No. 120655

IN THE
ILLINOIS SUPREME COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, Fifth Judicial District
Respondent-Appellee,	)	No. 5-10-0587
	)	
	)	
	)	There on Appeal from the Circuit Court
v.	)	of the Third Judicial Circuit,
	)	Madison County, Illinois
	)	No. 80-CF-5
	)	
RICHARD HOLMAN,	)	The Honorable
	)	Charles V. Romani,
Petitioner-Appellant.	)	Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

In 1979, five weeks before his eighteenth birthday, defendant Richard Holman murdered 83-year-old Esther Sepmeyer. A Madison County jury convicted defendant of first-degree murder. Defendant had previously been convicted of two other murders and an attempted murder in St. Clair County. After considering all sentencing factors and the evidence, the trial court found that defendant had no rehabilitative potential and sentenced him to natural life in prison.

In 2010, defendant moved for leave to file a successive postconviction petition; finding no cause, the trial court denied the motion. On appeal, defendant argued for the first time that the statute under which he was sentenced was facially unconstitutional under the Eighth Amendment. The appellate court affirmed. This Court denied leave to appeal, but issued a supervisory order remanding for the appellate court to reconsider in light of *People v. Davis*, 2014 IL 115595. On remand, defendant raised for the first time an as-applied Eighth Amendment challenge to his sentence. The issues presented are:

1. Whether defendant forfeited his Eighth Amendment claim by not raising it in his motion for leave to file a successive postconviction petition, in his initial appellate court briefs, and in his first petition for leave to appeal to this Court.

2. Forfeiture aside, whether a defendant establishes sufficient cause and prejudice to permit him to raise his claim in a successive postconviction petition where the procedure under which he was sentenced satisfies the Eighth Amendment and the trial court considered all mitigating factors before sentencing him to natural life.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 651. On September 28, 2016, this Court allowed defendant's petition for leave to appeal. *People v. Holman*, 60 N.E.3d 878 (Ill. 2016) (Table).

STATEMENT OF FACTS

On July 13, 1979, five weeks shy of defendant's eighteenth birthday, he and codefendant Girvies Davis burglarized a farmhouse in Madison County. C99, 103; R493-95, 586-87.[1] During the burglary, 83-year-old Esther Sepmeyer was shot in the face with a .22 caliber rifle, R493-95, 586-91, which had been stored in a cabinet in Esther's home, R454-55. Defendant's fingerprints were recovered from the inside and outside of that cabinet. R390-91, 510-15. Esther's lawnmower and radio were recovered from Davis's home. R428-34, 446-47, 452-53.

I. Pretrial, Trial, and Sentencing

In September 1979, following their arrest in St. Clair County for unrelated offenses, defendant and Davis confessed to a series of burglaries, robberies, attempted murders, and murders that were committed in the previous year in rural areas around East

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[1] Citations to the common law record, the report of proceedings, the exhibits in the record on appeal, defendant's brief, and defendant's appendix appear as "C__," "R__," "Peo. Exh. __ (__ [date])," "Def. Br. __," and "A__ at __," respectively. Citations to the brief of *amici curiae* appear as "Amici Br. __."

Pursuant to Rule 318(c), on January 31, 2017, the Illinois Appellate Court, Fifth District, certified to this Court the appellate court briefs. For the briefs filed in 2012, citations to defendant's opening brief, the People's brief, and defendant's reply brief appear as "Def. App. Ct. Br. __," "Peo. App. Ct. Br. __," and "Def. App. Ct. Reply Br. __," respectively. For the supplemental briefs filed in 2015, citations to defendant's opening brief, the People's brief, and defendant's reply brief appear as "Def. App. Ct. Supp. Br. __," "Peo. App. Ct. Supp. Br. __," and "Def. App. Ct. Supp. Reply Br. __," respectively.

St. Louis, including the crimes against Esther. R83-126, 489-95; Def. Exh. 1 (3/10/81) (defendant confesses to participating with Davis in seven murders and describes offenses and weapons used)[2]; *see People v. Davis*, 97 Ill. 2d 1, 8-10, 17-24 (1983); *People v. Davis*, 95 Ill. 2d 1, 12-16, 22 (1983). Defendant and Davis agreed that Esther had been shot with her own rifle, but blamed each other for the shooting. R494-95; *People v. Holman*, 115 Ill. App. 3d 60, 62 (5th Dist. 1983); *Davis*, 97 Ill. 2d at 8-10.

In March 1981, defendant and Davis were jointly tried, defendant before a jury and Davis before the court. R298-305. Both were convicted of Esther's first-degree murder. R695-701.[3] Defendant was ineligible for capital sentencing (because he was under 18 years old at the time of the murder), C103; Ill. Rev. Stat. 1979, ch. 38, ¶ 9-1(b), but the trial court had discretion to impose a prison term of (1) 20 to 40 years, or (2)

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[2] Among others, defendant and Davis confessed to the December 8, 1978 burglary and murder of 78-year-old Frieda Mueller and the December 22, 1978 burglary and murder of 89-year-old, wheelchair-bound Charles Biebel. R99-101; Def. Exh. 1 (3/10/81); *Davis*, 95 Ill. 2d at 12-14. Additionally, defendant and Davis confessed to offenses committed during the "Caseyville" or "Shell station" incident. R103-04, 646-48. Although the record shows that Keith Harris was convicted of those offenses, R104, 646-55; *Davis*, 97 Ill. 2d at 10; *Davis*, 95 Ill. 2d at 15-16, in 2003, Harris was pardoned for those crimes based on actual innocence. *See Harris v. Kuba*, 486 F.3d 1010, 1011-13 (7th Cir. 2007); Illinois Innocence Project, University of Illinois, Springfield, List of Exonerees/Releasees, available at: http://www.uis.edu/illinoisinnocenceproject/exonorees/kharris/ (accessed Mar. 20, 2017) (includes links to letter filed on behalf of Harris to Governor and related newspaper story).

[3] Davis was sentenced to death for Esther's murder; on appeal, this Court vacated the sentence and remanded for a new sentencing hearing. *Davis*, 97 Ill. 2d at 26-29. It is not clear whether Davis was resentenced for Esther's murder. Davis had previously been sentenced to death in St. Clair County for Biebel's murder. *Davis*, 95 Ill. 2d at 10-11, 53; *People v. Davis*, 119 Ill. 2d 61, 68 (1987). Defendant had initially been indicted for that murder, but the State later dismissed the charge. *Davis*, 95 Ill. 2d at 10; Peo. Exh. 108 (4/8/81), Exh. 109 (4/8/81). However, "[e]vidence indicate[d] that [defendant] was the actual triggerman" in Biebel's murder. *Davis*, 97 Ill. 2d at 24. In 1995, Davis was executed for that murder. *Davis*, 119 Ill. 2d at 68; *Davis v. Greer*, 13 F.3d 1134, 1144 (7th Cir. 1994); List of U.S. executions, available at: http://deathpenaltyusa.org/usa/state/illinois.htm (accessed Mar. 20, 2017).

natural life, if the court found, as relevant here, that defendant had been convicted of murdering two or more individuals, Ill. Rev. Stat. 1979, ch. 38, ¶¶ 9-1(b)(3), 1005-5-3(c)(1), 1005-8-1(a)(1) (1979).

At defendant's sentencing hearing, the trial court received evidence that defendant had been convicted of the August 30, 1979 first-degree murder of Franklin Cash and the attempted murder of James Ostman, and sentenced to concurrent prison terms of 35 and 25 years, respectively. C100, 374; R728-36; Peo. Exh. 61 (3/16/81), Exh. 112 (4/9/81). Defendant also had been convicted of the May 11, 1979 first-degree murder of 84-year-old John Oertel and sentenced to a consecutive 40-year term, C100, 373; R728-36; Peo. Exh. 62 (3/16/81), Exh. 103 (4/8/81).[4]

In addition, the trial court reviewed a presentence investigation report (PSI). During the presentence interview, defendant stated: "I fenced the stolen stuff but I didn't commit the home invasion. I wasn't present when the murder took place. Girvies Davis made a statement indicating my name. That gave police enough grounds to question me. I refused to talk because I didn't know anything." C100.

The PSI detailed defendant's juvenile delinquency and criminal history. C101-03. In November 1975, at age 14, defendant was adjudicated delinquent for burglary and sentenced to two years of probation. C101. In June 1977, at age 15, defendant was adjudicated delinquent of three counts of criminal damage to property and sentenced to

[4] At sentencing hearing, the trial court admitted People's exhibits 1 and 2, certified copies of defendant's St. Clair County conviction records. R731-32. Neither exhibit is in the record on appeal and the People have been unable to locate them. However, because background information relating to defendant's St. Clair County convictions appears in exhibits admitted during Davis's case, which are in the record on appeal, the People cite those exhibits.

the Department of Corrections, Juvenile Division (DOC-JD). C101-02. While in DOC-JD, defendant was granted several weekend passes. C102. After twice receiving 30-day authorized absences from DOC-JD, defendant was paroled in December 1977. *Id.* Three months later, at age 16, defendant was arrested for burglary; the court revoked parole and returned defendant to DOC-JD. *Id.* Defendant again was granted several passes. *Id.* Beginning in October 1978, at age 17, defendant received three consecutive 30-day authorized absences from DOC-JD.[5] *Id.* In January 1979, defendant was paroled. *Id.* Less than four months later, defendant murdered Oertel. C100, 373; R728-36; Peo. Exh. 62 (3/16/81), Exh. 103 (4/8/81). Two months after that, defendant murdered Esther. C1, 89; R698. And less than two months later, at age 18, defendant murdered Cash and attempted to murder Ostman. C100-03, 374; R728-36; Peo. Exh. 61 (3/16/91), Exh. 112 (4/9/81).

The PSI also revealed defendant's family history. C103-04. Defendant's father died when defendant was around seven years old. C103. Defendant had a "close, loving" relationship with his mother and six siblings. *Id.* Defendant's mother had been employed and regularly visited defendant in jail. C103-04. Defendant stated that he had two daughters, ages two and four, by different mothers, although that report had not been confirmed. C104.

Finally, attached to the PSI were psychiatric and psychological evaluations from early 1980, detailing defendant's intellectual disability. C104, 108-14. During the psychological evaluation, defendant reported that several years before, he had fallen from

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[5] Defendant confessed to participating in the murders of Mueller and Biebel, which occurred in December 1978, while defendant was on leave from DOC-JD. *See supra*, nn. 2-3.

a two-story building, and that after the fall, he had suffered "a severe dull headache 'like dynamite ready to explode' every day," and occasional "blackouts." C110. Defendant also informed the psychologist that he had quit school in the seventh grade. C110. Defendant had a full-scale I.Q. of 69, which fell at the lower end of the borderline range of mental retardation, C113; a verbal I.Q. of 73, which was in the borderline range, C111; and a performance I.Q. of 64, which was in the mildly retarded range, *id.* Defendant's subtest "scores in verbal areas of information, understanding of socially appropriate behavior and vocabulary definitions were quite low and probably in the moderately retarded range." *Id.* Defendant's neurological testing results showed "significant evidence" of "organ brain damage." *Id.* The psychologist opined that defendant "appeared to function intellectually between the mildly retarded and borderline range of retardation," and displayed "strong indications of neurological impairment on" tests for brain damage. *Id.*

During his psychiatric evaluation, defendant indicated that he did not know who was murdered or how the murder happened. C107-08. Defendant reported that he had regularly attended school until the tenth grade. C108. As to his past psychiatric history, defendant reported that before 1977 or 1978, he saw a psychiatrist after he fell from a two-story building and hit his head; in 1977 or 1978, pursuant to a court order, he had been evaluated by a psychiatrist and then hospitalized at Warren G. Murray Children's Home ("the children's home"). C108-09, 113.

Defendant's mental status evaluation revealed defendant's "attitude to be a mixture of extreme apprehension with a sense of hopelessness, some depression and maybe a touch of manipulativeness." C108. Defendant reported having "seen Lucille,

his deceased girlfriend and ha[ving] heard her talk." *Id.* On the mental status testing, defendant wrongly identified the President of the United States; "named three large cities of the U.S. as East St. Louis, St. Louis and could not name the third"; "could not understand or explain the [given] proverb"; "took a long time, counted on the fingers and still could not" count down from 100 by sevens; and did not know the approximate distance between St. Louis and Chicago. C108-09. During the interview, defendant had "extremely poor" eye contact, provided "very vague" answers, and "was very difficult to interview." C109.

Medical reports showed that defendant had been admitted to the children's home from September 1976 to November 1976. C113. There, defendant was diagnosed with mild mental retardation. *Id.* Therapists reported that defendant (1) "does not comprehend all that is going on around him but will do whatever is asked of him, whether it is bad or good"; and (2) "speaks in a low soft voice as though he lacks confidence or does not understand what it is that you are talking about but will agree he understands." *Id.* (internal quotation marks omitted). Psychological testing conducted at the children's home revealed that defendant "had a rather high need for approval, 'which set[] him up as prey for peers of higher intelligence who c[ould] influence him to do bad deeds.'" *Id.*

Based on all the information, including the results of defendant's psychological evaluation, the psychiatrist opined that defendant had the capacity to "see right from wrong" and make "socially appropriate judgment[s]." C113-14. The psychiatrist observed that defendant's intelligence level had improved since his stay at the children's home; this improvement could be explained by increased chronological age and

maturation of the central nervous system. C113. The psychiatrist also diagnosed defendant with acute reactive anxiety and depression. C109.

At the sentencing hearing, the People requested a natural-life sentence, arguing that defendant's lengthy criminal history, including three murders and an attempted murder committed while on parole, demonstrated that prior efforts to rehabilitate "this young man" had failed. R734-37, 740-41. Emphasizing that a natural-life sentence was "lethal" for "this very young man" who had an "ill disposition" and "bad education," defense counsel urged the trial court "to give this young man an opportunity" to again participate in society. R738-40.

In allocution, defendant stated: "Your Honor, [the prosecutor] made the statement that I was convicted of several – three counts of murder before. That I have been convicted as what they say as accessory of the murder, of knowing that this murder have taken place. I was never convicted of no murder." R742.

The trial court sentenced defendant to natural life in prison, explaining:

> In this sentence the Court has considered the factors enumerated in the Criminal Code as factors in mitigation and factors in aggravation. The Court does not find any factors in mitigation. There are many factors in aggravation. The Court has considered the evidence presented at the trial in this cause. The Court has considered the presentence investigation. The Court has considered the evidence presented at this hearing today and the arguments of counsel. And the Court believes that this Defendant cannot be rehabilitated and that it is important that society be protected from this Defendant.

R742.

II. Direct Appeal, Initial Postconviction, and Section 2-1401 Proceedings

On appeal, defendant did not challenge his sentence, and in May 1983, the appellate court affirmed his conviction. *Holman*, 115 Ill. App. 3d at 62-66. In April

2001, defendant filed his first postconviction petition, challenging his sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). C168-72. The trial court denied the petition in September 2001. C177. Nine months later, defendant filed another postconviction petition,[6] challenging the constitutionality of the statutes under which he was convicted and sentenced. C215. The trial court denied it in May 2002. C324. In June 2002, on the motion of one of the parties, the appellate court dismissed defendant's appeals from these judgments denying postconviction relief. C339, 344.

In 2009, defendant filed a petition for relief from judgment under 735 ILCS 5/2-1401, arguing that his sentence was void because it failed to conform to statutory requirements. C348, 351-58. The trial court denied the petition, C421-22, and the appellate court affirmed, *People v. Holman*, 2011 IL App (5th) 090678-U.

III. Successive Postconviction Proceedings

On October 7, 2010, defendant filed a pro se motion for leave to file a successive postconviction petition. C472. As cause for filing the successive petition, defendant asserted that he was actually innocent. C472-76. Defendant's petition challenged the statute under which he was sentenced based on the Sixth and Fourteenth Amendments, and the public notice requirement of the Illinois Constitution. C476-81. The trial court denied leave to file the successive petition, finding that defendant's asserted cause — that he was actually innocent — was insufficient under the Act. C493-94.

On appeal, defendant asserted neither cause nor prejudice to permit filing of his successive petition. Def. App. Ct. Br. 1-11. Instead, relying on *Roper v. Simmons*, 543

[6] At that time, the Post-Conviction Hearing Act (Act) did not bar successive postconviction petitions that were filed within the applicable limitations period. *See* 2003 Ill. Legis. Serv. P.A. 93-493 (S.B. 1440) (West) (enacting 725 ILCS 5/122-1(f) (eff. Jan. 1, 2004)).

U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), defendant argued that the statute under which he was sentenced is unconstitutional under the Eighth Amendment and void *ab initio*. Def. App. Ct. Br. 1, 4-10; Def. App. Ct. Reply. Br. 1-2. The appellate court rejected defendant's claim on three alternative grounds: (1) defendant forfeited his claim by not raising it in the trial court; (2) defendant could not raise his new claim for the first time on appeal because his argument rendered his sentence merely voidable, not void; and (3) the statutory scheme under which defendant was sentenced did not mandate a natural-life sentence and thus did not violate the Eighth Amendment. *People v. Holman*, 2012 IL App (5th) 100587-U, ¶¶ 18-20.

In his ensuing petition for leave to appeal (PLA), defendant argued that under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012), a "statute[] authorizing the discretionary imposition of a natural life sentence against a juvenile defendant convicted of homicide" violates the Eighth Amendment, and thus, defendant's sentence imposed under such a statute is void and can be challenged for the first time on appeal. A4 at 5, 14-15. On January 28, 2015, this Court denied the PLA, A4, but entered a supervisory order directing the appellate court to vacate its judgment and reconsider in light of *Davis*, 2014 IL 115595, to determine if a different result is warranted. *People v. Holman*, No. 115597 (Ill. Jan. 28, 2015); *see Davis*, 2014 IL 115595, ¶¶ 26-31, 43 (statute mandating natural-life sentence not facially unconstitutional or void *ab initio*, but *Miller* announced new substantive rule that is retroactive and satisfies cause-and-prejudice test to allow defendant sentenced to mandatory natural life to raise as-applied Eighth Amendment challenge in successive postconviction petition).

On remand, defendant argued for the first time that he had shown cause and prejudice to permit a successive postconviction petition because *Miller* applies retroactively to invalidate his discretionary natural-life sentence; defendant also argued for a ban on natural-life sentences for all juveniles. Def. App. Ct. Suppl. Br. 1, 9-29. The appellate court first concluded that its "previous finding that the defendant failed to meet the cause-and-prejudice test [wa]s contrary to" *Davis*. A2, ¶¶ 18-19. *But see Holman*, 2012 IL App (5th) 100587-U, ¶ 18 (appellate court's previous determination that defendant had not argued cause and prejudice). Next, the appellate court "relax[ed]" the forfeiture rule with respect to defendant's as-applied sentencing challenge because (1) "an unconstitutional sentence is void and may therefore be challenged at any time," A2, ¶¶ 15, 19 (citing *People v. Luciano*, 2013 IL App (2d) 110792, ¶ 48); and (2) disregarding *Miller*'s applicability "'would constitute a serious injustice,'" A2, ¶¶ 16, 19 (quoting *People v. Johnson*, 2013 IL App (5th) 110112, ¶ 13). On the merits, the appellate court found that (1) *Miller* does "not require sentencing courts to consider an enumerated set of factors," A2, ¶ 36; (2) "existing [Illinois] law required the sentencing court to look beyond the statutory factors in mitigation and consider any mitigating circumstances, including the defendant's age and social environment," A2, ¶ 40; (3) defendant's sentence comports with *Miller*, A2, ¶¶ 42-46; and (4) no categorical bar on life-without-parole sentences for juveniles is warranted, A2, ¶¶ 49-52.

STANDARD OF REVIEW

Whether the trial court properly denied defendant leave to file his successive postconviction petition is a question that this Court reviews *de novo*. *People v. Sanders*,

2016 IL 118123, ¶ 31. Defendant's as-applied constitutional challenge to his sentence is also reviewed *de novo*. *People v. Taylor*, 2015 IL 117267, ¶ 11.

ARGUMENT

I. Statutory and Constitutional Standards

A. Successive postconviction petition standards

A defendant may file a successive postconviction petition only with leave of the trial court, 725 ILCS 5/122-1(f) (2010); *People v. Smith*, 2014 IL 115946, ¶¶ 23, 33, which the court may grant if the defendant "demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure," 725 ILCS 5/122-1(f) (2010). A defendant "shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." *Id.* And a defendant establishes "prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.*

The defendant "'must establish cause and prejudice as to each individual claim asserted in a successive petition,'" and must submit enough documentation to allow the trial court to make that determination. *Smith*, 2014 IL 115946, ¶ 35 (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 463 (2002)). Under these standards, the trial court must deny leave to file a successive postconviction petition "when it is clear, from a review of the successive petition and the documentation submitted by the [defendant], that the claims alleged by the [defendant] fail as a matter of law or where the successive petition

with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35.

B. Eighth Amendment principles

As a class, juvenile offenders have lessened culpability and a greater chance for reform. *Miller*, 132 S. Ct. 2464; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 568-70. Thus, "they are less deserving of the most severe punishments." *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569); *see Miller*, 132 S. Ct. at 2469. Because "'[i]t is difficult . . . to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,'" *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573); *see Miller*, 132 S. Ct. at 2469, juveniles are different from adults for purposes of the Eighth Amendment's prohibition against the infliction of cruel and unusual punishments, *Miller*, 132 S. Ct. at 2464, 2470; *Graham*, 560 U.S. at 68-75; *Roper*, 543 U.S. at 568-75. Accordingly, the Eighth Amendment bars (1) capital punishment for juveniles, *Roper*, 543 U.S. at 575; (2) sentences of life without the possibility of parole for juveniles convicted of nonhomicide offenses, *Graham*, 560 U.S. at 75; and (3) mandatory sentences of life without the possibility of parole for juveniles convicted of homicide, *Miller,* 132 S. Ct. at 2469, 2475; *People v. Reyes*, 2016 IL 119271, ¶¶ 3-4, 9; *Davis*, 2014 IL 115595, ¶¶ 17-22, 43; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (*Miller* applies retroactively to cases on collateral review).

II. The Appellate Court Exceeded Its Authority in Considering Defendant's Forfeited As-Applied Eighth Amendment Claim.

Relying on *Miller*, defendant claims that his natural-life sentence violates the Eighth Amendment. Def. Br. 28-31. This claim is thrice-forfeited because defendant

omitted it from (1) his motion for leave to file a successive postconviction petition; (2) his 2012 pre-remand appellate court briefs; and (3) his first PLA to this Court. Accordingly, the appellate court erred in reaching defendant's forfeited claim.

A. Defendant's motion for leave to file a successive postconviction petition did not challenge his sentence as unconstitutional under the Eighth Amendment.

Under well-established principles of procedural default, a claim not raised in a postconviction petition may not be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (collecting prior cases); *cf.* 725 ILCS 5/122-3 (2010) ("Any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived.").

Here, although *Graham* and *Roper* had already been decided when defendant filed his motion, defendant's successive postconviction filings asserted no Eighth Amendment claim. C474-81; *see generally Graham*, 560 U.S. at 67-75 (describing prior precedent distinguishing juveniles from adults, including their greater rehabilitative potential, and explaining that the salient characteristics of youth make it difficult "'to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption'" (quoting *Roper*, 543 U.S. at 573); *cf.* Def. App. Ct. Br. 1-11 (before *Miller*, raising facial Eighth Amendment challenge under *Graham* and *Roper*). Neither defendant's motion nor the attached successive petition challenged his sentence as constitutionally disproportionate; instead, defendant argued that the statute under which he was sentenced was facially unconstitutional for reasons unrelated to his sentence's proportionality. C474-81 (citing

Sixth and Fourteenth Amendments and Illinois Constitution's public notice requirement). Accordingly, defendant's Eighth Amendment claim is forfeited.

B. Neither defendant's 2012 pre-remand appellate court briefs nor his first PLA raised an as-applied Eighth Amendment claim.

In his 2012 pre-remand appeal, defendant did not argue that the trial court erroneously denied leave to file the claims he raised in his successive petition. Def. App. Ct. Br. 1-11. Instead, defendant's opening brief presented an entirely different issue: "Whether the sentencing statute in effect at the time of [his] crime . . . was unconstitutional and void *ab initio* [because] it permitted the imposition of a sentence of life imprisonment without parole for a defendant who was under the age of 18 at the time of the offense." *Id.* at 1, 4. In support, defendant relied on *Roper* and *Graham*. Def. App. Ct. Br. 5-10. In his reply brief, defendant cited *Miller*, but only in support of his facial statutory challenge. Def. App. Ct. Reply Br. 1-2 (because "statute under which [defendant] was sentenced" is "unconstitutional," judgment "sending [defendant] to prison was a void order, and that order may be challenged in this appeal"; *Miller* "show[s] that a statute is unconstitutional if it does not account for the youth of the defendant when sentencing that defendant" to natural life). Likewise, in his first PLA, defendant argued that under *Miller*, a "statute[] authorizing the discretionary imposition of a natural life sentence against a juvenile defendant convicted of homicide" violates the Eighth Amendment, and thus, defendant's sentence imposed under such a statute is void and could be challenged for the first time on appeal. A4 at 5, 13-15 (sentencing scheme is facially unconstitutional because it "prohibits parole hearings for juveniles serving sentences of natural life").

Thus, when this Court vacated the appellate court's judgment and remanded for reconsideration in light of *Davis*, defendant's sole appellate argument was that his sentence is void because it was imposed under a statute that is facially unconstitutional. Defendant did not argue that his individual sentence was constitutionally disproportionate because the trial court failed to consider youth as mitigating. Defendant's claim is therefore forfeited.

Defendant claims that "this Court ordered the appellate court to consider [his] discretionary sentence in light of Davis." Def. Br. 10 n.2, 17 n.7. But defendant had never raised an as-applied challenge to his sentence. And *Davis* disposed of the facial challenge that defendant had raised. 2014 IL 115595, ¶¶ 24-32 (*Miller* did not render statute mandating natural-life sentence for juvenile defendant facially unconstitutional and void *ab initio*); *cf. id.*, ¶ 43 ("*Miller* does not invalidate the penalty of natural life without parole for multiple murderers, only its *mandatory* imposition on juveniles. A minor may still be sentenced to natural life imprisonment without parole so long as the sentence is at the trial court's discretion rather than mandatory."). Therefore, this Court's supervisory remand order did not invite the appellate court to consider a forfeited claim.

C. The appellate court exceeded its authority in considering defendant's forfeited claim.

On remand, defendant filed a supplemental brief raising a new claim: that his individual sentence is disproportionate under the Eighth Amendment. Def. App. Ct. Supp. Br. 1, 12. The appellate court lacked authority to "relax the forfeiture rule" and consider defendant's new claim, A2, ¶ 19. Sup. Ct. Rule 341(h)(7); *cf. People v. McNeal*, 194 Ill. 2d 135, 147 (2000) (postconviction "defendant may not add an issue to the case while the matter is on review")

As this Court has "repeatedly stressed, the appellate court does not possess the supervisory powers enjoyed by this [C]ourt and cannot, therefore, reach postconviction claims not raised in the initial petition[.]" *Jones*, 213 Ill. 2d at 507 (citations omitted). *Jones* explained: "the typical *pro se* litigant will draft an inartful pleading which does not survive [trial court] scrutiny," and "it is only during the appellate process, when the discerning eyes of an attorney are reviewing the record, that the more complex errors that a nonattorney cannot glean are discovered." 213 Ill. 2d at 504. The appellate attorney "then adds the newly discovered error to the appeal despite the fact that the claim was never considered by the trial court in the course of its ruling." *Id.* at 504-05. Although the appellate attorney's goals — of "zealously guarding the client's rights" and "attempting to conserve judicial resources by raising the claim expeditiously at the first available chance" — "are laudable, . . . they nonetheless conflict with the nature of appellate review and the strictures of the Act." *Id.* at 505.

The question on appeal from the denial of leave to file a successive postconviction petition is whether the motion, petition, and supporting documentation are sufficient to establish cause and prejudice as to each claim asserted in the successive petition, that is, whether the asserted claims fail as a matter of law or whether the pleadings are sufficient to justify further proceedings under the Act. *Smith*, 2014 IL 115946, ¶ 35. This standard limits the appellate court's review to the claims that were presented in the trial court pleadings. Put simply, the "appellate court is not free . . . to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." *Jones*, 213 Ill. 2d at 508.

In excusing defendant's forfeiture, the appellate court relied on two cases that were decided after its original opinion, neither of which supports its decision to excuse the forfeiture and consider defendant's claim. A2, ¶¶ 15-16, 19 (citing *Johnson*, 2013 IL App (5th) 110112, and *Luciano*, 2013 IL App (2d) 110792). In *Johnson*, the defendant's postconviction petition had asserted that his "mandatory sentence d[id] not reflect his ability to be rehabilitated and constitute[d] cruel and unusual punishment," and that trial counsel was ineffective for not moving to reconsider his sentence on this basis. 2013 IL App (5th) 110112, ¶¶ 6, 13. Thus, notwithstanding *Johnson*'s notation "that *Miller v. Alabama* ha[d] only been recently decided and to ignore its applicability in [that] case would constitute serious injustice," 2013 IL App (5th) 110112, ¶ 13, the defendant's postconviction petition in *Johnson* had in fact asserted an Eighth Amendment claim and argued that trial counsel was ineffective for not raising the claim.

Nor does *Luciano*, 2013 IL App (2d) 110792, support the appellate court's decision to excuse defendant's forfeiture. There, the defendant challenged his mandatory natural-life sentence under *Miller* for the first time on appeal. *Luciano*, 2013 IL App (2d) 110792, ¶¶ 35, 38, 45-47. Relying on the principle that a void sentence may be challenged at any time, the appellate court held that it could consider the forfeited claim. *Id.* at ¶ 48. But *People v. Castleberry*, 2015 IL 116916, ¶¶ 13, 19, abolished the void sentence rule upon which *Luciano* was premised. *See Luciano*, 2013 IL App (2d) 110792, ¶¶ 47-48. Further, *People v. Price* recently reaffirmed that a judgment will be deemed void (and thus subject to attack at any time) only: "(1) where the judgment was entered by a court that lacked personal or subject-matter jurisdiction; [or] (2) where the judgment was based on a statute that is facially unconstitutional and void *ab initio*."

2016 IL 118613, ¶¶ 29-32;[7] *cf. People v. Thompson*, 2015 IL 118151, ¶¶ 30-44 (as-applied challenge to sentence not exempt from typical forfeiture rules for collateral proceeding under 725 ILCS 5/2-1401). *Price* declined to "expand [this Court's] voidness doctrine by declaring as void all judgments of conviction and sentence that do not conform to a later announced substantive rule, although the judgment conformed to constitutional standards at the time of trial." 2016 IL 118613, ¶¶ 29, 32. Instead, "[i]f a new rule qualifies as a 'substantive rule' under *Teague*, then defendants whose convictions are final may seek the benefit of that rule through appropriate collateral proceedings." *Price*, 2016 IL 118613, ¶ 32 (citing *Montgomery*, 136 S. Ct. at 729).

Thus, if a defendant seeks the benefit of *Miller*'s new substantive rule, he must seek leave to file a successive postconviction petition in the trial court; he may not raise a new claim for the first time on appeal. *Thompson*, 2015 IL 118151, ¶ 44; *id.* at ¶ 38 (explaining importance of developing factual record in trial court for as-applied constitutional challenges); *Jones*, 213 Ill. 2d at 505-08 (explaining reasons for requiring litigants to follow proper procedure, including to avoid conflicting appellate court opinions on constitutional questions). Moreover, enforcing the forfeiture permits a defendant to provide adequate supporting documentation — which may not be in the appellate record on appeal — to support his cause-and-prejudice argument. *Smith*, 2014 IL 115946, ¶ 35. Accordingly, the appellate court here exceeded its authority in addressing defendant's forfeited *Miller* claim. The appellate court should have disposed

[7] Defendant's initial claim — that the statute under which he was sentenced is facially unconstitutional — likely qualified for the void *ab initio* exception to forfeiture. *But see Holman*, 2012 IL App (5th) 100587-U, ¶ 18 (finding claim forfeited). However, his new as-applied challenge falls within no exception to the normal forfeiture rules for collateral attacks.

of defendant's facial statutory challenge under *Davis*, and rejected defendant's new as-applied challenge as forfeited.

III. Forfeiture Aside, Because Defendant's Sentence Comports with *Miller*, He Cannot Establish Cause and Prejudice to File a Successive Postconviction Petition Raising an Eighth Amendment Challenge to His Sentence.

Defendant's brief rests on the erroneous presumption that *all* natural-life sentences imposed on juveniles before *Miller* — regardless of whether the sentence was imposed at the trial court's discretion — are unconstitutional. *See, e.g.*, Def. Br. 10 & n.2, 17 & n.7 ("juveniles who were sentenced to life without parole are entitled to a new sentencing hearing that comports with" *Miller*; "whether *Miller* should be applied to" defendant's discretionary natural-life sentence "is not the issue on appeal"). But *Davis* expressly rejected the notion that *Miller* invalidated discretionary natural-life sentences like the one defendant received. *Davis*, 2014 IL 115595, ¶ 43 ("*Miller* does not invalidate the penalty of natural life without parole for multiple murderers, only its *mandatory* imposition on juveniles. A minor may still be sentenced to natural life imprisonment without parole so long as the sentence is at the trial court's discretion[.]"). And *Montgomery* — which held that *Miller* applies retroactively to cases on collateral review — did not alter this conclusion. *Montgomery*, 136 S. Ct. at 732.

Thus, the threshold question is whether *Miller* requires new sentencing hearings for all juveniles sentenced to life without parole, even if the sentence was imposed at the trial court's discretion. The answer is no. That juveniles are immature and therefore less culpable for their crimes is not a new concept in our country's jurisprudence. Both the Supreme Court and this Court have long recognized the special status of juveniles, including the characteristics that establish their lessened culpability. Illinois in particular

has treated juveniles differently, constitutionally requiring since 1970 that the legislature determine, and the courts impose, sentences with the dual objectives of protecting the public *and* rehabilitating the offender. Ill. Const. 1970, art. I, § 11. To satisfy this constitutional mandate, Illinois trial courts have been required to consider all mitigating evidence, including an offender's youth and lessened culpability, and to impose a sentence that reflects the offender's rehabilitative potential. Reviewing courts have reduced sentences for young offenders where trial courts have failed to abide by the constitutional requirement. Accordingly, Illinois's individualized sentencing procedures satisfy *Miller*'s procedural requirement — "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors" — thus giving effect to *Miller*'s substantive holding. *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 132 S. Ct. at 2460).

But even if some juvenile offenders may be entitled to new sentencing hearings where their records affirmatively show that the trial court refused to consider youth and its attendant characteristics as sentencing factors, here, the record demonstrates that the trial court considered all mitigating evidence, including defendant's youth and its attendant characteristics, before sentencing defendant to natural life. Therefore, because defendant's sentence is constitutional, he cannot establish prejudice.

A. Background legal principles

That Illinois's individualized sentencing procedure comports with *Miller* is supported by a review of United States Supreme Court jurisprudence and established Illinois sentencing law.

1. United States Supreme Court jurisprudence

The Supreme Court has long recognized that children are constitutionally different from adults,[8] including that youth and its attendant circumstances are mitigating factors that must be considered at sentencing. As long ago as 1948, the Court observed that "[a]ge 15 is a tender and difficult age for a boy . . . . He cannot be judged by the more exacting standards of maturity. . . . This is the period of great instability which the crisis of adolescence produces." *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *see Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962) (juvenile's "youth and immaturity" pertinent to assessing voluntariness of confession). In 1979, the Court recognized that "juvenile offenders constitutionally may be treated differently from adults" because "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 634-35 (1979); *cf. id.* at 635 n.13 (unlike an adult, "'a child . . . is not possessed of that full capacity for individual choice'" (quoting *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring)).

Three years later, the Court emphasized that youth and its attendant characteristics "must be considered a[s] relevant mitigating factor[s]" at a capital sentencing hearing. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance are particularly relevant" as mitigating evidence). It explained:

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[8] This principle is not unique to criminal law. *See J.D.B. v. North Carolina*, 564 U.S. 261, 273 & n.6 (2011) (citing examples from other areas of law).

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Id. at 115-16 (quoting *Bellotti*, 443 U.S. at 635). The Court noted that because adolescents "are more vulnerable, more impulsive, and less self-disciplined, . . . they deserve less punishment." *Eddings*, 455 U.S. at 115 n.11 (quotation marks and citation omitted). Therefore, "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." *Eddings*, 455 U.S. at 116.

Two years after *Eddings*, the Court reiterated these principles. *See Schall v. Martin*, 467 U.S. 253, 265 n.15, 266 (1984) (because a juvenile is not fully formed in his emotional growth, intellectual ability, practical experience, and values, he does not view the commission of a crime in the same perspective as an adult). Three years later, in barring capital punishment for a person under 16 years of age, the Court emphasized that it "ha[d] already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion); *id.* at 834 (observing "broad agreement . . . that adolescents as a class are less mature and responsible than adults."); *id.* at 835 (because a teenager is less able to evaluate the consequences of his actions and more likely to be motivated by emotion or peer pressure, a juvenile's "conduct is not as morally reprehensible as that of an adult").

The next year, relying on these principles, Justice Brennan filed a dissenting opinion, joined by three justices, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. at 555, 562-75, determining that the Eighth Amendment bars capital punishment for juveniles because they "lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty." *Stanford*, 492 U.S. at 394 (Brennan, J., dissenting). He outlined the principles upon which *Roper* later relied in abrogating *Stanford* and barring capital punishment for juveniles. *Compare Stanford*, 492 U.S. at 393-405 (Brennan, J., dissenting), *with Roper*, 543 U.S. at 555, 562-75. Four years after *Stanford*, the Court reiterated that a sentencer "must be allowed to consider the mitigating qualities of youth," explaining that the "signature qualities of youth are transient" and "the impetuousness and recklessness that may dominate in younger years can subside" as individuals mature. *Johnson v. Texas*, 509 U.S. 350, 367-368 (1993).

In 2005, relying on this long line of precedent, the Court barred capital punishment for juveniles. *Roper*, 543 U.S. at 569-75. Three general differences between juveniles and adults establish that juveniles "cannot with reliability be classified among the worst offenders": (1) "as any parent knows," they "'lack maturity and [have] an underdeveloped sense of responsibility,'" which "'often result[s] in impetuous and ill-considered actions and decisions,'" *id.* at 569 (quoting *Johnson*, 509 U.S. at 367, and citing *Eddings*, 455 U.S. at 115-16); (2) they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," *Roper*, 567 U.S. at 569 (citing *Eddings*, 455 U.S. at 115); and (3) a juvenile's character "is not as well formed as that of an adult," since his "personality traits . . . are more transitory, less

fixed," *Roper*, 567 U.S. at 570 (citing E. Erikson, Identity: Youth and Crisis (1968)). Because "'the signature qualities of youth are transient,'" there exists "a greater possibility . . . that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570 (quoting *Johnson*, 509 U.S. at 368) (remaining citations omitted). Given the "diminished culpability of juveniles, . . . the penological justifications for the death penalty apply to them with lesser force than to adults." *Roper*, 543 U.S. at 571. And although individualized sentencing arguably could identify the rare juvenile for whom death is merited, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 572-73. Therefore, "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.*

Five years after *Roper*, in 2010, the Court applied these principles to categorically bar life-without-parole sentences for juveniles who did not commit homicide. *Graham*, 560 U.S. at 74-75. The Court explained that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences," most importantly that the life-without-parole "sentence alters the offender's life by a forfeiture that is irrevocable," leaving the offender without "hope of restoration." *Id.* at 69-70. As in *Roper*, the Court rejected an individualized sentencing approach: "'[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive' a sentence of life without parole for a nonhomicide crime

'despite insufficient culpability.'" *Graham*, 560 U.S. at 77-78 (quoting *Roper*, 543 U.S. at 572-73).

Two years later, in 2012, the Court considered these principles in conjunction with precedent that "prohibited mandatory imposition of capital punishment" and that required "sentencing authorities [to] consider the characteristics of the defendant and the details of his offense before sentencing him to death." *Miller*, 132 S. Ct. at 2463-64 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion)). Based on "[t]he confluence of these two lines of precedent," the Court held "that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Miller*, 132 S. Ct. at 2464, 2469, 2475. Just as *Graham* "mirrored a proscription first established in the death penalty context — that the punishment cannot be imposed for any nonhomicide crimes against individuals," *Miller* mirrored the bar against mandatory capital sentencing and the demand for individualized sentencing when imposing that punishment. *Miller*, 132 S. Ct. at 2466-68 (citations omitted). The Court explained that under mandatory life-without-parole sentencing schemes, "every juvenile will receive the same sentence as every other — the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Id.* at 2467-68. But "[i]n meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison." *Miller*, 132 S. Ct. at 2468. Thus, the Court held, "[b]y making youth (and all that accompanies it) irrelevant to imposition of th[e] harshest

prison sentence" for juveniles, a mandatory life-without-parole sentencing "scheme poses too great a risk of disproportionate punishment." *Id.* at 2469.

The Court did not consider whether the Eighth Amendment requires a categorical bar on life without parole for all juveniles, but noted that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* Reiterating the difficulty in distinguishing "between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,'" the Court chose not to "foreclose a sentencer's ability to make that judgment in homicide cases." *Id.* (quoting *Roper*, 543 U.S. at 573, and *Graham*, 560 U.S. at 68). But the mandatory punishment at issue "misse[d] too much" by "treat[ing] every child as an adult," *Miller*, 132 S. Ct. at 2468, and altogether precluding sentencers from accounting for the differences among defendants and crimes, *id.* at 2468-69 & n.8, 2475. Thus, a factfinder "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2475. The Court concluded: "By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Id.*

Four years later, the Court held that *Miller* announced a substantive rule of constitutional law that applies retroactively. *Montgomery*, 136 S. Ct. at 736. The Court described *Miller* as holding "that mandatory life-without-parole sentences for children 'pos[e] too great a risk of disproportionate punishment.'" *Montgomery*, 136 S. Ct. at 733

(quoting *Miller*, 132 S. Ct. at 2469). "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 132 S. Ct. at 734. "[L]ife without parole could be a proportionate sentence for the latter kind of juvenile offender," but it is a disproportionate sentence for "the vast majority of juvenile offenders," who fall within the former class. *Id.* Therefore, because the mandatory life-without-parole sentencing schemes held unconstitutional in *Miller* necessarily carried a significant, indeed unacceptable, risk that a juvenile defendant faced a punishment that the law could not impose on him, *Miller* announced a substantive rule. *Montgomery*, 136 S. Ct. at 733-34.

Montgomery further explained that "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 735 (quoting *Miller* 132 S. Ct. at 2460). This hearing "gives effect to *Miller*'s substantive holding." *Montgomery*, 136 S. Ct. at 735. But "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility . . . to implement its substantive guarantee." *Id.* Rather, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (quotation marks and citation omitted). Nor did *Montgomery* "require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole" because States could remedy the *Miller* violation by giving such offenders parole. *Id.* at 736.

2. Illinois law

"[T]raditionally, as a society [Illinois] ha[s] recognized that young defendants have greater rehabilitative potential." *People v. Leon Miller*, 202 Ill. 2d 328, 341-42 (2002). As early as 1894, this Court observed: "'There is in the law of nature, as well as the law that governs society, a marked distinction between persons of mature age and those who are minors. The habits and characters of the latter are, presumably, to a large extent as yet unformed and unsettled.'" *Id.* at 342 (quoting *People ex rel. Bradley v. Ill. State Reformatory*, 148 Ill. 413, 423 (1894)) (remaining citation omitted). Likewise, in 1932, this Court observed that "the fact of infancy has always made [juveniles] the objects of tender consideration and mercy when penalties are to be imposed." *People v. McWilliams*, 348 Ill. 333, 336-38 (1932) (reversing sentence because record was silent as to "where [the 17-year-old defendant] was born, how he was reared, what were the family conditions, how he had been occupied, and what influences for good or evil had surrounded him"). Accordingly, the legislature traditionally chose sentencing schemes aimed to reform rather than punish the juvenile offender. *See, e.g.*, *Bradley*, 148 Ill. at 422-24 (person between ages of 16 and 21 received sentence in reform school, while older adults received sentence in penitentiary to either solitary confinement or hard labor). In 1899, recognizing the rehabilitative potential of juveniles, "our state [became] the first to create a court system dedicated exclusively to juveniles." *Leon Miller*, 202 Ill. 2d at 341-42 (citing 1899 Ill. Laws 131, and *Bradley*, 148 Ill. at 423); *In re Armour*, 59 Ill. 2d 102, 104 (1974).

The focus on rehabilitative potential became a constitutional mandate for all offenders in 1970: "All 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. The rehabilitation clause — requiring that penalties must be determined "with the objective of restoring the offender to useful citizenship" — "provide[s] a limitation on penalties beyond those afforded by the [E]ighth [A]mendment." *People v. Clemons*, 2012 IL 107821, ¶¶ 39-40 (goal is to "'look at the person who committed the act and determine to what extent he can be restored to useful citizenship'" (citation omitted)).[9] The Unified Code of Corrections also expressly identified rehabilitation as a sentencing purpose. Ill. Rev. Stat. 1979, ch. 38, ¶ 1001-1-2; *People v. Perruquet*, 68 Ill. 2d 149, 155 (1977) (citing 1973 version). Thus, an Illinois trial judge must "fashion[] a sentence which will not only protect the interests of society, but will also allow for the possibility of rehabilitation of the offender." *Perruquet*, 68 Ill. 2d at 155.

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[9] Article I, section 11's first requirement — that penalties be determined "according to the seriousness of the offense" — is "the proportionate penalties clause." *Clemons*, 2012 IL 107821, ¶ 37. Although the rehabilitation clause provides greater protection than the Eighth Amendment, the relationship between the proportionate penalties clause and the Eighth Amendment remains unclear. *Id.* at ¶¶ 37-40. *People v. Patterson* referred to article I, section 11, as a whole as the "proportionate penalties clause," and held that the clause is "co-extensive" with the Eighth Amendment. *Patterson*, 2014 IL 115102, ¶¶ 100, 106 (citing *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006)). This statement has caused confusion in the appellate court. *Compare People v. Gipson*, 2015 IL App (1st) 122451, ¶¶ 69-70, *PLA allowed*, No. 119594 (Ill. Nov. 23, 2016) (reconciling statements in *Patterson* and *Clemons*), *with In re Shermaine S.*, 2015 IL App (1st) 142421, ¶ 31 (following *Patterson* to conclude that article I, section 11, offers same protections as Eighth Amendment). However, as to the operative scope of both article I, section 11, and the Eighth Amendment, the statement is accurate. *Patterson* held that because a juvenile transfer provision does not itself impose punishment, it violates neither the Eighth Amendment nor "the proportionate penalties clause" (meaning article I, section 11). 2014 IL 115102, ¶¶ 101-06. In this context, article I, section 11, and the Eighth Amendment *are* co-extensive, for both provisions apply only "to direct actions by the government to inflict punishment." *Rodney H.*, 223 Ill. 2d at 518 (citations omitted). But the protections they afford once they apply differ, as *Clemons* explained.

To this end, because a judge must impose a sentence "based upon the particular circumstances of each individual case," *id.* at 154, it is essential that the judge have the "'fullest information possible concerning the defendant's life and characteristics,'" *People v. La Pointe*, 88 Ill. 2d 482, 497 (1981) (quoting *Williams v. New York*, 337 U.S. 241, 246-51 (1949)). "[T]he trial judge must consider all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding." *People v. Ward*, 113 Ill. 2d 516, 527-28 (1986) (citing *United States v. Grayson*, 438 U.S. 41, 48 (1978), and *La Pointe*, 88 Ill. 2d at 495); *see* Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-3-2(a)(1) (statute requiring PSI, which must include information concerning defendant's criminal, physical health, mental health, family, economic, educational, occupational, and personal history). In sum, Illinois law requires the judge to consider all constitutional and statutory factors, including the nature and circumstances of the crime; the offender's degree of participation in the crime; his rehabilitative potential; his remorse or lack thereof; and his personal history, including his age, general moral character, mentality, social environment, habits, demeanor, criminal history, and education. Ill. Rev. Stat. 1979, ch. 38, ¶¶ 1005-5-3.1 & 1005-5-3.2; *People v. Fern*, 189 Ill. 2d 48, 53, 56 (1999); *Ward*, 113 Ill. 2d at 527-28; *La Pointe*, 88 Ill. 2d at 493-99; *Perruquet*, 68 Ill. 2d at 154-55.

To ensure that the Illinois constitutional mandate is satisfied, courts are empowered to reduce any sentence on appeal, *see* Sup. Ct. R. 615(b)(4), when "the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000) (reducing sentence on appeal); *see People v. Calhoun*, 404 Ill. App. 3d 362,

389-90 (1st Dist. 2010) (collecting cases and observing that Illinois "courts have never been reluctant to reduce a sentence on appeal, despite the serious nature of the underlying crime, where a trial court has neglected its duty to consider the relevant mitigating factors"); *People v. Maldonado*, 240 Ill. App. 3d 470, 485 (1st Dist. 1992) (collecting additional cases).[10]

Yet in reviewing sentences, courts are mindful "that the trial court is in a far better position to appraise and evaluate the likelihood of defendant's rehabilitation." *People v. Carmickle*, 46 Ill. App. 3d 112, 116 (3d Dist. 1977); *see Perruquet*, 68 Ill. 2d at 154 (similar). Moreover, the Illinois Constitution does not require the "judge to detail for the record the process by which he concluded that the penalty he imposed was appropriate," *La Pointe*, 88 Ill. 2d at 493, or make "an express finding . . . that there is no possibility of restoring the particular defendant to useful citizenship in order to impose a natural life sentence," *People v. Bartik*, 94 Ill. App. 3d 696, 702 (2d Dist. 1981). *Cf. People v. Meeks*, 81 Ill. 2d 524, 534 (1980) (judge not obligated "to recite, and assign value to, each fact presented in evidence at the sentencing hearing"). Rather, "[t]he record must

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[10] *See also, e.g.*, *People v. Brown*, 2015 IL App (1st) 130048, ¶¶ 39-47 (reducing sentence under Illinois Constitution for 16-year-old based on mitigating factors), *PLA denied*, No. 119427 (Ill. Sept. 30, 2015); *People v. Williams*, 196 Ill. App. 3d 851, 867-68 (1st Dist. 1990) (same for 15-year-old and 17-year-old); *People v. Steffens*, 131 Ill. App. 3d 141, 151-53 (1st Dist. 1985) (same for 16-year-old); *People v. Williams*, 62 Ill. App. 3d 966, 975-76 (1st Dist. 1978) (same for 19-year-old); *People v. Smith*, 50 Ill. App. 3d 320, 328 (1st Dist. 1977) (same for 18-year-old); *People v. Gibbs*, 49 Ill. App. 3d 644, 648 (1st Dist. 1977) (same for 19-year-old); *People v. Horton*, 43 Ill. App. 3d 150, 157 (1st Dist. 1976) (same for 17-year-old); *People v. Roddy*, 9 Ill. App. 3d 65, 65-66 (5th Dist. 1972) (same for 23-year-old); *People v. Hudson*, 3 Ill. App. 3d 815, 816-17 (5th Dist. 1972) (same for 17-year-old); *People v. Towns*, 3 Ill. App. 3d 710, 711-12 (5th Dist. 1971) (same); *People v. Haynes*, 133 Ill. App. 2d 873, 873-75 (5th Dist. 1971) (same for 22-year-old). Even before the 1970 Constitution, the appellate court, citing advances in psychology, psychiatry, and sociology, reduced a sentence on appeal because it failed to adequately reflect the defendant's rehabilitative potential. *People v. Lillie*, 79 Ill. App. 2d 174, 178-80 (5th Dist. 1967) (for 23-year-old).

show that the trial judge considered both the seriousness of the crime and the defendant's rehabilitative potential." *Bartik*, 94 Ill. App. 3d at 701-02 (sentence upheld where evidence on mitigation and rehabilitative potential were in record and judge stated he considered them).

Decades before *Roper*, Illinois barred capital punishment for juveniles. Ill. Rev. Stat. 1977, ch. 38, ¶ 9-1(b). And ten years before *Miller v. Alabama*, emphasizing Illinois's longstanding recognition that juveniles have greater rehabilitative potential, this Court upheld a trial court's finding that a mandatory natural-life sentence as applied to a particular 15-year-old convicted under an accountability theory violated the Illinois Constitution. *Leon Miller*, 202 Ill. 2d at 337-43. In so doing, this Court reiterated that in many cases, Illinois courts "have discretion to grant leniency to a juvenile even if he or she is prosecuted as an adult." *Id.* at 341-42 (citation omitted). Likewise, courts may grant leniency to offenders found guilty by accountability. *Id.* at 342. The mandatory natural-life sentence in *Leon Miller* "eliminate[d] the court's ability to consider any mitigating factors such as age or degree of participation," and implied that under any circumstances the juvenile offender was "incorrigible and incapable of rehabilitation for the rest of his life." *Id.* at 342-43. This Court rejected that "blanket proposition" and held that the sentencing scheme mandating natural life was disproportionate under the Illinois Constitution as applied to the defendant. *Id.* at 343.

B. Defendant cannot raise his as-applied Eighth Amendment claim in a successive postconviction petition because he fails to show prejudice.

Defendant claims that his sentence violates the Eighth Amendment because the trial court inadequately considered his youth and its attendant characteristics before

sentencing him to natural life in prison. Although the legal underpinnings for defendant's claim were reasonably available before *Miller*,[11] including at the time of his motion for leave to file a successive postconviction petition, *see supra* Part II.A, they were not available to defendant at the time he filed his initial postconviction petition. *Compare* C168-72 (postconviction petition filed in April 2001), *with Roper*, 543 U.S. at 551 (decided in 2005). Thus, defendant can show cause for his failure to assert an as-applied Eighth Amendment claim in earlier proceedings.

But defendant cannot show prejudice. He received a discretionary natural-life sentence under Illinois law that required the trial court to fashion a sentence that aimed both to protect the public and to rehabilitate him, if possible, after considering all mitigating factors, including his youth and its attendant characteristics. Because the record demonstrates that the trial court here followed that constitutionally adequate procedure, defendant cannot show prejudice.

1. The Illinois constitutional mandate requiring a judge to impose a sentence that reflects an offender's rehabilitative potential gives effect to *Miller*'s substantive holding.

"[T]he procedure *Miller* prescribes" is "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors." *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 132 S. Ct. at 2460); *see Miller*, 132 S. Ct. at 2471, 2475 (factfinder "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles"). Illinois law has long required such a hearing for

[11] *See, e.g.*, Br. for Petr., *Graham v. Florida*, No. 08-7412, 2009 WL 2159655, at *24-29 (U.S. July 16, 2009) (arguing for an extension of *Roper*'s categorical rule, citing relative culpability and other differences between juveniles and adults, and asserting that no legitimate penological purposes justified imposing a life-without-parole sentence on a juvenile nonhomicide offender); *id.* at *xii-xvii (collecting other authorities discussing these principles).

all discretionary sentences. The 1970 Illinois Constitution expressly mandates that courts impose sentences with the goal of rehabilitating the offender, thus providing a limitation on penalties beyond what is generally afforded under the Eighth Amendment. *Clemons*, 2012 IL 107821, ¶¶ 39-40. Likewise, Illinois statutory and common law also require sentences to reflect the offender's rehabilitative potential. *See supra*, Part III.B.2. To satisfy these directives, Illinois law requires judges to consider *all* factors bearing on the offender's rehabilitative potential when imposing a discretionary sentence. *See id.* No factor is statutorily or otherwise excluded from the mitigating evidence a judge must consider. *Cf. Eddings*, 455 U.S. at 114-15 (court's refusal to consider mitigating factor as matter of law violates Eighth Amendment). Nor is the special status of juveniles ignored. *Davis*, 2014 IL 115595, ¶ 45 ("In *Leon Miller*, this court expressly recognized the special status of juvenile offenders prior to *Roper*, *Graham*, and *Miller*."); *Leon Miller*, 202 Ill. 2d at 341-42 (relying on precedent from 1894). Indeed, an offender is permitted to present any evidence concerning his character and circumstances at the sentencing hearing. *Ward*, 113 Ill. 2d at 527-28; *La Pointe*, 88 Ill. 2d at 495-99. This individualized sentencing procedure — mandated by the Illinois Constitution's substantive guarantee that an offender receive a sentence that reflects his rehabilitative potential — "separate[s] those juveniles who may be sentenced to life without parole from those who may not," thus "giv[ing] effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735.

Defendant argues that every natural-life sentence imposed on an Illinois juvenile before *Miller* is unconstitutional because the trial judge could not have adequately

considered youth as a mitigating factor before *Miller*. *See, e.g.*, Def. Br. 25-26. But that is only true for juveniles who received *mandatory* natural life sentences, *but see Leon Miller*, 202 Ill. 2d at 341-43, which by their nature preclude individualized sentencing, thus creating an unacceptable risk that a juvenile whose crime reflects transient immaturity is irrevocably imprisoned for life, *Miller*, 132 S. Ct. at 2468-69, 2475. *See Jones v. Commonwealth*, 795 S.E.2d 705, 721-22 (Va. 2017) (observing the same). Discretionary sentences do not pose the same risk. *Compare Miller*, 132 S. Ct. at 2469, *with Graham*, 560 U.S. at 74-79. Instead, *Miller* determined that an individualized sentencing hearing where youth and its attendant characteristics are considered as sentencing factors sufficiently separates a juvenile whose crime reflects transient immaturity from the juvenile whose crime reflects irreparable corruption. 132 S. Ct. at 2469; *Montgomery*, 136 S. Ct. at 735. Established Illinois procedure for discretionary sentencing satisfies this constitutional mandate.

Contrary to defendant's suggestion, express findings concerning youth, its attendant characteristics, transient immaturity, and/or irreparable corruption are not constitutionally required. Even for sentences imposed after *Miller*, courts are "not require[d] . . . to make a finding of fact regarding a child's incorrigibility." *Montgomery*, 136 S. Ct. at 735. Instead, the sentencer must "*consider* a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.* at 734-35 (emphasis added). That is the degree of procedure that *Miller* mandates to give effect to its substantive holding. *Montgomery*, 136 S. Ct. at 735; *see State v. Mantich*, 888 N.W.2d 376, 383-84 (Neb. 2016) (allowing defendant to present evidence of, and requiring court to consider, mitigating factors satisfies *Miller*).

Under both the Illinois and United States Constitutions, in circumstances where individualized sentencing is a "constitutional imperative" rather than "simply enlightened policy," *Sumner v. Shuman*, 483 U.S. 66, 75 (1987), adequate "consideration" of the offender's characteristics "requires the sentencer to listen" to and weigh the mitigating evidence, *Eddings*, 455 U.S. at 115 & n.10; *People v. Phillips*, 127 Ill. 2d 499, 535 (1989); *see People v. Carlson*, 79 Ill. 2d 564, 590 (1980) ("[E]ighth [A]mendment 'requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death'") (quoting *Woodson*, 428 U.S. at 304). *Miller* itself concluded: "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have *the opportunity to consider* mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 132 S. Ct. at 2475 (emphasis added); *see id.* at 2467-69 (barring mandatory life-without-parole sentences for juveniles because they "preclude[] consideration of," "preclude a sentencer from taking into account," and prevent a sentencer from "look[ing] at" youth-related mitigating factors); *cf. Montgomery*, 136 S. Ct. at 736-37 (juveniles sentenced to mandatory life-without-parole "must be given the opportunity to show their crime did not reflect irreparable corruption"). This conclusion mirrors the individualized sentencing requirement for capital cases, *see Miller*, 132 S. Ct. 2466-68, which "is satisfied by allowing the [sentencer] to consider all relevant mitigating evidence," *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990), and ensures "that the death penalty is reserved only for the most culpable defendants committing the most serious offenses," *Miller*, 132 S. Ct at 2467 (citations omitted). *Compare id.* at 2471 n.10 ("when given the choice,

sentencers impose life without parole on children relatively rarely"), *with Woodson*, 428 U.S. at 295-96 & n.31 (mandatory imposition of death penalty violates Eighth Amendment partly because "juries with sentencing discretion do not impose the death penalty 'with any great frequency'"). And it is consistent with the dictionary definitions of "consider" and "take into account," the two terms *Miller* and *Montgomery* used to express the procedural requirement. *See Webster's Third New Int'l Dictionary* 483 (1993) ("consider" means "to reflect on: think about with a degree of care or caution," or "to think of: come to view, judge, or classify"; it "often indicates little more than think about"); *id.* at 2331 ("take into account" means "to make allowance for (as in passing judgment)").

Thus, requiring the sentencer to "consider" or "take into account" youth and its attendant characteristics as mitigating factors does not mean that the sentencer must discuss every mitigating fact that was considered on the record, or that a sentencer's failure to mention a factor necessarily means that it was not taken into account. *Cf.* Def. Br. 32-33 (faulting trial court for not mentioning defendant's age and its attendant characteristics). Indeed, in the capital context, the sentencer is often a jury, which considers without explanation all mitigating factors to determine whether any precluded imposing a death sentence. *See, e.g.*, *People v. Stewart*, 104 Ill. 2d 463, 492-97 (1984). Likewise, a trial court tasked with determining whether to impose the death penalty is not required to mention every fact that it considered in imposing that ultimate punishment. *People v. Burton*, 184 Ill. 2d 1, 34 (1998) ("fact that a court expressly mentions a factor in mitigation does not mean the court ignored other factors") (citing *People v. Burrows*, 148 Ill. 2d 196, 254-56 (1992)). Rather, "it is presumed that the trial court considered

any mitigating evidence before it, absent some indication to the contrary other than the sentence itself." *People v. Thompson*, 222 Ill. 2d 1, 45 (2006) (citing *Burton*, 184 Ill. 2d at 34). And in Illinois, for discretionary sentencing, trial courts are constitutionally required to consider all factors, including the mitigating factors of youth and its attendant characteristics, when imposing a sentence that reflects the offender's rehabilitative potential. *See generally People v. Carter*, 2015 IL 117709, ¶ 19 (trial court presumed to know and follow the law unless record affirmatively indicates otherwise).

Relying primarily on *Montgomery*, defendant argues that trial courts were and are required to say more on the record to ensure that juveniles whose crimes reflect transient immaturity are not sentenced to life without parole. Def. Br. 23-25 (quoting *Montgomery*, 136 S. Ct. at 734-35). But defendant reads *Montgomery* out of context. *Montgomery* considered the following question: "[W]hether *Miller*'s prohibition on mandatory life without parole for juvenile offenders . . . announce[d] a new substantive rule that . . . must be retroactive." *Montgomery*, 136 S. Ct. at 732. The Court answered yes, because in banning mandatory life without parole for juveniles and requiring individualized sentencing, *Miller* precluded legislatures from categorically imposing the harshest available penalty for the vast majority of juvenile offenders whose crimes result from transient immaturity rather than irreparable corruption. *Montgomery*, 136 S. Ct. at 732-36. Therefore, unlike certain death penalty decisions that were nonretroactive because they regulated only the adequacy of the individualized sentencing procedure used to impose capital punishment, *Miller* took the substantive step of precluding mandatory life-without-parole sentencing altogether to ensure that the category of

offenders for whom the punishment is unconstitutional — juveniles whose crimes reflect transient immaturity — did not receive that punishment at all. *Id.* at 735-36.

Montgomery's language must be read against this backdrop. Yet defendant ignores this context when he extracts the following statement from *Montgomery* to support his position: "*Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 132 S. Ct. at 2465); *see* Def. Br. 23 (quoting this language). Read in context, this passage elucidates *Montgomery*'s holding that *Miller* did more than merely announce a procedural rule that would not apply retroactively. *Miller* established that due to the diminished culpability of juveniles and the severity of life without parole, no penological theory justifies a legislature's decision to automatically impose life without parole on a juvenile offender. 132 S. Ct. at 2465-66. Although life without parole remains a proportionate penalty for the rare juvenile whose crime reflects irreparable corruption, a law that requires a sentencer to impose that harsh penalty without consideration of youth and its attendant characteristics serves no penological goal and results in the imposition of an excessive sentence for the vast majority of juvenile offenders. *Montgomery*, 136 S. Ct. at 734. The quoted passage therefore explains the substantive nature of *Miller*'s holding, but it does not impose additional procedures beyond the individualized hearing that *Miller* requires.

The same is true for *Montgomery*'s next sentence, upon which defendant also relies: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime

reflects unfortunate yet transient immaturity." *Montgomery*, 136 S. Ct. at 734 (quotation marks and citations omitted); *see* Def. Br. 23-24 (quoting this language). Again, in response to the question presented concerning *Miller*'s retroactivity, this passage emphasizes *Miller*'s substantive prohibition against life without parole for a juvenile whose crime results from transient immaturity. Read in context, it reaffirms that *Miller* rejected mandatory life-without-parole sentencing for juveniles because life without parole is an excessive penalty for most juvenile offenders, and the automatic imposition of that sentence poses too grave a risk of disproportionate punishment. And because the question presented in *Montgomery* did not ask the Court to revisit or enlarge *Miller*, the statement should not be read as imposing procedures beyond those required by *Miller*. As *Montgomery* explained in a later paragraph, *Miller*'s prescribed procedure — "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors" — "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 132 S. Ct. at 2460).[12]

[12] *Montgomery*'s broad language has been interpreted in different ways. *See, e.g.*, *State v. Valencia*, 386 P.3d 392, 395-96 (Ariz. 2016) (*Montgomery* clarified *Miller*); *Valencia*, 386 P.3d at 397 (*Montgomery* itself created new rule) (Bolick, J., concurring, joined by Pelander, V.C.J.); *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (*Montgomery* "refined" *Miller*); *Jones*, 795 S.E.2d at 721-23 (*Montgomery* did not expand *Miller*); Erin Dunn, *Montgomery v. Louisiana: An Attempt to Make Juvenile Life Without Parole a Practical Impossibility*, 32 Touro L. Rev. 679, 681 (2016) (comment) (*Montgomery* rewrote *Miller*). But, as discussed in the text, *Montgomery* should be read in the context of the question presented concerning *Miller*'s retroactivity, *Miller*'s holding, and *Miller*'s express reliance on capital sentencing cases. When that is done, there is no need to interpret *Montgomery* as expanding *Miller* beyond its holding that precluding courts from considering youth and its attendant characteristics before sentencing juveniles to life without parole violates the Eighth Amendment.

Miller imposed an individualized sentencing requirement for juvenile homicide offenders facing life without parole because mandatory imposition of that penalty on juveniles "poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. *Miller*'s procedural requirement — a hearing at which youth and its attendant characteristics are considered as sentencing factors — ensures that only the rare juvenile offender whose crime reflects irreparable corruption receives life without parole. Thus, under *Miller*, the Eighth Amendment is satisfied when the State provides that individualized sentencing hearing, which itself reduces the risk of disproportionate punishment. *See Miller*, 132 S. Ct. at 2471 n.10 ("when given the choice, sentencers impose life without parole on children relatively rarely").

In Illinois, every discretionary life-without-parole sentence was imposed under a constitutionally mandated procedure that satisfies at least this baseline, for youth and its attendant characteristics are mitigating factors that a court must consider under the Illinois Constitution when determining the sentence that reflects an offender's rehabilitative potential. And every juvenile who had received a discretionary life-without-parole sentence before *Miller* had the opportunity to challenge it under the already more protective Illinois Constitution. *Clemons*, 2012 IL 107821, ¶ 39 (rehabilitation clause "provide[s] a limitation on penalties beyond those afforded by the [E]ighth [A]mendment"). This constitutional mandate separates Illinois from many other States. *Compare, e.g.*, *State v. Riley*, 110 A.3d 1205, 1217 (Conn. 2015) (state law did not require court to consider or give mitigating weight to age or its attendant characteristics); *Landrum v. State*, 192 So. 3d 459, 463, 465-66, 468-69 (Fla. 2016) (same); *and State v. Zuber*, 152 A.3d 197, 212 & n.2 (N.J. 2017) (reversing mandatory

minimum prison sentences of 55 and 68 years, and noting that statutory mitigating factors merely "touch on" youth); *with State v. Long*, 8 N.E.3d 890, 895-96 (Ohio 2014) (statute Ohio scheme comports with *Miller* because court must consider nature of offender, rehabilitative potential, and all other relevant factors before imposing discretionary life sentence).[13]

Significantly, *Miller* did not address the constitutionality of *any* discretionary sentencing scheme, such that Illinois's established procedure can be said to violate the Eighth Amendment. *Cf. Pulley v. Harris*, 465 U.S. 37, 44-45 (1984) (each discretionary capital sentencing scheme must be examined on an individual basis); *Aiken v. Byars*, 765 S.E.2d 572, 579 (S.C. 2014) (Toal, C.J., dissenting) (faulting majority for "extend[ing] *Miller*'s holding — expressly applicable only to mandatory sentencing schemes — to a discretionary sentencing scheme, and [for] requir[ing] strict compliance with a rule that the Supreme Court has not yet set forth").[14] Of course, for future cases, this Court and/or

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[13] *Long* reversed a juvenile defendant's life-without-parole sentence on direct appeal because he had been sentenced at the same time as his two adult codefendants, and the trial court had received competing evidence and arguments concerning the relevance of defendant's youth. 8 N.E.3d at 896-99 (the record "show[s] that Long raised his youth as a mitigating factor but that the state argued the opposite"). In this context, "[b]ecause the trial court did not separately mention that Long was a juvenile when he committed the offense," the Ohio Supreme Court was not "sure how the trial court applied this factor," and thus reversed for a new sentencing hearing. *Id.* at 898-99. *Long* clarified that although "*Miller* does not require that specific findings be made on the record," *Long*, 8 N.E.3d at 898-99, the reasons for imposing life without parole on a particular juvenile "ought to be clear on the record," *id.* at 896.

[14] The majority in *Aiken*, upon whose decision defendant relies, Def. Br. 15, 19-20, consisted of two justices who concluded that *Miller* required resentencing for all juveniles sentenced to life without parole because they were not sentenced "through the lens mandated by *Miller*." *Aiken*, 765 S.E.2d at 577 n.8. A third justice would have reached the same result under the South Carolina Constitution, but "agree[d] with the dissent that *Miller* does not require . . . relief to juveniles who received discretionary [life-without-parole] sentences, and that the majority exceed[ed] the scope of current

the legislature can, as defendant suggests, guide Illinois courts or impose additional procedural requirements to further minimize the risk of disproportionate punishment and facilitate better review of life-without-parole sentences for juveniles sentenced after *Miller*. *See Montgomery*, 136 S. Ct. at 735 ("'leav[ing] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,'" but reminding States that the approach must not "demean the substantive character of the federal right at issue") (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)); *see, e.g.*, 730 ILCS 5/5-4.5-105(a) (eff. Jan. 1, 2016) (requiring courts to "consider" specific mitigating factors when sentencing juveniles).[15] But *Miller*

Eighth Amendment jurisprudence in ordering relief under *Miller*." *Aiken*, 765 S.E.2d at 578 (Pleicones, J., concurring). The remaining two justices disagreed with the majority's expansion of *Miller*. *Aiken*, 765 S.E.2d at 578-82 (Toal, C.J., dissenting). Thus, a majority of justices in *Aiken* rejected defendant's proposed reading of *Miller*.

[15] Defendant cites decisions where courts have "adopt[ed] the *Miller*-factors." Def. Br. 16-23. But most of these courts reversed mandatory or presumptive life-without-parole sentences on direct appeal, and then provided resentencing courts with guidance on how to satisfy *Miller* under their state laws, an approach that this Court did not take when invalidating a mandatory natural-life sentence in *Davis*. 2014 IL 115595, ¶ 43 ("remand[ing] for a new sentencing hearing, where the trial court may consider all permissible sentences"). *See Ex Parte Henderson*, 144 So. 3d 1262, 1283-84 (Ala. 2013) (reversing mandatory sentence; finding that *Miller* "did not delineate specifically which factors to use in sentencing" juveniles; guiding resentencing court to "consider[]," if applicable, "principles annunciated in *Miller*"); *People v. Gutierrez*, 324 P.3d 245, 249-50, 267-69 (Cal. 2014) (reversing sentences imposed under presumption in favor of life without parole; holding that state statute already "requires consideration of the *Miller* factors"; explaining that in future, courts must consider those *Miller* factors that are relevant to a particular defendant before imposing life without parole on juvenile); *State v. Ali*, 855 N.W.2d 235, 256-57 (Minn. 2014) (reversing mandatory sentence to provide court the "opportunity to consider any mitigating circumstances" before imposing life without parole); *Parker v. State*, 119 So. 3d 987, 995-99 (Miss. 2013) (similar); *Commonwealth v. Knox*, 50 A.3d 732, 744-45 (Pa. Super. Ct. 2012) (similar to *Henderson*); *Bear Cloud v. State*, 294 P.3d 36, 46-47 (Wyo. 2013) (similar to *Ali*). Some courts have extended *Miller* and required factual findings on the record. *See, e.g.*, *Veal*, 784 S.E.2d at 411-12 (reversing discretionary life-without-parole sentence because *Montgomery* requires "distinct determination on the record" concerning

does not mandate more procedure than Illinois already provides to juveniles subject to discretionary sentencing.

That is not to say that there is no recourse for a juvenile offender who believes his record affirmatively indicates that the trial court refused to consider youth or its attendant characteristics as mitigating factors before sentencing him to life without parole. *Cf. Carlson*, 79 Ill. 2d at 588-91 (reversing death sentence where record demonstrated that trial court gave no consideration to mitigating circumstances). Such an offender can move for leave to file a successive postconviction petition and assert cause and prejudice under *Miller*. Whether the offender demonstrates cause and prejudice would depend on a variety of factors, including when the offender was sentenced in relation to *Roper*, *Graham*, and *Miller*, whether the offender previously raised an Illinois constitutional challenge to his sentence, the evidence before the trial court at sentencing, and the nature of the record as it relates to the offender's allegation that the trial court refused to consider mitigating evidence. But here, as discussed below, the record establishes that defendant's sentence is constitutional.

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irreparable corruption); *People v. Null*, 836 N.W.2d 41, 74-75 (Iowa 2013) (requiring findings under Iowa Constitution); *State v. Fletcher*, 112 So. 3d 1031, 1036-37 (La. 2013) (reversing mandatory life-without-parole sentences and requiring resentencing courts to review *Miller*'s mitigating factors and state reasons for sentence on record, as required under article 894.1(C) of Louisiana Code of Criminal Procedure); *State v. Ramos*, 387 P.3d 650, 662-64 (Wash. 2017) (future sentencing courts must "thoroughly explain" reasons for imposing life without parole, but juveniles have burden of showing sentence other than life should apply); *Williams v. Virgin Islands*, 2013 WL 5913305, at *8 (V.I. Nov. 5, 2013) (reversing mandatory life-without-parole sentence; directing resentencing court to apply *Null*); *cf. State v. Sweet*, 879 N.W.2d 811, 832-39 (Iowa 2016) (banning life-without-parole sentences for juveniles under Iowa Constitution).

2. Because the record establishes that defendant's sentence is constitutional, defendant cannot establish prejudice.

The record establishes that defendant cannot establish prejudice. After considering all the evidence, the trial court expressly found that defendant could not be rehabilitated. Nothing in the record suggests that the trial court refused to consider the mitigating evidence before it, which included evidence of defendant's youth and individual circumstances. And the trial court's on-the-record determination that defendant's crime reflected irreparable corruption establishes that defendant falls within the class of juveniles who may constitutionally be sentenced to life without parole. Thus, defendant's sentence comports with *Miller*.

Defendant argues that the trial court did not consider his youth and its attendant characteristics because "[t]he record offers little information" about some of those characteristics. Def. Br. 29. As discussed *supra*, Part III.B.2, if such evidence existed, it was relevant and admissible under Illinois law to show defendant's rehabilitative potential. Thus, any deficiencies in the record are attributable to defendant, who could have presented evidence to support his argument against a natural-life sentence.

Moreover, nothing in the record suggests that the trial court refused to admit or consider any evidence. To the contrary, defendant declined the trial court's invitation to offer "any additions, corrections, or modifications" to the PSI. R728. Further, defendant's mother — who could have testified, at a minimum, to defendant's "home life," Def. Br. 29 — chose not to testify at sentencing. R733-34. And although he could have provided information about "the circumstances that led him to participate in the murder" and "his ability to work with his attorneys, prosecutors, or police," Def. Br. 29, defendant also declined to present any evidence. R733-34. *Cf. People v. Coleman*, 168

Ill. 2d 509, 556-57 (1995) (no Eighth Amendment violation where defendant chose not to present mitigating evidence). To the extent defendant needed more time to present evidence at sentencing, he could have sought a continuance. And if defendant believed trial counsel should have presented certain evidence or sought that continuance, he could have pointed to those supposed shortcomings as grounds for a finding of ineffective assistance of counsel in earlier proceedings. *Cf. Holman*, 115 Ill. App. 3d at 64-65 (on direct appeal, defendant argued other ineffective-assistance grounds).

Furthermore, the PSI — which the trial court expressly considered — contained mitigating evidence concerning defendant's circumstances, including his age. *See, e.g.*, C103-04 (around age seven, defendant's father died; otherwise stable family life).[16] Specifically, it revealed evidence concerning defendant's overall intellectual and social functioning. C113-14. At age 15, defendant was diagnosed with mild mental retardation and exhibited a high need for approval, lack of confidence, and high susceptibility to peer pressure. C113. About three years later — six months after Esther's murder — defendant functioned between the mild and borderline range of retardation. C111. This slight improvement in intellectual functioning could be explained by increased chronological age and maturation of the central nervous system. C113. Therefore, the trial court did consider the mitigating factors before it.

In defendant's view, had the trial court considered this evidence, it would not have imposed a natural life sentence. "[C]onsideration does not, however, require the

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[16] As the appellate court found, A2, ¶ 43, the mistake in the PSI concerning defendant's age does not support defendant's argument. *See* Def. Br. 39. Although the first page of the PSI incorrectly stated 1960 as defendant's birth year, C97, the PSI later correctly stated that defendant was born in 1961, C103. Further, everyone at the sentencing hearing knew defendant was a juvenile when he committed the murder, for if he had not been, the State likely would have sought the death penalty. R736.

court to rule in the defendant's favor." *Phillips*, 127 Ill. 2d at 535. *Miller* does not preclude courts from sentencing a juvenile to life without parole, or from weighing the nature of the offender's crime against the mitigating evidence of youth to determine whether the crime resulted from transient immaturity or irreparable corruption. *See, e.g.*, 132 S. Ct. at 2468-69 & n.8 (court must consider all factors, including the severity of the crime, before concluding life is appropriate penalty). While "the crime itself does not displace the mitigation of youth and its attendant circumstances," Def. Br. 37, the opposite is also true: a juvenile's youth does not expel consideration of the nature of the crime, for if the juvenile's crime reflects irreparable corruption, then life without parole is a permissible sentence. *Miller* directed courts to assess each individual offender, to differentiate "the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." 132 S. Ct. at 2467-68. The record here establishes that the trial court assessed defendant's individual circumstances and supports the court's finding that defendant's crime reflects irreparable corruption.

Since age 14, defendant was under some level of state supervision as a result of criminal activity. Each time the State lifted supervision, defendant reoffended. Three months before he turned 18, and while on parole, defendant participated in the murder of 84-year-old Oertel; about two months later, he murdered 83-year-old Esther; and a month after that he actively participated in the murder of Cash and the attempted murder of Ostman.[17] As to Esther's murder, defendant shot her with a .22 caliber semi-automatic

[17] These are the murders for which defendant was convicted. Defendant confessed to his involvement in additional murders that occurred during his and Davis's crime spree, including Biebel's murder, *supra*, nn.2-3, 5, where the "[e]vidence

rifle on the side of her face, even though she posed no threat to him or Davis. Although defendant claimed Davis shot Esther, only defendant's fingerprints were found on the inside and outside of the cabinet in Esther's home where the murder weapon was stored. R390-91, 510-15. And the jury was instructed on all first-degree murder theories, including intentional and knowing murder. R602-03, 607, 609. Thus, the evidence supports the conclusion that defendant personally shot Esther. *Cf. People v. Davis*, 233 Ill. 2d 244, 263 (2009) (return of general verdict presumes that jury found defendant committed "the most serious of the crimes alleged, which is intentional murder"). But even if Davis shot Esther, defendant actively participated in at least one prior murder with Davis under similar circumstances, and thus, must have anticipated Esther's murder when he chose to burglarize her home with Davis. *Davis*, 95 Ill. 2d at 52; R83-126, 489-95; Def. Exh. 1 (3/10/81). Defendant therefore is unlike Earl Enmund, Leon Miller, and Dante Brown, all of whom were indisputably convicted on accountability theories. *See* Def. Br. 38 (citing *Enmund v. Florida*, 458 U.S. 782, 798 (1982), *Leon Miller*, 202 Ill. 2d at 342-43, and *People v. Brown*, 2012 IL App (1st) 091940, ¶¶ 3, 68).

Moreover, Esther's murder was just one of a series of murders committed over the span of almost a year, and not an isolated event that reflects impulsivity and heedless risk-taking typical of adolescent behavior. Indeed, defendant chose at least twice to burglarize an elderly individual's home, and each time, the vulnerable victims were killed. Further, unlike the 14-year-old offenders in *Miller*, defendant was five weeks away from his eighteenth birthday when he murdered Esther. This fact is relevant, for

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indicate[d] that [defendant] was the actual triggerman." *Davis*, 97 Ill. 2d at 24. If this Court remands for further proceedings, the State could seek to introduce evidence concerning the other uncharged murders.

adolescent development generally occurs on a continuum, *Stanford*, 492 U.S. at 395-96 (Brennan, J., dissenting); Jonathan Todres, *Maturity*, 48 Hous. L. Rev. 1107, 1161 & n.260 (Winter 2012), and *Miller* requires the factfinder to "take into account the differences among defendants and crimes," 132 S. Ct. at 2469 n.8. Although defendant committed the murders with Davis, he could have extricated himself from Davis during the interval between them. *Cf.* Br. for Am. Psychological Assoc., et al., *Miller v. Alabama*, Nos. 10-9646 & 10-9647, 2012 WL 174239, at *16 (U.S. Jan. 17, 2012) (susceptibility to negative peer pressure "peaks at around age 14, and then declines slowly during the late adolescent years, with relatively little change after age 18"). For all these reasons, the record supports the trial court's finding that defendant could not be rehabilitated.

Defendant counters that the trial court did not consider youth or its attendant characteristics because (1) the statutory mitigating factors did not "account for the constitutional differences between juveniles and adults," Def. Br. 32; (2) the trial court found no factors in mitigation, *id.* at 29, 33; and (3) the trial court "fail[ed] to mention youth altogether," *id.* at 29. But, as discussed *supra*, Part III.B.2, the trial court had a constitutional obligation to fashion a sentence that not only protected the interests of society, but also allowed for the possibility of rehabilitating defendant. *Perruquet*, 68 Ill. 2d at 155. An offender's rehabilitative potential is determined by considering "all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding." *Ward*, 113 Ill. 2d at 527-28 (citing *Grayson*, 438 U.S. at 48, and *La Pointe*, 88 Ill. 2d at 495). Contrary to defendant's assertion, Def. Br. 33-35, the knowledge that juveniles as a class are

immature, impetuous, relatively irresponsible, susceptible to negative influences, and less culpable is not recent, for these are qualities that "any parent knows" about juveniles. *Roper*, 543 U.S. at 569 ("scientific and sociological studies . . . tend to confirm" what "any parent knows" about juveniles). Further, Illinois has long recognized the differences between juveniles and adults, including that the character and habits of juveniles are unformed and unsettled; and Illinois courts have repeatedly reduced sentences for young offenders in view of their rehabilitative potential. The trial court is presumed to have known and applied this law when sentencing defendant, and the record must be viewed in this context.

Furthermore, the statutory sentencing scheme that applied to defendant stated that the trial court should give "due regard for the character of the offender, the nature and circumstances of the offense and the public interest." Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-5-3.1(b). Specifically, it mandated that the court consider mitigating factors, including whether: (1) the defendant acted under strong provocation; (2) there were substantial grounds tending to excuse or justify the criminal conduct; (3) the defendant's conduct was induced or facilitated by another; (4) the defendant had any criminal or delinquency history; (5) the defendant's crime was the result of circumstances unlikely to recur; and (6) the character and attitudes of the defendant indicated that he was unlikely to commit another crime. Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-5-3.1(a)(3)-(5), (7)-(9); *cf. Miller*, 132 S. Ct. at 2468-69 (relevant factors include circumstances of offense; extent of participation; outside pressures; and whether juvenile was accomplice or principal). In sentencing defendant, the trial court expressly considered these mitigating factors and found that none weighed against a natural-life sentence. R.742 ("In this sentence the

Court has considered the factors enumerated in the Criminal Code as factors in mitigation and factors in aggravation. The Court does not find any factors in mitigation."); *cf. People v. Munson*, 171 Ill. 2d 158, 194-95 (1996) (when trial court found "no mitigation," it meant that it found the death penalty appropriate).

Defendant does not argue that the trial court erred in its finding as to the statutory mitigating factors. Def. Br. 29-41. Instead, defendant infers that because the trial court stated that it found no statutory mitigating factors, it also ignored all other mitigating factors. Def. Br. 29, 33. That inference is unsupported. The trial court said nothing about non-statutory mitigating factors, and it was not required to do so. *Burton*, 184 Ill. 2d at 34 ("fact that a court expressly mentions a factor in mitigation does not mean the court ignored other factors"). Rather, the trial court is presumed to have considered all mitigating factors unless something in the record — other than the sentence itself — affirmatively indicates otherwise. *Thompson*, 222 Ill. 2d at 45. Nothing on this record affirmatively indicates that the trial court did not consider all mitigating factors.

Defendant argues that due to his youth and intellectual disability the trial court improperly relied on his statement in allocution and the probation officer's opinion in the PSI concerning his rehabilitative potential. Def. Br. 35-36. But the trial judge observed defendant and the proceedings, and thus had a far better opportunity to consider this information than a reviewing court, which must rely on the cold record. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). Giving the trial judge the proper deference, defendant's statement in allocution does not, as defendant asserts, indicate a misunderstanding of law or lack of preparation. Def. Br. 36; *cf.* R727-28 (defendant objects to inclusion of juvenile record without his knowledge); R68-70 (at defendant's

request, counsel files motion for change of venue). Rather, consistent with every statement defendant previously made concerning Esther's murder, in allocution, defendant again denied killing anyone. *Cf.* R494-95 (defendant told police Davis shot Esther); C100 (during presentence interview, defendant denied being present at Esther's murder); C107-08 (to psychiatrist, defendant denied all memory of Esther's murder). In fact, defendant makes a similar argument now. *Compare* Def. Br. 38 (arguing that he is merely accountable for Esther's murder), *with* R742 (in allocution defendant states that he has been convicted only as an "accessory"). Further, the fact that defendant expressed no remorse for multiple murders, while not conclusive, is certainly evidence supporting the trial court's conclusion that defendant lacks rehabilitative potential. *Ward*, 113 Ill. 2d at 527-31. Indeed, *had* defendant expressed remorse, it would have been a mitigating factor indicating that his crime resulted from transient immaturity. *Id.*

Moreover, the trial court reasonably could have found that defendant's repeated disregard for the value of human life even when he was in the community under State supervision rendered him a permanent, future danger to society. As for defendant's intellectual disability, on the one hand, it makes him less culpable for his crime, *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002), but on the other hand, incapacitation remains a legitimate penological justification for sentencing an intellectually disabled homicide offender to life without parole, *see Brown*, 2012 IL App (1st) 091940, ¶¶ 73, 79. While most juveniles have a heightened capacity for change because their "deficiencies will be reformed" with time and neurological development, *Miller*, 132 S. Ct. 2461, 2465, 2467, the same generally cannot be said of an intellectually disabled person, *see Heller v. Doe*, 509 U.S. 312, 321-23 (1993) ("mental retardation is a developmental disability that

becomes apparent before adulthood"; it is a "relatively static condition, so a determination of dangerousness may be made with some accuracy based on previous [violent] behavior"); *cf.* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 39 (5th ed. 2013) (intellectual disability is "generally lifelong, although severity levels may change over time"; "[e]arly and ongoing interventions may improve adaptive functioning," and sometimes can result in improved "intellectual functioning, such that the diagnosis . . . is no longer appropriate"). Whether a particular individual's intellectual disability renders him a future danger to the community is a case-by-case determination. *People v. Heider*, 231 Ill. 2d 1, 20-21 (2008); *Thompson*, 222 Ill. 2d at 43-44. Here, the trial court permissibly determined, based on all of the relevant factors including defendant's youth and intellectual ability, that defendant posed a future danger to society and that his crime reflected irreparable corruption.

Contrary to defendant's characterization, Def. Br. 38-39, the parties' arguments at sentencing do not support the inference that the trial court did not give youth its proper mitigating value. First, unlike *Long*, the prosecutor did not suggest that defendant's youth was not a mitigating factor. 8 N.E.3d at 486-87. Rather, the prosecutor stated the facts: that because defendant was "too young" when he murdered Esther, capital sentencing was unavailable. R736. The prosecutor then argued that due to his criminal history, the nature of his crime, and the repeated failed attempts to rehabilitate "this young man," defendant should be removed from society for life. R736-37, 740-41. Contrary to defendant's suggestion, the prosecutor had no obligation to argue for mitigation based on youth. In any event, in determining the sentence, the trial court is presumed to know the law, to have considered only proper factors, and to have

disregarded irrelevant, inflammatory, or emotional factors. *People v. Johnson*, 149 Ill. 2d 118, 154 (1992); *People v. Thompson*, 234 Ill. App. 3d 770, 777 (1st Dist. 1991.

More importantly, defense counsel framed the salient question before the court: "whether this Court should assess natural life to this very young man," R738, or "whether [his] punishment ought to be such as to rehabilitate him," R739. Counsel expressly asked the court "to give this young man an opportunity" to again participate in society. R739-40. He suggested that defendant's "ill disposition of the body and bad education" made him less culpable. R739. Counsel emphasized that a natural-life sentence for defendant is equal to death, and that defendant should not receive this ultimate punishment. R739-40; *cf. Miller*, 132 S. Ct. at 2466 (for juveniles, life without parole is "akin to the death penalty"). Given this argument, defendant's assertion that his youth was a "neutral factor" at sentencing, Def. Br. 38, is unsupported. The record fails to disclose any evidence that the trial court disregarded or failed to weigh youth and its attendant characteristics when determining that defendant had no rehabilitative potential and thus should be incapacitated for the remainder of his life.

Finally, defendant's belief that he is not the rare juvenile offender for whom life without parole is the appropriate sentence does not make it so. Defendant's analysis would create a categorical ban on life-without-parole sentences for all juveniles, and especially for those sentenced before *Miller*. *See, e.g.*, Def. Br. 33-34 ("given the recent development of both case law and science, only the most prescient trial judge could have considered youth in light of what we now know about brain development and the lessened culpability of youth itself in a way that comports with *Miller*"); *id.* at 37 (faulting appellate court for weighing nature of his crime against him, suggesting that

brutality or viciousness of crime can never overcome mitigating evidence of youth). But just five years ago, the Supreme Court found that individualized sentencing was sufficient to satisfy the Eighth Amendment, *Miller*, 132 S. Ct. at 2469, and it reaffirmed that decision last year, *Montgomery*, 136 S. Ct. at 732-36. Further, no evidence supports *amici curiae's* premature argument that "*Miller* and *Montgomery* have created an unworkable standard for the individualized sentencing of juveniles." Amici Br. 27.[18]

In sum, defendant had "the opportunity to show [that his] crime did not reflect irreparable corruption," as *Miller* requires. *Montgomery*, 136 S. Ct. at 736. As mandated by the Illinois Constitution, the trial court looked at defendant's individual circumstances, weighed the evidence, considering mitigating and aggravating factors, found that defendant could not be rehabilitated, and imposed a natural-life sentence. Nothing about this process violates *Miller*. Thus, defendant's sentence is constitutional and he cannot establish prejudice.

IV. If This Record Does Not Establish that Defendant's Sentence Is Constitutional, Then This Court Should Remand to the Circuit Court for Further Successive Postconviction Proceedings.

The record before this Court establishes the constitutionality of defendant's sentence. But if this Court concludes otherwise, then it should remand to the circuit court for further successive postconviction proceedings. On remand, the trial court can receive

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[18] *Amici curiae* argue that life without parole should be categorically barred for juveniles under both the Eighth Amendment and the Illinois Constitution. Amici Br. 14-33. Even if defendant were making that claim under the Eighth Amendment, he does not make it under the Illinois Constitution. Defendant's case arises under a motion for leave to file a successive postconviction petition, his asserted cause is *Miller*, and his claim is grounded only in *Miller* and the Eighth Amendment. Thus, because the parties have not raised the issues, this Court should decline to address *amici*'s Illinois constitutional arguments on this point. *See In re J.W.*, 204 Ill. 2d 50, 72-73 (2003); *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 61-62 (2001).

evidence from the parties and determine whether defendant's crime reflected irreparable corruption or transient immaturity. *See Montgomery*, 136 S. Ct. at 736-37; *Valencia*, 386 P.3d at 395-96. If the former, the court should uphold the sentence. If the latter, defendant would be entitled to a new sentencing hearing; he could then elect to be sentenced under the law in effect at the time of his offense or the law in effect at the time of that new sentencing hearing. *Reyes*, 2016 IL 119271, ¶¶ 12-14. This remedy accounts for the various factual and procedural differences in cases that might arise post-*Miller*, and provides a uniform method of ensuring compliance.

CONCLUSION

The People of the State of Illinois respectfully request that this Court affirm the appellate court's judgment.

March 21, 2017

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341, and this Court's March 15, 2017 order allowing the People's motion for leave to file an appellee's brief not to exceed 65 pages. The length of this brief, excluding the pages permitted to be excluded under Rule 341, is 57 pages.

/s/ Gopi Kashyap
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VERIFICATION OF SERVICE BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that on March 21, 2017, the **Brief of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and pursuant to Illinois Supreme Court Rules 11(b)(6) and 341(e), one copy was served by email upon the following:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail an original and 12 copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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03/21/2017

Supreme Court Clerk

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