

No. 132048

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF	)	Appeal from the Appellate Court of
ILLINOIS,	)	Illinois, No. 5-23-0304.
	)	
Respondent-Appellee,	)	There on appeal from the Circuit
	)	Court of the Twentieth Judicial
-vs-	)	Circuit, St. Clair County, Illinois,
	)	No. 08-CF-1453.
	)	
LORTEZ THOMAS,	)	Honorable
	)	Julie Katz,
Petitioner-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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NATURE OF THE CASE

Lortez Thomas, petitioner-appellant, appeals from a judgment granting the State's motion to dismiss his petition for postconviction relief at the second stage.

An issue is raised concerning the sufficiency of the postconviction pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether Lortez Thomas' claim that his 60-year sentence was unconstitutionally disproportionate as applied to him, an intellectually disabled individual, was properly raised in his initial postconviction petition, or alternatively, whether appellate counsel was ineffective for failing to raise his claim on direct appeal.

II. Whether Lortez Thomas made a substantial showing that his *de facto* life sentence of 60 years was unconstitutionally disproportionate based on his intellectual disability, where the factors identified by this Court including Thomas' diminished culpability, lack of future dangerousness, and rehabilitative potential, were not properly considered at sentencing or on direct appeal, and are strongly mitigating in this case.

CONSTITUTIONAL PROVISION INVOLVED**Ill. Const.1970, art. 1, §11 - Limitation of Penalties After Conviction**

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

Lortez Thomas – a “moderately” intellectually disabled individual with “extreme intellectual deficits,” an IQ of 48, and the cognitive abilities of an eight-year-old – was convicted of the first degree murder of Eric Mollet.¹ (R. 758; C. 273-76) Thomas was sentenced to 60 years in prison. (C. 362; R. 818)

Trial²

After Thomas was charged with the murder of Eric Mollet, questions about his mental capacity and fitness arose several times while his case was pending. In June of 2010, the court found Thomas unfit to stand trial based on the conclusions of clinical psychologist Dr. Daniel J. Cuneo, who found that Thomas’ mental illness “substantially impairs his ability to understand the nature and purpose of the proceedings against him and his ability to assist in his own defense.” (C. 123-27) In October of 2010, after four months of inpatient treatment, a forensic unit administrator of the Illinois Department of Human Services filed a report concluding that Thomas had achieved “legal fitness,” after which the court found Thomas fit to stand trial. (Sup. C. 13; R. 28-29)

¹ Throughout the transcript and documents contained in the common law record, the terms “mental retardation” and “mentally retarded” are often used. (C. 123-32, 409-12, 436-39, 486, 496-97; R. 809) Illinois has replaced those phrases throughout state law with the terms “intellectually disabled” and “intellectual disability.” See Pub. Act 97-227, § 1 (eff. Jan. 1, 2012); *People v. Valdez*, 2022 IL App (1st) 181463, ¶ 143. Accordingly, counsel refers to Thomas’ condition as intellectual disability or intellectually disabled rather than mental retardation or mentally retarded. See *People v. Coty*, 2020 IL 123972, ¶ 4; *People v. Smith*, 2019 IL App (3d) 160631, ¶ 21 n.1; *People v. Clark*, 2023 IL 127273, ¶ 10 n. 1.

² This Statement of Facts contains facts relevant to the issue on appeal, and Thomas’ previous appeal sets forth the details of the case. See *People v. Thomas*, 2018 IL App (5th) 140465-U.

In March of 2012, the parties stipulated to reports from Drs. Cuneo and John Rabun, finding that Thomas was cognitively impaired at the time of his arrest and interrogation and could not comprehend *Miranda* warnings, and therefore did not freely and voluntarily waive his right to remain silent before making statements to police. (C. 121-28, 134; R. 33) Based on that stipulation, the court granted Thomas' motion to suppress his statement. (C. 141; R. 33)

On a defense motion, the court ordered Dr. Cuneo to evaluate Thomas to determine whether he qualified for a guilty but mentally ill plea, and whether special provisions would be needed for the trial. (R. 35) Dr. Cuneo concluded that Thomas was legally sane at the time of the alleged offense but that he would qualify for a guilty but mentally ill plea. (Sup. C. 17) He also concluded that Thomas remained fit to stand trial but recommended that the vocabulary and sentence structure at trial be kept simple, and that there be periodic checks on whether he understood what was happening at the trial. (Sup. C. 26) The parties and the court agreed to follow these recommendations. (C. 180; R. 128)

According to the State's evidence at Thomas' jury trial, Thomas, along with Jason Cowley and Justin Skinner, were at a house party with Eric Mollet and some others, when Cowley got into a fight with Mollet over money.³ A physical fight broke out between Cowley, Thomas, Skinner, and Mollet, which resulted in Thomas shooting and killing Mollet. (R. 311-389) Mollet's body was taken to an abandoned house next door where it was set on fire. (R. 390-91)

³ Prior to trial, the defense filed a motion to admit Cowley's prior 1989 guilty plea, citing police reports describing him shooting someone in the neck at a party where drugs resulted in a feud; the defense argued that the facts of this case were similar. (R. 160) The motion was denied. Cowley eventually pled guilty in the instant case to the concealment of Mollet's homicidal death, a Class 3 felony, and was sentenced to 8 years in prison at 50%.

After Thomas' motion for new trial was denied, a sentencing hearing was held. The State presented a victim impact statement from Mollet's sister. In mitigation, Thomas' aunt testified that he was a good kid who had a difficult upbringing. (R. 785-92) The Pre-Sentence Investigation report ("PSI") included information that Thomas never knew his father and from the age of 10 was raised by his aunt; his mother died when he was 20. (Sup. C. 32) Thomas dropped out of high school his junior year, and before he was incarcerated he was unemployed and on social security. Thomas used alcohol, marijuana, and cocaine socially. His criminal history consists of convictions for non-violent offenses of possession of a controlled substance (1998 and 2008), residential burglary (1998), possession of cannabis (2004), and driving under the influence (2005).

In aggravation, the State argued that Mollet did not do anything wrong but Thomas only cared about his own needs and desires. (R. 797) The State argued Thomas' sentence should send a message to the county, state, and society that it will not tolerate senseless murder and destruction, and that Thomas should spend the rest of his life in prison where he belongs. (R. 797)

In mitigation, defense counsel argued for the minimum sentence of 45 years in prison because Thomas will be too old to be a threat after that long, and the following mitigating factors apply: Thomas' conduct was induced or facilitated by someone else; he lived a relatively law-abiding life for a substantial time before this case; his upbringing was difficult where he grew up in a poor, crime-ridden area, his mom gave him up due to her drug problems, and he never knew his dad; he has severe intellectual disabilities and his drug and alcohol problem negatively affects his judgment; the offense is not likely to recur and he is capable of rehabilitation; and a long sentence will pose hardship on his family who has already

suffered many losses. Counsel mentioned that Thomas has a history of head trauma and is moderately intellectually disabled, with an IQ of 48 and the cognitive ability of an eight-year-old, and is illiterate. (R. 809) In his statement in allocution, Thomas maintained that another “guy” present was the shooter. (C. 810)

The court sentenced Thomas to 60 years in prison – 35 years for the murder plus the mandatory 25-year add-on based on his use of a firearm. (C. 362; R. 818) When imposing sentence, the court said it considered statutory factors in aggravation and mitigation, Thomas’ criminal history, statements of counsel, and Thomas’ statement in allocution. (R. 817) The court commented, “I find that your method of this murder is cold blooded, benevolent, and despicable.” (R. 817-18) Defense counsel filed a motion to reconsider sentence that asserted that Thomas’ sentence was excessive generally. After arguments, the motion was denied. (C. 364-65; R. 823-28)

Direct Appeal

On direct appeal, appellate counsel raised two issues: (1) the trial court erred when it found Thomas restored to fitness based solely on the stipulated report of an expert without making an independent inquiry into fitness or otherwise exercising its discretion; and (2) the court failed to comply with the special provisions recommended by Dr. Cuneo to ensure Thomas understood the proceedings. (C. 408-26) The Fifth District Appellate Court affirmed. *People v. Thomas*, 2018 IL App (5th) 140465-U, *PLA denied*, 111 N.E.3d 960 (2018).

Post-Conviction Proceedings

On January 25, 2019, Thomas filed a *pro se* postconviction petition asserting, among other things, that his 60-year sentence is a *de facto* life sentence that violates the United States Constitution and the Proportionate Penalties Clause of the Illinois

Constitution under *Atkins v. Virginia*, 536 U.S. 304 (2002), and *People v. Coty*, 2018 IL App (1st) 162383, and appellate counsel was ineffective for not raising this and other issues on direct appeal. (C. 455-80)

Thomas attached to his petition several exhibits, including a letter from Dr. Rabun, a certificate of “lay advocacy” from an individual who prepared the postconviction petition for Thomas, and an affidavit from an individual who helped Thomas prepare his *pro se*-filed documents during trial and who averred that Thomas cannot read or write. (C. 484-88)

On April 17, 2019, the circuit court found that Thomas’ petition stated the gist of a constitutional claim and advanced it to the second stage. (C. 491) On October 31, 2019, postconviction counsel filed an amended petition asserting the same claims Thomas had raised in his *pro se* petition but with more detail and specificity. (C. 494-500) On January 9, 2020, the State filed a motion to dismiss Thomas’ petition, arguing that his claims pertain to matters that may have been or already had been addressed on direct appeal, and that his allegations of ineffective assistance of appellate counsel fail to show that counsel’s performance was deficient or prejudiced Thomas in any way. (C. 539)

In 2021, postconviction counsel was allowed to withdraw and Thomas hired private counsel. (C. 556) New postconviction counsel then filed a second amended petition on September 28, 2022. (C. 584) The amended petition argued that Thomas’ claims fall into the exceptions to *res judicata* and waiver due to appellate counsel’s ineffectiveness. In addition to the issues raised in Thomas’ *pro se* petition and first amended petition, this amended petition asserted additional claims that trial counsel was ineffective for, among other things, “improperly fail[ing] to present to the court, in mitigation, that Petitioner suffered from [intellectual disability].

Had trial counsel presented this to the court, Petitioner’s sentence would have been reduced.” (C. 584-91)

The State filed a motion to dismiss the second amended petition on October 27, 2022, incorporating its arguments in the first motion to dismiss, and adding that *Atkins* does not apply because Thomas is not serving a life sentence and the *Atkins* protections do not extend to mandatory (*de facto*) life sentences because the appellate court’s decision in *Coty* was overturned by this Court. (C. 62) At argument on the motion, postconviction counsel argued that this Court’s decision in *Coty* is limited to its facts and does not rule out the possibility of an eighth amendment or proportionate penalties argument under the circumstances of Thomas’ case. The circuit court noted that several decisions make clear that a defendant cannot make a claim under *Miller v. Alabama*, 567 U.S. 460 (2012), if he was over 18 years old at the time of the offense, so all it would consider was Thomas’ proportionate penalties claim. (R. 857-59)

On January 5, 2023, the circuit court dismissed Thomas’ petitions. The court held that all of the arguments, other than ineffective assistance of appellate counsel, were either raised on appeal and therefore *res judicata*, or not raised on appeal so waived. (C. 625) Even if not procedurally barred, the circuit court held that there was no merit to the claims for the “reasons set forth” in the State’s motions to dismiss: caselaw cited by Thomas is either not applicable (*Atkins*) or overruled by the Illinois Supreme Court (*Coty*). (C. 625)

On appeal, Thomas argued that his postconviction petition made a substantial showing that his 60-year sentence is unconstitutional under the Proportionate Penalties Clause of the Illinois Constitution as applied to him, and that his appellate counsel was ineffective for failing to raise this issue on direct appeal. On June

13, 2025, the Fifth District Appellate Court entered an unpublished order affirming the dismissal of Thomas’ petition “for failure to make a substantial showing of a constitutional violation.” *People v. Thomas*, 2025 IL App (5th) 230304-U, ¶ 2. The court did not address the substantive merits of Thomas’ proportionate penalties claim. Rather, it held that Thomas forfeited the issue because he failed to raise it on direct appeal. *Id.*, ¶ 19. But the court also rejected Thomas’ claim that appellate counsel was ineffective for failing to raise this issue on direct appeal because it found “the basis on which he seeks to invalidate his sentence – as unconstitutional, as applied to him, under the Illinois proportionate penalties clause – was not supported by precedent at the time of his direct appeal.” *Id.*, ¶ 22. The court concluded, “Given the state of the law at the time of defendant’s direct appeal, we cannot conclude that [Thomas] set forth an arguable claim that appellate counsel’s performance amounted to objectively unreasonable assistance. Accordingly, we cannot excuse forfeiture in the instant case based on ineffective assistance of counsel.” *Id.*, ¶ 24.

No petition for rehearing was filed. This Court granted leave to appeal on September 24, 2025.

ARGUMENT

- I. Lortez Thomas’ claim that his 60-year sentence is unconstitutionally disproportionate as applied to him, an intellectually disabled individual, was properly raised in his initial postconviction petition; alternatively, appellate counsel was ineffective for failing to raise this claim on direct appeal.**

A. Introduction

As Lortez Thomas asserted in his petition to this Court, the lower court’s decision in this case puts him in an untenable Catch-22. On the one hand, the appellate court refused to rule on the substantive merits of Thomas’ as-applied, proportionate penalties challenge to his *de facto* life sentence based on his intellectual disability, finding the claim forfeited in his initial postconviction petition because it was not raised on direct appeal. On the other hand, the appellate court rejected Thomas’ claim that appellate counsel was ineffective, reasoning there was no legal basis at the time of his direct appeal for his as-applied challenge based on intellectual disability. *People v. Thomas*, 2025 IL App (5th) 230304-U, ¶ 21-24.

The appellate court’s decision does not properly apply this Court’s precedent, which holds that as-applied proportionate penalties challenges are cognizable, properly-raised claims in a petition filed under the Post-Conviction Hearing Act. See *People v. Spencer*, 2025 IL 130015, ¶¶ 42-46 (defendant’s as-applied proportionate penalties challenge could not be considered on direct appeal but was cognizable in postconviction proceedings). Consistent with *Spencer*, this Court should find that Thomas’s as-applied proportionate penalties challenge was properly raised in his initial postconviction petition, and is not subject to forfeiture based on the failure to raise it on direct appeal.

Alternatively, the appellate court erred in ruling that Thomas’s appellate

counsel was not ineffective for failing to challenge his sentence on direct appeal based on its assessment that the legal basis for Thomas's claim was not available at the time of his direct appeal. Not only did the legal landscape for his claim exist at the time of his direct appeal, as shown by *Atkins v. Virginia*, 536 U.S. 304 (2002), *Miller v. Alabama*, 567 U.S. 460 (2012), and *People v. Coty*, 2018 IL App (1st) 162383, Thomas' own history of severe intellectual disability, as highlighted by the fact that the parties agreed he was unable to understand *Miranda* warnings, was available to appellate counsel at the time of direct appeal. This Court should vacate the decision of the appellate court, and remand this matter for further postconviction proceedings on Thomas's as-applied challenge to his 60-year *de facto* life sentence, or alternatively, for a new sentencing hearing. See *People v. Buffer*, 2019 IL 122327, ¶ 42 (appropriate remedy for defendant subjected to legislatively mandated *de facto* life sentence was remand for new sentencing hearing, rather than remand for advancement of postconviction proceedings).

B. Lortez Thomas properly raised his as-applied challenge in his initial postconviction petition.

This Court's decisions establish that as-applied proportionate penalties challenges are more appropriately raised in postconviction proceedings because "[a]ll as-applied constitutional challenges are, by definition, reliant on the application of the law to the specific facts and circumstances alleged by the challenger." *Spencer*, 2025 IL 130015, ¶ 44 (internal citations omitted). Thus, meaningful review of an as-applied challenge requires a sufficiently developed record in the circuit court through an evidentiary hearing and factual findings. See *Spencer*, 2025 IL 130015, ¶ 42-46 (internal citations omitted) (holding that the proper venue for defendant's as-applied challenge to his 100-year sentence under the proportionate penalties

clause is through a postconviction proceeding); *People v. Harris*, 2018 IL 121932, ¶ 48 (concluding that 18-year-old defendant's as-applied proportionate penalties challenge was "more appropriately raised" in a postconviction proceeding rather than on direct appeal), and *People v. Thompson*, 2015 IL 118151, ¶ 44 (finding that 19-year-old defendant was not foreclosed from raising as-applied challenge in postconviction petition and observing that the Act was designed to resolve such constitutional claims).

Thomas complied with this Court's precedent by raising his as-applied proportionate penalties challenge in his initial postconviction petition. Specifically, Thomas asserted in his initial *pro se* petition that his 60-year sentence is a *de facto* life sentence that, as applied to him, violates the Illinois Constitution's Proportionate Penalties Clause, which requires that "a trial court's sentence must be based on the particular circumstances of each case, including the defendant's credibility, age, demeanor, moral character, mentality, social environment, and habits." (C. 473) Indeed, in his *pro se* and amended petition Thomas presented facts and evidence to lay the groundwork for a sufficiently developed record to address his claim. Citing to *Atkins v. Virginia*, 536 U.S. 304 (2002), and *People v. Coty*, 2018 IL App (1st) 162383, Thomas asserted, "Just as the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, 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 desserts.'" (C. 474) Thomas attached Dr. John Rabun's report stating his expert opinion that Thomas "suffers from Moderate Mental Retardation," [sic] and argued "it shocks the moral sense of the community to send an intellectually disabled person [like himself] to prison for the remainder

of his life, with no chance to rehabilitate himself into a useful member of society.”
(C. 473-74, 485-87)

At the second stage, postconviction counsel filed an amended petition asserting the same claims Thomas had raised in his *pro se* petition but with more detail and specificity, adding a citation to, among other things, *People v. Coty*, 2014 IL App (1st) 12-1799-U, and attaching a report from Dr. Daniel Cuneo, who determined, in relevant part: Thomas scored at the upper end of the “Moderate Mentally Retarded Range” [sic] of intelligence, his Full Scale IQ is approximately 48, and his overall performance would place him in the bottom 0.4 of the nation intellectually; his cognitive abilities are roughly the equivalent of an eight-year-old; he is illiterate; he has a history of head trauma with loss of consciousness; and he receives SSI for his extremely limited intellectual ability. (C. 496-97)

Thus, it is clear that Thomas’s *pro se* and amended petitions adequately raised a constitutional claim, supported by additional factual evidence and new caselaw, that the sentencing statute that resulted in his mandatory *de facto* life sentence violates the Proportionate Penalties Clause of the Illinois Constitution as applied to him, a moderately intellectually disabled and illiterate person with an IQ of 48, the brain maturity of an eight-year-old, and a history of head trauma with loss of consciousness.

Notably, while this Court rejected the intellectually disabled defendants’ as-applied proportionate penalties claims in *People v. Clark*, 2023 IL 127273, ¶ 82, and *People v. Coty*, 2020 IL 123972, it did not foreclose such claims. To the contrary, this Court articulated a roadmap – which was not previously available to Thomas – for evaluating as-applied proportionate penalties challenges when intellectual disability is a factor at sentencing. And, as explained below, applying

that roadmap to Thomas and his particular disabilities demonstrate that he made a substantial showing that the statute resulting in his mandatory *de facto* life sentence is cruel, degrading, or so disproportionate that it shocks the moral sense of the community when it is applied to him. *People v. Miller*, 202 Ill. 2d 328, 338-42 (2002) (*Leon Miller*).

C. Alternatively, appellate counsel was ineffective for failing to raise this issue on direct appeal.

Although this Court has repeatedly directed defendants to raise as-applied proportionate penalties challenges in postconviction proceedings, as the record on direct appeal will not be sufficiently developed to present the claim, the Fifth District Appellate Court below found that the issue was forfeited because it should have been raised on direct appeal. If this Court agrees with the Fifth District that Thomas should have raised his as-applied proportionate penalties challenge on direct appeal, he is not foreclosed from raising the issue in the instant appeal because, in addition to his proportionate penalties claim, Thomas also raised in his petition that his appellate counsel was ineffective for not raising this proportionate penalties challenge on direct appeal. The doctrine of forfeiture is relaxed where the forfeiture stems from the ineffective assistance of appellate counsel. See *People v. Coleman*, 168 Ill. 2d 509, 522-23 (1995) (“This court has held that the doctrine of waiver should not bar consideration of an issue where the alleged waiver stems from incompetency of counsel on appeal.”); *People v. Blair*, 215 Ill. 2d 427, 450-451 (2005) (forfeiture does not apply where the alleged forfeiture stems from the incompetence of appellate counsel, or where facts relating to the claim do not appear on the face of the original appellate record); *People v. Williams*, 2024 IL 127304, ¶¶ 19-20 (noting that “[w]hen a postconviction petitioner asserts

claims that could have been raised on direct appeal, he can avoid the procedural bar of forfeiture by casting his claim as ineffective assistance of appellate counsel for failing to raise the issue on direct appeal,” and holding that defendant’s proportionate penalties claim raised for the first time in a postconviction petition was not forfeited because defendant expressly asserted trial and appellate counsel’s failure to assert the claim).

The appellate court rejected Thomas’ ineffectiveness claim, finding that “the basis on which he seeks to invalidate his sentence – as unconstitutional, as applied to him, under the Illinois proportionate penalties clause – was not supported by precedent at the time of his direct appeal.” *Thomas*, 2025 IL App (5th) 230304-U, ¶ 22. And yet, the court refused to rule on the merits of Thomas’ proportionate penalties claim because it found he forfeited the issue by not raising it on direct appeal. *Id.* at ¶ 19. The court’s conclusion is wrong for several reasons.

To the extent the record contained sufficient evidence of Thomas’ diminished culpability, intellectual disability, and rehabilitative potential, appellate counsel was ineffective for failing to raise this issue on direct appeal. (C. 408-26) *People v. Thomas*, 2018 IL App (5th) 140465-U. Counsel also had a legal basis for the claim where the Proportionate Penalties Clause of the Illinois Constitution existed long before Thomas’ sentencing. See *Clark*, 2023 IL 127273, ¶¶ 61-63 (Illinois cases have long held that the proportionate penalties clause required circuit court to take into account defendant’s youth and mentality in fashioning appropriate sentence).

This Court has defined forfeiture “as the failure to make the timely assertion of the right.” *People v. Lesley*, 2018 IL 122100, ¶ 37 (Emphasis added.) So, by definition, for the appellate court to have found that Thomas forfeited the issue

as it did below, the right involved must have existed at that time. The Fifth District’s finding that “the basis on which [Thomas] seeks to invalidate his sentence *** was not supported by precedent at the time of his direct appeal” is plainly wrong. *Thomas*, 2025 IL App (5th) 230304-U, ¶ 22. At the very least, the initial appellate decision in *Coty* was in existence when Thomas’ sentence became final, and appellate counsel could have relied on the reasoning of that decision to raise an as-applied proportionate penalties challenge to Thomas’ 60-year sentence on direct appeal. *Coty*, 2014 IL App (1st) 121799-U, ¶ 65 (holding that the “statutory scheme was disproportionate as applied to the defendant, so as to shock the moral sense of our community” and remanding for resentencing).⁴ Not only was *Coty* in existence when Thomas was sentenced, but so were *Atkins* and *Miller v. Alabama*, on which appellate counsel could have structured an argument. Just as the legal landscape existed for *Coty* to make the argument, based on *Atkins* and *Miller*, that landscape existed for Thomas.

This Court’s ruling in *People v. Cathey*, 2012 IL 111746, supports such a conclusion. In *Cathey*, this Court found that appellate counsel was ineffective for failing to raise a delayed-*Montgomery* ruling issue on direct appeal. In so finding, this Court found “misplaced” the appellate court’s conclusion that “counsel’s performance could not have been unreasonable as a matter of law because *Patrick*

⁴ Thomas was sentenced on July 3, 2014. Trial counsel filed a motion to reduce and/or modify sentence on July 9, 2014, that did not include an as-applied proportionate penalties challenge to Thomas’ sentence. (C. 364-65) The unpublished 2014 decision in *Coty* was issued on August 28, 2014. *Coty*, 2014 IL App (1st) 121799-U. A hearing on Thomas’ motion to reduce and/or modify sentence was held on September 5, 2014 and denied on that date. (C. 371) Neither *Coty* nor the Proportionate Penalties Clause was mentioned by the parties at that hearing. (R. 821-29)

[the controlling case] was not decided until after defendant’s direct appeal was complete.” *Cathey*, 2012 IL 111746, ¶¶ 25-26. This Court explained, “The inquiry is not simply when *Patrick* was decided. Rather, the relevant focus under *Strickland* is on the state of the law at the time of defendant’s trial and appeal and whether a reasonable attorney should have challenged the trial court’s delayed *Montgomery* ruling.” *Id.*, ¶ 26. This Court found it arguable that “prevailing norms required a reasonable attorney to argue that the trial judge erred” where: counsel emphasized the issue so was “clearly cognizant” of its importance; several appellate decisions during the defendant’s trial and appeal addressed the issue; and “authority from other jurisdictions” had also found the error. *Id.*, ¶¶ 27-28. Notably, many appellate court decisions that this Court cited as having been issued during the pendency of *Cathey*’s trial and appeal are unpublished cases. *Id.*, ¶¶ 27-28, fn. 1.

This Court’s holding in *Cathey* negates the Fifth District’s conclusion in a few ways. First, the 2014 *Coty* decision – even though it was unpublished – demonstrates that a legal landscape existed, based on *Atkins*, *Miller*, and the Proportionate Penalties Clause that should have prompted appellate counsel to raise the as-applied argument on direct appeal. Appellate counsel also should have alternatively argued that trial counsel was ineffective for not only failing to present expert testimony and evidence about Thomas’ intellectual disabilities at the sentencing hearing, but also failing to bring to the court’s attention at the motion to reconsider sentence the evolving standards of decency with respect to the sentencing of the intellectually disabled to mandatory (*de facto*) life sentences, in light of the intersection of *Atkins*, *Coty*, and Illinois’ Proportionate Penalties Clause. This is especially true given that, as in *Cathey*, defense counsel in this case highlighted the importance of Thomas’ intellectual disabilities at sentencing,

and those disabilities were a prominent feature of the case.

Illinois and federal courts have long held that procedural rules must yield where they cause injustice, especially when applied rigidly to vulnerable individuals like Thomas. See *United States v. Kirby*, 74 U.S. 482, 486 (1868) (“All laws should receive a sensible construction *** not to lead to injustice, oppression, or an absurd consequence.”); *People v. Cooper*, 2025 IL 130946, ¶ 5 (no law should be construed in a manner that will lead to consequences that are absurd, inconvenient, or unjust). The appellate court’s ruling in this case, denying Thomas a hearing on the constitutionality of his 60-year *de facto* life sentence as applied to him because it is forfeited but at the same time not raisable, is exactly the kind of absurd and unjust result this Court has warned against. See *People v. Hoffman*, 2025 IL 130344, ¶ 37 (rejecting interpretation of statute that would lead to absurd results).

Furthermore, the appellate court’s decision ultimately deprives Thomas a full and fair review of his sentence. There is no question that no challenge to Thomas’s sentence was raised on direct appeal, so *any* challenge to his sentence had to be raised in a postconviction proceeding. Illinois courts routinely consider whether counsel was ineffective for failing to challenge a sentence on direct appeal on postconviction review. See *People v. Smith*, 2023 IL App (1st) 221496, ¶ ¶ 31-40.

As such, Lortez Thomas requests that this Court review the substance of Thomas’ postconviction petition and find, as explained below, that he made a substantial showing that his as-applied proportionate penalties challenge to the sentencing statute mandating his *de facto* life sentence is meritorious and remand for a third-stage evidentiary hearing, or alternatively, remand for a new sentencing hearing. See *People v. Buffer*, 2019 IL 122327, ¶ 42 (appropriate remedy for defendant subjected to legislatively mandated *de facto* life sentence was remand

for new sentencing hearing, rather than remand for advancement of postconviction proceedings); *People v. Domagala*, 2013 IL 113688, ¶ 49 (where petitioner's postconviction petition set forth a substantial showing of a constitutional violation, appellate court judgment reversed and cause remanded to the circuit court for an evidentiary hearing).

II. Lortez Thomas made a substantial showing that his mandatory *de facto* life sentence of 60 years in prison is unconstitutional under the Proportionate Penalties Clause of the Illinois Constitution as applied to him, where the factors identified by this Court including Thomas’ diminished culpability, lack of future dangerousness, and rehabilitative potential, were not properly considered at sentencing or on direct appeal, and are strongly mitigating in this case.

A. Introduction

Although 30 years old at the time of the offense, Lortez Thomas had the cognitive abilities of an eight-year-old. He cannot read or write. He has an IQ of 48 and suffers with “extreme intellectual deficits.” Prior to his trial, Thomas was found unfit to stand trial and also qualified for the guilty but mentally ill plea. Thomas was restored to fitness, prosecuted, and sentenced to 60 years in prison, a mandatory *de facto* life sentence. (C. 362; R. 818) If he lives long enough to survive his prison sentence, Thomas will be 90 years old upon release, but his brain’s functioning will still be that of an eight-year-old’s.

Thomas made a substantial showing in his post-conviction petition that his 60-year, *de facto* life prison sentence is the result of the application of a sentencing statute that, as applied to him, violates the Proportionate Penalties Clause of the Illinois Constitution. Thomas also made a substantial showing that his appellate attorney was ineffective for failing to raise this issue on direct appeal. This Court should therefore reverse the appellate court’s decision, address the merits of Thomas’ proportionate penalties clause claim – a claim that has yet to be considered by a reviewing court – and remand the case to the circuit court for either a third-stage evidentiary hearing or a new sentencing hearing.

B. Standard of Review and Postconviction Law

Under the Post-Conviction Hearing Act (“the Act”), a criminal defendant may challenge the substantial denial of state or federal constitutional rights in

the proceedings which resulted in his conviction or sentence by filing a postconviction petition in the circuit court. 725 ILCS 5/122-1 *et seq.* (West 2019); *People v. Hilliard*, 2023 IL 128186, ¶ 18. In this case, Thomas’ postconviction petition was dismissed at the second stage. At the second stage of post-conviction proceedings, when the trial court reviews the State’s motion to dismiss, “all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true.” *People v. Childress*, 191 Ill. 2d 168, 174 (2000). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a “substantial showing of a constitutional violation.” *People v. Edwards*, 197 Ill. 2d 239, 246 (2001); *People v. Domagala*, 2013 IL 113688, ¶ 33. If the petitioner makes the requisite substantial showing that his constitutional rights were violated, he is entitled to a third stage evidentiary hearing. *Id.* A trial court’s decision to dismiss a post-conviction petition without an evidentiary hearing is subject to *de novo* review. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

C. The Proportionate Penalty Clause

The Proportionate Penalties Clause of the Illinois Constitution dictates that “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. This Court has recognized three different forms of proportionality review. *People v. Miller*, 202 Ill. 2d 328, 338-42 (2002) (*Leon Miller*). The relevant form of proportionality at issue here, as raised by Thomas in his postconviction petition, concerns whether the relevant sentencing statute that led to his 60-year sentence is unconstitutional as applied to him – specifically, whether the punishment imposed on Thomas is cruel or degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community. *Leon Miller*, 202 Ill. 2d

at 338-42 (internal citations omitted).

The “shocks the conscience” standard is not subject to a fixed definition because it is based on evolving concepts of decency. *Leon Miller*, 202 Ill. 2d at 338-42. As this Court has noted, “We have never defined what kind of punishment constitutes ‘cruel,’ ‘degrading,’ or ‘so wholly disproportioned to the offense as to shock the moral sense of the community.’” *Id.* at 339. “This is so because, as our society evolves, so too do our concepts of elemental decency and fairness which shape the ‘moral sense’ of the community.” *Id.* (internal citations omitted). For this analysis, this Court “review[s] 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.” *Id.* at 340. To determine whether a penalty shocks the moral sense of the community, the court must consider both objective evidence as well as the community’s changing standard of moral decency. *Id.* at 339.

As to Illinois’ requirement that penalties must be determined “with the objective of restoring the offender to useful citizenship,” the Illinois Constitutional Convention record indicates that the framers intended to “provide a limitation on penalties beyond those afforded by the eighth amendment.” *People v. Clemons*, 2012 IL 107821, ¶ 39. As this Court acknowledged in *Clemons*, the framers of the Illinois Constitution explained that “with all we’ve learned about penology that somewhere along the line we ought to indicate that in addition to looking to the act that the person committed, we also should also look at the person who committed the act and determine to what extent he can be restored to useful citizenship,” and that “some emphasis would have to be placed on rehabilitation.” 2012 IL 107821, ¶ 39 (Internal citations omitted.)

Claims under the Proportionate Penalties Clause are not limited to only juveniles or people with life sentences; a defendant of any age can challenge a sentence of any length. *Hilliard*, 2023 IL 128186, ¶ 29.

With these principles in mind, Thomas made a substantial showing that his 60-year sentence is unconstitutional under the Proportionate Penalties Clause because, in light of our evolving standards of decency, it shocks the moral sense of the community and constitutes cruelty to impose a mandatory *de facto* life sentence on Thomas, a person whose culpability is lessened by his significant intellectual disability, who does not pose increased future dangerousness, and who has significant rehabilitative potential. See *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (holding that the eighth amendment to the United States Constitution prohibits executing individuals with intellectual disability because, *inter alia*, a national consensus had emerged against the practice, reflecting the “evolving standards of decency that mark the progress of a maturing society”) (internal citations omitted).

In *People v. Coty*, 2020 IL 123972, this Court addressed the application of the Proportionate Penalties Clause to a statutorily mandated term of natural life imprisonment as applied to a defendant with mental illnesses. This Court identified three factors associated with intellectual disabilities that could impact sentencing: “culpability, future dangerousness, and rehabilitative potential.” *Id.*, ¶ 32. This Court agreed that an intellectual disability inherently diminishes culpability. *Id.* ¶ 33, discussing *Atkins*, 536 U.S. at 318, 320. But that can sometimes be offset, this Court explained, because the same characteristics that make those with intellectual disabilities less blameworthy can, *in some circumstances*, make it more likely that the defendant will commit dangerous crimes in the future. *Id.*

¶¶ 34-36 (emphasis added), *citing People v. Heider*, 231 Ill. 2d 1, 20-21 (2008). And, this Court found that due to its “relatively static” nature, an intellectual disability can also impair rehabilitation when it is the source of the defendant’s criminal conduct. *Coty*, 2020 IL 123972, ¶¶ 37-40.

Although this Court in *Coty* recognized that an intellectual disability can sometimes create circumstances justifying a longer sentence, it also emphasized that the effects of an intellectual disability can be considered aggravating *only* “so long as the evidence supports the conclusion that the defendant poses a future danger.” *Id.* ¶ 35 (emphasis added), *quoting Heider*, 231 Ill. 2d at 21. In *Coty*, this Court found that although the defendant’s moral culpability may have been diminished, his “predominantly static condition” also meant that he was less likely to be rehabilitated and more likely to continue committing sexual offenses against children – and incapacitating repeat sex offenders was the point of the mandatory life sentence. 2020 IL 123972, ¶ 42. Hence, the life sentence was not constitutionally disproportionate. *Id.* ¶ 44. Essential to the decision in *Coty* was the fact that the defendant there was a repeat child sex offender. *Id.* ¶ 36. While the effects of his intellectual disability reduced his culpability, some of the effects also “ma[d]e him a continuing danger to reoffend.” *Id.* (emphasis removed).

Here, when applying the three factors set out in *Coty* – culpability, future dangerousness, and rehabilitative potential – the “objective evidence” makes a substantial showing that Thomas’ intellectual disability is a mitigating factor in his particular circumstances, such that the application of the mandatory *de facto* life sentence violates the Proportionate Penalties Clause as applied to him. See *Leon Miller*, 202 Ill. 2d at 339 (to determine whether a penalty shocks the moral sense of the community, the court must consider both objective evidence

as well as the community's changing standard of moral decency).

1. Thomas has diminished capacity, and therefore diminished culpability.

There is no question that Thomas has a severe intellectual disability. Clinical psychologist Dr. Daniel Cuneo evaluated Thomas pre-trial and concluded both that Thomas was unfit to stand trial and that he qualified for a guilty but mentally ill plea. (C. 123-27; Sup. C. 17) And, Dr. Cuneo and Dr. John Rabun both found that Thomas did not have the mental capacity to knowingly and intelligently waive his *Miranda* rights, so the State conceded that Thomas' custodial interrogatory statements had to be suppressed. (C. 121-28, 134) Dr. Cuneo's findings include that:

- Thomas' full-scale IQ is 48, in the "moderate mentally retarded [sic] range of intelligence"
- his thinking is neither loose nor tangential, but rather very concrete, consistent with his "very limited intellectual abilities"
- his overall performance would place him in the bottom .4 of the nation intellectually and his cognitive abilities would be roughly the equivalent of an eight-year-old
- Thomas is illiterate and only scored at the pre-kindergarten level; for example, he could not read simple words like "in" or "cat"
- Thomas has a history of head trauma with loss of consciousness and complains of headaches
- he receives SSI for his "extremely limited intellectual ability"
- Thomas' "limited intellectual abilities would make him much more suggestible and easily led [and h]e would be much more likely to seek to please another individual" (C. 128-32)

The State's psychiatrist, Dr. Rabun, agreed with Dr. Cuneo's findings and added that Thomas' communication skills are impaired due to his intellectual deficits, that his intellectual and adaptive functioning impairments started prior

to the age of 18, and that he did not exhibit any signs of depression, mania, or psychosis. (C. 486) Dr. Rabun noted that Thomas’ “measured IQ places him below 98-99% of his same age peers in intellectual functioning.” (C. 486)

The law supports the proposition that Thomas’ intellectual disability mitigates his culpability. First, the mitigating nature of an intellectual disability is widely recognized under Illinois statutory law. That the defendant is “a person with an intellectual disability” has been a statutory factor in mitigation for more than thirty years. See 730 ILCS 5/5-5-3.1(a)(13) (West 2014); see also P.A. 86-903, § 1 (eff. Jan. 1, 1990). Similarly, before Illinois abolished the death penalty, a defendant’s “reduced mental capacity” was deemed a mitigating factor at a capital sentencing hearing. See 720 ILCS 5/9-1(c)(7) (West 2014) (added by P.A. 93-605, § 10 (eff. Nov. 19, 2003)).

Second, the mitigating nature of an intellectual disability is also constitutionally significant. In *Atkins*, the United States Supreme Court held that the eighth amendment prohibits capital punishment when the offender has an intellectual disability. 536 U.S. at 321. In so holding, the *Atkins* court identified the following factors to weigh in sentencing an intellectually disabled defendant to execution: “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.” *Coty*, 2020 IL 123972, ¶ 33, citing *Atkins* 536 U.S. at 318. Notably, the *Atkins* Court established that an IQ score of approximately 70 or below is typically considered the cutoff for intellectual functioning, but it did not set a rigid, inflexible bright-line rule for the states to follow. Here, Thomas’ IQ is well below the *Atkins*

threshold at 48.

The United States Supreme Court acknowledged that characteristics of the intellectually disabled are significant because they “diminish *** personal culpability” and inherently make an offense less blameworthy than it would otherwise have been, which undermines the retributive value of a severe sentence. *Atkins*, 536 U.S. at 318. Also, those characteristics make it much more difficult for an intellectually disabled person to fully understand the significance of a severe sentence and use that information to modify their behavior accordingly, which means that such sentences do not effectively deter people with intellectual disabilities. *Id.* at 318-20. Hence, a defendant’s intellectual disability is naturally mitigating, and undermines the justifications for severe penalties. In addition, the characteristics associated with intellectual disabilities make it more likely that a harsh sentence will actually be imposed because an intellectual disability makes it harder for a defendant to effectively work with counsel to identify and put forward a persuasive case in mitigation, thus creating a “special risk” that too-severe punishment will be meted out. *Id.* at 321.

Atkins, which dealt with the death penalty, does not categorically forbid sentencing defendants with intellectual disabilities to life without parole, even when mandatory. See *Coty*, 2020 IL 123972, ¶ 45. Yet, it provides legal support for the proposition that Thomas’ intellectual disability inherently mitigated his personal culpability such that a *de facto* life sentence is unconstitutional as applied to him. Indeed, the record shows that the mitigating characteristics identified in *Atkins* were present here and contributed to Thomas’ role in the offense. The fight leading to the shooting was started by someone else – described as the “main guy” – who told Thomas to get involved. (R. 317-20, 352) Witnesses testified that

someone else may have handed Thomas the gun, and that afterwards, Thomas said he “didn’t really try to do it” and, “I can’t believe I killed this man.” (R. 320, 388-89)

This case exemplifies what the Court concluded in *Atkins*: “There is no evidence that [intellectually disabled individuals] are more likely to engage in criminal conduct than others, but 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.” 536 U.S. at 318. As the Court noted in *Atkins*, an intellectual disability like Thomas’ can make it harder to “understand the reactions of others.” *Id.*

More broadly, people with intellectual disabilities display “difficulties with social judgment [and] self-management of*** interpersonal relationships.” American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 809 (5th ed. 2013) [DSM-5], p. 38.⁵ Even those with mild disabilities often have a hard time “accurately perceiving peers’ social cues,” have a “limited understanding of risk in social situations,” and have immature “social judgment.” *Id.* at p. 34. Moreover, intellectual disabilities make it harder “to understand and process information” and to “engage in logical reasoning.” *Atkins*, 536 U.S. at 318.

Here, the facts support that Thomas’ intellectual disability caused him to act on impulse when he himself said he “didn’t really try to do it.” (R. 388) His disability also prevented him from recognizing that the situation need not have

⁵ This Court has previously cited to and acknowledged the content of the DSM. See, e.g., *In re Detention of New*, 2014 IL 116306, ¶¶ 42-43 (quoting the DSM-5); see also *People v. Lang*, 113 Ill. 2d 407, 453-53 (1986) (citing DSM-III), and *People v. Baez*, 241 Ill. 2d 44, 82, fn. 4 (2011) (explaining the patient assessment “axes” laid out in the DSM-IV).

escalated, and ultimately led him to impulsively shoot Mollet under the influence of Cowley, the person who targeted Mollet in the first instance. “Gullibility is often a feature [of intellectual disability], involving naivete in social situations and a tendency for being easily led by others [which] may result in exploitation by others and possible *** unintentional criminal involvement.” See DSM-5, p. 38. Here, Thomas’ gullibility likely played a central role in his actions, but, for the reasons explained below, it does not render him a continuous danger to the community.

2. Thomas’ intellectual disability is not an indicator of future dangerousness.

In *Coty*, this Court found the defendant was more likely to reoffend *because* of his disability. 2020 IL 123972, ¶ 42. In so finding, this Court noted that “some of the very factors that the Court in *Atkins* found reduced culpability *** are what make [Coty] a continuing danger to reoffend.” *Id.*, ¶ 36, citing *Atkins*, 536 U.S. at 318. Here, by contrast, there is no evidence to support the conclusion that Thomas’ intellectual disability suggests the potential for future dangerousness.

Unlike the defendant in *Coty*, Thomas does not have a history of violent recidivism, and his criminal history consists of addiction-related, victimless crimes. This history combined with his intellectual disability does not support a conclusion that he poses a future danger. See *Heider*, 231 Ill. 2d at 23 (finding that the evidence did not support conclusion that intellectually disabled defendant with a history of traffic violations, but not crimes, posed a future danger); and *People v. Garcia*, 2023 IL App (1st) 172005 (Tailor, J.), ¶ 97 (finding court abused its discretion in refusing to consider defendant’s intellectual disability as conceivably mitigating and distinguishing *Coty* because defendant’s prior convictions did not involve sex or the use of violence). Thomas’ lack of future dangerousness is even more discernible

given that he is already 47 years of age, and research consistently shows that as people who have been convicted of murder age, the likelihood of re-offending drops significantly. See Justice Policy Institute, *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*.⁶

3. Thomas’ intellectual disability does not indicate he is beyond rehabilitation, but rather, the objective evidence makes a substantial showing that he has genuine rehabilitative potential.

This Court in *Coty* deemed the third factor of the applicable analysis – an intellectually disabled persons’s rehabilitative potential – “particularly important, as it is the second consideration in our proportionate penalties clause.” 2020 IL 123972, ¶ 32. Here, there is objective evidence that substantially proves that Thomas’ intellectual disability does not pose an obstacle to rehabilitation for a few reasons. First, Thomas suffers from an intellectual disability, and did not additionally suffer from a mental illness like the defendants in *Coty* and *Clark*. Second, Thomas’ successful restoration to fitness demonstrates that he not only capable of being rehabilitated, but has actually begun the process of rehabilitation.

a. According to the Illinois legislature and medical science, intellectual disability does not pose the same future dangerousness as mental illness or developmental disabilities.

The Mental Health and Disabilities Code recognizes a distinction between a “developmental disability,” a “mental illness,” and an “intellectual disability” like Thomas’. A “developmental disability” means a severe, *chronic* disability, other than mental illness, found to be closely related to an intellectual disability,”

⁶ Available at: <https://acrobat.adobe.com/id/urn:aaid:sc:US:52616e5d-bdfd-4b29-92ce-24539c2b0e87>

but “in addition, *** is likely to continue *indefinitely*.” 405 ILCS 5/1-106 (eff. Jan. 1, 2023). (Emphasis added.) A “mental illness” is defined as “a mental, or emotional disorder that substantially impairs a person’s thought, perception of reality, emotional process, judgment, behavior, or ability to cope with the ordinary demands of life, but does not include a developmental disability, dementia or Alzheimer’s disease absent psychosis, a substance use disorder, or an abnormality manifested only by repeated criminal or otherwise antisocial conduct.” 405 ILCS 5/1-129 (eff. Jan. 1, 2019).

In contrast, an “intellectual disability” is defined as “a disorder *** that includes both intellectual and adaptive deficits in conceptual, social and practical domains.” 405 ILCS 5/1-116 (eff. Jan. 1, 2023). Diagnosis requires satisfaction of three criteria: (1) significant limitations in intellectual functioning—such as reasoning, problem-solving, abstract thinking, judgment, and learning—confirmed by clinical assessment and standardized intelligence testing, typically reflected by an IQ of approximately 70 or below; (2) deficits in adaptive functioning that prevent the individual, without ongoing support, from meeting developmental and sociocultural standards of personal independence and social responsibility, thereby limiting daily functioning in areas such as communication, social participation, and independent living across multiple settings; and (3) onset of these intellectual and adaptive deficits during the developmental period. 405 ILCS 5/1-116.

Notably, unlike developmental disability, intellectual disability is not defined as chronic or indefinite.⁷ Also, the definition includes language acknowledging

⁷ Upon passage of the Individual with Disabilities Education Act (“IDEA”), the United States Congress explicitly found, “Disability is a natural

that “ongoing support” will prevent adaptive deficits from limiting functioning in daily life activities. The DSM-5 also provides that although generally lifelong, intellectual disability may change in severity levels over time. DSM-5, p. 39. Indeed, “Early and ongoing interventions may improve adaptive functioning throughout childhood and adulthood [and i]n some cases, these result in significant improvement of intellectual functioning ***.” *Id.* For adults like Thomas, the extent of support provided may allow for improved adaptive function. *Id.*

Thomas was not diagnosed with a chronic or indefinite developmental disability, nor does he suffer from any psychoses or delusions; he has never been diagnosed with any mental health conditions involving a personality disorder that could indicate life-long dangerousness like the defendants in *Clark* and *Coty*. In *People v. Clark*, ¶¶ 13, 97, this Court found that there was evidence in the record affirmatively establishing that the defendant’s mental impairments – including antisocial personality disorder, borderline personality disorder, and fetal alcohol syndrome – “could be neither cured nor treated” so that “his emotional instability, inappropriate intense anger, and lack of anger and impulse control were permanent fixtures of his character.” And, in *Coty*, while the defendant had a lifelong intellectual disability, his PSI also reported that his criminal background “indicates an anti-social personality” and his “previous behavior reflects a lack of social conformity.” *People v. Coty*, 2018 IL App (1st) 162383, ¶ 43, fn. 15.

Here, no such evidence exists about Thomas. Rather, the State’s own

part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 U.S.C.A. § 1400 (eff. Oct. 5, 2010).

psychiatrist “found no evidence to suggest Mr. Thomas was suffering from a primary mood or psychotic disorder” and he did not “exhibit any signs of major depression, mania, or psychosis.” (C. 527) Thus, unlike in *Coty* and *Clark*, where there was direct evidence in the record that the defendants were not capable of rehabilitation, here, it is the opposite: there is direct evidence that Thomas *is* capable—and actually began some rehabilitation with the proper intervention and support.

b. Thomas’ successful restoration to fitness demonstrates that he is not only capable of being rehabilitated, but has actually begun the process of rehabilitation.

Thomas’ quick and remarkable transformation from unfitness to fitness demonstrates his rehabilitative potential when given the proper counseling, treatment, and training. On May 20, 2010, Dr. Cuneo opined that Thomas was unfit to stand trial, finding that his mental illnesses of moderate intellectual disability and alcohol, cocaine, and cannabis dependence substantially impaired his ability to understand the nature and purpose of the proceedings against him and his ability to assist in his own defense. (C. 126) Dr. Cuneo reported that Thomas could not comprehend the different roles in the court and “would quickly become frustrated during attempts to break down” concepts. (C. 127) The doctor also noted that Thomas “was extremely quiet and he made little eye contact,” and [t]here were often long delays between his responses. (C. 125)

Only after about three months of treatment at the Choate Developmental Center, Dr. Lisa Hollabaugh found “that, despite only having been very recently admitted to our facility, [Thomas] already display[ed] a burgeoning understanding of terms and concepts taught in Legal Fitness Restoration Training classes, where he appear[ed] attentive and evidence[d] satisfactory participation.” (Sup. C. 10) Although Dr. Hollabaugh concluded that Thomas had yet to demonstrate satisfactory

knowledge of terms and concepts for a finding of legal fitness, she opined that he “appear[ed] to possess the capacity to be restored to legal fitness within the statutory time period.” (Sup. C. 10) She also noted that Thomas “ha[d] been very cooperative and pleasant since his admission,” he “follow[ed] the unit rules and guidelines,” and his “interactions with staff and peers ha[d] been appropriate.” (Sup. C. 12)

Not even two months later, Thomas was found fit after receiving services in legal fitness classes, vocational training, money management, activity therapy, living skills, laundry training, and lifestyle management. (Sup. C. 11, 14) Not only was Thomas able to develop and articulate a strong understanding of legal concepts and appropriate courtroom behavior so as to assist in his defense, but he also was “a model patient,” interacting with peers and staff appropriately, following all the unit rules and guidelines, and participating fully in all of his classes and programs. (Sup. C. 15) Dr. Hollabaugh concluded that Thomas presented as “alert and oriented,” with well organized thoughts and no evidence of major mood disorder. Further, despite having been reportedly frustrated by his inability to understand things in May, by October, Dr. Hollabaugh found that “[b]ehaviorally, [Thomas] is calm without agitation.” (Sup. C. 15) Thomas’ significant transformation is proof that he has a real potential for rehabilitation if given the proper treatment, counseling, and training that he never received throughout his entire life.

Thomas’ limited criminal background also demonstrates that he is not beyond rehabilitation. Before the incident in question, Thomas’ criminal history consisted of only non-violent offenses that were sporadic in nature. At the age of 19, he was convicted of drug possession and at 20, for a residential burglary that he was adamant his cousin committed. (Sup. C. 33) Five and a half years passed before

his next conviction – cannabis possession – and then nine months later, he was convicted of driving under the influence. Another nearly four years passed before his next conviction for drug possession in 2008, for which he was arrested on the same day as the instant offense. Thomas’ PSI and Dr. Cuneo’s fitness evaluation both indicated that Thomas suffered from alcohol, cocaine, and cannabis dependence. (C. 123-27) Dr. Cuneo surmised that Thomas’ drug and alcohol use was a form of self-medication after enduring a severely dysfunctional childhood, including being removed from his drug-abusing mother by DCFS at age ten. (Sup. C. 22-24; C. 125) At sentencing, Thomas’ trial attorney argued that his drug and alcohol addiction is a mitigating factor, especially coupled with his intellectual disabilities. (R. 809)

This Court has acknowledged that a defendant’s alcoholism can be mitigating. See *People v. Christiansen*, 166 Ill. 2d 96, 122 (1987) (acknowledging alcoholism as a proper mitigating factor); cf. *People v. King*, 192 Ill. 2d 189, 201 (2000) (where counsel failed to present evidence of defendant’s addiction history and other mitigating evidence, an evidentiary hearing was warranted). While this Court has recognized that “a history of substance abuse is a double-edged sword at the aggravation/mitigation phase,” here, Thomas is not arguing that “since drugs are partly to blame for his actions, [he] is somehow less culpable.” *People v. Madej*, 177 Ill. 2d 116, 138-39 (1997), quoting *People v. Shatner*, 174 Ill. 2d 133, 160 (1996). Rather, Thomas’ struggles with drug and alcohol addiction puts his previously non-violent criminal history into context, and demonstrates that the current offense was an outlier that is not indicative of Thomas’ future dangerousness to warrant a *de facto* life sentence.

This is especially true given that there is no evidence that Thomas ever

previously had an opportunity for treatment. (Sup. C. 32; C. 126-29) But, there *is* evidence that if given proper treatment, and much-necessary mental health counseling to deal with the effects of his traumatic childhood, he has a very strong chance for rehabilitation. In fact, in his report finding Thomas unfit in May 2010, Dr. Cuneo concluded that if “Thomas were provided with a course of inpatient rehabilitative treatment, there is a substantial probability that he would be able to attain fitness within the course of one year.” (C. 127) Contrast with *Clark*, 2023 IL 127273, ¶ 11 (doctor who testified at sentencing hearing opined that defendant’s prospect for alcohol treatment was “bleak” because of his low intelligence and that it was “virtually impossible” to change the personality of someone with an antisocial personality disorder, something Thomas does not have). And, as noted above, after only three months of services and therapy – which he never previously received – Thomas exhibited significant positive behavioral improvements, including having appropriate interactions, sleeping and eating well, and being “neatly dressed” and “maintain[ing] good hygiene.” (Sup. C. 11-12)

Conclusion

In sum, Thomas made a substantial showing that as applied to him, the statutory sentencing scheme resulting in his mandatory *de facto* life sentence violates the Proportionate Penalties Clause of the Illinois Constitution. Thomas’ significant intellectual disability and his childhood history of poverty, abuse, and abandonment reduced his individual culpability, demonstrating that a *de facto* life sentence is not justified by the seriousness of the offense. At the same time, Thomas’ lack of violent criminal history contradicts any notion that he cannot be restored to useful citizenship, and in fact, the record proves that he is capable of rehabilitation. This Court should therefore remand this cause to the circuit

court for a resentencing hearing, or alternatively, for a third-stage evidentiary hearing. See *People v. Buffer*, 2019 IL 122327, ¶ 47 (“[b]ased on the particular issue raised” on appeal – an as applied proportionate penalties challenge to a *de facto* life sentence “and in the interests of judicial economy,” this Court remanded to the circuit court for a new sentencing hearing); *People v. Domagala*, 2013 IL 113688, ¶ 49 (where petitioner’s postconviction petition set forth a substantial showing of a constitutional violation, appellate court judgment reversed and cause remanded to the circuit court for an evidentiary hearing).

CONCLUSION

For the foregoing reasons, Lortez Thomas, petitioner-appellant, respectfully

requests that this Court reduce his sentence or remand to the circuit court for a resentencing hearing, or alternatively, for a third-stage evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 39 pages.

/s/ Pamela Rubeo
PAMELA RUBEO
Supervisor

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**IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

LORTEZ THOMAS,

Defendant.

Case No. 08-CF-1453

**FILED
ST. CLAIR COUNTY**

JAN 05 2023

M. J. 3
CIRCUIT CLERK

ORDER

This 5th day of January, 2023, being a regular judicial day of this Court, and the *Motion to Dismiss Second Amended Petition for Post-Conviction Relief* filed by the State having come on for hearing on December 21, 2022; the State being represented by its attorney, Special Prosecutor DAVID W. RANDS; and the Defendant, LORTEZ THOMAS, appearing in person and being represented by his attorney, JOSLYN SANDIFER; and the Court, having heard the arguments of counsel, having reviewed the Court file, case law and the pleadings currently pending, and being fully advised in the premises, finds as follows:

1. That the Defendant was convicted of the offense of first-degree murder on May 21, 2014 after a jury trial.
2. That the jury further determined that, because the Defendant discharged a firearm during the commission of the offense of first-degree murder, he was subject to a sentencing enhancement of an additional term of twenty-five (25) years to natural life to be added to the sentence imposed by the trial court.
3. That, on July 3, 2014, the Defendant was sentenced to a term of incarceration of thirty-five (35) years for the underlying offense of first-degree murder, with an additional firearm

enhancement of twenty-five (25) years, for a total sentence of sixty (60) years, to be served at one hundred percent (100%).

4. That the Defendant appealed his conviction and sentence to the Fifth District Appellate Court. Other than giving the Defendant credit against his sentence for the time that he spent in the custody of the Department of Human Services, the Fifth District Appellate Court affirmed his conviction and sentence in all respects. See *People v. Thomas*, 2018 IL App (5th) 140465-U.

5. That the Defendant filed pro se a *Post-Conviction Petition for Relief* on January 25, 2019, an *Amended Petition for Post-Conviction Relief* on October 31, 2019, and a *Second Amended Petition for Post-Conviction Relief* on September 28, 2022.

6. That said *Second Amended Petition for Post-Conviction Relief* asserted claims as follows: (1) that the Defendant received ineffective assistance of trial counsel in various respects; (2) that the Defendant's sentence violated the Eighth (8th) Amendment to the U.S. Constitution and the proportionate penalties clause of the Illinois Constitution; (3) that the Defendant was denied due process and equal protection in various respects; and (4) that the Defendant received ineffective assistance of appellate counsel by failing to raise the foregoing issues.

7. That the State filed a *Motion to Dismiss* on January 9, 2020 and a *Motion to Dismiss Second Amended Petition for Post-Conviction Relief* on October 27, 2022.

8. That said *Motions* contend as follows: (1) that all of the arguments asserted by the Defendant, other than his claim that he received ineffective assistance of appellate counsel, were either addressed in the appeal that he filed and are therefore barred by the doctrine of *res judicata* or could have been addressed, in which event the arguments are waived; (2) that the cases cited by the Defendant that are alleged to provide him relief are not applicable to his case;

and (3) that the Defendant failed to make a sufficient showing of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

9. That the State's *Motions* are very thorough, and they respond to each and every issue raised by the Defendant in the *Second Amended Petition for Post-Conviction Relief*.

10. That, as said *Motions* correctly point out, all arguments other than the claim of effective assistance of appellate counsel were either raised on appeal and are therefore barred by *res judicata*, or they were not raised on appeal, in which event they are waived.

11. That, even if those arguments are not deemed to be either waived or barred by the doctrine of *res judicata*, they have no merit for the reasons set forth in the State's *Motions*. The case law cited by the Defendant is either not applicable to his situation, e.g. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), or was overruled by the Illinois Supreme Court, e.g. *People v. Coty*, 2020 IL 123972 (2020).

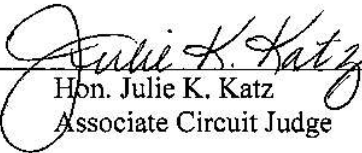
12. That the Defendant also cited *People v. Clark*, 2021 IL App (3d) 180610, 176 N.E.3d 1256 (Ill. App. 2021), which was a case more aligned with the facts of the instant case than the facts in *Coty*, in that the defendant in *Clark* was also convicted of first-degree murder, he was a young adult, and he was intellectually disabled. He made the same arguments that are being made by the Defendant in this case, and the *Clark* court held that *Coty* was controlling and defeated the defendant's claim.

13. That the Defendant argues that appellate counsel was ineffective for failing to raise the above arguments on appeal. Since the above arguments have no merit, the Defendant's appellate counsel cannot be said to have been ineffective for failing to raise them.

14. That the Defendant failed to establish that he suffered a substantial denial of his constitutional rights, which is required in order for this matter to be advanced to a third-stage evidentiary hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the *Motion to Dismiss Second Amended Petition for Post-Conviction Relief* is hereby granted.

ENTER: _____


Hon. Julie K. Katz
Associate Circuit Judge

Copies sent to:

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Special Prosecutor
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JOSLYN SANDIFER
Attorney for Defendant
7008 West Main Street
Belleville, IL 62223

NO.
IN THE
CIRCUIT COURT TWENTIETH JUDICIAL CIRCUIT
SAINT CLAIR COUNTY, ILLINOIS

FILED
ST. CLAIR COUNTY

APR 26 2023

CIRCUIT CLERK

PEOPLE OF THE STATE
OF ILLINOIS,
Plaintiffs-Appellee

v.
LORTEZ THOMAS
Defendants-Appellants

Appeal from the Twentieth Judicial Circuit
St. Clair County to the Fifth Appellate District

CASE NO. 08 CF 1453

HONORABLE
Julie K. Kate [ASSOCIATE CIRCUIT JUDGE]
Judge Presiding

NOTICE OF APPEAL

COME NOW LORTEZ THOMAS AND IN SUPPORT OF HIS NOTICE
OF APPEAL: AN APPEAL IS TAKEN FROM THE ORDER OR JUDGMENT DESCRIBED BELOW.

AVER AS FOLLOWS:

1. COURT TO WHICH APPEAL IS TAKEN: FIFTH APPELLATE DISTRICT, 14TH AND MAIN ST.,
MOUNT VERNON, ILLINOIS 62869
2. NAME AND ADDRESS OF APPELLANT TO WHICH NOTICES WILL BE SENT:
LORTEZ THOMAS, P.O. Box 1000, MARIETTA, ILLINOIS 62859
3. NAME AND ADDRESS OF APPELLANT'S ATTORNEY ON APPEAL: NONE ASSIGNED.
4. APPELLANT LORTEZ THOMAS IS AN IMPRISONED PRISONER OF THE STATE, HAS NO ATTORNEY IN THESE
PROCEEDINGS AND WOULD LIKE COUNSEL ASSIGNED TO HIM FROM THE APPELLATE
DEFENDERS OFFICE. [YES]. PREVIOUS COUNSEL: JOSHUA R. SAWATKE, 7000 MAIN ST, BELLEVILLE, IL 62223.
5. DATE OF JUDGMENT OR ORDER:
Appellant Takes Appeal from ORDER Filed / DATED 5 January 2023 By Associate
Judge Julie K. Kate, Twentieth Circuit, MOTION TO RECONSIDER Filed on 3 February 2023
WAS DENIED ON 31 MARCH 2023.
6. APPELLANT WAS CONVICTED OF FIRST DEGREE MURDER, 31 MAY 2014.
7. APPELLANT WAS SENTENCED TO 30 YEARS IN PRISON BY HONORABLE JAN FISS.
8. APPELLANT APPEALS FROM A POST-CONVICTION PETITION.
9. APPELLANT LORTEZ THOMAS TAKES APPEAL FROM AN ORDER OF THE TWENTIETH
JUDICIAL CIRCUIT COURT AND JUDGE JULIE K. KATE [ASSOCIATE CIRCUIT JUDGE]
AND SPECIFICALLY:
 - a) COUNSEL'S INEFFECTIVENESS BY CAUSING THE POST-CONVICTION PROCESS TO LOSE
ITS CHARACTER AS A CONFRONTATION BETWEEN ADVERSARIES IN FAILING
TO ARGUE COGENTLY.

Copy to SA/Def

7, [cont.]

- b) APPELLANTS Right to Effective Assistance of Counsel on First Appeal, Denied.
- c) THE CIRCUIT COURT HERE EXERCISES DISCRETION IN DECIDING WHETHER UNFAIR PREJUDICE OUTWEIGHS PROBATIVE VALUE IN ACQUISITION OF EVIDENCE. UNFAIR PREJUDICE, BEING COMPARING TWO TIME ADVANCED AGE OFFENDER TO APPELLANTS SINGLE, MINOR COMMITTED INCIDENT. DISREGARDING ANY PROBATIVE VALUE IN THE ACQUISITION OF EVIDENCE.
- d) THE CIRCUIT COURTS DECISION WAS SO EXTREME IT CONSTITUTED AN ABUSE OF DISCRETION AND ITS STANDARD OF REVIEW IS PLenary.
- e) THE CIRCUIT COURT BASED ITS ORDER ON THE ARGUMENTS OF PRESENT COUNSEL AND NOT ON THE MERITS OF THE CONSTITUTIONALITY OF APPELLANTS CLAIMS OR REFUSAL TO [OF COUNSEL] PRESENT THE CLAIMS ON 1ST APPEAL. OBJECTS TO COUNSEL'S FAILURE TO PRESENT NEW FACTS FOR RECONSIDERATION, AND MERELY RECITING EXISTING CLAIMS.
- f) THE CIRCUIT COURT FAILED INCLUSION OF ANY MEMORANDUM OR CASE PRECEDENTS SUITABLE OF SHOWING APPLICABILITY TO APPELLANTS SITUATION, AND ARE MERELY CONCLUSIONS OF LAW.
- h) ALL OTHER CLAIMS MADE IN APPELLANTS POST-CONVICTION PETITION, ASSOCIATE JUDGE LIMITED ABILITY TO PRESIDE OVER CRIMINAL CASES.

8. Compile THE TRIME RECORDED IN ACCORDANCE WITH ILLINOIS SUPREME COURT RULES: 324, 325, 327, 607, 608, 651 AND EXCLUSIVE OF ALL ACTIONS AS OUTLINED,

WHEREFORE LORTEZ THOMAS HOPES AND PRAYS THIS HONORABLE COURT FILE AND DOCUMENT THIS ABOVE WRITTEN "NOTICE OF APPEAL" IN THIS COURT AND THE APPELLATE COURT SO HE MAY MOVE FORTH WITH HIS APPEAL. AND ANY OTHER RELIEF DEEMED JUST OR NECESSARY.

DATE: 31 March 2023

Respectfully submitted,

By Lortez Thomas

P.O. Box 1000 B81330
MERRICK, ILLINOIS
60259

NOTICE

Decision filed 06/13/25. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2025 IL App (5th) 230304-U

NO. 5-23-0304

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee	)	St. Clair County.
	)	
v.	)	No. 08-CF-1453
	)	
LORTEZ THOMAS,	)	Honorable
	)	Julie K. Katz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice McHaney and Justice Vaughan concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the dismissal of defendant's second amended postconviction petition for failure to make a substantial showing of a constitutional violation.

¶ 2 Following a jury trial, defendant, Lortez Thomas, an intellectually disabled man, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and sentenced to 60 years in prison. Defendant appeals from the trial court's second-stage dismissal of his second amended postconviction petition, filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)), alleging that the trial court's imposition of a 60-year sentence amounted to an unconstitutional *de facto* life sentence, as applied to him, in violation of the Illinois proportionate penalties clause (Ill. Const. 1970, art. I, § 11), especially where the record demonstrates defendant's diminished capacity, intellectual disability, and rehabilitative potential.

Defendant also argues that appellate counsel rendered ineffective assistance for failure to raise this issue on direct appeal. For the following reasons, we affirm.

¶ 3 I. Background

¶ 4 We recite only those facts relevant to the issues on appeal, provided defendant's previous appeal set forth in great length the details of defendant's case. See *People v. Thomas*, 2018 IL App (5th) 140465-U.

¶ 5 In December 2008, the State charged defendant by indictment with one count of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and two counts of criminal sexual assault (*id.* § 12-13(a)(1)). In October 2009 and March 2010, prior to defendant's May 2014 jury trial, Dr. Daniel J. Cuneo evaluated defendant to determine his psychological and mental capacities to waive his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Following the evaluation, Dr. Cuneo concluded that defendant's drug dependence and moderate mental retardation "substantially impaired his ability to knowingly, intelligently, and willingly waive" his *Miranda* rights. Following an evaluation in May 2010, Dr. Cuneo found defendant unfit to stand trial. In October 2010, the trial court found defendant fit to stand trial. In May 2014, a jury found defendant guilty of first degree murder, and the court sentenced him to 60 years in prison. Because the jury determined that defendant discharged a firearm during the commission of the offense, the court imposed a mandatory sentencing enhancement of 25 years in prison. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2022) (statutory sentencing enhancement ranges from 25 years or up to a term of natural life in prison). This court affirmed defendant's conviction and sentence but corrected defendant's mittimus to reflect days spent in treatment at the Illinois Department of Human Services. See *Thomas*, 2018 IL App (5th) 140465-U, ¶ 44.

¶ 6 On January 25, 2019, defendant filed a *pro se* petition for postconviction relief pursuant to the Act, challenging, *inter alia*, his sentence. Specifically, defendant argued that his 60-year sentence was unconstitutional under the Illinois proportionate penalties clause and amounted to a *de facto* life sentence with no opportunity “to rehabilitate himself into a useful member of society.” Defendant argued that “juvenile and adults with intellectual disabilities” should be treated similarly, pursuant to *Miller v. Alabama*, 567 U.S. 460, 483-84 (2012), and *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Defendant also argued ineffective assistance of appellate counsel for the “constitution[al] violations within this petition.”

¶ 7 On April 17, 2019, the trial court determined that defendant’s *pro se* petition for postconviction relief set forth the gist of a constitutional claim. The court appointed counsel to represent defendant and granted defendant leave to file an amended postconviction petition.

¶ 8 On October 31, 2019, defendant, represented by counsel, filed an amended postconviction petition, arguing, *inter alia*, that defendant’s *de facto* life sentence violated the eighth amendment to the United States Constitution and the Illinois proportionate penalties clause, given the record demonstrated that defendant possessed intellectual challenges and deficiencies to intelligently, knowingly, and willingly waive his *Miranda* rights. Defendant, with reliance on *People v. Coty*, 2014 IL App (1st) 121799-U; *People v. Coty*, 2018 IL App (1st) 162383; and *Atkins*, 536 U.S. 304, argued that mandatory life sentences imposed on intellectually challenged individuals were unconstitutional. Defendant also argued that appellate counsel rendered ineffective assistance of counsel for “fail[ing] to raise on appeal the issues set forth in this Amended Petition.”

¶ 9 On January 9, 2020, the State filed a motion to dismiss defendant’s amended postconviction petition, arguing that all of defendant’s claims, except his claims of ineffective assistance of appellate counsel, involved matters already decided, or issues that could have been

raised, on direct appeal. Pertinent to this appeal, the State argued that the constitutionality of defendant's sentence was barred by the doctrine of *res judicata* or waiver. Specific to defendant's claim of ineffective assistance of appellate counsel, the State argued that defendant's petition failed to show that appellate counsel rendered deficient performance or that defendant suffered prejudice, as required by *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 10 On June 24, 2020, defendant filed a *pro se* motion to withdraw postconviction counsel, asserting his desire to hire private counsel. On April 7, 2021, the trial court discharged defendant's appointed counsel.

¶ 11 On September 28, 2022, after multiple extensions to file an amended postconviction petition, defendant's private counsel, Attorney Joslyn Sandifer, filed a second amended postconviction petition, arguing, *inter alia*, that defendant's *de facto* life sentence, which the trial court imposed on an intellectually challenged individual, was unconstitutional under the eighth amendment and the Illinois proportionate penalties clause, pursuant to *Coty*, 2014 IL App (1st) 121799-U; *Coty*, 2018 IL App (1st) 162383; and *Atkins*, 536 U.S. 304. Defendant also argued that appellate counsel rendered ineffective assistance by failing to raise on appeal the issues set forth in the petition.

¶ 12 On October 27, 2022, the State filed a motion to dismiss defendant's second amended postconviction petition. The State incorporated its January 9, 2020, motion to dismiss by reference and also argued that defendant's argument concerning his sentence "[wa]s flawed in a number of ways." Specifically, the State argued that defendant "[wa]s not under a sentence of death, which would bring him within the ambit of *Atkins v. Virginia*, 536 U.S. 304." In addition, because the Illinois Supreme Court in *People v. Coty*, 2020 IL 123972, ¶ 52 overruled the First District Appellate Court in *Coty*, 2018 IL App (1st) 162383, which defendant relied on, the State argued

that “*Atkins* protections did not extend to a person sentenced to a *mandatory* term of natural life. Those protections would certainly not extend to Defendant.” (Emphasis in original.) The State argued, again, that defendant failed to make a sufficient showing under *Strickland* as to ineffective assistance of appellate counsel.

¶ 13 On January 5, 2023, following a December 21, 2022, hearing on the State’s motion to dismiss, the trial court determined that defendant failed to establish that he suffered a substantial denial of his constitutional rights to advance to a third-stage evidentiary hearing. In granting the State’s motion to dismiss, the court determined that defendant’s claims, aside from his claim of ineffective assistance of appellate counsel, not only lacked merit but were waived or barred by the doctrine of *res judicata*. Having determined that defendant’s arguments lacked merit, the trial court concluded that appellate counsel could not be ineffective for failing to raise the issues.

¶ 14 On February 3, 2023, defendant, represented by counsel, filed a motion to reconsider, arguing that appellate counsel’s failure to thoroughly articulate “trial counsel’s failure to address [defendant’s] mental health circum[s]tances at the very least *** fell below the proper standard of care” and resulted in a “grave miscarriage of justice.” The trial court subsequently denied defendant’s motion to reconsider, and defendant filed a timely *pro se* notice of appeal.

¶ 15 II. Analysis

¶ 16 On appeal, defendant argues that the trial court’s imposition of a 60-year *de facto* life sentence, as applied to him—an intellectually disabled man—, “shock[ed] the moral sense of the community” and “[wa]s not justified by the seriousness of the offense,” in violation of the Illinois proportionate penalties clause of the Illinois Constitution, especially where the record demonstrates defendant’s diminished capacity, intellectual disability, and rehabilitative potential.

In addition, defendant argues that appellate counsel rendered ineffective assistance for failing to raise this issue on direct appeal. We disagree.

¶ 17 The Act allows an incarcerated defendant to assert a substantial violation of his constitutional rights at trial. *People v. Bailey*, 2017 IL 121450, ¶ 17. A postconviction proceeding does not substitute for a direct appeal but instead “offers a mechanism for a criminal defendant to assert a collateral attack on a final judgment.” *People v. Robinson*, 2020 IL 123849, ¶ 42. Proceedings under the Act are divided into three stages. *People v. English*, 2013 IL 112890, ¶ 23. At the first stage, the trial court may summarily dismiss a petition that is “frivolous or *** patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2020). To survive the first stage, “a petition need only present the gist of a constitutional claim.” *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If a trial court does not dismiss a petition at the first stage, it advances to the second stage where the court may appoint counsel, and the State may move to dismiss the defendant’s petition. 725 ILCS 5/122-2.1(b) (West 2020). At the second stage, the defendant must make a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 33. Such a showing is made when the petition’s well-pled allegations, if proven at an evidentiary hearing, would entitle the defendant to relief. *Id.* The trial court does not engage in fact-finding or credibility determinations at this stage; rather, all well-pled facts not positively rebutted by the original trial record are taken as true. *Id.* If the petition fails to make a substantial showing of a constitutional violation, it is dismissed and does not advance to the third-stage evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 18 The second stage of postconviction proceedings tests only the legal sufficiency of the petition. *Domagala*, 2013 IL 113688, ¶ 35. “In other words, the ‘substantial showing’ of a constitutional violation that must be made at the second stage [citation] is a measure of the legal

sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle [defendant] to relief." (Emphasis in original.) *Id.* That said, this inquiry does not require the trial court to make findings of fact or assess the parties' credibility. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). A motion to dismiss filed at the second stage "raises the sole issue of whether the petition being attacked is proper as a matter of law." *Id.* We review the trial court's determination at the second stage *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 19 At the outset, we address forfeiture. The State argues, and we agree, that defendant failed to raise his claim concerning the Illinois proportionate penalties clause on direct appeal, thus, he forfeited this issue. *People v. Daniels*, 2020 IL App (1st) 171738, ¶ 21 (issues raised and decided on direct appeal or in a prior proceeding are barred by the principles of *res judicata*, and issues that could have been raised, but were not, are forfeited). Nevertheless, defendant alleges that the failure to raise this alleged error on direct appeal was due to appellate counsel's ineffectiveness. The doctrine of forfeiture does not bar the consideration of ineffective assistance of appellate counsel. *People v. Coleman*, 168 Ill. 2d 509, 522-23 (1995); *People v. Williams*, 209 Ill. 2d 227, 233 (2004) (the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness requires, the forfeiture stems from the ineffective assistance of appellate counsel, or the facts relating to the issue do not appear on the face of the original appellate record).

¶ 20 To establish that appellate counsel rendered ineffective assistance of counsel, a defendant must satisfy the standard set forth in *Strickland*, 466 U.S. at 685-87. As such, a defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. *Id.* at 694; *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). Appellate counsel is not obligated to raise "every

conceivable issue on appeal,” but rather is expected to “exercise professional judgment to select from the many potential claims of errors that might be asserted on appeal.” *Williams*, 209 Ill. 2d at 243.

¶ 21 Appellate counsel’s assessment of the merits of an issue depends on the state of the law at the time of the direct appeal. *English*, 2013 IL 112890, ¶ 34 (“ ‘Representation based on the law prevailing at the time of trial is adequate, and counsel is not incompetent for failing to accurately predict the existing law will change. [Citation.] The same principles apply for claims of inadequate representation on direct appeal.’ ” (quoting *People v. Weninger*, 292 Ill. App. 3d 340, 345 (1997))); see also *People v. Barnard*, 104 Ill. 2d 218 (1984)). Appellate counsel is also not required to raise issues that he reasonably determines are not meritorious. *English*, 2013 IL 112890, ¶ 34; see also *Strickland*, 466 U.S. at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”). “[U]nless the underlying issues are meritorious, [a] defendant has suffered no prejudice from counsel’s failure to raise them on appeal.” *People v. Easley*, 192 Ill. 2d 307, 329 (2000).

¶ 22 Here, contrary to defendant’s argument, the basis on which he seeks to invalidate his sentence—as unconstitutional, as applied to him, under the Illinois proportionate penalties clause—was not supported by precedent at the time of his direct appeal. Rather, defendant relies on “the initial appellate decision in *Coty I* [which] existed at the time of [defendant’s] sentence,” asserting that appellate counsel “could have based its argument on this case,” which held that “ ‘statutory scheme was disproportionate as applied to the defendant, so as to shock the moral sense of our community.’ ” See *People v. Coty*, 2014 IL App (1st) 121799-U, ¶ 65. However, we note that defendant refers to an unpublished Rule 23 order of the First District for support.

Importantly, under a prior version of Illinois Supreme Court Rule 23, litigants were prohibited from citing unpublished orders as precedential value except to support contentions such as double jeopardy, *res judicata*, collateral estoppel, and law of the case. Ill. S. Ct. R. 23(e)(1), Committee Comments (eff. Jan. 1, 2021). Although we acknowledge that the current rule authorizes litigants to cite nonprecedential orders entered after January 1, 2021, for persuasive purposes, the prior version of Illinois Rule 23 prohibited counsel from citing unpublished orders at the time of defendant's direct appeal. *Id.*

¶ 23 Furthermore, we note that the First District published an opinion in *Coty*, 2018 IL App (1st) 162383, ¶ 77 (held that the trial court imposed a 50-year *de facto* life sentence on the defendant, without the procedural safeguards set forth in *Atkins*, 536 U.S. at 320, and *Miller*, 567 U.S. 460, violating the moral sense of our community) on August 8, 2018—15 days before this court entered a Rule 23 order affirming, as modified, defendant's direct appeal. *Thomas*, 2018 IL App (5th) 140465-U. However, at the time appellate counsel filed defendant's appeal in September 2014 and then presented oral argument before this court in September 2017, the controlling law under *Atkins* (eighth amendment prohibits capital punishment of individuals with intellectual disabilities) and *Miller* (unconstitutional to impose life without parole sentences on individuals under 18 years of age at the time of the crime) did not extend sentencing considerations to adult individuals with intellectual disabilities outside the context of capital punishment. Although we recognize that appellate counsel could have filed a motion to supplement before this court, defendant does not raise this argument in this appeal. Even if appellate counsel would have raised this issue on direct appeal and later supplemented the record with *Coty*, 2018 IL App (1st) 162383, we are not bound by the decisions of our fellow appellate districts. *In re Application of County Treasurer*, 292 Ill. App. 3d 310, 315 (1997). Moreover, as stated above, our supreme court in *Coty*,

2020 IL 123972, ¶ 52, overruled the First District in *Coty*, 2018 IL App (1st) 162383, expressly rejecting a challenge by the defendant to expand the proportionate penalties clause under *Atkins* and *Miller*.

¶ 24 Given the state of the law at the time of defendant's direct appeal, we cannot conclude that defendant set forth an arguable claim that appellate counsel's performance amounted to objectively unreasonable assistance. Accordingly, we cannot excuse forfeiture in the instant case based on ineffective assistance of counsel. See *English*, 2013 IL 112890, ¶ 35.

¶ 25 III. Conclusion

¶ 26 For the foregoing reasons, we affirm the trial court's second-stage dismissal of defendant's second amended postconviction petition.

¶ 27 Affirmed.

No. 132048

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF	)	Appeal from the Appellate Court of
ILLINOIS,	)	Illinois, No. 5-23-0304.
	)	
Respondent-Appellee,	)	There on appeal from the Circuit
	)	Court of the Twentieth Judicial
-vs-	)	Circuit, St. Clair County, Illinois,
	)	No. 08-CF-1453.
	)	
LORTEZ THOMAS,	)	Honorable
	)	Julie Katz,
Petitioner-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 3, 2026, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Tosya Khodarkovsky

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