2014 IL App (1st) 121799-U, ¶¶ 43-75. In doing so, we recognized that the defendant was intellectually disabled with an IQ score somewhere between 55 and 65. *Id.* ¶ 66. As a result, under our prevailing social norms his culpability was less than that of a person with normal cognitive capacity. *Id.* In addition, we held, "it cannot be ignored that the offense [albeit serious] ***

included a single, brief act of penetration that did not result in any physical injury to the victim." *Id.* ¶ 67. We further noted that the encounter was neither orchestrated nor preplanned but "rather was seemingly impulsive, and the defendant expressed remorse over what he had done." *Id.* Accordingly, we vacated the defendant's sentence and remanded to the trial court for resentencing to give the trial court discretion to impose a term of years. *Id.* ¶ 78.

¶ 42 H. Resentencing

¶ 43 On remand, a new sentencing hearing was held on August 10, 2016. No new evidence was presented at that hearing regarding the defendant's circumstances over the decade that had passed since he was first sentenced. Instead, prior to the hearing, the court noted that the appellate court had remanded the matter for resentencing, "indicating that Judge Toomin had observed during the course of the original trial that [the defendant] suffered from an intellectual disability." At the hearing, the court stated it had been "tendered a large volume of materials," which included "the transcript of the original trial, and the sentencing that occurred, incorporating the testimony of a doctor who testified regarding [the defendant's] intellectual difficulties or disabilities. I am taking all that into account." After questions from defense counsel, the court also acknowledged that it had reviewed the expert opinion given at the defendant's motion to suppress hearing, as well as the *new* PSI.[15]

¶ 44 The parties then proceeded with very brief arguments. In aggravation, the State, *inter alia*, argued that the victim's mother was "very troubled by the fact that the defendant had to be resentenced" and wanted "her feelings" represented to the court. The State further argued

[15]We note that the record contains two new PSI reports, one dated December 18, 2014, and the other dated March 21, 2016. These two PSI reports are almost identical and make no reference to the defendant's intellectual disability or his behavior/actions in the last ten years of incarceration. With respect to the defendant's psychological health history, both new PSIs merely report that the defendant states that he has never been treated by a mental health professional. In addition, under the rubric "Attitudes/Values," the new PSIs simply state that "[t]he defendant's criminal background indicates an anti-social personality" and that "[h]is previous behavior reflects a lack of social conformity."

the offense was serious and that the defendant knew what he was doing when he approached the victim. The State therefore asked for "a significant number of years."

¶ 45 In mitigation, defense counsel argued that, in remanding for resentencing, this court had already found that the crime was a single contact lasting less than a minute and was impulsive rather than preplanned or orchestrated. Additionally, the defendant had expressed remorse over what he had done. Defense counsel further argued that it was undisputed that the defendant was intellectually disabled and therefore less culpable. Accordingly, defense counsel asked that the court give the defendant "a term of years that allows him upon sufficient punishment to resume some sort of life following incarceration."

¶ 46 After hearing arguments, the trial court sentenced the defendant to 50 years in prison to be served at 85%, followed by 3 years to life of mandatory supervised release (MSR). In entering this sentence, the court stated:

> "William, I'm going to consider today the evidence presented at trial, the [new] pre-sentence report, the evidence offered in aggravation, mitigation, the statutory factors in aggravation, mitigation, the financial impact of incarceration, the arguments the attorneys just made here moments [a]go, and the assertions relative to the mother of the victim indicating that she still takes this case seriously, this was a serious case, and this was an offense committed by somebody whom this was not the first."

¶ 47 Defense counsel subsequently filed a motion to reconsider, arguing, *inter alia*, that (1) the sentence was excessive in light of the defendant's background and the nature of the offense, citing the proportionate penalties clause, (2) the court improperly considered in aggravation matters that were implicit in the offense, and (3) the State failed to prove eligibility for an

enhanced penalty or extended term. The trial court denied this motion, and the defendant now appeals.

¶ 48 II. ANALYSIS

¶ 49 On appeal, the defendant makes three arguments regarding his sentence. First, he asserts that the trial court abused its discretion in sentencing him to a 50-year extended term sentence, without properly considering that it was, in fact, imposing a *de facto* life sentence on a defendant with intellectual disabilities. Second, the defendant contends that the imposition of this *de facto* life sentence is unconstitutional as applied to him both under the eighth amendment and the proportionate penalties clause. For the reasons that follow, we agree with the latter contention.

¶ 50 A. Abuse of Discretion

¶ 51 At the outset we acknowledge our supreme court's mandate that we consider nonconstitutional arguments before considering constitutional ones (*In re E.H.*, 224 Ill. 2d 172, 178 (2006)). Accordingly, we must first consider whether the trial court abused its discretion in sentencing the defendant to 50 years' imprisonment in light of our prior mandate. A reviewing court will find an abuse of discretion only where the sentencing decision is fanciful, unreasonable, or arbitrary and no reasonable person would take the view adopted by the trial court. *People v. Abrams*, 2015 IL App (1st) 133746, ¶ 32.

¶ 52 Our decision to resentence the defendant was filed on August 28, 2014. There, presented with a mandatory natural life sentence, we held that resentencing was necessary under the proportionate penalties clause because the statutory scheme precluded the sentencing court from considering the unique characteristics of the intellectually disabled defendant. See *Coty II*, 2014 IL App (1st) 121799-U, ¶¶ 61-75. Our analysis, however, did not address whether a sentencing court *must* consider whether an intellectually disabled defendant has characteristics

accompanying that disability that reduce his culpability. In addition, based on the law in existence at the time, our decision did not address whether, under either the state or federal constitutions, a *de facto* life sentence or a discretionary life sentence would be unconstitutional as applied to the intellectually disabled defendant in this case. In fact, our mandate nowhere directed that the trial court was required to consider the defendant's intellectual disability and accompanying characteristics in issuing a sentence. Instead, we only stated, "the defendant, who is [intellectually disabled], should not have been sentenced to mandatory natural life imprisonment, *without the trial court having had an opportunity to consider* his mental capacity and the facts surrounding the commission of the offense." (Emphasis added.) *Id.* ¶ 75. We therefore remanded "for resentencing before a court that has discretion to impose a term-of-years sentence." *Id.* ¶ 77.

¶ 53 On remand the trial court imposed a term of years within the appropriate sentencing range.[16]

¶ 54 In doing so, the trial court acknowledged the defendant's intellectual disability but found that other factors warranted a 50-year prison term. Although the trial court's findings in this respect are, at best, sparse, the trial court explicitly stated it considered the evidence presented at the defendant's trial and the parties' arguments, both of which referenced the defendant's disability at the time of his trial in 2006. Since the trial court did no more or less than we instructed it to do, we find no abuse of discretion. See *Abrams*, 2015 IL App (1st) 133746, ¶ 33.

¶ 55 B. Constitutional Arguments

[16]As a Class X offender the defendant was punishable by a sentencing range between 6 and 30 years. 730 ILCS 5/5-8-1(a)(3) (West 2004). In addition, because the victim was under 18 years of age, the defendant was further eligible for an extended term sentence up to 60 years' imprisonment (*id.* § 5-5-3.2(c)).

¶ 56 That said, however, we are now asked to determine for the first time whether the defendant's 50-year prison term constitutes a *de facto* life sentence imposed in a manner inconsistent with the eighth amendment and the proportionate penalties clause. As shall be fully discussed below, we find that the trial court on remand imposed a discretionary *de facto* life sentence without a record sufficient to assess the unique factors that can impact the culpability of the intellectually disabled. We hold that this procedure resulted in constitutional error. See Ill. Cons. 1970, art I, § 11.

¶ 57 The defendant challenges his sentence both under the eighth amendment and the proportionate penalties clause. As an initial matter, the State argues that the defendant has forfeited any constitutional arguments by failing to properly preserve them below but then concedes that our supreme court has urged that "the interests of judicial economy favor addressing [such] issue[s] on direct appeal rather than requiring defendant to raise [them] in a separate postconviction petition." *People v. Cregan*, 2014 IL 113600, ¶ 18. The defendant responds that he has properly preserved the proportionate penalties issue by raising it in his postsentencing motion and urges us to consider his eighth amendment challenge under the plain error doctrine. While we would reach the same result under both the federal and state constitutions, because the defendant only raised the proportionate penalties argument in his motion to reduce his sentence, we will proceed with the merits of that claim alone.

¶ 58 The Illinois Constitution states 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. "[T]he framers [of the Illinois Constitution] intended *** to provide a limitation on penalties beyond those afforded by the eighth amendment." *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 69; *People v. Harris*, 2016 IL App (1st) 141744,

¶ 40. And our supreme court has held that it is inaccurate to state that these two constitutional provisions are synonymous, although the relationship between them is certainly unclear. See *People v. Clemons*, 2012 IL 107821, ¶¶ 36-37, 40 (holding that the proportionate penalties clause "focuses on the objective of rehabilitation" and places greater limitations on the legislature's ability to prescribe harsh sentences than the eighth amendment). But see *People v. Patterson*, 2014 IL 115102, ¶ 106. Nevertheless, our supreme court has never shied from applying eighth amendment precedent to decide proportionate penalties cases, and we see no reason why we should not do the same here. See *e.g.*, *People v. Miller*, 202 Ill. 2d 328, 339 (2002) (hereinafter *Leon Miller*); see also *Patterson*, 2014 IL 115102, ¶ 106.

¶ 59 To succeed on a proportionate penalties claim, the defendant here must show either (1) that the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community or (2) that similar offenses are compared and the conduct that creates a less serious threat to the public health and safety is punished more harshly. *People v. Klepper*, 234 Ill. 2d 337, 348-49 (2009); see also *Leon Miller*, 202 Ill. 2d at 338.

¶ 60 Our supreme court has repeatedly refused to define what kind of punishment qualifies as cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community, because "as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Leon Miller*, 202 Ill. 2d at 339 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (whether a punishment shocks the moral sense of the community is based upon an "evolving standard[ ] of decency that mark[s] the progress of a maturing society")).

¶ 61 Noting that our supreme court has repeatedly held that those "evolving standard[s] of decency *** mark[ ] the progress of a maturing society," in *Coty II*, we reviewed the gravity of the defendant's offense in connection with the severity of his sentence within our community's evolving standard of decency. (Internal quotation marks omitted.) *Coty II*, 2014 IL App (1st) 121799-U, ¶ 62.

¶ 62 At the time we decided *Coty II*, that standard had evolved to prohibit the imposition of the death penalty on juveniles and intellectually disabled offenders, as well as to condemn the imposition of mandatory natural life imprisonment on juveniles. See *id.* ¶ 63 (citing *Graham v. Florida*, 560 U.S. 48, 68 (2010), *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), *Miller v. Alabama*, 567 U.S. 460, 488-89 (2012),[17] and *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)). Accordingly, in *Coty II*, we held that the statutory provision under which the defendant had been sentenced to mandatory natural life imprisonment, without the trial court having any discretion, was disproportionate as applied to him, so as to shock the moral sense of our community. *Id.* ¶ ¶ 64-69 (citing *Leon Miller*, 202 Ill. 2d at 339-42).

¶ 63 Since our decision in *Coty II*, our community's standards of decency have considerably evolved, albeit in the context of juvenile defendants and the eighth amendment (U.S. Const., amend. VIII). First, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), the

[17] *Roper* held that the eighth amendment prohibited death penalty sentences for juveniles who commit murder. *Roper*, 543 U.S. at 578-79. *Graham* held that the eighth amendment prohibited mandatory life sentences for juveniles who commit nonhomicide offenses. *Graham*, 560 U.S. at 82. *Miller* held that the eighth amendment prohibited mandatory life sentences for juveniles who commit murder. *Miller*, 567 U.S. at 489-90. All three decisions recognized the following general difference between juveniles and adults, which render juveniles less morally reprehensible: (1) lack of maturity and underdeveloped sense of responsibility; (2) vulnerability and susceptibility to negative influences and outside pressures; and (3) a yet unfully formed character, which makes them more malleable and their malfeasance less indicative of irretrievable depravity. *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70. In *Miller*, the Supreme Court further held that "children are constitutionally different from adults for purposes of sentencing" and that a trial court must therefore be able to consider mitigating factors in determining whether to impose a natural life sentence. *Miller*, 567 U.S. at 471.

United States Supreme Court held that state courts must give *Miller* effect in collateral proceedings and that, under *Miller*, life imprisonment without parole is unconstitutional for juvenile offenders "whose crimes reflect the transient immaturity of youth" "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at ___, 136 S. Ct. at 734.

¶ 64 Next, in *People v. Reyes*, 2016 IL 119271, ¶ 9, our supreme court interpreted the holding of *Miller* to apply to *de facto* as much as *de jure* life sentences. Noting that *Miller*'s "holding required that life-without-parole sentences be based on judicial discretion rather than statutory mandates" (*id.* ¶ 4), our supreme court held:

> "A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation." *Id.* ¶ 9.

¶ 65 In addition our supreme court held:

> " '[T]he teachings of the *Roper*/*Graham*/*Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's "diminished culpability ***["] when, as here, the aggregate sentences result in the functional equivalent of life without parole. To do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile "die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence *** more

> appropriate." [Citation.] Such a lengthy sentence " 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the juvenile convict], he will remain in prison for the rest of his days.' " [Citation.] That is exactly the result that *Miller* held was unconstitutional. [Citation.]' " *Id.* (quoting *Bear Cloud v. State*, 2014 WY 113, ¶ 33, 334 P.3d 132 (Wyo. 2014)).

¶ 66 Subsequently, in *People v. Holman*, 2017 IL 120655, our supreme court interpreted *Miller* to apply to discretionary, as much as mandatory, natural life sentences. *Id.* ¶ 40. The court there held that "[l]ife sentences, *whether mandatory or discretionary*, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." (Emphasis added.) See *id.* (interpreting *Miller*, 567 U.S. at 465, and *Montgomery*, 577 U.S. at__, 136 S. Ct. at 736). Noting that Illinois courts have always held that age is a complex sentencing factor, our supreme court instructed that, before imposing either a mandatory or a discretionary natural life sentence on a juvenile, the trial court *must* first determine that the juvenile's conduct showed "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation," by considering the characteristics specific to juveniles articulated by the Supreme Court in *Miller*. *Id.* ¶ 46.[18]

¶ 67 Aside from our supreme court's holdings in *Holman* and *Reyes*, since our decision in *Coty II* numerous panels of our appellate court have explicitly held that discretionary *de facto* life sentences for juveniles are unconstitutional under the eighth amendment. See, *e.g.*, *People v.*

[18]Those characteristics include, but are not limited to, the following factors: (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the crime and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation. See *Miller*, 567 U.S. at 477-78.

Morris, 2017 IL App (1st) 141117, ¶ 30; *People v. Nieto*, 2016 IL App (1st) 121604, ¶¶ 42-43, *pet. for leave to appeal pending*, No. 120826 (filed July 8, 2016); *People v. Smolley*, 2018 IL App (3d) 150577, ¶¶ 21-22; *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 24, *pet. for leave to appeal pending*, No. 121578 (filed Dec. 30, 2016); *People v. Buffer*, 2017 IL App (1st) 142931, ¶¶ 62-63, *pet. for leave to appeal granted*, No. 122327 (Ill. Nov. 22, 2017); *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶¶ 25-27, *pet. for leave to appeal pending*, No. 121275 (filed Oct. 12, 2016). But see *People v. Perez*, 2018 IL App (1st) 153629, ¶¶ 37-38; *People v. Hoy*, 2017 IL App (1st) 142596, ¶ 46, *pet. for leave to appeal pending*, No. 122911 (filed May 9, 2018); *People v. Jackson*, 2016 IL App (1st) 143025, ¶¶ 54-58, *pet. for leave to appeal pending*, No. 121527 (filed Nov. 3, 2016); *People v. Evans*, 2017 IL App (1st) 143562, ¶¶ 14-18, *pet. for leave to appeal pending*, No. 122701 (filed Sept. 19, 2017).

¶ 68 Accordingly, as of today, our community's standards of decency appear to have evolved to prohibit the imposition of *de jure* and *de facto* mandatory and discretionary life sentences for juveniles, where procedurally the court fails to consider the attendant characteristics of youth. See *Reyes*, 2016 IL 119271, ¶ 9; *Holman*, 2017 IL 120655, ¶ 46; *Buffer*, 2017 IL App (1st) 142931, ¶¶ 62-63.

¶ 69 In the midst of significant juvenile jurisprudence, however, one must not forget that such jurisprudence began with *Atkins* and the Court's concern with the intellectually disabled. See *Miller*, 567 U.S. at 483-84, 509 (citing *Atkins*, 536 U.S. at 316, 342). In *Coty II*, we already held that under *Atkins* adults with intellectual disabilities deserve special treatment in a proportionality analysis (see *Coty II*, 2014 IL App (1st) 121799-U, ¶¶ 61-75). In doing so, we only implied that adults with intellectual disabilities should be treated similarly to minors. *Id.* We now unequivocally hold that they should.

¶ 70 Intellectually disabled individuals, just like juveniles, are less culpable, where the deficiencies associated with intellectual disability "diminish their personal culpability." *Atkins*, 536 U.S. at 318. Indeed, "clinical definitions of [intellectual disability] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.*; see also 730 ILCS 5/5-1-13 (West 2014) (defining intellectual disability as "sub-average general intellectual functioning generally originating during the developmental period and associated with impairment in adaptive behavior reflected in delayed maturation or reduced learning ability or inadequate social adjustment"). Intellectually disabled persons "frequently know the difference between right and wrong and are competent to stand trial," but "by definition[,] they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions." *Atkins*, 536 U.S. at 318.

¶ 71 Additional risks accompanying the unique characteristics of the intellectually disabled are the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the fact that they are "typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 321. In addition, "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and *** are followers rather than leaders." *Id.* at 318.

¶ 72 As such, just as "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders" (*Miller*, at 567 U.S. at 472), the distinctive attributes of the intellectually disabled, who are by their very nature less culpable,

diminish "the interest in seeing that the offender gets his 'just deserts' " (*Atkins*, 536 U.S. at 319).

¶ 73 Similarly, with respect to deterrence, the same cognitive and behavioral impairments that make intellectually disabled individuals less morally culpable make it less likely that they can process the fact that their behavior exposes them to severe punishment. *Id.* at 320.

¶ 74 Because intellectually disabled offenders are so unlikely to process the possibility of receiving a sentence equivalent to natural life imprisonment, they are unlikely to control their conduct based on that information. *Id.* at 319-20. Simply put, an intellectually disabled defendant is far less likely than an average adult to understand the permanence of life in prison, let alone weigh the consequences of such a life against the perceived benefit of criminal conduct. As such, just as with minors, it is less likely that the possibility of facing such an extreme sanction will deter an intellectually disabled person from committing a crime. *Id.*

¶ 75 Accordingly, since we hold today that minors and adults with intellectual disabilities should be treated similarly in a proportionality analysis, we see no reason why, under our community's evolving standards of decency, the prohibition against the imposition of discretionary *de facto* life sentences without the procedural safeguards of *Miller* and its progeny should not be extended to intellectually disabled persons where the record shows that the trial court did not take into account those characteristics accompanying an intellectual disability as articulated in *Atkins*, so as to show "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Holman*, 2017 IL 120655, ¶ 46. As *Atkins* articulated, those attendant characteristics include, but are not limited to, an intellectually disabled person's diminished capacity (1) to understand and process information, (2) to communicate, (3) to abstract from mistakes and learn from experience, (4) to engage in

logical reasoning, (5) to control impulses, and (6) to understand others' actions and reactions, so as to be more susceptible to manipulation and pressure. *Atkins*, 636 U.S. at 318.

¶ 76 In reaching this decision, we acknowledge that thus far our supreme court has declined to extend the *Miller* line of cases to adults. See *People v. Thompson*, 2015 IL 118151, ¶¶ 8-21. That decision, however, did not involve intellectually disabled defendants. Moreover, we find that a different determination is warranted here. That is because the *Miller* line of cases began with *Atkins*, and explicitly relied on *Atkins*'s rationale pertaining to the intellectually disabled, to expand the law to juvenile defendants. See, *e.g.*, *Miller*, 567 U.S. at 483-84, 509 (citing *Atkins*, 536 U.S. at 316, 342); *Roper*, 543 U.S. at 560, 563-576 (discussing *Atkins*, 536 U.S. 304). As such, it is more accurate to state that *Miller* and its progeny are an extension of *Atkins*.

¶ 77 Moreover, since we agree with those decisions that hold that the Illinois proportionate penalties clause is broader than the eighth amendment (see *Clemons*, 2012 IL 107821, ¶ 39; *Gipson*, 2015 IL App (1st) 122451, ¶¶ 69-70; *Harris*, 2016 IL App (1st) 141744, ¶ 38) and requires consideration of the constitutional objective of "restoring an offender to useful citizenship" (internal quotation marks omitted) (*Leon Miller*, 202 Ill. 2d at 338), an objective that is "much broader than defendant's past conduct in committing the offense" (see *Gipson*, 2015 IL App (1st) 122451, ¶ 72), we find that the procedural safeguards originating with *Atkins*, and created by *Miller* and its progeny are applicable to intellectually disabled defendants under our constitution.

¶ 78 We now turn to the sentencing of this defendant. As already noted above, the defendant here was convicted of predatory criminal sexual assault (a Class X felony) punishable at the time of his offense by a sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/12-14.1 (West 2004) (recodified as 720 ILCS 5/11-1.40 (West 2012)); 730 ILCS 5/5-8-1(a)(3) (West 2004).

The defendant was also eligible for an extended term sentence up to 60 years' imprisonment because the victim was under 18 years of age (730 ILCS 5/5-5-3.2(c) (West 2004)). Furthermore, under "truth in sentencing" statutes, the defendant was required to serve at least 85% of this sentence, depending upon his conduct, while serving that sentence. See *People v. Harris*, 2012 IL App (1st) 092251, ¶ 24 (noting that the "truth-in-sentencing" statutes do "not change the sentence actually imposed ***. [Citation.] Rather, [they] determine[ ] the percentage to be actually served, which in turn depends upon the conduct of the defendant while serving that sentence.").

¶ 79 On remand, the trial court below sentenced the 52-year-old defendant to 50 years' imprisonment. According to the IDOC website, of which we may take judicial notice (see *People v. Sanchez*, 404 Ill. App. 3d 15, 17 (2010) (finding that this court can take judicial notice of the IDOC website); see also *Buffer*, 2017 IL App (1st) 142931, ¶ 62), with time served, the defendant's earliest release (parole) date will be March 26, 2049, at which point he will be 84 years old. The defendant's actual discharge date is set for March 27, 2052, at which point he will be 88. As shall be explained further below, under our prior holdings, and contrary to the State's assertion, there can be no doubt that this sentence is equivalent to condemning the defendant to natural life imprisonment. See *Buffer*, 2017 IL App (1st) 142931, ¶ 62.

¶ 80 We acknowledge that our supreme court has not yet defined what constitutes a *de facto* life sentence, apart from stating that this is a sentence that is "unsurvivable" and "cannot be served in one lifetime" (*Reyes*, 2016 IL 119271, ¶¶ 8-9), and that our appellate courts appear to be split on this issue,[19] and disagree as to whether it is even appropriate for a court of review to

[19]The following courts have found *de facto* life sentences: *Morris*, 2017 IL App (1st) 141117, ¶ 30 (discretionary 100 years); *Nieto*, 2016 IL App (1st) 121604, ¶¶ 42-43, *pet. for leave to appeal pending*, No. 120826 (filed July 8, 2016) (discretionary 78 years); *Smolley*, 2018 IL App (3d) 150577, ¶ ¶ 21-22 (discretionary 65 years); *Ortiz*, 2016 IL App (1st) 133294, ¶ 24, *pet. for leave to appeal*

reflect on questions of biology and statistics (see *Harris*, 2016 IL App (1st) 141744, ¶ 52). Nonetheless, this exact panel has previously held that a 50-year sentence imposed on a 16-year-old juvenile was a *de facto* life sentence. *Buffer*, 2017 IL App (1st) 142931, ¶ 62. In doing so, we relied on the decision in *Sanders*, 2016 IL App (1st) 121732-B, wherein the court looked to the United States Sentencing Commission's Preliminary Quarterly Data Report, to determine the average life expectancy of a prisoner and found that a " 'person held in a general prison population has a life expectancy of about 64 years' " and that this estimate " 'probably overstate[s] the average life expectancy" for those committed " 'to prison for lengthy terms.' " *Buffer*, 2017 IL App (1st) 142931, ¶ 59 (quoting *Sanders*, 2016 IL App (1st) 121732-B, ¶ 26). We also noted that *Sanders* quoted a study that showed that each year in prison resulted in a two-year decline in life expectancy, resulting from "high levels of violence and communicable disease, poor diets, and shoddy health care *** behind bars," and that subsequent courts have found that this "was not surprising given the harshness of a lifetime spent in a state penitentiary." (Internal quotation marks omitted.) *Id.* ¶ 59 (quoting *Sanders*, 2016 IL App (1st) 121732-B, ¶ 26); *Harris*, 2016 IL App (1st) 141744, ¶ 53. We therefore concluded that a 50-year discretionary sentence imposed on a 16-year-old juvenile, which permitted his release on parole

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pending, No. 121578 (filed Dec. 30, 2016) (discretionary 60 years); *Buffer*, 2017 IL App (1st) 142931, ¶¶ 62-63, *pet. for leave to appeal granted*, No. 122327, (Ill. Nov. 22, 2017) (discretionary 50 years); *Sanders*, 2016 IL App (1st) 121732-B, ¶¶ 25-27, *pet. for leave to appeal pending*, No. 121275 (filed Oct. 12, 2016) (discretionary sentence totaling 100 years, or "at least 49 years" with good-conduct credit). Conversely, the following courts have *not* found *de facto* life sentences: *Perez*, 2018 IL App (1st) 153629, ¶ ¶ 37-38 (discretionary 53 years); *Hoy*, 2017 IL App (1st) 142596, ¶ 46, *pet. for leave to appeal pending*, No. 122911 (filed May 9, 2018) (discretionary 52 years); *Jackson*, 2016 IL App (1st) 143025, ¶ ¶ 54-58, *pet. for leave to appeal pending*, No. 121527 (filed Nov. 3, 2016) (discretionary 50 years); or *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 16, *pet. for leave to appeal pending*, No. 121901 (filed Feb. 10, 2017) (mandatory 45 years); *Evans*, 2017 IL App (1st) 143562, ¶¶ 14-18, *pet. for leave to appeal pending*, No. 122701 (filed Sept. 19, 2017) (discretionary 90-year total sentence, or 45 years with day-for-day good-conduct credit).

at the earliest at age 66, which was 2 years over his life expectancy, was the equivalent of an unconstitutional mandatory natural life sentence. See *Buffer*, 2017 IL App (1st) 142931, ¶ 64.

¶ 81 Applying the rationale of *Buffer* and *Sanders* to the facts of this case, we are compelled to conclude that the intellectually disabled defendant, whose average life expectancy is at best 64[20] but who will not be released until he is at least 84, has similarly been condemned to spend the rest of his days in prison. This "unsurvivable" sentence is equivalent to natural life imprisonment, a sentence which the original sentencing judge, who presided over the trial, heard all the evidence, and viewed all the witnesses, believed was inappropriate. See *Reyes*, 2016 IL 119271, ¶¶ 8-9.

¶ 82 Moreover, the record indicates that the trial court was not presented with current evidence of and, thus, could not have fully considered the attendant characteristics of the defendant's intellectual disability.

¶ 83 In *Holman*, our supreme court held that in determining whether an error occurred in a defendant's original sentence, a reviewing court "must look at the cold record to determine if the trial court considered [the attendant characteristics of youth] at the defendant's original sentencing hearing." *Holman*, 2017 IL 120655, ¶ 47. As the court explained, "the only evidence that matters" is the evidence at the "defendant's original sentencing hearing." *Id.* Here, however, we are not determining whether an error occurred in the defendant's original sentence, since we have already determined that error did occur. Instead, we are deciding whether constitutional

[20]The defendant on appeal urges us to take judicial notice of the Central Intelligence Agency's website, which states that the average life expectancy of a male in the United States is 77 years. We need not do so, however, since we may rely on our prior holdings, which refer to the more specific life expectancy of the prison population. See *Buffer*, 2017 IL App (1st) 142931, ¶ 59; *Sanders*, 2016 IL App (1st) 121732-B, ¶ 26.

error occurred on resentencing. Under these circumstances, the "cold record" before us is the one from the resentencing hearing.

¶ 84 That "cold" record does not establish that the trial court had a proper opportunity to consider, much less that it did consider, the attendant characteristics of the defendant's intellectual disability and determined that the defendant was irretrievably depraved, permanently incorrigible, or irreparably corrupted beyond any possibility of rehabilitation so as to require a *de facto* life sentence. See *Id.* ¶ 46.

¶ 85 In *Coty II*, we noted that it was undisputed that, at the time of the offense, the defendant was intellectually disabled with an IQ score somewhere between 55 and 65 and that, as such, under our prevailing social norms his culpability was less than that of a person with normal cognitive capacity. *Coty II*, 2014 IL App (1st) 121799-U, ¶ 66 (citing *Atkins*, 536 U.S. at 305). We further found that while we in no way diminished the seriousness of the offense, that offense included a single, brief act of penetration that did not result in any injury to the victim. *Id.* ¶ 67. In addition, we found that the encounter was an isolated event and that it was neither preplanned nor orchestrated but, rather, seemingly impulsive. *Id.* We further stated that we were troubled by the fact that the original sentencing judge, who had the benefit of observing the defendant throughout trial, had expressed reservations about imposing a life sentence under these particular circumstances. *Id.* ¶ 68. We finally noted that, despite the defendant's cognitive impairments and the brief and limited, albeit serious, nature of his offense, the defendant had nonetheless been sentenced to the harshest penalty prescribed by our laws, which our jurisprudence dictates should be reserved for the most severe offense—murder. *Id.* ¶ 69 (citing *People v. Brown*, 2012 IL App (1st) 091940, ¶ 68, and *Kennedy v. Louisiana*, 554 U.S. 407 438 (2008)).

¶ 86 Although on remand from *Coty II*, the resentencing court was in possession of the trial record created in 2006, that record was void of any information about the state of the attributes of the defendant's intellectual disability in 2016. The new PSI ordered for purposes of resentencing contained no reference whatsoever to the defendant's intellectual disability. Instead, it noted that the defendant had stated that he had never been treated by a mental health professional. In this respect, we find very troubling that the public defender did not attempt on remand to have the defendant reevaluated or to introduce any evidence that would enlighten the trial court as to whether the defendant had been receiving any special services for his disability in the last 10 years of his incarceration or whether those services had any effect. As such, the resentencing court was without an iota of evidence from which to determine whether the defendant's cognitive ability, behavior, adaptability, or ability to comprehend the consequences of his actions had changed for better or worse in the 10 years of his imprisonment. Therefore, the trial court was without the necessary facts from which to determine whether the defendant could be restored to useful citizenship or whether he was so irretrievably depraved and of such danger of recidivism that a natural life sentence was warranted. Under these circumstances and in the context of our community's clearly evolving standards of decency, we are compelled to conclude that the imposition of a 50-year *de facto* life sentence on this particular defendant, without the procedural safeguards of *Atkins*, *Miller*, and its progeny, was a penalty so wholly disproportionate that it violated the moral sense of our community. See *Gipson*, 2015 IL App (1st) 122451, ¶ 72 ("[T]he proportionate penalties clause demands consideration of the defendant's character by sentencing a defendant with the objective of restoring the defendant to useful citizenship, an objective that is much broader than defendant's past conduct in committing the offense."). Accordingly, we find

the sentence unconstitutional under the proportionate penalties clause (Ill. Const. 1970, art. I, § 11).

¶ 87 We therefore vacate the defendant's sentence and remand for a new sentencing hearing before a different judge. On remand, we urge the public defender to have the defendant's mental health evaluated and to provide the court with as much information as possible as to the defendant's behavior and progress, or lack thereof, while in prison. We also instruct the trial court on remand to give serious consideration to the attendant characteristics of the defendant's intellectual disability and the fact that this disability "diminish[es] both [his] culpability and the need for retribution" particularly in the context of this, a nonhomicide offense. *Gipson*, 2015 IL App (1st) 122451, ¶ 74; see also *Atkins*, 536 U.S. at 320. In addition, we remind the trial court that, should it determine that there is a *bona fide* doubt of the defendant's fitness to be sentenced, it has the discretion to order a new fitness hearing to determine whether the defendant should continue to be housed in the general prison population or if he needs to be placed in a mental health facility where he can be treated for his intellectual disability before any sentence can even be imposed. 725 ILCS 5/104-11 (West 2016). Furthermore, because the defendant has already spent nearly 15 years in prison and this is the second time we are vacating his sentence, we instruct the trial court to act with the utmost expediency.

¶ 88 III. CONCLUSION

¶ 89 For all of the aforementioned reasons, we vacate the defendant's sentence and reverse and remand for a new sentencing hearing, with instructions.

¶ 90 Sentence vacated.

¶ 91 Reversed and remanded with instructions.

2014 IL App (1st) 12-1799-U

FOURTH DIVISION
August 28, 2014

No. 1-12-1799

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 04 CR 30062
WILLIAM COTY,	)	
	)	The Honorable
Petitioner-Appellant.	)	Nicholas Ford,
	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order dismissing the defendant's section 2-1401 petition is vacated. The circuit court improperly dismissed the defendant's petition, *sua sponte*, on the basis of timeliness. The circuit court also improperly dismissed the defendant's petition on the merits. While the court was correct that the defendant had failed to properly state a facial challenge to the mandatory sentencing scheme under which he was sentenced to natural life in prison without the possibility of parole, it erred in finding that the defendant had also failed to state an as-applied challenge to that sentencing scheme on the basis of the Illinois Constitution's proportionate penalties clause.

¶ 2 After a jury trial, the defendant, William Coty, who is mentally retarded[1], was convicted of one count of predatory criminal sexual assault of a child, one count of criminal sexual assault and one count of aggravated criminal sexual abuse against the six-year-old victim, K.W. Because the defendant had a prior conviction for aggravated criminal sexual assault, pursuant to section 12.14.1(b)(2) of the Criminal Code of 1968 (Criminal Code) (720 ILCS 5/12-14.1(b)(2) (West 2004)),[2] the circuit court had no discretion but to sentence him to mandatory natural life in prison without the possibility of parole. After his conviction and sentence were affirmed on appeal, the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/2-1401 (West 2004)), alleging that his mandatory natural life sentence was unconstitutional both under the Eight Amendment to the United States constitution (U.S. Const., amend. VIII) and the Illinois constitution (Ill. Const. 1970, art. I, § 11). The defendant asserted that the statutory scheme under which he was sentenced was facially unconstitutional because it categorically forbade the sentencing judge from considering his mental retardation and the circumstances of his offense. In the alternative, the defendant asserted that, in the very least, this statutory scheme, as applied to him violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970,

[1] We acknowledge that the term "mentally retarded" is not the politically correct term for describing a person, such as the defendant here, who is impaired by an intellectual handicap. Nevertheless, because both the trial court and the relevant case-law rely on this term, we too will use it for purposes of consistency.

[2] We note that section 12-14.1(b)(2) was recodified as 720 ILCS 5/11-1.40(b)(2) (West 2011) and became effective July 1, 2011.

art. I, § 11). The circuit court dismissed the defendant's petition, and the defendant now appeals. For the reasons that follow, we affirm in part and reverse in part.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. The defendant was arrested on November 21, 2004, and charged with, *inter alia*, predatory criminal sexual assault of a child, criminal sexual assault and aggravated criminal sexual abuse.

¶ 5 A. Pretrial Proceedings

¶ 6 Prior to trial, the State filed a motion to admit other crime's evidence, and following a hearing, the trial court granted that motion.[3] This evidence was not presented at trial for the jury; rather it was used only by the trial judge for sentencing purposes.

¶ 7 Prior to trial, the trial court also conducted a fitness hearing. The State called Dr. Debra Ferguson, a forensic clinical services psychologist who admitted that the defendant's full scale IQ was 65, but who testified that the defendant was fit to stand trial. The defendant called Dr. Sandra Dawkins who testified that the defendant's full scale IQ was 55 and that he was unfit to stand trial. After hearing evidence and arguments by both parties, the circuit court found that although it was undisputed that the defendant was "mentally retarded," he was nevertheless fit to stand trial.

¶ 8 The defendant then filed a motion to suppress his inculpatory statements to police. At the

[3] The other crimes evidence consisted of the defendant's 1988 conviction for aggravated criminal sexual assault in case No. 88 CR 12137, involving a 9-year-old victim, for which the defendant was sentenced to six years' imprisonment.

hearing on the motion to suppress, the State called Sergeant Charles Battaglia who testified that he and his partner Detective Eileen O'Donnell, interviewed the defendant on November 22, 2004 at the police station. Sergeant Battaglia averred that he read the defendant the *Miranda* warnings, after which, the defendant agreed to answer their questions. Sergeant Battaglia also testified that after this interview, Cook County Assistant State's Attorney (ASA) Dean Fugate re-*Mirandized* the defendant and thereafter took the defendant's handwritten statement.

¶ 9 The State also called their expert forensic psychologist, Dr. Ferguson, who was tasked with determining whether the defendant was capable of understanding his *Miranda* rights. Dr. Ferguson averred that she interviewed the defendant and performed one part of the "Grisso scales" test--the "Function of Rights in Interrogation"-- to assess the defendant's capacity to understand his *Miranda* rights.[4] According to Dr. Ferguson, the defendant successfully applied the *Miranda* warnings he had received to a hypothetical situation, and therefore passed this portion of the "Grisso scales" test. Dr. Ferguson also averred that during her interview with the defendant, the defendant exhibited an understanding of his *Miranda* rights. In particular, Dr. Ferguson explained that the defendant had acknowledged to her that the police read him his *Miranda* rights. When asked to explain what those rights entailed, the defendant told Dr. Ferguson that "yeah I know they (*sic*) supposed to read you your rights *** I'm slow but I ain't

[4] The "Grisso scales" test, otherwise knowing as the *Comprehension of Miranda Rights: Manual for Administration and Scoring* provides four instruments by which mental health professionals may asses the capacity of individuals to appreciate and understand the significance of their Miranda rights. These include: (1) the comprehension of *Miranda* rights; (2) the comprehension of *Miranda* rights recognition; (3) the comprehension of *Miranda* vocabulary and (4) the function of rights in interrogation.

that slow. They have to read you your rights. They can't just lock you up like that without reading you your rights."

¶ 10 In opposition to the State's testimony, at the motion to suppress hearing, the defendant called his own expert, Dr. Michael Fields, who testified that he administered the full Grisso-scales test to the defendant to determine his understanding of the *Miranda* warnings. Dr. Fields testified that the defendant scored poorly on all four parts of the Grisso-scales test. In addition, he stated that during his interview with the defendant, the defendant could not name his *Miranda* rights. Based on the above, Dr. Fields opined that "there were significant doubts about [the defendant's] ability to understand *Miranda*." However, when questioned further, Dr. Fields acknowledged that he could not state with certainty that the defendant was categorically unable to understand his *Miranda* rights.

¶ 11 After hearing the testimony and argument by the parties, the circuit court denied the defendant's motion to suppress his statements to police. In doing so, the court noted that Dr. Ferguson's interview provided the stronger and better evidence of the defendant's capacity. The court stated that Dr. Fields articulated an equivocal opinion that lacked certainty, and that his opinion was based more on testing rather than on a clinical interview of the defendant.

¶ 12 B. Jury Trial

¶ 13 At trial, the victim K.W., testified that she was six years old in November 2004 and that the defendant, whom she knew as "Shakey," lived as a boarder in her grandparents' house. The victim lived with her grandparents, her parents, her siblings, her cousin and "Shakey." The defendant lived in the basement, as did K.W.'s parents and siblings, and K.W. was allowed to sleep in the basement or upstairs with her grandparents. K.W. testified that on November 18, 2004, she was watching TV alone in the defendant's room in the basement, while her parents and

cousin were asleep. She stated that she was wearing a T-shirt, skirt and underwear. K.W. averred that the defendant came into the room and sat down on the couch with her. He then started to "scooch" toward her and every time she moved away, he moved closer until she could no longer move. K.W. stated that the defendant then touched her arm, her shoulder, her leg, and then "started messing with me down there." She identified that part of her body as the "part that [she] use[s] to go to the bathroom with." K.W. then explained that the defendant had "not [touched her] with his hand, but with his tongue" and indicated that she was on the floor when he pushed her underwear to the side of her leg and did so. The defendant then told K.W., "you won't tell anyone." K.W. immediately went and woke her mother, and told her that the defendant had "messed with her down there."

¶ 14 On cross-examination, K.W. denied telling the police that the defendant touched her vagina with his hand, and insisted that she told them he had used his tongue. She similarly admitted that she did not tell the emergency room physician that the defendant had used his tongue. When asked to explain why she did not tell the emergency doctor that the defendant had licked her instead of touched her, K.W. stated that she forgot.

¶ 15 K.W.'s mother, Keafa W., testified that on the night in question at about 11 p.m., K.W. came into her room. K.W. told Keafa, "Shakey touched me" and then patted her vaginal area to show her mother where she had been touched. Keafa woke her husband up and they went upstairs with K.W. to talk to K.W.'s grandparents. While they were upstairs, Keafa heard the front door close and her husband observed the defendant leaving.

¶ 16 On cross-examination, Keafa admitted that K.W. never told her that the defendant licked her, and that she only accused him of "touching her." Keafa also acknowledged that she did not call the police until the next afternoon, November 19, 2004. She explained, however, that she waited

until the next afternoon because she was under the misapprehension that K.W.'s grandparents were going to call the police.

¶ 17 Pediatric emergency physician Dr. Gail Allen testified that she examined K.W. on November 21, 2004. Dr. Allen stated that on that date K.W. was six years old and weighed 53 pounds. According to Dr. Allen, K.W. pointed at her vagina, and told her that the defendant had "touched her." Dr. Allen stated that she conducted a physical examination of K.W. but that the exam was normal and that she found no signs of penetration, trauma, or "touching." She explained, however, that in her experience this was common in abuse cases because evidence of trauma is usually seen if the child is examined immediately after the traumatic event or if there was "repeated, repetitive trauma over a chronic period" of time.

¶ 18 On cross-examination, Dr. Allen acknowledged that K.W. did not tell her that the defendant had touched her with his tongue. She also admitted that K.W.'s chart from the emergency room visit revealed that K.W. had told a resident that she was wearing shorts, and not a skirt on the night of the incident. On redirect examination, however, Dr. Allen testified that accorindg to the resident's notes K.W. had stated that the defendant looked "down there," that he had touched her "down there," and that he had "put his finger in the hole and moved it around in circles."

¶ 19 Chicago police officer Donald Story testified that at about midnight on November 21, 2004, he and his partner, Officer Elkins, arrested the defendant at his sister's home. Once in the police car, Officer Elkins gave the defendant his *Miranda* rights, and asked him if he wanted to answer the police officers' questions. According to Officer Story, the defendant agreed and asked what the arrest was about. Upon being told of the allegations, the defendant told the officers that K.W. "came into [his] room, sat on [his] lap, [and] rubbed around a little bit and." Once at the station, Officer Story contacted Area 1 police.

¶ 20 Detective Eileen O'Donnell next testified that she and her partner, Detective Battaglia were assigned to investigated K.W.'s case on November 21, 2004. The next day, after hearing K.W.'s victim sensitive interview, they proceeded to interview the defendant. According to Detective O'Donnell, Detective Battaglia read the defendant the *Miranda* warnings and the defendant agreed to speak with the detectives. After the interview, Detective O'Donnell contacted felony review.

¶ 21 ASA Dean Fugate next testified that he arrived at the police station on November 22, 2004, and spoke to the defendant in an interview room in the presence of the two detectives. Fugate averred that he gave the defendant his *Miranda* warnings from memory and explained to him who he was, and that the defendant indicated that he understood his rights and was willing to speak to him. Fugate and the defendant then had a 15-minute conversation, at the end of which the defendant agreed to memorialize his statement in writing. After Fugate asked the defendant to read the *Miranda* warnings on the form for the handwritten statement, he learned that he defendant was illiterate. Fugate therefore read the *Miranda* rights to the defendant from that printed form and had him sign his name on the form. According to Fugate, the defendant was able to sign his name. Fugate then took down a handwritten statement, after which the defendant, Fugate and the two detectives signed each page.

¶ 22 The defendant's handwritten statement was then published to the jury. In that statement, the defendant stated that he was 46 years old and that in November 2004, he rented a room in the basement of 7036 South Aberdeen Avenue in Chicago, where he shared the basement with K.W. and her family. The defendant stated that on November 18, 2004, he was changing his clothes in his bedroom with his door open when K.W. walked into the room. The defendant told K.W. to leave but she would not. The defendant stated that he finished changing his clothes behind a

curtain and then sat on his couch. He averred that K.W. then sat on his lap and "began grinding her butt on his lap." The defendant stated that "his penis was hard" but claimed that he and K.W. were both clothed.[5] He stated that he then placed his right hand underneath K.W.'s clothes and touched her vagina. He admitted that the "inserted his finger into [K.W.'s] vagina up to the first joint. The defendant stated that he did not move his finger inside of K.W.'s vagina and that he kept it inside only for "one minute." The defendant averred that K.W. said "that feels good."

¶ 23 In his handwritten statement, the defendant further stated that K.W. pulled her shorts and panties down to her knees before sitting on his lap. He then stated that she was not wearing pants when she was seated on his lap. The defendant also stated that after K.W. got off his lap and pulled her pants up, she left the room and he saw her go upstairs with her parents into her grandparents' room. The defendant then left the house out of the front door and went to his sister's house. He also stated that he "felt bad that he touched the little girl" and that he was aware that she was six years old.

¶ 24 In his statement, the defendant also indicated that he understands and writes English, but that he cannot read it, and that he was treated well by the police officers.

¶ 25 After the defendant's statement was read into the record, the State rested. The defense presented no witnesses and the parties proceeded to closing arguments. After arguments were heard, the jury deliberated and returned a verdict of guilty on all three counts. The defendant's motion for a new trial was denied.

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[5] Fugate testified that during his interview with the defendant, the defendant initially told him that the victim's pants were on throughout the incident, but that afterwards, while Fugate was taking down the handwritten statement, he indicated that the victim removed her pants during the incident.

¶ 26 On November 17, 2006, the court held a sentencing hearing, wherein the defendant's sister, Irma Coty testified regarding his mental disabilities, Irma testified that the defendant has been mentally retarded since he was born, and that he does "not understand what is going on," and needs psychiatric treatment. The presentence investigation report, which was admitted into the record, revealed that the defendant attended special education classes in the Chicago Public School system up until the eighth grade, and that he receives social security disability from the State of Illinois because of his mental health. The report further revealed that the defendant's sister Irma, "takes care of him, handles his finances and helps him with his daily routine." Despite this evidence, based upon the defendant's prior conviction for aggravated criminal sexual assault in case No. 88 CR 12137, the court sentenced the defendant to natural life in prison, pursuant to the mandates of section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)). In doing so, the trial judge noted that he would not have sentenced the defendant to life, but that he was bound by statute to do so. As the court explained:

> "[T]he parties recognize that the court's hands are tied because of the prior conviction for aggravated criminal sexual assault, which makes this conviction one for which he must receive a sentence of life imprisonment without parole. The facts of the cause certainly warrant a substantial sentence here. It would not be the sentence that the court is required to give, had I any discretion, but I must follow the law nonetheless. The legislature has determined a second aggravated criminal sexual assault in one's lifetime means what they say it means."

¶ 27 C. Direct Appeal

¶ 28 The defendant subsequently appealed his conviction, arguing that: (1) he was convicted of

an "uncharged form of predatory criminal sexual assault, specifically 'oral genital contact' "; (2) the testimony of Dr. Allen was inadmissible hearsay and violated the defendant's right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004) because the physician relied on a resident's findings in forming her medical opinion; (3) he was denied his right to a fair trial because of improper prosecutorial comments; and (4) he was denied his right to effective representation of counsel where counsel failed to object to the prosecutor's comments and failed to impeached K.W.'s trial testimony with her prior inconsistent statements. See *People v. Williams*, No. 1-06-3530 (unpublished order pursuant to Supreme Court Rule 23). On March 27, 2009, this court rejected the defendant's claims and affirmed his conviction and sentence. *People v. Williams*, No. 1-06-3530 (unpublished order pursuant to Supreme Court Rule 23) (2009). The defendant's petition for leave to appeal to the Illinois Supreme Court was denied on September 30, 2009. See *People v. Williams*, 233 Ill. 2d 571 (2009).

¶ 29 D. Petition for Relief from Judgment

¶ 30 On March 8, 2012, the defendant filed the instant *pro se* section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)), alleging that his mandatory natural life sentence was unconstitutional because the trial court was prohibited from considering his individual characteristics (namely his mental retardation) and the seriousness of the offense in ordering that sentence. The defendant acknowledged that his petition was untimely under the statute (735 ILCS 5/2-1401 (West 2012)), but claimed that his sentence was void and that therefore he could challenge it at any time. The defendant asked that the circuit court vacate his sentence and remand for resentencing in the 6 to 30 year range. The State did not file any response to the defendant's petition.

¶ 31 On May 10, 2012, the circuit court *sua sponte* denied the defendant's petition. In its written

order, the court first held that the petition was untimely because it was filed over five years after the defendant's conviction, on October 11, 2006, which was contrary to the mandate of the statute that it be filed within two years after the entry of final judgment. See 735 ILCS 5/2-1401 (West 2012). The court also found that the defendant's constitutional argument did not fall within the purview of a section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)) because it addressed errors of law, rather than errors of fact. The court explained that the petition merely argued mitigating factors, which had already been addressed at trial, and did not address any new issues of fact. The court then nonetheless considered the merits of the defendant's argument and found that the defendant failed to establish that the sentencing scheme under which he was sentenced to life imprisonment was either facially unconstitutional or unconstitutional as applied to him.[6] The defendant now appeals the dismissal of his section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)).

¶ 32 II. ANALYSIS

¶ 33 We begin by setting forth the well-established principles regarding such petitions. Section 2-1401 of the Civil Procedure Code (735 ILCS 5/2-1401 (West 2008)) provides a comprehensive statutory procedure by which final orders, judgments, and decrees may be

[6] In doing so, the circuit court noted that the defendant had incorrectly stated in his petition that he was sentenced pursuant to 730 ILCS 5/5-5-3(c)(8) (West 2004), when in fact he was sentenced pursuant to 720 ILCS 5/12-14.1(b)(2) (West 2004). The court then analyzed the constitutionality of 720 ILCS 5/12-14.1(b)(2) (West 2004), the actual sentencing scheme under which the defendant was sanctioned to natural life imprisonment. On appeal, both parties proceed to argue the merits of the constitutionality of the proper section under which the defendant was sentenced, and we will do the same.

vacated after 30 days from their entry. *In re Dar. C.*, 2011 IL 111083, ¶ 104; *People v. Vincent*, 226 Ill. 2d 1, 7 (2007); *People v. Haynes*, 192 Ill. 2d 437, 460 (2000); see also *Mills v. McDuffa*, 393 Ill. App. 3d 940, 945 (2009). To obtain relief under section 2-1401, a defendant must establish "proof, by a preponderance of the evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8; see also *People v. Pinkolsky*, 207 Ill. 2d 555, 566 (2003). Although the statute is ordinarily used to correct errors of fact, our supreme court has repeatedly held that it may also be used to challenge judgment claimed to be defective for legal reasons. See *e.g.*, *People v. Lawton*, 212 Ill. 2d 285, 297 (2004) (holding that section 2-1401 petition could be used by the defendant to make a constitutional challenge that he was denied effective assistance of counsel); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002) (holding that the Chicago Board of Education could use a section 2-1401 petition to challenge the prior judgment against it on the grounds that the manner in which it had been served did not comply with statutory requirements). In particular, our supreme court has held that a defendant may use a section 2-1401 to make an argument alleging that his sentence is void. See *People v. Harvey*, 196 Ill. 2d 444, 447 (2001) (holding that a defendant may proceed under a section 2-1401 in raising an unsuccessful challenge to an extended-term sentence based on a claim that it did not meet the requirements of the sentencing statute).

¶ 34 Where the claims in a section 2-1401 petition are insufficient to warrant relief as a matter of law, the circuit court may *sua sponte* dismiss the petition with prejudice or deny relief, even where the State has not filed any responsive pleading to such a petition. *Vincent*, 226 Ill. 2d at 12. We review a circuit court's order dismissing a section 2-1401 petition *de novo*. *Vincent*, 226

Ill. 2d at 18. In doing so, we are mindful that we are not bound by the reasons relied upon by the circuit court and may affirm on any basis supported by the record. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008)).

¶ 35 A. Timeliness

¶ 36 The State initially contends that the circuit court properly dismissed the defendant's petition as untimely. It is well-established that a section 2-1401 petition must be filed within two years after entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (West 2008); see also *Vincent*, 226 Ill. 2d at 7; *People v. Pinkolsky*, 207 Ill. 2d 555, 566 (2003). The two-year filing period, however, will be excused where a clear showing has been made that the person seeking relief is: (1) under legal disability or duress or (2) the grounds for relief are fraudulently concealed. *Pinkolsky*, 207 Ill. 2d at 566; see also *Mahaffey*, 194 Ill. 2d at 181-82. In addition, the two-year limitations period does not apply to petitions brought on voidness grounds. *Sarkissian*, 201 Ill. 2d at 104; see also *People v. Morfin*, 2012 IL App (1st) 103568 ¶ 30 ("A petition challenging a judgment as void is not subject to the limitations period ***."); see also 735 ILCS 5/2-1401(f) (West 2004) ("[n]othing contained in this Section affects any existing right to relief from a void order or judgment ***.")

¶ 37 The State contends that the circuit court properly dismissed the defendant's petition as untimely because the defendant's sentence was not void but rather only voidable. In support the State cites to *People v. Gray*, 2013 IL App (1st) 112572. In that case, this appellate court addressed the issue of what constitutes voidness for purposes of a section 2-1401 petition. See *Gray*, 2013 IL App (1st) 112572. There, a juvenile defendant was found guilty of first degree murder through accountability and because he had a prior murder conviction, by statute he received a mandatory life sentence. See *Gray*, 2013 IL App (1st) 112572, ¶ 3 (citing 730 ILCS

5/5-8-1(a)(1)(c)(i) (West 2004)). The *Gray* defendant filed a section 2-1401 petition about ten years after his sentencing, arguing that the two-year limitation period should not apply to his petition because the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), had rendered his mandatory life sentence void.[7] *Gray*, 2013 IL App (1st) 112572, ¶ 8. The State filed a motion to dismiss the defendant's petition, arguing, *inter alia*, that it was not filed in a timely manner. *Gray*, 2013 IL App (1st) 112572, ¶ 5. The circuit court granted the State's motion and the defendant appealed. *Gray*, 2013 IL App (1st) 112572, ¶ 5.

¶ 38 On appeal, the defendant in *Gray* argued that "a sentence which *** violates the constitution is void from its inception and may be challenged at any time." *Gray*, 2013 IL App (1st) 112572, ¶ 8. We disagreed. In addressing the voidness issue, we initially explained that our supreme court has repeatedly held that a judgment is void, rather than voidable, only if the court that entered it lacked jurisdiction, *i.e.,* lacked personal or subject matter jurisdiction or, the power to render a particular judgment. *Gray*, 2013 IL App (1st) 112572, ¶ 10. We explained that "the power to render a particular judgment" does not necessarily mean that the judgment rendered is one that should have been rendered. *Gray*, 2013 IL App (1st) 112572, ¶ 10. Rather, as we noted "the power to decide carries with it the power to decide wrong, as well as right, and a court [does] not lose jurisdiction merely because it make a mistake in the law, the facts or both." *Gray*, 2013 IL App (1st) 112572, ¶ 10.

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[7] As shall be more fully discussed below, in *Miller*, the United States Supreme Court held that a statutory scheme that imposed a mandatory natural-life sentence on a minor violated the eighth amendment's prohibition against cruel and unusual punishment. See *Miller*, 567 U.S. __, 132 S. Ct. 2455.

¶ 39 Based on the aforementioned principles, we next distinguished between a facially unconstitutional sentencing statue and one that could be either constitutionally or unconstitutionally applied. *Gray*, 2013 IL App (1st) 112572, ¶¶ 10-12. We explained that "[a] statue that is unconstitutional on its face--that is, where no set of circumstances exists under which it would be valid—is void *ab initio*, while a statute that is merely unconstitutional as applied is not." *Gray*, 2013 IL App (1st) 112572, ¶ 10. We then held that notwithstanding *Miller*'s prohibition of mandatory life sentences for minors, the challenged sentencing statute was not void, because it could be constitutionally applied to adult defendants. *Gray*, 2013 IL App (1st) 112572, ¶ 11. Accordingly, we concluded that because the defendant's sentence was not void, but merely voidable, he could bring a challenge to his sentence by way of a section 2-1401 only if he did so in a timely manner, *i.e.*, within the statutorily prescribed two-year limitation period. *Gray*, 2013 IL App (1st) 112572, ¶ 12.

¶ 40 The defendant acknowledges the holding in *Gray*, but asserts that it is inapplicable since in that case the State filed a motion to dismiss on the basis of timeliness, whereas here, the circuit court improperly *sua sponte* dismissed the defendant's petition on that basis. For the reasons that follow, we agree.

¶ 41 The record below reveals that unlike in *Gray*, the State here never challenged the defendant's petition on the basis of timeliness. In fact, the State filed *no* responsive pleading to the defendant's *pro se* petition with the circuit court. Rather, the court *sua sponte* dismissed the petition, *inter alia*, on the basis of timeliness. The court, however, was without authority to do so.

¶ 42 It is well-settled that while a trial court may *sua sponte* dismiss a section 2-1401 petition

when that petition is without merit (*People v. Berrios*, 387 Ill. App. 3d 1061, 1063 (2009) (citing *Vincent*, 226 Ill. 2d at 8-12); *People v. Malloy*, 374 Ill. App. 3d 820, 823-24 (2007)), it may not do so on the basis of timeliness. See *Malloy*, 374 Ill. App. 3d at 823-24. The reason is that the two-year period contained in section 2-1401 is a statute of limitations rather than a jurisdictional prerequisite. *Berrios*, 387 Ill. App. 3d at 1063; see also *Malloy*, 374 Ill. App. 3d at 823-24. As such, the State must assert the time limitation as an affirmative defense and the trial court may not, *sua sponte*, dismiss the petition on the basis of timeliness. *Berrios*, 387 Ill. App. 3d at 1063; see also *Malloy*, 374 Ill. App. 3d at 823-24 (holding that because the two-year limitation period for filing petitions for relief from judgment pursuant to section 2-1401 of the Civil Procedure Code is a statue of limitations, it "must be asserted as an affirmative defense by the State" and the trial court "may not dismiss [such] a petition *** on its own motion, on the basis of timeliness."); see also *People v. Ross*, 191 Ill.App.3d 1046, 1053 (1989) (holding that the section 2-1401 time period is a procedural limitation that may be waived by the State if not asserted); see also *People v. Smith*, 386 Ill.App.3d 473, 476 (2008) (holding that a trial court may dismiss a section 2-1401 petition *sua sponte* on any basis, *except* for timeliness); see also *People v. Harvey*, 196 Ill.2d at 447 (referring to the two-year time period in section 2-1401 as a "limitations period" and implying that it can be waived). Under the aforementioned principles we conclude that the circuit court's dismissal of the defendant's section 2-1401 petition on the basis of timeliness was improper. Accordingly, we proceed to address the merits of the defendant's petition.

¶ 43 B. Facial Unconstitutionality

¶ 44 On appeal, the defendant first contends that the trial court erred when it dismissed his section

2-1401 because he made a well-founded claim that the mandatory sentencing scheme under which he was sentenced to natural life imprisonment, without the circuit court being permitted to consider any of his personal characteristics, namely his mental retardation, violates the eight amendment of the United States Constitution. In support of his contention, the defendant cites to the recent decisions by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), *Roper v. Simmons*, 543 U.S. 551, 560 (2005), *Miller*, 567 U.S. at __, 132 S. Ct. at 2463, and *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

¶ 45 *Roper*, *Graham*, and *Miller* form a line of United States Supreme Court decisions that address how the eighth amendment's ban on "cruel and unusual punishments" applies to sentencing juveniles. In those cases, the Court recognized three general differences between juveniles under 18 and adults, which render their irresponsible conduct less morally reprehensible than that of adults. See *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70. These are: (1) that juveniles have a lack of maturity and underdeveloped sense of responsibility; (2) that they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and (3) that their character is not as well formed as that of an adult. See *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70.

¶ 46 On the basis of the aforementioned principles, in *Roper*, 543 U.S. at 578, the Court specifically held that the eight amendment forbids the imposition of the death penalty "on offenders who [are] under the age of 18 when their crimes [are] committed." Subsequently, in *Graham*, 560 U.S. at 74, the Court held that the eighth amendment prohibits the sentence of natural life without the possibility of parole "for a juvenile offender who did not commit homicide." The Court further held that the "State need not guarantee the offender eventual

release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 560 U. S. at 82.

¶ 47 Most recently, in *Miller*, the Court considered appeals by two 14-year-olds, convicted of murder and sentenced to life imprisonment without the possibility of parole, under sentencing schemes that did not permit the sentencing authority to have any discretion in imposing different punishment. *Miller*, 567 U.S. at __, 132 S. Ct. at 2460. Relying on its earlier decisions in *Roper* and *Graham*, the Court in *Miller* recognized that "children are constitutionally different from adults for purposes of sentencing" (*Miller*, 567 U.S. at __, 132 S. Ct. at 2464), and that "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Miller*, 567 U.S. at __, 132 S. Ct. at 2468. The Court explained that a mandatory sentence precludes consideration of mitigating factors, such as: the juvenile's age and its attendant characteristics; the juvenile's family and home environment and the circumstances of the offense, including the extent of the juvenile's participation therein and the effect of any familial or peer pressure; the juvenile's possible inability to interact with police officers or prosecutors, or incapacity to assist his or her own attorneys; and "the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 567 U.S. at __, 132 S. Ct. at 2468.

¶ 48 Based on the above, the Court found that "[a] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at __, 132 S. Ct. at 2475. The court then held that "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes," the mandatory sentencing schemes before it "violated the principle of proportionality," and thereby

the eighth amendment's prohibition against cruel and unusual punishment. *Miller*, 567 U.S. at __, 132 S. Ct. at 2475.

¶ 49 In its decision in *Miller*, the Court refused to hold categorically that a juvenile can never receive life imprisonment without parole for a homicide offense. *Miller*, 567 U.S. at __, 132 S. Ct. at 2469. Nevertheless, the Court stated that "given all we have said in *Roper*, *Graham*, and this decision ***, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 567 U.S. at __, 132 S. Ct. at 2469.

¶ 50 On appeal, the defendant contends that under the principles of *Miller*, *Roper* and *Graham* we must find that the statutory scheme under which he was sentenced to mandatory life imprisonment is also facially unconstitutional. The defendant was sentenced to natural life imprisonment pursuant to section 12-14.1(b)(2) of the Criminal Code. 720 ILCS 5/12-14.1(b)(2) (West 2004). That section provides in pertinent part:

> "A person who *** is convicted of the offense of predatory criminal sexual assault of a child after having previously been convicted of the offense *** of aggravated sexual assault *** shall be sentenced to a term of natural life imprisonment." 720 ILCS 5/12-14.1(b)(2) (West 2004).

¶ 51 The defendant asserts that because under the aforementioned statutory scheme the trial court had no discretion to consider his personal characteristics, most importantly his mental retardation, but also the particular circumstances of this offense, the statutory scheme itself is unconstitutional. The defendant acknowledges that *Miller*, *Roper* and *Graham*, apply to juveniles, but asserts that the principles articulated in those cases apply with full force to mentally retarded individuals. In support, he relies on *Atkins*, 536 U.S. at 318.

¶ 52 In *Atkins*, the United States Supreme Court held that the death penalty "is not a suitable

punishment for a mentally retarded criminal." *Atkins*, 536 U.S. at 321. In doing so, the Court recognized that although mentally retarded individuals "frequently know the difference between right and wrong and are competent to stand trial," because of their impairments, they nevertheless, have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." *Atkins*, 536 U.S. at 305. The Court further noted that "[t]here is no evidence that [mentally retarded individuals] are more likely to engage in criminal conduct than others, but [that] there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Atkins*, 536 U.S. at 305. Accordingly, the Court in *Atkins* held that while mentally retarded individual's deficiencies "do not warrant an exemption from criminal sanctions, *** they do diminish their personal culpability." *Atkins*, 536 U.S. at 305.

¶ 53 The defendant argues that while he does not face the death penalty, like the defendant in *Atkins* did, the concerns outlined in *Atkins* remain relevant in light of the evidence of his mental deficiencies and his resulting diminished personal culpability. He asserts that section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)) is facially unconstitutional because it does not permit the trial court, under any circumstances to consider mental retardation and its relevant mitigating factors in sentencing a defendant. While we agree with the defendant that pursuant to *Atkins* the United States Supreme Court has made it clear that mentally retarded individuals should not be held to the same level of culpability as other adults, for the reasons that follow, we nevertheless must reject the defendant's facial challenge to the

constitutionality of section 12-14.1(b)(2) of the Criminal Code. 720 ILCS 5/12-14.1(b)(2) (West 2004).

¶ 54 A facial challenge to the constitutionality of a statute "is the most difficult challenge to mount." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008); *People v. Greco*, 204 Ill. 2d 400, 407 (2003). A statute is facially unconstitutional only if there are no circumstances in which the statute could be validly applied. *Napleton*, 229 Ill. 2d at 306. The fact that the statute could be found unconstitutional under some set of circumstances does not establish the facial invalidity of the statute. *In re Parentage of John M.,* 212 Ill. 2d 253, 269 (2004). Thus, a facial challenge must fail if any situation exists where the statute could be validly applied. *In re M.T.*, 221 Ill. 2d 517, 533 (2006) (and cases cited therein).

¶ 55 In the present case, there is nothing in section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)), which would lead us to conclude that it cannot or should not validly be applied to adults who are not mentally retarded. The legislature has found it fit to mandate a sentence of natural life without the possibility of parole to defendants who have committed the offense of predatory criminal sexual assault of a child after already having previously been convicted of the offense of aggravated sexual assault. 720 ILCS 5/12-14.1(b)(2) (West 2004). The purpose of the statute is clear, to prevent recidivism. Accordingly, because there are situations where the statue can be validly applied to adults with full mental capacity, we cannot find that the statute itself is facially unconstitutional. See *People v. Davis,* 2014 IL 115595, ¶ 30.

¶ 56 In coming to this conclusion, we find our supreme court's recent decision in *Davis*, 2014 IL 115595, instructive. In that case, a juvenile defendant, *inter alia*, challenged section 5-8-1(a)(1)(c) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c) (West 1992), which

provided that the trial court "shall" sentence a defendant convicted of murder of more than one person to a term of natural life in prison. The defendant argued that this sentencing statute was facially unconstitutional, and violated the eighth amendment's prohibition against cruel and unusual punishments because it not permit the sentencer under any circumstances to consider the defendant's age and its relevant mitigating factors. *Davis*, 2014 IL 115595, ¶ 28. In mounting his constitutional challenge to the aforementioned statute, the defendant in *Davis*, just as the defendant, here, relied on the recent decision of the United States Supreme Court in *Miller*, 567 U.S. at __, 132 S. Ct. at 2470.

¶ 57 In rejecting the defendant's argument, our supreme court in *Davis*, recognized the holding in *Miller*, but noted that its prohibition of mandatory sentence of life without parole was limited to juveniles. *Davis*, 2014 IL 115595, ¶ 29. The court explained that, even under *Miller*, the sentencing statute challenged by the defendant, could still be validly applied to adults. *Davis*, 2014 IL 115595, ¶ 30. Accordingly, the court refused to find the statute facially unconstitutional. *Davis*, 2014 IL 115595, ¶ 30.

¶ 58 Applying the aforementioned rationale of *Davis* to the cause at bar, we too are compelled to reject the defendant's facial challenge to section 12-14.1(b)(2) of the Criminal Code. 720 ILCS 5/12-14.1(b)(2) (West 2004). *Davis*, 2014 IL 115595, ¶ 30. Because section 12-14.1(b)(2) can and, as shall be more fully discussed below, has been found to properly apply to adults (see *e.g.*, *People v. Huddleston*, 212 Ill. 2d 107 (2004); *People v. Peters*, 2011 IL (1st) 092830), we find that the statute is facially constitutional.

¶ 59 In coming to this decision, we also find relevant that as of now, there is no Illinois or United States Supreme Court decision that stands for the proposition that a sentencing statute mandating life imprisonment without the possibility of parole for mentally retarded individuals, without

permitting the sentencer to take into account the defendant's mental capacity, is facially unconstitutional. In fact, the few Illinois cases that have previously addressed this issue, albeit before the United States Supreme Court decided *Miller*, have upheld such statutes. See *e.g., People v. Brown*, 2012 IL App (1st) 091940 (rejecting the defendant's attempt to facially challenge his statutorily mandated sentence of natural life in prison without the possibility of parole for a mentally retarded defendant convicted of two first-degree murders under a theory of accountability); *People v. Rice*, 257 Ill. App. 3d 220, 228-29 (1993) (holding that the multiple-murder sentencing statute as applied to a mentally retarded juvenile offender does not violate the eighth amendment of the United States Constitution). What is more, even *Miller*, upon which the defendant relies, rejected a categorical ban on mandatory life sentences for juveniles. *Miller*, 567 U.S. at __, 132 S. Ct. at 2469. Accordingly, for all of the aforementioned reasons we reject the defendant's argument.

¶ 60 C. As Applied Challenge--Proportionate Penalties Clause

¶ 61 The defendant next asserts that section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)), under which he was sentenced to natural life in prison, as applied to him, violates the Illinois Constitution's proportionate penalties clause (Ill. Const. 1970, art. I, § 11). The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective or restoring the offender to useful citizenship." Ill. Const. 1970, art I., § 11. A sentence violates the proportionate penalties clause if: (1) the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; or (2) similar offenses are compared and the conduct that creates a less serious threat to the public health and safety is punished more harshly. *People v. Sharpe*, 216 Ill. 2d 481, 519 (2005);

People v. Huddleston, 212 Ill. 2d 107, 120 (2004); see also *People v. Miller*, 202 Ill. 2d 328, 338 (2002); *People v. Farmer*, 165 Ill. 2d 194, 209-10 (1995); *People v. Steppan*, 105 Ill. 2d 310, 320 (1985). In the instant case, the defendant contends that section 12-14.1(b)(2) (720 ILCS 5/12-14.1(b)(2) (West 2004)) fails under the first test. For the reasons that follow, we agree.

¶ 62 In determining whether a statute is unconstitutional as applied to a defendant because it shocks to the moral sense of the community, our supreme court has explained:

> "When the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual, or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment not known to the common law, or is a degrading punishment which had become obsolete in the State prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community." *Miller*, 202 Ill. 2d at 339 (citing *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 421–22, 36 N.E. 76 (1894)).

In this context, however, our supreme court has refused to define what kind of punishment constitutes "cruel," "degrading," or "so wholly disproportionate to the offense as to shock the moral sense of the community." *Miller*, 202 Ill. 2d at 339. Its rationale has been that "as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Miller*, 202 Ill. 2d at 339 (citing *Trop*, 356 U. S. at 101) (whether a punishment shocks the moral sense of the community is based upon an "evolving standard[ ] of decency that mark[s] the progress of a maturing society")).

¶ 63 We therefore review the gravity of the defendant's offense in connection with the severity of

the statutorily mandated sentence within our community's evolving standard of decency. *Miller*, 202 Ill. 2d at 339 (citing *Trop*, 356 U. S. at 101). Thus far, that standard has evolved to prohibit the imposition of the death penalty on juveniles and mentally retarded offenders. *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70; *Atkins*, 536 U.S. at 321. More recently, it has also evolved to condemn, albeit in a very particular set of circumstances, the imposition of mandatory life imprisonment on juveniles, where the trial court is not given an opportunity, in the very least, to consider mitigating factors before imposing such a penalty. See *Miller*, 567 U.S. at __, 132 S. Ct. at 2475 ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

¶ 64 In *Miller*, our supreme court held that imposing mandatory sentence of life without the possibility of parole on a juvenile offender convicted of murdering more than one victim under a theory of accountability and without considering the facts of the crime, including the defendant's age, offended the Illinois Constitution's proportionate penalties clause and was unconstitutional as applied to the defendants. See *Miller*, 202 Ill. 2d at 339-42. Our supreme court held the mandatory life sentence for the 15-year-old look out was "particularly harsh and unconstitutionally disproportionate," because it "grossly distort[ed] the factual realities of the case and [did not] accurately represent[] [the] defendant's personal culpability." *Miller*, 202 Ill. 2d at 341. In coming to this decision, the court, *inter alia*, noted the longstanding distinction between the culpability of adults and juveniles, and held that a sentencing statute, which entirely

eliminated the court's ability to consider any mitigating factors, including the defendant's age, and by extension his or her culpability, violated the proportionate penalties clause of the Illinois constitution. See *Miller*, 202 Ill. 2d at 341-42.

¶ 65 In the present case, the defendant was sentenced pursuant to section 12-14.1(b) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)). Just as in *Miller*, under this statutory provision, in doling out the harshest penalty in our state, the trial court was not permitted to consider the actual facts of the crime, or the defendant's level of culpability for the offense. Accordingly, for the reasons that follow, and applying the rationale of *Miller* to the cause at bar, we find that this statutory scheme was disproportionate as applied to the defendant, so as to shock the moral sense of our community. See *Miller*, 202 Ill. 2d at 341.

¶ 66 We begin by noting that it is undisputed that at the time of the offense, the defendant was mentally retarded with an IQ score somewhere between 55 and 65. As such, under our prevailing social norms, we must recognize that his culpability was lesser than that of a person with normal cognitive capacity. See *Atkins*, 536 U.S. at 305. As the United States Supreme Court in *Atkins* aptly explained:

> "Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability." *Atkins*, 536 U.S. at 305.

The Court further noted these additional concerns with mentally retarded individuals: "the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 305.

¶ 67 In addition, while we in no way diminish the seriousness of the offense with which the defendant was charged and convicted, it cannot be ignored that the offense here included a single, brief act of penetration that did not result in any physical injury to the victim. The record below reveals that the defendant lived in the residence with the victim and her family for two or three years before the incident. Prior to the evening of the assault the family "never had problems with him." The defendant made a single contact with the victim's vagina, either with his tongue, hand or finger, and the entire encounter lasted a minute. What is more, the encounter was not pre-planned or orchestrated, but rather was seemingly impulsive, and the defendant expressed remorse over what he had done.

¶ 68 The sentencing judge himself noted that under these particular circumstances, while the offense warranted a severe penalty, it did not warrant a sentence of life without the possibility of parole. The judge nevertheless explained that he was bound to follow the statute and therefore had to sentence the defendant to life.

¶ 69 Despite the defendant's cognitive impairments and the brief and limited, albeit serious nature, of his offense, the defendant here was sentenced to the harshest penalty prescribed by our laws, which our jurisprudence dictates should be reserved for the most severe offense—*i.e.,* murder. See *Brown*, 2012 IL App (1st) 091940, ¶ 68 (noting that "[Illinois] has long recognized that the murder of another human is 'the highest crime known to the law.' [Citation.] Because of the

moral depravity involved in such an offense, murders are deserving of the 'most serious forms of punishment.' [Citation.]"); see also *Kennedy v. Louisiana*, 554 U.S. 407 438 (2008) (noting that "there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other," and concluding that "[t]he latter crimes may be devastating in their harm *** but [that] '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.' ") (citing *Coker v. Georgia*, 433 U. S. 584, 598 (1977) (plurality opinion)). Applying the rationale of *Miller* to the very unique facts of this case, namely the defendant's diminished culpability arising from his mental retardation, and the particular circumstances of this offense, we find that the defendant's mandatory natural life sentence pursuant to section 12-14.1(b) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)), was disproportionate so as to violate the moral sense of our community. See *Miller*, 202 Ill 2d at 341-42. Accordingly, we find that the sentence, as it applies to the defendant, violates the Illinois Constitution's proportionate penalties clause. See *Miller*, 202 Ill 2d at 341-42; see also *Miller*, 567 U.S. at __, 132 S. Ct. at 2475.

¶ 70 In coming to this decision we have considered the cases of *Huddleston*, 212 Ill. 2d at 129 and *Peters*, 2011 IL App (1st) 092830, relied upon by the State. We acknowledge that in *Huddleston* and *Peters* both our supreme court and the Illinois appellate court rejected as-applied challenges to the instant or similar provisions of the Criminal Code. We nevertheless find those cases readily distinguishable from the cause at bar.

¶ 71 First and foremost, neither *Huddleston*, nor *Peters* involved mentally retarded defendants

making as-applied challenges on the basis of their mental incapacity. Rather, both decisions involved adult defendants with full mental faculties and in position of authority or trust. See Huddleston, 212 Ill. 2d at 129; *Peters*, 2011 IL (1st) 092830.

¶ 72 In addition, the circumstances of the crimes committed in those cases, are far more heinous than the ones with which we are presented here. In *Huddleston*, the defendant was a teacher, who placed his penis, which was covered with various food items, in the mouths of three of his students, each approximately 10 years old, within a two to three month period. *Huddleston*, 212 Ill. 2d at 325. The Illinois Supreme Court held that the mandatory life sentence, as applied to the defendant pursuant to section 12-14.1(b)(1.2) of the Criminal Code (720 ILCS 5/12-14.1(b)(1.2) (West 2002))[8] did not shock the moral sense of the community because: (1) the defendant had committed assaults against three victims, one more than the minimum required under the statutory provision for a mandatory life sentence; (2) the multiple assaults over a three month span revealed that there was a period of time during which the defendant could have reflected upon the gross impropriety of his actions and refrained from further violation of children under his supervision, but failed to do so; and (3) the offense was "the result of planning and well-orchestrated execution." *Huddleston*, 212 Ill. 2d at 141-43.

¶ 73 Similarly, in *Peters*, the defendant, who was the victim's step-father, inserted his penis into the victim's vagina two or three times a week for three years, starting when she was 10 years old and threatened to hurt her mother if she ever told anyone what he had done. *Peters*, 2011 IL App

[8] That section mandates a sentence of natural life imprisonment for when a person is "convicted of predatory criminal sexual assault of a child committed against 2 or more persons regardless of whether the offenses occurred as the result of the same at or of several related or unrelated acts." 720 ILCS 5/12-14.1(b)(1.2) (West 2002).

(1st) 092839, ¶ 54. The victim's sisters testified that the defendant had similarly assaulted them for two years. *Peters*, 2011 IL App (1st) 092839, ¶ 54. Under these circumstances, the appellate court found that the mandatory life sentence without the possibility of parole imposed pursuant to section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2008)) was not disproportionate in a way that shocked the moral sense of the community. *Peters*, 2011 IL App (1st) 092839, ¶ 54.

¶ 74 As already discussed above, unlike in *Huddleston* and *Peters*, in the present case, the defendant's conduct was neither repeated, nor orchestrated and planned. Rather, it involved a single and brief act, and was by all accounts done on impulse. What is more, unlike in *Peters* and *Huddleston* the defendant here did not have any supervisory authority (either by way of a family connection or by way of his status as a teacher) over the victim. Accordingly, we find *Huddleston* and *Peters* completely factually distinguishable, and reject their applicability to to the cause at bar. See *Hill v. Cowan*, 202 Ill. 2d 151, 158 (2002) (noting that a holding that a statute is unconstitutional as applied does not broadly declare a statue unconstitutional but narrowly finds the statute unconstitutional under the specific facts of the case).

¶ 75 In doing so, we by no means diminish the seriousness of the offense for which the defendant was convicted, nor the legislature's attempt to protect children from sexual predators. In fact we fully recognize and agree with our supreme court that "aside from any physical injury a child may suffer in a sexual assault, children who are sexually assaulted are subject to chronic psychological problems that may be even more pernicious." *Huddleston*, 212 Ill. 2d at 135. Indeed, sexual assault "is without doubt deserving of serious punishment." *Coker*, 344 U.S. at 598. All we hold today, is that under the very unique circumstances of this case, the defendant, who is mentally retarded, should not have been sentenced to mandatory natural life

imprisonment, without the trial court having had an opportunity to consider his mental capacity and the facts surrounding the commission of the offense.

¶ 76 III. CONCLUSION

¶ 77 Accordingly, for all of the aforementioned reasons, we find section 12-14.1(b) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)) as applied to the defendant, a mentally retarded offender, whose crime comprised of a single, brief and limited encounter with the victim, and who confessed to and expressed remorse for his conduct, violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). We therefore vacate the defendant's sentence and remand for resentencing before a court that has discretion to impose a term-of-years sentence.

¶ 78 Affirmed in part and reversed in part; sentence vacated and cause remanded for resentencing.

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS)
-VS-) No. 04-CR-30062
WILLIAM COTY) Trial Judge: MICHAEL TOOMIN
) Attorneys: KATHLEEN D. FRITZ & ELIZABETH KUCABA

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:
APPELLANT'S NAME: WILLIAM COTY
IR#: 643825 D. O. B.: 09/29/1964
APPELLANT'S ADDRESS: ILLINOIS DEPARTMENT OF CORRECTIONS
APPELLANT'S ATTORNEY: State Appellate Defender
ADDRESS: 203 N. LaSalle, 24th Floor, Chicago, IL 60601
OFFENSE: PREDATORY CRIMINAL SEXUAL ASSAULT
JUDGEMENT: GUILTY
DATE: 10/11/06
SENTENCE: 50 YEARS ILLINOIS DEPARTMENT OF CORRECTIONS

APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the appellant; order the Clerk to prepare the Record on Appeal and the Appoint Counsel on Appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is unable to pay for the Record or appeal lawyer.

APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished appellant without cost within 45 days of receipt of this Order.

ENTERED
AUG 11 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Dates to be transcribed;
PRE-TRIAL MOTION DATE(S): 08/07/06
JURY TRIAL DATE(S): 10/10/06 THRU 10/11/06
BENCH TRIAL DATE(S): N/A
SENTENCING DATE(S): 11/17/06 & 08/10/16
DATE: 08/11/16

OTHER: _____

ENTER: _____
JUDGE

C: 00152

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS)
V.)
WILLIAM COTY)
Defendant

CASE NUMBER 04CR[redacted]6201
DATE OF BIRTH 09/[redacted]64
DATE OF ARREST 11/21/04
IR NUMBER 0643825 SID NUMBER 025844550

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence		Class
002	720-5/12-14.1(A)(1)	PREDATORY CRIMINAL SEXUAL ASL	YRS. 050	MOS.00	X
	and said sentence shall run concurrent with count(s) ___ ___ ___ ___				
____	_____	_____	YRS. ____	MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:				
____	_____	_____	YRS. ____	MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:				
____	_____	_____	YRS. ____	MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:				
____	_____	_____	YRS. ____	MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:				

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 3553 days as of the date of this order

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____ _____ _____ _____
AND: consecutive to the sentence imposed under case number(s)
_____ _____ _____ _____ _____

IT IS FURTHER ORDERED THAT 3 YEARS MSR_____
COUNTS 8 AND 12 TO MERGE WITH COUNT 2_____
_____

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

FILED
AUG 10 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

DATED AUGUST 10, 2016 ENTER: 08/10/16
CERTIFIED BY P GLIKIS
DEPUTY CLERK
VERIFIED BY _____
JUDGE: FORD, NICHOLAS R. 1756

WAP2 08/10/16 11:36:29 CCG N305

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs. No. 04 CR 30062-01

WILLIAM COTY,
Defendant.

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable NICHOLAS R. FORD, Judge of said court, on Wednesday, the 10th day of August, 2016, at the hour of approximately 11:30 o'clock a.m.

PRESENT:

HON. ANITA M. ALVAREZ,
State's Attorney of Cook County,
BY: MS. NANCY NAZARIAN,
Assistant State's Attorney,
On behalf of the People;

MS. AMY P. CAMPANELLI,
Public Defender of Cook County,
BY: MS. KATHLEEN FRITZ,
Assistant Public Defender,
On behalf of the Defendant.

Laurel E. Laudien, RMR, RPR, CSR #084.001871
Official Court Reporter - Circuit Court of Cook County
County Department - Criminal Division
(773) 674-6065

THE COURT: William Coty.

(SHORT PAUSE.)

THE COURT: Hey, William, how've you been?

THE DEFENDANT: I'm all right.

THE COURT: All right. So this is here today on remand from the Appellate Court indicating that Judge Toomin had observed during the course of the original trial that Mr. Coty suffered from an intellectual disability that was such that something that he noted during the course of sentencing. The Appellate Court has asked that Mr. Coty be resentenced, and I'm here today to do that.

Are you ready to go, William?

THE DEFENDANT: I am.

THE COURT: State, I will indicate, first of all, though that I was tendered a large volume of materials both by the State and Defense that included, among other things, the transcript of the original trial, and the sentencing that occurred, including the testimony of a Doctor who testified regarding William's intellectual difficulties or disabilities. I am taking all that into account.

Is there any objection to me taking that into account in whatever sentence?

MS. FRITZ: No, Judge.

I would also ask that you take the expert opinion into account that was given at the motion to suppress statement, a copy of the transcript also.

THE COURT: I have reviewed that also.

MS. FRITZ: Yes, you have.

THE COURT: We are all up to speed on that.

Is there anything -- and I have a new Pre-sentence Investigation.

MS. FRITZ: You do.

THE COURT: Are there any corrections or deletions to that?

MS. FRITZ: There are not.

MS. NAZARIAN: No.

THE COURT: So what, if anything, State, I guess we'll go by you first, by way of aggravation, what do you want to tell me about the case and about Mr. Coty?

MS. NAZARIAN: Well, Judge --

THE COURT: Obviously I'm familiar with the case. I'm familiar with his background.

Is there anything you want to add?

MS. NAZARIAN: I did speak to the victim's mom a couple of months ago to advise her of the Appellate Court opinion and this Defendant would be resentenced.

The victim's mom's name is Keafa Willis Barnes, that's K-E-A-F-A, W-I-L-L-I-S, B-A-R-N-E-S, and the victim is Kanisha Willis. Kanisha is now an 18-year-old young lady. Miss Willis Barnes is very troubled by the fact that the Defendant had to be resentenced, but wanted to make sure that we represented her feelings to the Court.

I don't know if you want us to do that now or if you want to wait for witnesses.

THE COURT: Are you calling witnesses?

MS. NAZARIAN: I am not calling witnesses.

MS. FRITZ: Us, no.

MS. NAZARIAN: I wasn't sure if Defense was calling witnesses.

Judge, this Defendant, the Appellate Court made it very clear that they did not diminish the seriousness of the offense. They concluded it was a single-brief act of penetration, and I'm quoting here from the Appellate Court opinion, that did not result in any physical injury to the victim, and so they felt that the natural life sentence was violated, the proportionate penalties clause in the Constitution.

However, I will point out that even though they characterized it as a single brief act of penetration, it

was very disturbing and emotionally upsetting both for the victim and especially for the victim's family, her mom in particular. She felt that a significant number of years is still appropriate for this Defendant to be punished for the crime that he did commit against her then six-year-old daughter. Her daughter was six at the time of the offense in November of 2004.

This Defendant, there really -- the fact that his IQ is in the 55 to 65 range, under prevailing social norms, his culpability was less than a person with normal cognitive capacity according to the Appellate Court. Nevertheless, the Defendant knew what he was doing in that he told the victim he was very careful in how he approached her and told her not to tell anyone and then left immediately when she went up to call for assistance or to tell somebody what had happened. So clearly he was aware what he had done and what he had done was wrong.

A significant number of years is appropriate for this Defendant, particularly when you look at all the factors in mitigation and aggravation that we enunciated back at the original sentencing hearing some ten years ago.

THE COURT: Okay. Mitigation.

MS. FRITZ: Judge, with respect to the encounter in

question, the Appellate Court specifically found that it was a single contact that lasted not even a minute. The encounter was not on behalf of my client preplanned or orchestrated. It seemed simply impulsive and he expressed remorse over what he had done. As such, they found that the nature of this crime could not be compared in terms of moral depravity and injury to the person and public to something such as murder which would require a mandatory natural life sentence.

Given both the nature of the crime and his disabilities, the Appellate Court found that the natural life sentence was so disproportionate as to violate the moral sense of our community, and that is a direct quote. Judge Toomin found and the Appellate Court agreed that my client suffered from, and the specific finding was that my client was mildly mentally retarded.

There were expert opinions elicited at the motion to suppress statements, and there was a family member who testified at his sentencing. Her name is Irma, I-R-M-A, Coty, C-O-T-Y, his sister, who testified, and I quote, "that my client has been retarded since he was a baby."

The family knew, the family of the victim knew my client and hadn't had a problem with him, but they

were aware of his intellectual shortcomings. Miss Coty has been here. She's not been here today, but she's been here on previous occasions. She stands by her opinion, I have spoken with her, that my client is, in fact, due to his -- he was fit to stand trial, but barely, and due to some of his intellectual shortcomings, he is, in fact, less culpable than others might be.

Given that, Judge, I would ask that in keeping with the Appellate Court opinion, that you give him a term of years that allows him upon sufficient punishment to resume some sort of life following incarceration.

THE COURT: William, is there anything you want to say before I sentence you?

THE DEFENDANT: Go on.

THE COURT: Pardon me?

MS. FRITZ: He said come on.

THE DEFENDANT: I would like to see what you got to say.

THE COURT: Okay. William, I'm going to consider today the evidence presented at trial, the pre-sentence report, the evidence offered in aggravation, mitigation, the statutory factors in aggravation, mitigation, the financial impact of incarceration, the arguments the attorneys just made here moments go, and the assertions

relative to the mother of the victim indicating that she still takes this case seriously, this was a serious case, and this was an offense committed by somebody whom this was not the first. He was previously sentenced to a period of natural life.

Today I will sentence the Defendant to a period of 50 years in the Illinois Department of Corrections to be served at 85 percent. I will credit him 3,553 days, and that sentence will be followed by a period of three years to life of mandatory supervised release.

William, I want you to know that you have the right to appeal. You have the right to request the Clerk to prepare and file a notice of appeal. Your right to appeal the judgment of conviction will be preserve only if the notice of appeal is filed in the Trial Court within 30 days from the date on which the sentence was imposed. That's today.

However, prior to taking your appeal, if you choose to challenge the correctness of the sentence or any aspect of the sentencing hearing, you must file within 30 days of today's date a written motion to reconsider sentence imposed or to consider any challenges to the sentencing hearing setting forth in the motion all issues or claims of error regarding the sentence imposed

or the sentencing hearing.

Any issue or claim of error regarding the sentence imposed or any aspect of the sentencing hearing not raised in the written will be deemed waived or given up.

Within 30 days of the Court's ruling disposing of your motion to reconsider the sentence or challenges to the sentencing hearing, if you then wish to appeal, you must file or request the Clerk of the Court to prepare and file in the Trial Court a written notice of appeal.

If you cannot afford the costs of an attorney for the motions or the appeal, or the cost of any transcripts you would need for the motion or the appeal, they would be provided to you free of cost.

You would be limited on your right to appeal to those claims of error set out in the original motion.

Do you understand that, William?

Is that a yes, my friend?

THE DEFENDANT: Yes.

THE COURT: Good luck to you.

MS. FRITZ: Judge, I'm going to ask leave to file the motion to reconsider sentence and the notice of appeal tomorrow. They are going to be -- I'll rest on

them.

THE COURT: I will grant you leave to file tomorrow.

MS. FRITZ: Thank you very much, Judge.

THE COURT: Good luck, William.

(WHEREUPON, THE PROCEEDINGS WERE ADJOURNED TO BE RECONVENED ON AUGUST 11, 2016, AT 9:30 O'CLOCK A.M.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

I, Laurel E. Laudien, an Official Court Reporter for the Circuit Court of Cook County, County Department - Criminal Division, do hereby certify that I reported in shorthand the proceedings had at the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable NICHOLAS R. FORD, Judge of said court.

Official Court Reporter
RMR, RPR, CSR #084.001871

Dated this 8th day
of December, 2016.

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***People v. Coty*, No. 04 CR 30062 (Cir. Ct. Cook Cnty.)**

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Trial Exhibits (one envelope)

Petition for Relief from Judgment Common Law Record

Petition for Relief from Judgment Report of Proceedings

Resentencing Common Law Record

Resentencing Report of Proceedings

PROOF OF 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, 2019, the **Brief and Appendix of Plaintiff-Appellant 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 addresses:

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/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

E-FILED
7/11/2019 2:55 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK