No. 124046

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, v. ASHANTI LUSBY, Petitioner-Appellee.	)	Appeal from the Appellate Court of Illinois, Third District, No. 3-15-0189 There on Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, No. 01 CF 664 The Honorable David M. Carlson, Judge Presiding.

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

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ORAL ARGUMENT REQUESTED

E-FILED
4/9/2019 9:59 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

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NATURE OF THE CASE

Defendant Ashanti Lusby was convicted of murder, aggravated criminal sexual assault, and home invasion; he was 16 years old at the time of the crimes. In 2002, the circuit court sentenced defendant to an aggregate 130-year prison term, of which he must serve at least 50%. In 2015, the court denied defendant's motion for leave to file a successive postconviction petition claiming that his de facto life-without-parole sentence violated his Eighth Amendment rights under *Miller v. Alabama*, 567 U.S. 460 (2012). The appellate court reversed, holding that defendant had demonstrated cause and prejudice: issuance of *Miller* constituted cause; and defendant was prejudiced because non-compliance with *Miller* was evident in the circuit court's failure to "explicitly" state that it had "considered" the presentence investigation report (PSI) when sentencing defendant. The State appeals from the appellate court's judgment remanding, not for further postconviction proceedings, but for resentencing. Thus, an issue is raised about the sufficiency of the postconviction pleadings.

ISSUES PRESENTED

1. Whether, when the State improperly provides input on a defendant's motion for leave to file a successive postconviction petition, the appellate court must remand for the circuit court to consider the motion without the State's input.

2. Whether the appellate court erred in finding that defendant established prejudice sufficient to permit him to file a successive postconviction petition because (1) sentencing courts are not required to "explicitly" state that they considered the PSI (and, in any event, the circuit court here did just that); and (2) defendant's sentencing hearing comported with *Miller*.

3. Whether, upon finding that defendant had established cause and prejudice, the appellate court erred by remanding for a new sentencing hearing rather than for the filing of a successive petition, appointment of counsel, and further postconviction proceedings.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On January 31, 2019, this Court allowed the State's petition for leave to appeal. *People v. Lusby*, 116 N.E.3d 927 (Table) (Ill. 2019).

STATUTORY PROVISION INVOLVED

§ 122-1. Petition in the trial court.

> (f) Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner 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. For purposes of subsection (f): (1) a prisoner 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; and (2) a prisoner shows 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.

725 ILCS 5/122-1(f) (2014).

STATEMENT OF FACTS

Trial and Sentencing

On February 9, 1996, 27-year-old Jennifer Happ was found dead in her home. R109-10, 114-30, 210.[1] Evidence at trial established that Happ suffered (1) multiple external and internal rectal and vaginal lacerations and abrasions; (2) a fatal, "hard contact" gunshot wound above her right eye; (3) a fractured skull, caused by the gun firing while in contact with her head; (4) facial lacerations extending from the gunshot entrance wound; and (5) two knife wounds to her neck. R109-10, 114-30, 210-35, 238. A forensic pathologist concluded that Happ died from the gunshot wound to her forehead and that she had been sexually assaulted. R234-35.

When police arrived at Happ's residence, both the overhead and interior garage doors were open, R114-17, and muddy footprints led away from her driveway to a sidewalk near the apartment building where defendant lived with his mother. R344, 421-43, 507. According to defendant's girlfriend at the time, in early February 1996, defendant had armed himself with a gun and left his apartment with two friends for 30-45 minutes; when they returned, defendant was unusually excited and nervous,

[1] "C_" refers to the common law record; "IC_" refers to the impounded common law record; "R_" refers to the report of proceedings; "A_" refers to the appendix to this brief; and "Def. App. Ct. AT Br." and "St. App. Ct. AE Br.," refer to the appellate court briefs, certified copies of which have been filed in this Court under Rule 318(c). Citations to the common law record are to the typewritten page numbers appearing at the top and bottom right-hand corners (not the Bates stamp number at the bottom right-hand corner).

ran to his bedroom, and refused to open the door. R337-53. Defendant was 16 years old in February 1996. R507; IC42.

Forensic testing of fluid from Happ's vagina and rectum revealed two DNA profiles, one matching Happ and the other matching defendant. R265-73, 278-85, 298, 301-25, 541. During a police interview in April 2001, the then-22-year-old defendant denied any knowledge of Happ or her murder. R405-13; IC42. At trial, however, defendant testified that as he was walking home, Happ (whom he did not know) invited him into her home; when she asked his age, he lied and told her that he was 18; for around 15 minutes, Happ read a book while defendant watched television; they then had consensual sex; and defendant left. R506-21.

A Will County jury convicted defendant of first degree murder, aggravated criminal sexual assault, and home invasion, and found that the crimes were accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. R766-82, 793-97; C164-78. Defendant faced sentencing ranges of (1) 20 to 60 years for first degree murder, 730 ILCS 5/5-8-1(a)(1)(a) (1996), with a discretionary extended term of 60 to 100 years based on the jury's finding of exceptional brutality, 730 ILCS 5/5-5-3.2(b)(2) (1996); 730 ILCS 5/5-8-2(a)(1) (1996); (2) six to 30 years for aggravated criminal sexual assault, 720 ILCS 5/12-14(d) (1996); 730 ILCS 5/5-8-1(a)(3) (1996); and (3) six to 30 years for home invasion, 720 ILCS 5/12-11(c) (1996); 730 ILCS 5/5-8-1(a)(3) (1996). The statutory scheme mandated consecutive

sentences, except that the aggregate of the sentences could not exceed the sum of the maximum terms for the two most serious felonies. 730 ILCS 5/5-8-4(a), (c)(2) (1996). Thus, defendant's minimum sentence was 32 years, his maximum sentence was 130 years; he was also entitled to day-for-day good conduct credit. 730 ILCS 5/3-6-3(a) (1994); *People v. Reedy*, 186 Ill. 2d 1, 8-18 (1999).

The circuit court began the sentencing hearing by stating, "Now I have reviewed the [PSI]. Has everyone had a chance to review it?" A10. The parties responded that they had reviewed it, defense counsel raised an objection about the victim impact letters, and the circuit court permitted the prosecutor to amend defendant's criminal history to reflect an additional misdemeanor conviction. A11-14.

The PSI reported that defendant believed that he had "a good relationship with both [of his] parents and that they visit[ed] him often in jail." IC48. Visitation records, however, reflected that defendant's father had never visited, and the probation officer who prepared the PSI was unable to verify defendant's relationship with his parents. *Id.* Defendant reported having two children, a four-year-old and a second child of an unknown age. IC49. Defendant's two sisters each had a misdemeanor theft conviction. IC48. According to the PSI, defendant was expelled from high school "after his sophomore year due to 'gang banging,'" IC49, and he had worked for only two months, IC50. He had used marijuana (daily) and PCP, and drank

alcohol. IC51. Defendant's claim that he completed drug treatment during probation could not be verified. *Id.*

As to defendant's criminal history, the PSI revealed that about four months after murdering Happ, at age 17, defendant was adjudicated delinquent of aggravated discharge of a firearm in juvenile court. IC42, 47. After serving nearly 16 months in prison, defendant was released on parole. *Id.* Four months later, on April 14, 1998 (the very day that he was discharged from parole), the then-19-year-old defendant was arrested for robbery. *Id.* In August 1999, defendant was convicted of attempting to obstruct justice (a misdemeanor) and served 18 days in jail. A13-14. The following month, he was sentenced to 48 months of probation for the robbery. IC47. Less than six months later, in March 2000, the State sought to revoke defendant's probation. *Id.* About 13 months later, at age 22, defendant was convicted of resisting a peace officer. IC42, 47. Two days later, he was arrested for murdering Happ. IC42, 46-47. Defendant was later convicted of an aggravated battery that occurred three months after Happ's murder, while he was in custody. IC47; A19, 46.

At the sentencing hearing, Robert Miller testified to the incident leading to the aggravated battery conviction. A18-19. In July 2001, while Miller waited for the jail telephone, defendant started an argument and then invited Miller to the gym to settle the dispute. A19-22. When Miller entered the gym, defendant hit him, knocking Miller unconscious. A22-23. Miller

was taken to the hospital, where he remained for about three days for treatment of two broken bones and a lip injury that required three stitches. A23-28.

Happ's mother testified that Happ was her only daughter, the older sister to two brothers, and a dedicated teacher. A30-33, 36. She described the impact of her daughter's sexual assault and murder on her family. A32-42. As an addendum to the PSI, the trial court received numerous letters from Happ's relatives, friends, and community members. IC3-41; A12-13. The circuit court noted defendant's objection to these letters, stating that although the letters were "helpful" and "to a certain degree enlightening," the court would base its sentencing decision on the facts of the case and not on the letters. A12-13.

Citing the PSI, the prosecutor argued that defendant's brutal and heinous acts, violent criminal history, and lack of remorse demonstrated that he was both dangerous and incapable of rehabilitation. A44-50. Maintaining defendant's innocence, defense counsel asked the trial judge to "consider all the facts" and determine the appropriate sentence based on "reason," "conscience," and "experience." A50-52. Counsel emphasized that defendant "was 17 [sic] years old when this took place" and that "[none] of us [is] the same person at 17 and then at 27 and then at 37, 47 or whatever." A51-52. In allocution, defendant stated that (1) he was "sorry for [the victim] being dead," (2) when he "left that house that lady was alive," (3) he had "been a

little rough around the edges," but was not a "killer" or "rapist," and (4) in the five years since Happ's murder, "it [had] never come up that [he] killed or raped anybody else." A52-53.

The circuit court observed that the case was factually "very difficult" because of Happ's injuries and "the method of [her] murder." A53. The court found that defendant had "terrorized and sexually assaulted and humiliated and executed [Happ] in her own home," and that defendant's criminal acts were "depraved" and "show[ed] absolutely no respect for human life." *Id.* Defendant's acts and offenses, the court noted, "could be considered capital punishment activities," but he was ineligible for such punishment "solely because [he was] . . . under the age of 18." *Id.*

After reviewing the statutory mitigating factors, the court found that none applied. A54. In contrast, the court found "many" aggravating factors and concluded that the proper sentence was one that ensured that defendant remained in prison for life. *Id.* As to defendant's youth, the court explained,

> This is a choice that you made at a young age and I know that choices, youthful choices . . . are sometimes in very[,] very poor judgment, but this is not one that can be taken back, and this is not one that can be considered minor, and this is not one that can be considered for anything but setting [defendant's] future in [prison].
>
> From what I've seen here from everything that I have seen and heard in this trial this is a life you chose, a life of carrying weapons, a life of showing no respect for human life[.]

A54-55. The circuit court sentenced defendant to the maximum prison term for each conviction, resulting in an aggregate sentence of 130 years, A55, of which defendant must serve 65 years, *see* 730 ILCS 5/3-6-3(a) (1994).

Defendant moved to reconsider his sentence, arguing that it "was excessive" because "it failed to adequately consider the fact that the [he] was a minor at the time of the offenses," and "further fail[ed] to adequately consider his potential for rehabilitation and return to useful citizenship." C323. Defendant argued that "given his young age," he had "excellent potential to be restored to useful citizenship" if provided an "opportunity" with "appropriate counseling and direction." *Id.* The circuit court denied the motion, explaining:

> It's always difficult for the [t]rial [j]udge because you prepare yourself for sentencing like this, you sit down and you look at everything. You look at the law and look at the sentencing Code, because it's confusing, and you try to fashion the sentence appropriate and consisten[t] with the sentencing Code and appropriate to the facts. I believe I felt comfortable with my sentence at the time. I believe I followed the law as I understood it and took into account all the factors both in aggravation and in mitigation that apply here.

A62-63.

Direct appeal and first postconviction petition

On direct appeal, the appellate court rejected as forfeited an evidentiary claim, C357-61, and this Court denied leave to appeal in March 2005, C356. In September 2005, defendant filed a pro se postconviction petition alleging a due process claim and an ineffective assistance of counsel

claim unrelated to his sentence. C364-68, 418. The circuit court summarily dismissed the petition, the appellate court affirmed, and this Court denied leave to appeal in 2009. C415-34.

The present successive postconviction petition

In November 2014, defendant filed a pro se motion for leave to file a successive postconviction petition, asserting that *Miller v. Alabama*, decided in June 2012, provided cause for the successive petition and that he was prejudiced because his aggregate sentence violated the Eighth Amendment. C441-51. The circuit court granted the State's request for an extension of time to file an objection. C452; R912-14. After the State filed a written objection, C456-64, the circuit court held a hearing at which the prosecutor argued that defendant had not satisfied the cause and prejudice test for filing a successive petition, and the court denied defendant's motion "based on the law." R921-23; A64-65. Defendant was not present at that hearing. R921-23; A65.

On appeal, defendant argued that his de facto life sentence violated the Eighth Amendment and that he had established cause and prejudice in light of *Miller*. A3, 4. He asked the court to reverse the circuit court's judgment denying leave to file the successive petition and remand for further proceedings because the State had improperly provided input at the leave-to-file stage. Def. App. Ct. AT Br. 18-19, 24.

The appellate court held that petitioner established "cause" to file the successive petition because *Miller* had not been decided when defendant filed his initial postconviction petition. A5. As to prejudice, a majority of the panel concluded that defendant's sentence violated the Eighth Amendment because "the trial court did not 'explicitly' state that it considered the evidence [of defendant's youth and its attendant characteristics that was included] in [his] PSI." A6. The majority reversed the circuit court's judgment denying leave to file the successive petition, vacated defendant's sentence, and remanded for resentencing. A7. The majority agreed that the circuit court erred when it allowed the State to file and argue objections to defendant's leave-to-file motion, but provided no remedy for this error. *Id.*

The dissenting justice concluded that defendant could not establish prejudice because (1) the circuit judge's statements at sentencing showed that he considered defendant's youth and attendant circumstances; and (2) the court "considered those factors a second time" when denying defendant's motion to reconsider sentence, which asserted that "the court had failed to consider his age, his potential for rehabilitation, and his potential to be restored to useful citizenship." A8 (Carter, J., dissenting). The "trial court determined that the horrendous conduct of this defendant showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id.* (Carter, J., dissenting). Observing that information concerning defendant's youth and attendant

characteristics "was contained in the PSI," the dissent could not "join the majority in its conclusion that the trial court failed to consider th[at] information . . . merely because the trial court did not expressly state that it had considered the PSI." *Id.* (Carter, J., dissenting).

ARGUMENT

This Court's review is guided by several familiar principles. The Eighth Amendment bars a particular penalty — life imprisonment without the possibility of parole — for a specific class of offenders — juvenile homicide offenders whose crimes reflect the transient immaturity of youth. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-46 (2016); *Miller*, 567 U.S. at 479-80. Where, as here, the Eighth Amendment prohibits a particular form of punishment for a specific class of offenders, to obtain relief, an individual offender must demonstrate that he belongs to the protected class for whom the penalty is prohibited. *See Montgomery*, 136 S. Ct. at 734-35 (citing *Atkins v. Virginia*, 536 U.S. 304, 317 (2002)). Although *Miller* concerned a mandatory natural life sentence, 567 U.S. at 465, this Court has extended *Miller* both to discretionary natural life sentences, *People v. Holman*, 2017 IL 120655, ¶ 40,[2] and to term-of-years sentences whose length constitute de facto life sentences, *People v. Reyes*, 2016 IL 119271, ¶¶ 2, 9 (per curiam)

[2] On March 18, 2019, the United States Supreme Court granted certiorari in *Mathena v. Malvo*, No. 18-217, which may resolve a nationwide split on whether *Miller*'s rule applies to discretionary life-without-parole sentences. *See* Petition for Writ of Certiorari, *Mathena v. Malvo*, No. 18-217, *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-217.html.

(holding that *Miller* applies to term-of-years sentence that cannot be served in one lifetime and that aggregate sentence of 97 years, with earliest opportunity for release after 89 years, qualifies as such a sentence).

The Post-Conviction Hearing Act contemplates that only one postconviction petition will be filed, unless the exception in section 122-1(f) is satisfied. *People v. Bailey*, 2017 IL 121450, ¶¶ 14-15. Under this provision, a defendant may file a successive petition if he obtains permission from the court upon demonstrating "cause" and "prejudice" for not having raised the alleged errors in his initial postconviction petition. *Id.* The Act defines these key terms:

> (1) a prisoner 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; and (2) a prisoner shows 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.

725 ILCS 5/122-1(f) (2014). A petitioner must make a prima facie showing of cause and prejudice to obtain leave to file. *Bailey*, 2017 IL 121450, ¶¶ 22, 24.

I. Because the Circuit Court Relied upon the State's Input at the Leave-to-File Stage, the Appellate Court Must Remand for the Circuit Court to Consider the Motion Without the State's Input.

Standard of Review: Whether the lower court provided an appropriate remedy is a question of law subject to de novo review where, as here, the relevant facts are not in dispute. *See People v. Galan*, 229 Ill. 2d 484, 497 (2008). Similarly, questions of statutory construction generally present legal

questions that are reviewed de novo. *Bailey*, 2017 IL 121450, ¶ 13 (citing *People v. Smith*, 2014 IL 115946, ¶ 21).

The Act requires the circuit court to *independently* decide, based upon the pleadings and supporting documentation — meaning without input from the State — whether a petitioner has made the requisite prima facie showing of cause and prejudice to warrant granting leave to file a successive postconviction petition. *Bailey*, 2017 IL 121450, ¶¶ 24-25. In so holding, *Bailey* relied heavily upon *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996), which held that reversal is "required" when a circuit court seeks or relies upon input from the State during first-stage review of an initial postconviction petition. *Bailey*, 2017 IL 121450, ¶¶ 19-20. Although different standards apply during first-stage review of an initial petition and leave-to-file review of a proposed successive petition, in both instances the Act requires the circuit court to conduct an independent review without the State's input. *Id.*, ¶¶ 20, 39. Yet *Bailey* affirmed the circuit court's denial of the leave-to-file motion because it "alleged no facts for even a cursory showing of cause and prejudice." *Id.*, ¶¶ 42-46.

Since *Bailey*, the appellate court has divided over the proper remedy for such an error. Several decisions have held that the appellate court may *not* evaluate whether a leave-to-file motion made an adequate showing of cause and prejudice. *People v. Munson*, 2018 IL App (3d) 150544, ¶¶ 10-12; *People v. Partida*, 2018 IL App (3d) 160581, ¶¶ 10-12; *People v. Baller*, 2018

IL App (3d) 160165, ¶¶ 14-16, 23 (2-1 decision). In contrast, the *Baller* dissent and the decision below acknowledged no impediment to the appellate court's de novo evaluation of cause and prejudice. *Baller*, 2018 IL App (3d) 160165, ¶ 29 (Schmidt, J., dissenting); A7. This Court should follow the reasoned analysis of the *Munson*/*Partida*/*Baller* line of cases and hold that the appellate court must reverse and remand upon finding that the circuit court committed a *Bailey* error.

As noted, *Bailey* relied heavily upon *Gaultney, Bailey*, 2017 IL 121450, ¶¶ 18-20, which held not only that it was improper for the State to influence the circuit court's first-stage review of an initial postconviction petition, but also that a violation of that rule "required" reversal and remand for an independent determination by the circuit court. *Gaultney*, 174 Ill. 2d at 419-20. Thus, under *Gaultney*'s interpretation of the Act, if the State impermissibly and prematurely participates at the leave-to-file stage, the appellate court must reverse and remand for a fresh, independent review of the leave-to-file motion.[3]

A contrary rule would run afoul of *Bailey*'s proscription against State participation at the leave-to-file stage, for if the appellate court were

[3] *Bailey* described the State's position on remedy as being that remand was not required because Bailey's leave-to-file motion was deficient on its face. 2017 IL 121450, ¶ 41. More precisely, the State argued that (1) *Gaultney* does not require reversal unless the record confirms that the circuit court was influenced by the State's input and the record did not reflect such influence; and (2) the circuit court did not need to rely on the State's input because the motion was facially meritless. *People v. Bailey*, No. 121450, State's AE Br. 7, 2017 WL 4314245, at *7. The State did not address the scope of the appellate court's remedial authority in this context. *Id.*

permitted to rule on a defendant's motion for leave to file a successive petition, that determination necessarily would follow the appellate court's receipt of State input during appellate briefing. *See Baller*, 2018 IL App (3d) 160165, ¶ 23 (Holdridge, J., concurring). Consistent with *Bailey*'s requirement that the circuit court review leave-to-file motions free from State input, this Court should hold that, to remedy a *Bailey* error, the appellate court must reverse and remand for independent review in the circuit court.

The *Baller* dissent would have held, under the general principle that the appellate court can affirm for any reason apparent in the record, that the appellate court may determine whether the circuit court correctly denied leave to file. *Id.*, ¶ 29 (Schmidt, J., dissenting). But this position is inconsistent with the Act as interpreted by *Gaultney* and *Bailey*, as well as Rule 615(b). There is no reasoned basis to conclude that the appellate court *must* reverse and remand for independent circuit court review after the State improperly participated in first-stage proceedings on an initial petition (*Gaultney*) but need not do so after the State improperly participated in the leave-to-file stage of a proposed successive petition (*Bailey*). The rationale forbidding State participation is the same in both circumstances. And under Rule 615(b), the appellate court may reverse, affirm, or modify an appealed judgment or order *only* "within statutory bounds." *People v. Whitfield*, 228 Ill. 2d 502, 520-21 (2007) (citing 134 Ill. 2d R. 615).

In any event, the appellate court here did not *affirm* the circuit court's judgment on a basis apparent in the record. Instead, it *reversed* the circuit court's judgment after reviewing a State brief that addressed cause and prejudice on the merits. A7; St. App. Ct. AE Br. 4-10. Thus, the appellate court failed to conduct the cause-and-prejudice analysis free from State input. In sum, this Court should hold that upon finding a *Bailey* error, the appellate court must reverse and remand for the circuit court to conduct leave-to-file review independent from State participation. *See Baller*, 2018 IL App (3d) 160165, ¶¶ 14-16; *see also* Def. App. Ct. AT Br. 24.

II. In an Exercise of Its Supervisory Authority, This Court Should Affirm the Circuit Court's Denial of Defendant's Leave-to-File Motion.

Standard of review: This Court reviews de novo the question of whether the lower court properly denied a petitioner's motion for leave to file a successive postconviction petition. *Bailey*, 2017 IL 121450, ¶ 13 (citing *People v. Wrice*, 2012 IL 111860, ¶ 50) (legal issues are reviewed de novo)).

Although the appellate court is not authorized to evaluate whether a postconviction petitioner adequately demonstrated cause and prejudice, *this* Court may do so; indeed, it did just that in *Bailey,* noting that it was conducting merits review "[i]n the interest of judicial economy." 2017 IL 121450, ¶¶ 42-46. Presumably, this Court did so in an exercise of its broad supervisory authority. *See Whitfield*, 228 Ill. 2d at 520-21 (this Court, and not appellate court, possesses inherent supervisory authority from article VI,

section 16, of Illinois Constitution). Here, there is no dispute that the circuit court erred by considering the State's input when addressing defendant's leave-to-file motion, C452; R921-23; A64-65. If, as in *Bailey*, the Court chooses to exercise its supervisory authority to address the merits of defendant's leave-to-file motion, it should affirm the circuit court's denial because the record below firmly establishes that defendant failed to make the requisite showing of prejudice.

The State does not dispute that defendant's 130-year aggregate sentence for crimes committed as a juvenile is the functional equivalent of life without parole. *See Reyes*, 2016 IL 119271, ¶ 10 (per curiam) (*Miller* applies when juvenile commits multiple offenses during a single course of conduct and receives an aggregate *de facto* life-without-parole sentence for those offenses). Nor does the State dispute that defendant raised his *Miller* claim in his leave-to-file motion and proposed successive postconviction petition, and he could not have done so in his initial petition, which predated *Miller*. Finally, the State agrees that the circuit court should have concluded that defendant's pleadings made a prima facie showing of "cause." *See People v. Davis*, 2014 IL 115595, ¶ 42 (*Miller* provided cause for successive petition because decision was unavailable earlier); *Bailey*, 2017 IL 121450, ¶ 24 (requiring prima facie showing for leave to file).

But even if a defendant can establish "cause," this Court can affirm the denial of leave to file when the record establishes the absence of prejudice.

Smith, 2014 IL 115946, ¶ 37 (finding no prejudice because jury instructions and closing argument established that underlying claim about prosecutor's opening statement had no merit). And this Court should affirm here because the record demonstrates that defendant's Eighth Amendment claim is meritless.

Under *Miller*, a juvenile offender may be sentenced to life without parole only if "the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Holman*, 2017 IL 12655, ¶ 46. The circuit court can make that determination only after considering the defendant's youth and its attendant characteristics, *id.*, ¶¶ 43, 46. In assessing whether a juvenile offender's life sentence comports with *Miller*'s procedural requirements, a court must look backward at the cold record and determine whether the circuit court considered evidence of the offender's youth and its attendant characteristics at the original sentencing hearing. *Id.*, ¶ 47.

A. *Miller* does not require courts to use magic words before sentencing a juvenile offender to life imprisonment.

The appellate majority found that the PSI contained evidence related to defendant's youth and its attendant characteristics. A6. Yet it concluded that defendant's sentence violated *Miller* because the circuit court did not "'explicitly' state" that it had "considered the evidence in [defendant]'s PSI during sentencing." *Id.* But under this Court's settled precedent, a sentencing court is presumed to know and follow the law. *People v. Carter*,

2015 IL 117709, ¶ 19; *see* 730 ILCS 5/5-3-1 & 5-4-1(a)(2) (1996) (requiring court to consider PSI). A sentencing court is also presumed to have "considered any mitigating evidence before it, absent some indication to the contrary other than the sentence itself." *People v. Thompson*, 222 Ill. 2d 1, 45 (2006) (citation omitted). Finally, a sentencing court is not required to "detail for the record the process by which [it] concluded that the penalty [it] imposed was appropriate." *People v. La Pointe*, 88 Ill. 2d 482, 493 (1981).

Thus, although *Miller* requires a sentencing court to consider youth-related factors before sentencing a juvenile offender to lifetime imprisonment, *Holman*, 2017 IL 120655, ¶¶ 43, 46, it does not alter the settled presumptions that attach to the sentencing court's ultimate decision. Indeed, *Miller* imposes no formal factfinding requirement at all. *Id.*, ¶ 39 (citing *Montgomery*, 736 S. Ct. at 735). In holding to the contrary, the appellate majority imposed a new requirement on the circuit court and announced a new standard for reviewing juvenile life sentences, in conflict with *Miller*, this Court's precedent, and other appellate court decisions. *See*, *e.g.*, *People v. Walker*, 2018 IL App (3d) 140723-B, ¶¶ 27-35 (life sentence constitutional where (1) trial court aware of defendant's age and background; (2) neither trial evidence nor PSI showed defendant was immature, unaware of risks, or incompetent; and (3) defendant involved in egregious crime and showed no remorse or rehabilitative potential); *People v. Johnson*, 2018 IL App (1st) 153266, ¶¶ 24-26 (same, where defendant had "'opportunity to present

evidence to show that his criminal conduct was the product of immaturity and not incorrigibility," and "trial court had before it the trial evidence, the PSI, and the sentencing arguments of the parties"; "commented on some of [the evidence], including defendant's age and intelligence; and concluded that defendant's offense was 'cold-blooded'"). This Court should reaffirm that a court must consider the *Miller* factors before sentencing a juvenile offender to life in prison, but need not use any "magic words" to ensure that its sentencing determination passes constitutional muster.

In any event, the appellate majority overlooked that the circuit court here explicitly stated that it had considered the PSI. The circuit court began the sentencing hearing by stating that it had "reviewed" the PSI, A10, and by allowing the parties to make any necessary corrections or additions to it, A10-14. Moreover, both parties referred to the PSI during their arguments. A45-52. And in announcing defendant's sentence, the circuit court stated that the sentence was based on "what [the court had] seen here" and "everything that [it] ha[d] seen and heard in th[e] trial." A55. These facts alone demonstrate that the court considered the PSI before sentencing defendant. A8 (Carter, J., dissenting).

The circuit court then confirmed as much in ruling on defendant's motion to reconsider his sentence, which urged reconsideration based on his age and rehabilitative prospects. C322-24. In denying the motion, the circuit court confirmed that it had "look[ed] at everything," including "the law," "the

sentencing Code," and "the facts," and had "followed the law" when it fashioned defendant's sentence. A62-63; A8 (Carter, J., dissenting); *see also* 730 ILCS 5/5-3-1 & 5-4-1(a)(2) (1996) (requiring court to consider PSI before imposing sentence). Accordingly, the record demonstrates that the circuit court considered the PSI when sentencing defendant, and the appellate court erred in holding otherwise.

B. Defendant's sentence comports with the Eighth Amendment.

Defendant's sentence is constitutional because, as the dissenting justice observed, A8 (Carter, J., dissenting), the circuit court sentenced defendant to de facto life without parole only after considering his youth and its attendant characteristics. The record establishes that the circuit court considered (1) defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) defendant's family and home environment; (3) defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) any evidence of defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) defendant's prospects for rehabilitation. *See Holman*, 2017 IL 120655, ¶ 46 (citing *Miller*, 567 U.S. at 477-78).

The trial judge stated that he reviewed the PSI, A10, which addressed all of these factors. The PSI confirmed defendant's age at the time of the

crimes, IC42, a fact that was also repeatedly discussed during the sentencing hearing, A46-47, 51-52, 54-55; *see also* A62-63. And nothing in the record painted defendant as immature, impetuous, or unaware of risks. The PSI also addressed defendant's family and home environment, reflecting defendant's good relationship with his mother and nothing more concerning than a father who may have played a less active role in defendant's life and two sisters who each committed a misdemeanor *after* defendant's crimes. IC48-49. Significantly, defendant was the principal and sole offender, and there is no indication that peer or familial pressure played any role in his decision to commit the crimes. Nor does the record suggest that defendant had trouble dealing with officers or prosecutors, or that he suffered from any mental or physical impairment. IC49, 51. Finally, as the circuit court found, defendant lacked rehabilitative potential, as evidenced by his numerous violent acts as a juvenile and adult, even while in custody or on probation, during the five years that followed his murder of Happ. IC47; A45-46.

Moreover, although *Miller* does not require it, *see Montgomery*, 736 S. Ct. at 735; *Holman*, 2017 IL 120655, ¶ 39, the circuit court made a factual finding that defendant's conduct showed irretrievable depravity. The circuit court emphasized that defendant's criminal acts were "depraved" and "show[ed] absolutely no respect for human life" given that defendant sexually assaulted Happ, "terrorized" and "humiliated" her before executing her in her home via this "very difficult" "method of murder." A53. The court noted that

"many" statutory aggravating factors were present, while no statutory mitigating factors were present. A54. The court recognized that defendant was young when he committed his crimes, and that youthful choices can reflect "very[,] very poor judgment." A55. Nevertheless, the court ultimately concluded that since defendant's crimes were so severe, the appropriate sentence was one that ensured that he remained in prison for life. A54-55.

The trial record supports this finding. Defendant held a knife to Happ's throat while he violently assaulted her, causing multiple rectal and vaginal lacerations. And he executed her by placing his gun directly on her forehead, fracturing her skull. R211-35.

After seeing and hearing this evidence, the jury found that defendant's crimes reflected "exceptionally brutal or heinous behavior indicative of wanton cruelty," i.e., that they were (1) brutal because the acts were "cruel and cold-blooded, grossly ruthless or devoid of mercy or compassion," or (2) heinous because they were "enormously and flagrantly criminal hatefully or shockingly evil or grossly bad." R767-68, 773-74 (jury instructions defining terms). Having presided over defendant's trial, the sentencing judge agreed, finding that defendant's acts were "depraved," "show[ed] absolutely no respect for human life," and were not the product of youthful immature judgment. A53-55.

As in *Holman*, "defendant had every opportunity to present evidence to show that his criminal conduct was the product of immaturity and not

incorrigibility[,]" but "[h]e chose to offer nothing," 2017 IL 120655, ¶ 49 (citation omitted); A42, even in support of his motion to reconsider sentence. As in *Holman*, the circuit court here "had no evidence to consider on any of the statutory factors in mitigation, but some evidence related to the *Miller* factors. On the other side of the scale, the circuit court had significant evidence to consider on the statutory factors in aggravation." *Id.*, ¶ 50; *see* 730 ILCS 5/5-5-3.2(a)(1), (3), (7) (1996); A54. And, as in *Holman*, the trial court concluded that "defendant's conduct placed him beyond rehabilitation and sentenced him to life without parole." 2017 IL 120655, ¶ 50; A53-55.

Defendant's de facto life-without-parole sentence for crimes committed as a juvenile "passes constitutional muster under *Miller*." *Holman*, 2017 IL 120655, ¶ 50. Notwithstanding the majority's holding, A6, *Miller* does not require that the circuit court use certain magic words — such as explicitly saying that it consulted the PSI — before sentencing a juvenile offender to a life-without-parole sentence. To the contrary, the presumptions that ordinarily apply in review of sentencing decisions apply during evaluation of a *Miller* claim. In any event, the circuit court began the sentencing hearing here by acknowledging that it considered the PSI. And because nothing about defendant's sentence or the procedure used to impose that sentence violated the Eighth Amendment, he has failed to demonstrate the requisite prejudice for filing a successive postconviction petition. Accordingly, this

Court should affirm the circuit court's denial of defendant's leave-to-file motion. *See Smith*, 2014 IL 115946, ¶ 37.

III. The Appellate Court Exceeded Its Authority in Bypassing the Act's Procedural Requirements and Granting Postconviction Relief.

Standard of Review: Both the appropriateness of the lower court's remedy and the statutory construction issues are questions of law subject to de novo review. *See Galan*, 229 Ill. 2d at 497; *Bailey*, 2017 IL 121450, ¶ 13 (citing *Smith*, 2014 IL 115946, ¶ 21).

Upon reversing the circuit court's judgment denying defendant's leave-to-file motion, the majority erred in remanding for a new sentencing hearing. A7. As *Bailey* reaffirmed, "satisfying the [Act's] cause and prejudice requirement does not entitle [a petitioner] to relief but rather 'only gives a petitioner an avenue for filing a successive postconviction petition.'" 2017 IL 121450, ¶ 22 (quoting *Smith*, 2014 IL 115946, ¶ 29). The motion stage "is a preliminary screening" that merely allows the petition to be filed. *Id.*, ¶¶ 24-26. Once the circuit court grants leave to file, the successive petition is docketed for second-stage review. *People v. Jones*, 2016 IL App (1st) 123371, ¶ 58 (citing *Wrice*, 2012 IL 111860, ¶ 90); *see also Bailey*, 2017 IL 121450, ¶ 26. At the second stage, counsel may be appointed and the State can move to dismiss the petition on any grounds, including the petitioner's failure to prove cause and prejudice. *Bailey*, 2017 IL 121450, ¶¶ 26-27.

The appellate court concluded that further postconviction proceedings were unnecessary because defendant's sentence violated the Eighth Amendment. A7. But postconviction petitions can assert only constitutional claims, and they are subject to a statute of limitations and other procedural hurdles, such as res judicata and waiver. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). The substantive nature of *Miller*'s constitutional rule does not vitiate the State's statutory authority to raise such defenses and respond to the petition's merits at second-stage proceedings in the circuit court. Under *Montgomery*, a State's obligation to enforce a substantive constitutional right arises only if "the claim is properly presented" and the State's collateral proceeding is "open" for relief. 136 S. Ct. at 731-32; *Walker*, 2018 IL App (3d) 140723-B, ¶ 19 (concluding that postconviction petition raising *Miller* claim was untimely); *cf.*, *e.g.*, 725 ILCS 5/122-2.2 (180-day limitations period for filing postconviction petition challenging capital sentence under *Atkins*, 536 U.S. 304). Federal habeas courts have similarly refused to consider untimely *Miller* claims. *See*, *e.g.*, *Gray v. Dorethy*, 2017 WL 4263985, at *2-*3 (N.D. Ill. Sept. 26, 2017); *see generally Dodd v. United States*, 545 U.S. 353, 356-60 (2005) (one-year limitations period begins on date constitutional right recognized, not when it is made retroactive).

Rule 615(b) underscores this conclusion. "[T]he scope of appellate review is defined by the trial court's judgment and the proceedings and orders related to it[.]" *People v. Bingham*, 2018 IL 122008, ¶ 16. Here, the

judgment on appeal is circuit court's judgment denying defendant's motion for leave to file a successive postconviction petition; the circuit court made no judgment on the merits of the postconviction petition itself — which has yet to be filed — or the underlying judgment of conviction. *People v. Young*, 2018 IL 122598, ¶¶ 16, 28; *see People v. Johnson*, 206 Ill. 2d 348, 356 (2002) ("A petition for post-conviction relief is not an appeal of the underlying judgment; rather, it is a collateral proceeding."). Put another way, the lower court was tasked with reviewing whether the leave-to-file motion adequately alleged a prima facie showing of cause and prejudice, and not whether the motion (or proposed successive petition) actually proved a constitutional violation. *See Young*, 2018 IL 122598, ¶ 28. Thus, the appellate court's remedial authority was limited to reversing, affirming, or modifying the order denying the motion for leave to file a successive petition and did not permit the court to affirmatively award postconviction relief.

Accordingly, the Act contemplates only one remedy for an erroneous denial of leave to file a successive petition: a remand for the petition to be filed and for further proceedings under the Act. *See Wrice*, 2012 IL 111860, ¶ 87 (reversing order denying leave to file successive petition, remanding for appointment of counsel at second stage, and refusing to "'short circuit'" process by remanding for third-stage hearing); *see also People v. Allen*, 2015 IL 113135, ¶¶ 33-35 ("[n]ot until the second stage is the petition [properly] subjected to adversarial testing through the State's involvement"). The

appellate court erred in concluding that this case warrants a different remedy merely because it presents a *Miller* claim.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully ask this Court to reverse the portions of the Third District's judgment that (1) reversed the circuit court's denial of defendant's motion for leave to file a successive postconviction petition and (2) remanded for resentencing, and to affirm the circuit court's judgment. In the alternative, the State asks this Court to reverse solely the portion of the Third District's judgment that remanded for resentencing and remand to the circuit court with instructions to (1) grant the leave-to-file motion; and (2) hold further postconviction proceedings.

April 9, 2019

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 29 pages.

/s/ Leah M. Bendik
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2018 IL App (3d) 150189
Appellate Court of Illinois, Third District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Ashanti LUSBY, Defendant-Appellant.

Appeal No. 3-15-0189
|
Opinion filed August 21, 2018

Synopsis

Background: After defendant, who was 16 at the time offenses were committed, was convicted of first degree murder, aggravated criminal sexual assault, and home invasion, and sentenced to 130 years imprisonment, the 12th Judicial Circuit Court, Will County, David Martin Carlson, J., denied defendant's motion to reconsider, and the Appellate Court affirmed, 881 N.E.2d 981. Defendant filed a pro se motion for leave to file a successive postconviction petition. The Circuit Court denied defendant's petition. Defendant appealed.

Holdings: The Appellate Court, McDade, J., held that:

requirement that the trial court consider defendant's age and attendant characteristics when sentencing a juvenile to life in prison without parole, in accordance with *Miller v. Alabama*, applied to defendant's case;

defendant met cause requirement needed to file a successive postconviction petition;

defendant met prejudice requirement needed to file a successive postconviction petition;

State was not permitted to participate at cause and prejudice stage of defendant's successive postconviction proceedings; and

even though trial court denied defendant's successive post-conviction petition, despite the Supreme Court's ruling that failure to consider age when sentencing a juvenile to life in prison without parole satisfied cause and prejudice test to support a successive post-conviction petition, defendant was not entitled to a new judge on remand.

Reversed and remanded.

Carter, P.J., filed dissenting opinion.

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Circuit No. 01-CF-664, The Honorable David Martin Carlson, Judge, presiding.

OPINION

JUSTICE McDADE delivered the judgment of the court, with opinion.

***1** ¶ 1 Petitioner Ashanti Lusby was convicted of first degree murder, aggravated criminal sexual assault, and home invasion. He was 16 years old at the time the offenses occurred. He filed a direct appeal and, subsequently, a *pro se* postconviction petition, which were both denied by this court. He later filed a motion for leave to file a successive postconviction petition, arguing that his *de facto* life sentence violated his eighth amendment rights because the trial court did not consider his age and its attendant characteristics in accordance with *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The State requested that the trial court allow it to file objections to Lusby's motion, which the court granted. The State also argued its objections before the court. Neither Lusby nor his defense attorney was present for the State's arguments. The trial court denied Lusby's motion and he appealed, arguing that (1) the trial court erred when it denied his motion for leave to file a successive postconviction petition, (2) the trial court erred when it allowed the State to file and argue objections to his motion, and (3) he is entitled to a new judge on remand. We reverse and remand this case for a new sentencing hearing.

¶ 2 FACTS

¶ 3 On February 9, 1996, a woman was found dead in her home. She had multiple rectal and vaginal lacerations, knife wounds to her neck, and a gunshot wound above her right eye. Lusby, who was 16 years old at the time of

the offense, was charged in a 15-count indictment for first degree murder, aggravated criminal sexual assault, and home invasion for the events that occurred on February 9.

¶ 4 The jury found Lusby guilty of all 15 charges. In October 2002, Lusby filed a motion for a new trial, which the trial court denied. In March 2003, a sentencing hearing was held. A presentence investigation report (PSI) was submitted to the court. The report stated that Lusby was born in Chicago, Illinois, on April 11, 1979. He moved to Joliet, Illinois, when he was 10 years old. He went back to Chicago for one year when he was 14 years old but eventually returned to Joliet. Lusby was single and had two children. He received his GED in the Illinois Youth Center. The last grade he completed was the tenth grade because he was expelled for "gang banging." He had used marijuana, phencyclidine (PCP), and alcohol in the past and had used marijuana every day but denied that he was currently using any drugs or alcohol. He claims that he completed drug treatment, but this could not be confirmed. He did not have any current mental health issues. Lusby had been convicted of the following offenses: (1) 1994 aggravated discharge of a firearm (juvenile), (2) 1998 robbery, (3) 2001 resisting a peace officer, and (4) 2001 aggravated battery. The State noted that Lusby also had a 1998 misdemeanor conviction for attempting to obstruct justice. Lusby's probation had been revoked on the robbery conviction in March 2000. Lusby stated that he had a good relationship with his mother and father and that they visited him often in jail although detention facility records show that Lusby's father never visited him. He has two sisters, both of whom have theft convictions. The probation officer recommended that "defendant may benefit from counseling to control his violent tendencies." The State attached 21 victim impact letters as an addendum to the PSI. Lusby objected, arguing that the letters were prejudicial. The trial court stated, "I will base the decision on the facts of the case and not on these letters."

*2 ¶ 5 The State presented two witnesses at the sentencing hearing. Robert Miller testified that, in July 2001, he was an inmate in the Will County jail. While Miller was using the phone, Lusby approached Miller, put his hand on the receiver, and stated Miller had cut into the line waiting to use the phone. Miller and Lusby were arguing when a deputy interjected, stating that Miller did not cut and commanding Lusby to wait in line. After Miller completed his call, he got into another altercation with Lusby. Lusby "called him into the gym," and Miller followed. Once there, Lusby hit Miller in the face causing Miller a broken bone under his left eye, a broken nose, and a cut on his lip requiring three stitches. Jean Happ testified concerning her victim impact statement, which was admitted into evidence. Defense counsel did not present any evidence or witnesses.

¶ 6 Ultimately, Lusby's 15 convictions were reduced to three: one count for first degree murder, one for aggravated sexual assault, and one for home invasion. The State requested that the other first degree murder counts (I, III through XIII) merge with count II (first degree murder for intentional killing with exceptional brutal and heinous behavior indicative of wanton cruelty). The State noted that the trial court may enhance Lusby's sentence on count II to a minimum of 60 years and a maximum of 100 years pursuant to section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5-8-2 (West 2002)). The State also asked the court to merge the other aggravated sexual assault convictions (counts IX, XI, XII) with count X (aggravated sexual assault) and the home invasion convictions in counts XIV and XV with count XIII (home invasion). It stated that the trial court may sentence Lusby to a maximum of 30 years on counts X and XIII and that both counts are to run consecutively to the first degree murder charge.

¶ 7 During the trial court's oral pronouncement, it stated:

> "THE COURT: All right. Well, this is a case that is a very difficult case from the standpoint of the facts of the injuries and of the method of murder of the victim. It certain—certainly the defendant's age is a factor at the very least to the extent that he is not eligible for the imposition of capital punishment based solely because of his age, because but for his age at under the age of 18, certainly this—these are the type of things, let me put it that way, that I have seen that all the attorneys that are in this trial have seen as facts that would—that could be considered capital punishment activities.
>
> But I cannot, I cannot ignore the fact that Miss Happ was terrorized and sexually assaulted and humiliated and executed in her own home; and this was clearly a depraved act by you, Mr. Lusby, and it shows absolutely no respect for human life. It is ironic to me I guess that this Miss Happ was working to provide a positive influence on children in the area and the area that you lived in and even children that were—would

be yours or your nieces or nephews or other family members might have been influenced positively by this woman, but your actions saw that didn't happen.

So it is very difficult for me to consider any leniency in this case. It is very difficult for me to see any factors in mitigation. I have gone through the section on mitigation. There are no factors in mitigation that apply.

I have gone through the factors in aggravation and those factors there are many that apply, and I sincerely believe that the appropriate sentence is a sentence that will see that this does not occur outside of the Department of Corrections again. This is a choice that you made at a young age and I know that choices, youthful choices can be—are not, you know, sometimes are [*sic*] sometimes in very very poor judgment, but this is not one that can be taken back, and this is not one that can be considered minor, and this is not one that can be considered for anything but setting your future in the Department of Corrections.

***3** From what I've seen here from everything that I have seen and heard in this trial this is a life you chose, a life of carrying weapons, a life of showing no respect for human life, and I am not at all uncomfortable in imposing the maximum sentence on the murder of 100 years. The consecutive sentence on the other two Class X offenses again the manner and method of this crime makes me convinced that it is not for me to minimize it in any way, and as a consequence I will impose an additional consecutive 30 years on each of these offenses. So that is the order of the Court. Certainly you have every right to appeal the sentence."

¶ 8 Thus, the court sentenced Lusby to 100 years' imprisonment on the first degree murder conviction to be followed by concurrent 30 year sentences for aggravated criminal sexual assault and home invasion, totaling 130 years' imprisonment. Lusby filed a motion to reconsider, arguing that the trial court failed to consider Lusby's age, potential for rehabilitation, and potential to be restored to useful citizenship during sentencing. The trial court denied the motion, stating:

"THE COURT: All right. I tink [*sic*] these motions are required prior to a thorough appellate review. It's always difficult for the Trial Judge because you prepare yourself for sentencing like this, you sit down and you look at everything. You look at the law and look at the sentencing Code, because it's confusing, and you try to fashion the sentence appropriate and consisten [*sic*] with the sentencing Code and appropriate to the facts. I believe I felt comfortable with my sentence at the time. I believe I followed the law as I understood it and took into account all the factors both in aggravation and in mitigation that apply here. So show the motion to reconsider sentence presented and argued and denied."

¶ 9 Lusby filed a direct appeal to this court. *People v. Lusby*, 353 Ill. App. 3d 1109, 317 Ill.Dec. 495, 881 N.E.2d 981 (2004) (table) (unpublished order under Supreme Court Rule 23). This court affirmed the trial court's decision, and our supreme court denied Lusby's petition for leave to appeal in March 2005. *Id.*, *appeal denied*, 214 Ill. 2d 544, 294 Ill.Dec. 6, 830 N.E.2d 6 (2005).

¶ 10 In September 2005, Lusby filed a *pro se* postconviction petition. Lusby claimed that his right to due process was violated when he was required to wear an electric stun belt in the presence of the jury and that defense counsel rendered ineffective assistance of counsel when it failed to object to the use of the belt. The trial court dismissed the petition, and Lusby appealed. This court affirmed the trial court's dismissal. *People v. Lusby*, 377 Ill. App. 3d 1156, 352 Ill.Dec. 153, 953 N.E.2d 89 (2007) (table) (unpublished order under Supreme Court Rule 23). Our supreme court denied his petition for leave to appeal in September 2009. *Id.*, *appeal denied*, 233 Ill. 2d 582, 335 Ill.Dec. 641, 919 N.E.2d 360 (2009).

¶ 11 In November 2014, Lusby filed a *pro se* motion for leave to file a successive postconviction petition. In the motion, he argued that his *de facto* life sentence violated his eighth amendment rights. He claimed that he had met the cause and prejudice requirements to file a successive postconviction petition under section 122-1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2014)) because (1) the ruling in *Miller*, 567 U.S. 460, 132 S.Ct. 2455, which established that a court must consider a juvenile's age and its attendant characteristics before sentencing him to mandatory life imprisonment, was issued after Lusby's trial and initial postconviction petition, and (2) Lusby did not have an opportunity to present mitigating evidence so the trial court could consider his age and the possible impact of his age-related factors on his commission of the offense.

*4 ¶ 12 The State requested a 35-day extension to file objections to Lusby's motion, which the trial court allowed. In its objections, the State alleged that *Miller* did not apply to this case because the Court in *Miller* addressed mandatory life sentences, not *de facto* life sentences. It also argued that our supreme court in *People v. Davis*, 2014 IL 115595, 379 Ill.Dec. 381, 6 N.E.3d 709, ruled that *Miller* does not apply to a discretionary life sentence. It further alleged that the court properly considered all the evidence before making its findings.

¶ 13 In January 2015, without the presence of Lusby or his defense attorney, the State argued its objections before the court, and the court denied Lusby's petition, stating:

> "THE COURT: All right[.] Show that I have reviewed all the pleadings, I have reviewed the Court file, and I will find that the request for a second—I guess it's a second post-conviction petition to be filed is denied based upon the law[.]"

Lusby appealed.

¶ 14 ANALYSIS

¶ 15 I. Motion for Leave to File a Successive Postconviction Petition

¶ 16 Lusby argues that the trial court erred when it denied his motion for leave to file a successive postconviction petition. Specifically, Lusby claims that he had met the requisite cause and prejudice test to file a successive petition because (1) he could not assert his claim until the Supreme Court's decision in *Miller*, 567 U.S. 460, 132 S.Ct. 2455, and our supreme court's decision in *Davis*, 2014 IL 115595, 379 Ill.Dec. 381, 6 N.E.3d 709, and (2) the trial court failed to consider his age and its attendant characteristics during sentencing and, therefore, violated his eighth amendment rights.

¶ 17 Citing *People v. Guerrero*, 2012 IL 112020, ¶ 20, 357 Ill.Dec. 511, 963 N.E.2d 909, the State argues that the lack of precedent on a particular position does not constitute "cause" because Lusby must raise any issues to preserve it for review even when the law is unfavorable to his position. It further claims that Lusby did not show "cause" because there were no external factors that impeded Lusby's ability to raise the claim during his initial postconviction petition, as he raised the same argument in his motion to reconsider. Also, it contends that Lusby did not show prejudice because (1) the record shows that the trial court considered his age during sentencing; (2) regardless of whether the trial court considered Lusby's age, his sentence "reflects irreparable corruption" and the trial court properly sentenced him to 130 years; and (3) *Miller* addresses mandatory life sentences whereas this case involves a *de facto* life sentence.

¶ 18 Because the parties dispute whether *Miller* applies to this case, we first consider its applicability. The eighth amendment prohibits the imposition of cruel and unusual punishment and applies to the states through the fourteenth amendment. *Davis*, 2014 IL 115595, ¶ 18, 379 Ill.Dec. 381, 6 N.E.3d 709 (citing *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)). "The eighth amendment's ban on excessive sanctions flows from the basic principle that criminal punishment should be graduated and proportioned to both the offender and the offense." *Id.* "To determine whether a punishment is so disproportionate as to be cruel and unusual, a court must look beyond history to the evolving standards of decency that mark the progress of a maturing society." (Internal quotation marks omitted.) *Id.*

¶ 19 In *Miller*, the defendant was convicted of murder and sentenced to mandatory life imprisonment without parole. The Supreme Court determined that a sentence of life without parole for a juvenile who committed any offense, including homicide, without the court's consideration of the juvenile's age or its attendant characteristics, violates the eighth amendment. *Miller*, 567 U.S. at 489, 132 S.Ct. 2455. Relying on *Roper* and *Graham*, the Court reasoned that youth characteristics "diminish the penological justifications for imposing the harshest sentences on juvenile offenders." *Id.* at 472, 132 S.Ct. 2455; also see *Roper*, 543 U.S. 551, 125 S.Ct. 1183 (holding that the eighth amendment bars capital punishment of juveniles); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (finding that the eighth amendment prohibits a sentence of life without parole for juveniles who commit nonhomicide offenses). It declined to consider whether the eighth amendment requires a "categorical bar on life without parole for juveniles." *Miller*, 567 U.S. at 479, 132 S.Ct. 2455. Instead, the Court found that a court has the ability to sentence a juvenile to life in prison without parole but it must take into consideration "how children are different, and how those

differences counsel against irrevocably sentencing them to a lifetime in prison" beforehand. *Id.* at 480, 132 S.Ct. 2455.

*5 ¶ 20 Recently, our supreme court in *People v. Holman*, 2017 IL 120655, 418 Ill.Dec. 889, 91 N.E.3d 849, held that *Miller* applies to cases when a defendant is sentenced to a discretionary life sentence. It reasoned that a juvenile's diminished culpability is "neither crime-nor sentence-specific" and that discretionary life sentences for juveniles are "disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." *Id.* ¶ 40.

¶ 21 Lusby's 130-year sentence is a *de facto* life sentence. See *People v. Smolley*, 2018 IL App (3d) 150577, ¶ 22, — Ill.Dec. ——, — N.E.3d —— (15-year-old defendant's 65-year sentence constituted *de facto* life sentence); *People v. Buffer*, 2017 IL App (1st) 142931, ¶ 62, 412 Ill.Dec. 490, 75 N.E.3d 470 (16-year-old defendant's 50-year sentence constituted *de facto* life sentence); *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 24, 408 Ill.Dec. 469, 65 N.E.3d 945 (defendant's 60-year sentence constituted *de facto* life sentence). Moreover, our supreme court in *Holman* established that *Miller* is also applicable to a discretionary life sentence. Therefore, we find that *Miller* applies in this case.

¶ 22 Next, we consider whether Lusby has met the cause and prejudice test although *Miller* was decided after his trial and the filing of his initial postconviction petition. The Post-Conviction Hearing Act allows the filing of only one postconviction petition without leave of the court. 725 ILCS 5/122-1(f) (West 2016). "[A] defendant faces immense procedural default hurdles when bringing a successive postconviction petition." *Davis*, 2014 IL 115595, ¶ 14, 379 Ill.Dec. 381, 6 N.E.3d 709. Because it interferes with the finality of criminal litigation, these hurdles are lowered only in limited circumstances. *Id.* "One such basis for relaxing the bar against successive postconviction petitions is where a petitioner can establish 'cause and prejudice' for the failure to raise the claim earlier." *Id.*; 725 ILCS 5/122-1(f) (West 2016). Cause refers to some objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding. *Davis*, 2014 IL 115595, ¶ 14, 379 Ill.Dec. 381, 6 N.E.3d 709. Prejudice refers to a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process. *Id.* "Both prongs must be satisfied for the defendant to prevail." *Id.*

¶ 23 Our supreme court in *Davis* determined that the Court's decision in *Miller* constitutes "cause" under section 122-1(f) because it was not available to counsel earlier. *Id.* ¶ 42. Here, *Miller* was not decided until seven years after Lusby filed his initial postconviction petition. *Miller* was not available to Lusby's counsel at the time of his sentencing or at the time he filed his initial postconviction petition.

¶ 24 The State argues that Lusby did not show "cause" because he previously argued that the trial court failed to consider his age in his motion to reconsider. Lusby did argue that the trial court failed to consider his age during sentencing in his motion to reconsider. However, Lusby is specifically arguing that *Miller*, which requires a court to consider a juvenile's age and its attendant characteristics before sentencing him to a life sentence, was applicable to this case and should be applied retroactively. Defense counsel did not have an opportunity to present this argument because *Miller* was decided after he filed his initial postconviction petition. See *People v. Williams*, 2018 IL App (1st) 151373, ¶ 13, —— Ill.Dec ——, —— N.E.3d —— (rejecting the State's *res judicata* argument because *Miller* was decided 17 years after the defendant's conviction and sentence). Therefore, we find that Lusby met the "cause" prong of the cause and prejudice test.

*6 ¶ 25 Lusby claims that he also met the "prejudice" prong under the cause and prejudice test and requests that this court remand this case for a new sentencing hearing rather than proceed to the second-stage postconviction proceedings. *Davis*, 2014 IL 115595, 379 Ill.Dec. 381, 6 N.E.3d 709, and *Holman*, 2017 IL 120655, 418 Ill.Dec. 889, 91 N.E.3d 849, provide guidance on this issue. In *Davis*, the defendant fatally shot two people. *Davis*, 2014 IL 115595, ¶ 4, 379 Ill.Dec. 381, 6 N.E.3d 709. He was convicted of murder and sentenced to natural life imprisonment without the possibility of parole. *Id.* ¶ 5. The First District determined that *Miller* applied retroactively on postconviction review and remanded the defendant's case for a new sentencing hearing, and the State appealed. *Id.* ¶ 10. The supreme court noted that a new rule is not applied retroactively to cases on collateral review unless (1) it is a new substantive rule or (2) it is a rule " 'implicating the fundamental fairness and accuracy of the criminal proceeding.' " *Id.* ¶ 36 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004)). Relying on

People v. Morfin, 2012 IL App (1st) 103568, 367 Ill.Dec. 282, 981 N.E.2d 1010, the court explained that the Supreme Court's ruling in *Miller* created a new substantive law because, although *Miller* actually mandates a new procedure by requiring a court to consider a juvenile's age during sentencing, the rule "is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing." (Internal quotation marks omitted.) *Davis*, 2014 IL 115595, ¶ 39, 379 Ill.Dec. 381, 6 N.E.3d 709. Therefore, the court determined that *Miller* applied retroactively. It also held that, based on *Miller*'s substantive rule that prohibits mandatory life without parole of juveniles, *Miller* constitutes prejudice under the cause and prejudice test because "it retroactively applies to defendant's sentencing hearing." *Id.* ¶ 42.

¶ 26 In *Holman*, the defendant argued that the trial court erred when it denied his motion for leave to file a successive postconviction petition. *Holman*, 2017 IL 120655, ¶ 20, 418 Ill.Dec. 889, 91 N.E.3d 849. On appeal, the defendant argued that his discretionary life sentence was unconstitutional under *Miller*. *Id.* Our supreme court determined that a trial court must consider a juvenile's age-related characteristics as specified in *Miller* because "age is not a chronological fact but a multifaceted set of attributes that carry constitutional significance." *Id.* ¶¶ 43-44. These characteristics include:

> "(1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation." *Id.* ¶ 46.

The court reviewed the trial record and held that the defendant's sentence was constitutional. *Id.* ¶¶ 47, 50. It reasoned that (1) the trial court's statement that "it found 'no mitigating factors' " (*id.* ¶ 49) was about the 12 factors enumerated in section 5-5-3.1 of the Unified Code of Corrections (730 ILCS 5/5-5-3.1 (West 2016)) and not about the *Miller* factors, (2) the trial court did not have any evidence related to the statutory factors in mitigation enumerated in section 5-5-3.1, and (3) the defendant intentionally decided not to present any mitigating evidence despite his opportunity to do so. The court further found that the trial court "explicitly stated that it considered the trial evidence and the PSI" and that the minimal evidence related to the *Miller* factors did not undermine the "significant evidence" related to factors in aggravation. *Holman*, 2017 IL 120655, ¶¶ 48-50, 418 Ill.Dec. 889, 91 N.E.3d 849. It concluded that the trial court properly denied his motion for leave to file a successive postconviction petition. *Id.* ¶ 50.

¶ 27 Here, the trial court mentions age in two instances: (1) when the court stated that Lusby is not eligible for capital punishment because of his age, and (2) when the court stated, "This is a choice that you made at a young age and I know that choices, youthful choices can be—are not, you know, sometimes are [*sic*] sometimes in very very poor judgment, but this is not one that can be taken back, and this is not one that can be considered minor, and this is not one that can be considered for anything but setting your future in the Department of Corrections." Based on the ruling, the trial court did not address Lusby's age-related characteristics; rather, it gave a generalized statement about youth and their poor judgment. Unlike the trial court in *Holman*, there is no indication in the record that the trial court considered the evidence of Lusby's "immaturity, impetuosity, and failure to appreciate risks and consequences" or family environment in the PSI. The PSI included various incidences of such evidence including that (1) Lusby was expelled from the tenth grade for "gang banging"; (2) he had used marijuana, PCP, and alcohol; (3) he had a lengthy criminal history including his 1994 aggravated discharge of a firearm juvenile conviction; (4) his sisters also had a criminal history; and (5) the probation officer had recommended Lusby attend counseling to control his "violent tendencies."

*7 ¶ 28 The trial court also stated that there were no factors in mitigation, and similar to *Holman*, we find that the trial court was refering to the factors enumerated in section 5-5-3.1. However, unlike *Holman*, the trial court did not "explicitly" state that it considered the evidence in Lusby's PSI during sentencing, and thus, we cannot conclude that the trial court considered any evidence related to the *Miller* factors. Therefore, we find that Lusby was prejudiced because *Miller* is applied retroactively and the trial court did not consider his age and the attendant characteristics described in *Miller* before sentencing him to *de facto* life.

¶ 29 We note that the crime for which Lusby was convicted and sentenced was heinous. Under *Miller*, a trial court may sentence "the rare juvenile offender whose crime reflects irreparable corruption" to life without parole. *Miller*, 567 U.S. at 479-80, 132 S.Ct. 2455. However, "[t]he court may make that decision only after considering the defendant's youth and its attendant characteristics." *Holman*, 2017 IL 120655, ¶ 46, 418 Ill.Dec. 889, 91 N.E.3d 849. Generally, a case will advance to the three-stage process for reviewing postconviction petitions when the court determines that the petitioner has satisfied the cause and prejudice test. See *People v. Bailey*, 2017 IL 121450, ¶ 26, 421 Ill.Dec. 833, 102 N.E.3d 114. Because we hold that Lusby's sentence violated the eighth amendment, we remand this case for resentencing. See *Smolley*, 2018 IL App (3d) 150577, ¶ 21, — Ill.Dec. ——, — N.E.3d —— ("[w]here the record does not indicate that the trial court considered the defendant's characteristics of youth before sentencing a juvenile to a *de facto* life sentence, the case should be remanded for a new sentencing hearing"); *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 51, 405 Ill.Dec. 453, 58 N.E.3d 714 ("Because defendant's sentence is unconstitutional, he is entitled to a new sentencing hearing. There is no need for further postconviction proceedings on this issue."). This issue is dispositive of this appeal. However, we address the remaining issues as they may occur on rehearing.

¶ 30 II. State's Objections

¶ 31 Lusby argues that the trial court erred when it allowed the State to file and argue objections to his motion for leave to file a successive postconviction petition. Both parties contend that the same issue is addressed in *People v. Bailey*, 2016 IL App (3d) 140207, 406 Ill.Dec. 296, 60 N.E.3d 198 (*Bailey I*), which was currently pending before the supreme court at the time Lusby filed this appeal. Since then, the supreme court made its decision in *People v. Bailey*, 2017 IL 121450, 421 Ill.Dec. 833, 102 N.E.3d 114 (*Bailey II*). Based on the supreme court's ruling in *Bailey II*, the State concedes that the trial court erred when it allowed the objections.

¶ 32 In *Bailey II*, the court held that the State is not permitted to participate at the cause and prejudice stage of successive postconviction proceedings because (1) the court is statutorily required to make an independent determination of whether the petitioner met the requisite of cause and prejudice, (2) there is no provision in the statute that allows an evidentiary hearing on the issue of cause and prejudice, and (3) it would be fundamentally unfair for the State to participate as "successive postconviction petitions are typically filed *pro se* and the Act makes no provision for a defendant to be entitled to counsel until after a postconviction petition is docketed." *Id.* ¶¶ 24, 27.

¶ 33 Pursuant to *Bailey II*, the State improperly filed and argued objections to Lusby's motion. Therefore, the trial court erred when it allowed the objections.

¶ 34 III. Substitution of Judge

¶ 35 Lastly, Lusby requests that this case be heard before a different judge on remand. "There is no absolute right to a substitution of judge at a post-conviction proceeding. [Citation.] Rather, the same judge who presided over the defendant's trial should hear his post-conviction petition, unless it is shown that the defendant would be substantially prejudiced." *People v. Hall*, 157 Ill. 2d 324, 331, 193 Ill.Dec. 98, 626 N.E.2d 131 (1993). The trial court erred when it denied Lusby's motion despite the supreme court's ruling in *Davis* that *Miller* satisfies the requisite cause and prejudice test under section 122-1(f) of the Post-Conviction Hearing Act. It also improperly allowed the State to file and argue objections to Lusby's motion. However, we do not see any malicious intent in the trial court's errors and there is "no indication that the court will not follow the law on remand." *People v. White*, 2017 IL App (1st) 142358, ¶ 43, 412 Ill.Dec. 25, 74 N.E.3d 492. Therefore, we deny Lusby's request for a new judge on remand.

¶ 36 CONCLUSION

*8 ¶ 37 The judgment of the circuit court of Will County is reversed and remanded.

¶ 38 Reversed and remanded.

Justice O'Brien concurred in the judgment and opinion.

Presiding Justice Carter dissented, with opinion.

¶ 39 PRESIDING JUSTICE CARTER, dissenting.

¶ 40 I respectfully dissent from the majority's decision in the present case. I would find that defendant has failed to establish prejudice under the cause and prejudice test. In my opinion, the trial court's comments show that it considered defendant's youth and its attendant circumstances in sentencing defendant. The trial court even considered those factors a second time at the hearing on the motion to reconsider sentence when defendant again raised the issue of his age and asserted that the trial court had failed to consider his age, his potential for rehabilitation, and his potential to be restored to useful citizenship.

¶ 41 In *Holman*, our supreme court recognized that "a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." See *Holman*, 2017 IL 120655, ¶ 46, 418 Ill.Dec. 889, 91 N.E.3d 849. Defendant in the instant case sexually assaulted and then executed the victim, a 27-year-old school teacher, in her own home. When the victim was later discovered, she had multiple rectal and vaginal lacerations, knife wounds to her neck, and a gunshot wound above her right eye. Defendant's semen was found in the victim's rectum and vagina. As the trial court's comments in sentencing indicate, the trial court determined that the horrendous conduct of this defendant showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation. See *id.* I would find, therefore, that defendant's sentence passes constitutional standards. See *id.* ¶¶ 46-50. I cannot join the majority in its conclusion that the trial court failed to consider the required information, much of which was contained in the PSI, merely because the trial court did not expressly state that it had considered the PSI. I would, thus, affirm the trial court's denial of defendant's motion for leave to file a successive postconviction petition.

All Citations

--- N.E.3d ----, 2018 IL App (3d) 150189, 2018 WL 3980048

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STATE OF ILLINOIS)
) SS:
COUNTY OF W I L L)

THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs. No. 01 CF 364
ASHANTI G. LUSBY,
Defendant.

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE GERALD R. KINNEY, Judge of the Circuit Court of Will County, Illinois, on the 29th day of October, 2002.

APPEARANCES:

MR. JEFFREY TOMCZAK,
Will County State's Attorney
and
MS. JANINE BOGGS,
Assistant State's Attorney
for the Plaintiff;

MR. EDWARD JAQUAYS,
Assistant Public Defender
for the Defendant.

TAMMY M. MAIER, C.S.R.
LICENSE NO. 84-3364
OFFICIAL COURT REPORTER
WILL COUNTY COURTHOUSE
JOLIET, ILLINOIS 60432

We eliminated many photographs. Many of the photographs we covered certain parts of the victim for that purpose and for the defendant's protection. We redacted the videotape to a significant extent to minimize again the viewing of the body, and given the fact that as I have said many times that it is a jury decision on the issue of brutal and heinous behavior indicative of wanton cruelty, to some extent the State had an absolute right to try to present that evidence, so we minimized it. We tried to take the inflammatory, as much inflammatory matters as possible out of this case.

The jury has made it's decision. I believe it is the appropriate decision, and the motion for new trial is denied.

MR. JAQUAYS: Thank you, your Honor.

THE COURT: Thank you.

MR. TOMCZAK: We're ready for sentencing, Judge.

THE COURT: All right. Now I have reviewed the presentence investigation. Has everyone had a chance to review it?

MS. BOGGS: I have.

MR. JAQUAYS: I have, and I have an objection to it.

THE COURT: All right.

MR. JAQUAYS: The objection is really to the addendum that has been attached thereto and which I recently received as I don't know how else to describe it as to the volume of which I think the cumulative effect is to overwhelm the Court. I think it is excessive. I would ask the Court I don't know how much of it -- the Court has already read it, but to the extent that it is in my opinion excessive I would ask the Court to disregard the volume of letters which have been attached.

THE COURT: Any response to that?

MR. TOMCZAK: Judge, our response would be simple. We know that this Court will only consider what it knows to be proper evidence in relation to the sentencing. We did have a victim here that was very very well loved in the community, your Honor, and a third grade school teacher. It is not unusual for that amount of letters to be coming in. And, you know, this is

the fact of matter. The defendant killed someone who is very dear to the community and very dear to her family and friends, and Judge, I don't know relative to this cumulative argument, but I know your Honor will only consider the evidence that you feel is appropriate in light of the factors in aggravation and mitigation, and I will leave it to your judgment as to these letters, Judge.

THE COURT: Well, the letters were presented in a separate addendum. I did have a chance to go through them, so for me to say that I didn't see them wouldn't be accurate.

I guess it goes without saying that whenever a human life is taken there are people who are impacted by that, typically more than one. I certainly am not -- my decision in this case can't be based as I tell the jury when I select them, that they must not base their decision on any kind of passion or prejudice, I certainly can't base mine on that either, and I will base the decision on the facts of the case and not on these letters. Although they're helpful. They're certainly -- they're certainly

to a certain degree enlightening, but I think they're probably more helpful for those who suffered the loss than they can be for the Court because I know I can't, I know I can't, I can't base my decision on the passion and the grief of those who have been left behind. So the objection is noted. I am going to allow them to stay as part of the file with those comments having already been made.

Any other changes to the PSI?

MR. JAQUAYS: No, sir.

MS. BOGGS: We do.

THE COURT: Mr. Jaquays, what did you have?

MR. JAQUAYS: Go ahead. If they're dealing with the PSI, I'll defer.

MS. BOGGS: I'm still on the PSI.

THE COURT: You're still on the PSI. All right.

MS. BOGGS: There is a misdemeanor that has not been added. It is 98 CM 1190 and I had it sent up this afternoon for the Court. The defendant used an alias, Dale Williams. It was later amended when he conceded that he was in fact Ashanti Lusby. It is an attempt obstructing

justice in Will County. He was convicted, and that was imposed on August 27 of '99. He served 18 days in jail.

THE COURT: Any issue as to whether that should be added to his criminal history, Mr. Jaquays?

MR. JAQUAYS: I would have to accept the State's representations.

MS. BOGGS: Judge, just for the record I believe he told Mr. Kocisko a little bit about it, but he didn't know numbers and Mr. Kocisko couldn't find it.

THE COURT: All right, we'll indicate that that then is a prior misdemeanor. I see that the names were changed on the face of the information and that the information in 98 CM 1190 does reflect Ashanti Lusby as the defendant as opposed to Dale Williams so I will note that for the completeness of this presentence investigation.

MR. TOMCZAK: Thank you, your Honor.

MS. BOGGS: As to the PSI we have nothing additional.

THE COURT: Mr. Jaquays.

MR. JAQUAYS: The last issue that we raised

as we go through the victim impact statement which was presented to me today, and I would have an objection to its present form.

THE COURT: Now that I have not seen.

MS. BOGGS: Judge, for the record while we go through this I will ask leave to file for the Court's review People's Exhibit No. 5 for sentencing for that reference point until it is identified.

THE COURT: And your objections, Mr. Jaquays.

MR. JAQUAYS: Judge, with respect to the proposed impact statement which was tendered to me this afternoon, it has to deal with what I believe to be the final page which in my opinion exceeds the appropriate scope of an impact statement. My understanding the impact statement is supposed to be exactly what it says, how it impacted the family without any reference or suggestion as to what the sentence should be. The paragraph final page after it says Ashanti Lusby must be punished read as a whole in my opinion is an attempt to suggest an appropriate sentence to the Court which I don't think is part

of a true impact statement that should be allowed.

MR. TOMCZAK: Just a brief response. Your Honor, this does not suggest a particular sentence. We're here looking at a sentencing on a murder case. It is a mandatory prison sentence. I mean punishment is part of what you do, Judge, and you know that. Mrs. Happ is merely saying that Mr. Lusby must be punished and kept off the street to protect others. That's standard operating procedure here in a sentencing hearing. There is nothing unusual about that. Taken as a whole, your Honor, if you have had occasion to read this, this is pretty much a standard victim impact statement. There is nothing inflammatory contained in here and the simple statement that Mr. Lusby must be punished after having been found guilty of heinous and brutal murder I think is an understatement.

MR. JAQUAYS: Judge, I didn't object to the language must be punished. I said after the language.

THE COURT: Right, after that.

Well, I did review it at the very

least now at least the last paragraph of this and again I don't think it is out of bounds. I have gone through a lot of reading on what is appropriate in a victim impact statement and the one thing that comes to mind is that it shouldn't be an effort to attack the defendant but rather an effort to express what the feelings of the victim are with regards to their loss and not an effort to attack or to somehow call the defendant all the names people might typically try to do, and I have seen those. Those kinds I have stricken. This type it appears to me to be not inappropriate, so I will deny the request on the victim impact.

MR. TOMCZAK: Thank you, Judge. Ready for aggravation, your Honor.

THE COURT: Then if you have witnesses to call.

MR. TOMCZAK: Just a couple.

THE COURT: Call your first witness.

MS. BOGGS: Thank you. We will call Robert Miller.

First will you be sworn.

THE COURT: Raise your right hand to be

sworn.

(WHEREUPON, the witness was duly sworn.)

THE COURT: Have a seat in the witness chair.

ROBERT MILLER,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BOGGS:

Q Robert, could you state your name for us, please?

A My name is Robert Miller.

Q And where do you currently reside, Mr. Miller?

A In the Will County Adult Detention Facility.

Q How long have you been in the Will County Adult Detention Facility?

A About 23 months.

Q And are you in there for the felony offense of residential burglary?

A Yes, ma'am.

Q Have you and I had any conversations about you getting any kind of deals for you coming in here today?

A No, ma'am.

Q In fact are you here today because you were a victim while in the jail of an offense?

A Yes, ma'am.

MR. JAQUAYS: Objection, leading nature.

THE COURT: I'll sustain the objection as to characterization at this time.

BY MS. BOGGS:

Q Robert, were you involved in an incident that occurred in the Will County Jail on July 1st of the year 2001?

A Yes, ma'am.

Q Can you tell us what occurred on that day while you were in the jail?

A I went to go use the phone and --

Q I am going to move this just a little bit. You're a little soft spoken.

Okay, you went to use the phone, and where at in the jail is this phone located?

A By the deputy's desk.

Q Can you explain to us the procedure

for you to be able to use the phone at the jail?

A You sit in a line and who sat down the first gets to go first.

Q So there is like a sequence of people in a line?

A Yes, ma'am.

Q And did you sit down in this line?

A Yes, ma'am.

Q Were there other people in the line?

A Yes, ma'am.

Q Was Ashanti Lusby in the line?

A No, ma'am.

Q At some point while you were in this line does the line move up?

A Yes, ma'am.

Q Did you get to the point where you were first in line?

A Yes, ma'am.

Q And how is it then that you would then be able to use the phone?

A The deputy will tell you it's your turn. You get up to use it.

Q And were you told that in this case?

A Yes, ma'am.

Q What happened when you went to use the phone?

A Ashanti Lusby approached me, told me I cut. The deputy said that I didn't cut. He put his hand on the receiver and then we got in a little argument and he sat down because the deputy said that I did not cut.

Q So he was made to go sit down?

A Yes, ma'am.

Q Now do you see Ashanti Lusby here today?

A Yes, ma'am.

Q Can you identify him for me and tell me something he's wearing?

A A gray outfit.

Q And is he standing or seated?

A Seated.

Q And can you point him out for me?

A (Indicating.)

MS. BOGGS: Please let the record show the identification of the defendant?

THE COURT: The record should reflect the witness has identified the defendant.

BY MS. BOGGS:

Q After you used the phone did something else happen?

A We exchanged words. He called me a bitch. I called him one back and he said let's go in the gym. I didn't at first, and then I thought about it and I went to walk in the gym and he hit me, knocked me out because I don't remember nothing after that.

Q Let's back up a little bit. He called you into the gym?

A Yes, ma'am.

Q Did he -- did you see him go in the direction of the gym?

A Yes, ma'am.

Q Did you eventually come in?

A Yes, ma'am.

Q When you entered the gym what happened?

A I got hit.

Q And did you see the person who hit you?

A Yes, ma'am.

Q Who?

A Ashanti Lusby.

Q How many times were you hit?

A I don't know, ma'am.

Q What happened? What's the next thing you remember?

A I got hit and I was knocked out, and then when I came to, I was gushing blood.

Q Did you ever see anybody besides Ashanti Lusby in that gym?

A No, ma'am.

Q I am going to show you some photographs -- or let me back up a little bit. Strike that.

You said you woke up and you were gushing blood?

A Yes, ma'am.

Q From where?

A From my nose and my mouth.

Q What did you do?

A I went up to the deputy and told him I was attacked.

Q And did you tell him who did it?

A Yes, ma'am. He more or less he knew, already knew who did it because he knew our complications.

Q Well, do you remember what you said to him when you said who did it?

A No, ma'am.

Q But somehow indicated to him that it was Ashanti Lusby?

A Yes, ma'am.

Q Did you know him by name at that time?

A No, ma'am. I never even seen the guy before.

Q Was this the same deputy who had observed the verbal altercation between you before?

A Yes, ma'am.

Q You go up to the deputy. From there what happened to you?

A They locked everybody down and took me to the hospital.

Q And while you were in the ambulance for the hospital did you also meet with another police officer?

A Yes, ma'am. They started taking pictures of my face.

Q I am going to show you some photographs marked People's Exhibit No. 1 for

sentencing and ask you if you recognize what this photograph is of.

A Of me laying in the hospital.

Q In the hospital?

A I mean in the ambulance.

Q And is that the same incident you just explained to me that a deputy came in and took photographs of you?

A Yes, ma'am.

Q Was this photograph taken at that time?

A Yes, ma'am.

Q And does this photograph show injuries to your face of some sort?

A Yes, ma'am.

Q Could you tell us what those injuries or what kind of physical things you can see from that photograph?

A The nose.

Q I am going to show you what's marked as People's Exhibit No. 2 for sentencing also for identification, ask you if you recognize that photo.

A Yes, ma'am.

Q Who is that a photo of?

A Me in the ambulance again.

Q Does that show your face from a different angle?

A Yes, ma'am.

Q And I'll show you what's marked as People's Exhibit No. 3 for identification, and who is that a photograph of?

A Of me.

Q Again was that taken in the ambulance on that date?

A Yes, ma'am.

Q Does it show physical injuries to your face?

A Yes, ma'am.

Q Now prior to entering the gymnasium on that day did you have any of these injuries?

A No, ma'am.

Q I'll show you what's marked as People's Exhibit No. 4 for sentencing and ask you if you recognize this photograph.

A Yes, ma'am.

Q And who is this a photograph of?

A Me.

Q Was that photograph taken the same day or some other day?
A Some other day.
Q Do you remember how many days after it was taken?
A Three or four.
Q And again does that photograph show physical injuries to your face?
A Yes, ma'am.
Q From the time of photographs 1 through 3 which were taken in the ambulance until the day that People's Exhibit No. 4 was taken, did you sustain any other injuries that could have caused the facial damage that we see in People's 4?
A No, ma'am.
Q Now you went to the hospital and at the hospital were you advised of several injuries that occurred to you?
A Yes, ma'am.
Q What injuries did you sustain?
A Bone broken under my left eye, my nose broken and three stitches in my lip.
Q And the person that caused those injuries to you?

A Ashanti Lusby.
MS. BOGGS: I move to admit People's Exhibits 1 through 4.
THE COURT: Any objection?
MR. JAQUAYS: No objection.
THE COURT: 1 through 4 are admitted. Thank you.
BY MS. BOGGS:
Q And the location of this incident occurred in the Will County Jail here in Will County, Illinois, correct?
A Yes, ma'am.
MS. BOGGS: If I could have just one second.
THE COURT: All right.
(Pause.)
MS. BOGGS: I have nothing.
THE COURT: Any questions, Mr. Jaquays?
CROSS-EXAMINATION
BY MR. JAQUAYS:
Q Mr. Miller, when you went into the gym you went in to fight, is that correct?
A No, sir. I didn't want to fight, that's why I went in there.
Q Well, you told the Court that

originally Mr. Lusby had suggested to you that you go into the gym and fight. First you said you weren't going to do it and then you said you did?

A Yes.

Q So when you went in there you went in there to fight, isn't that true?

A Yes.

Q In fact you got into a fight but you lost?

A Yeah. I didn't swing or nothing. All I did was open up the door and I got hit.

Q Oh, okay. Was anybody else in the gym?

A No, sir.

Q Was anybody else there to verify your version of events?

A No, sir.

MR. JAQUAYS: Nothing further.

REDIRECT EXAMINATION

BY MS. BOGGS:

Q Mr. Williams, you didn't beat yourself, did you?

A No, ma'am.

MS. BOGGS: Nothing further.

THE COURT: All right. Thank you. You can step down.

Go ahead.

MS. BOGGS: At this time the People would call Mrs. Jean Happ.

MR. TOMCZAK: Your Honor, she is going to take the witness stand with your permission.

THE COURT: Yes, absolutely.

MS. BOGGS: Can I have People's 5 back to identify?

THE COURT: You sure can.

You want to swear her in, please?

(WHEREUPON, the witness was duly sworn.)

THE COURT: And you can have a seat in the witness chair.

JEAN HAPP,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BOGGS:

Q Mrs. Happ, would you state your name

for us, please?

A Yes. My name is Jean Happ.

Q Could you tell us your relationship to the victim, Jennifer Happ, in this case?

A I'm Jennifer's mother.

Q I am going to show you a document that is marked as People's Exhibit No. 5 for sentencing, ask you if you recognize this document.

A Yes, I do.

Q And what does it appear to be?

A A copy of the impact statement I'm going to read.

Q And in fact is it signed by yourself?

A Yes, it is.

Q At this time would you like that to be published to the jury?

A Yes.

Q Or to the jury. To the Judge. Excuse me.

And in what fashion? Do you wish to read it yourself?

A I wish to read it myself if I can get through it. If not, I'd like you to finish it.

Q Okay. Whenever you're ready you can begin to read.

A I thank you for the opportunity to read this impact statement. It is meant to tell you how Jenn's death has affected our lives. I really believe that unless you have experienced an unnecessary, violent death in your immediate family, there is no way you can truly understand the pain and trauma that a family goes through, but I will try and explain. I'll try to tell you about the past six and a half years of hell.

On Friday morning, February 9, 1996 our lives were changed forever. When our local chief of police came to tell us that our only daughter and first born was a victim of a homicide, life as we knew it changed. Never again would our family be complete. Never again would we hear that familiar laugh on the phone or see that smiling face. Never again could I enjoy that special bond that only a mother and daughter can have. Never again could our sons look to their older sister for advice and companionship. Never again could my husband receive one of the special hugs that Jenn gave him so often.

I think that the hardest part of that day was to have to tell our two sons that their sister was dead. Nick was only a year younger than his sister and they had a very close and special relationship. Andy is 11 years younger and I will never forget his first words after we told him. He said I just lost my best friend. As a mother I still feel the guilt that I could not protect my child. I did not protect Jenn from this monster, and I did not protect the boys from the pain that I know they still feel.

Our trauma was increased many fold at that terrible time by the fact that we had absolutely no idea who could have done such a horrible act. We were in shock and grief but also had to focus on trying to help the police. We could not even imagine a motive. Jenn was good and kind and had no enemies that we could think of. Several of Jenn's closest friends found out about her death when the police called them to question them before we even had a chance to tell them. Everyone that Jenn knew became a suspect. Every person that we talked to we would try and analyze if they would have had a motive

or an opportunity to kill Jenn. We began to have trouble trusting anyone.

There also was the fact that we did not even get to say good-bye to Jenn. Her head wound was so devastating that our funeral director could not do anything to make her viewable. He did tell us that he could drape her so we could hold her hand, but that was not enough.

Early one June morning, a little over a year after Jenn was murdered, we received a call telling us that our 24 year old niece had been found beaten to death in Chicago. For a few days, until an arrest was made in Jenn's cousin's case, we experienced new fears. Was someone out to hurt our family? Was anyone safe? Who would be next? The stress was overwhelming.

For the five years after Jenn's death until Lusby was arrested in April of 2001, our lives focused on who did this to her and why. We own our own business and I cannot tell you how many days my husband and I wasted because we just sat at work and talked about different ideas. It was hard to focus on our business. We spent

hours talking to the detectives. We listened to anyone who had a theory, hoping that someone would come up with who did this. Although our family knew some of the details of Jenn's rape and torture, no one else did. The police had asked us to keep that information confidential and we did. Most of our friends thought that someone just broke into Jenn's home and shot her. One day an acquaintance said to me that it was horrible that Jenn was shot but thank God she was not raped. I had to sit there with a straight face and say nothing.

The pain of Jenn's death has never gone away. It's just as strong today as it was that day in February 1996. We have just learned to live with it. I still have what I call my Jenn attacks. Those are times when I see, hear or smell something that reminds me of Jenn, and just like that, I have trouble breathing, my heart races and I start crying. There is actual physical pain in my chest as I struggle to control myself. The nights -- nights are the worst for me. I spend several nights each month where I cannot sleep because my thoughts turn to

Jenn and I think about how afraid she must have been. To be raped is horrible, but to be tortured the way she was is inhumane. I can't even imagine the pain she went through for what? To satisfy the wants of one selfish, self-centered person who does not care about anyone but himself?

As Jenn's tombstone says, Jenn was a daughter, sister, teacher, friend. She also was the most caring person I have ever known. She only saw the good in others, not their flaws. When she was in college and decided to become a teacher, she stated that she wanted to help children and thought that being a teacher was the best way that she could do that. After graduation, since she could not find a teaching job in the midwest, she went to Texas to teach. She told us that she went to school to learn how to teach and she would go where ever she was needed to do that. After two years in Houston she wanted to move back closer to home so she could spend more time with our family. She hated missing the family gatherings and just fooling around with her brothers. Soon after she started

teaching at Troy School District, she started taking classes to get her Master's Degree in counseling. She especially wanted to work with disadvantaged children who did not have a good home life.

After Jenn's death we heard from so many people telling us how Jenn had touched their lives and made a difference for them. In fact we're still meeting people who have a story to tell us about Jenn and how she helped them. One young lady changed her college major to elementary education after she attended the memorial service and saw all the children bring flowers. She knew then that teachers can make a difference. Today she is a wonderful first grade teacher. Jenn definitely changed lives.

The first time we met my son's wife Kristal was when she asked us to raise the flag for the first time on a new flag pole at the high school softball diamond. Kristal was new to Durant and had never had the chance to meet Jenn but had heard many things about her from teachers and coaches. That compelled her as varsity softball coach so much that she decided to

dedicate the flag pole to Jenn's memory. Since that time Kristal has become a very special daughter-in-law. She also is an elementary teacher and I know that she and Jenn would have been best friends. Of course Jenn's death has had a great impact on her life even though they never met.

I cannot even imagine how many children would have had a better life today if Jenn had not been taken away but instead was still teaching. Many, many children have told us that she was the best teacher they ever had. Several of these children still keep in touch with us and want to know why this happened.

Our refrigerator at home is covered with photos. Most of them are pictures of children that Jenn never had the opportunity to meet, to hold and to love. Emily, Meredith, Matthew, Adam, Jake, Gretchen, Joe, Alex, Adam, Aaron, Austin and Jenna, all children of high school friends who used to spend time at our house with our daughter. They still come to our house, but now it's to talk to us and remember. These friends hold a memorial softball tournament

each year to raise money. That money is donated to the school Jenn attended in her memory.

There are pictures of Sophia, Noah, Kayla, Clair, Regan, Cael, children of other teachers and friends. Pictures of Kara, Ben, Jessie, Madison, Haley, Megan, the children of Jenn's cousins that have been born since her death. Then there is Pamala and Kara. Pamala graduated from high school last year. She was in Jenn's very first class in Texas and the first in her family to make it through high school. Jenn had promise her that if she stayed in school and graduated she would come to her graduation. Well, Pamala graduated, but Jenn did not get to go. Then there is the picture of Kara, who was in Jenn's third grade class at Troy. She learned on that February day that her favorite teacher would not be coming back to teach. Kara and her classmates tried to understand about death and how anyone could take the life of someone else. Third graders should not have to know these things. Kara remembers riding to Iowa while her mother drove the school bus taking teachers to Jenn's funeral. Kara still writes to us. To

this day she has Jenn's picture in her bedroom and has told us that someday she hopes to be a teacher like Miss Happ.

One of the most important pictures though on our refrigerator was added last year. Hannah Jenn Happ is our granddaughter, Jenn's niece. Jenn will never get to know this loving little girl, and Hannah Jenn has been robbed of a special aunt who I know would have loved her and taught her so many things. Now all Hannah has of her only aunt is part of her name, pictures and stories that we will tell her.

Since Lusby's arrest we have made many three trips to Joliet for his court appearances. Although the state's attorney has told us we did not need to attend these court dates we felt we needed to be here to represent Jenn.

Have our lives been changed by this tragic event? You bet. I struggle each day to understand why this had to happen. Who gave this person the right to enter Jenn's home, torture her, rape her and take her life. And if that was not bad enough, he had the gaul to sit

up on the witness stand and lie about Jenn's morals. Ashanti Lusby tried to take away the one thing that Jenn had left, her reputation, and I want everyone to know it did not work. Anyone, and I mean anyone that knew Jenn would not believe his lies. What had she done to deserve this? Nothing. Jenn was not given a choice. Jenn was never given a second chance. A gun was pushed against her head that February night and her life was ended. Ashanti Lusby did have a choice and he chose to commit this atrocious act and now he must pay for his actions. For five years after that February night Lusby was free to enjoy life. He could go where he wished and do what he wanted. Jenn could not. He never felt any remorse for what he did. He did not make amends for his actions nor did he try to better himself. Ashanti Lusby must be punished and kept off the streets to protect others. I know that as much as we'd like to have Jenn back with us, that cannot happen. All we can do is try to make sure that no other family has to go through such pain and suffering because of Ashunti Lusby. He does not deserve to be free. He should not be

allowed to make any choices again. I sincerely hope that he will never get out of prison to hurt again. Please protect somebody else's daughter, sister, teacher and friend.

MS. BOGGS: At this time, your Honor, the People move to tender People's Exhibit No. 5 into evidence to the Court.

THE COURT: All right. I'll accept People's 5.

Now did you have any questions, Mr. Jaquays?

MR. JAQUAYS: No, sir.

THE COURT: Thank you very much.

MS. BOGGS: Your Honor, the People have no other witnesses to present.

THE COURT: All right.

Now Mr. Jaquays, did you have any evidence or witnesses that you wished to call at this time?

MR. JAQUAYS: No, sir.

THE COURT: All right. Then I will hear the party's recommendations for sentencing beginning with the State.

MR. TOMCZAK: Thank you, Judge.

THE COURT: In terms of the -- well, you go ahead because there is a lot of -- obviously there are complications here.

MR. TOMCZAK: Right.

THE COURT: And they all need to be fully aware.

MR. TOMCZAK: That's what I wanted to advise the Court, before I get into the actual recommendation I want to speak a little bit about the sections that apply here.

Judge, the most important beginning of our sentencing hearing here is the fact that the jury did find the heinous and brutal activity, and that starts, that starts our inquiry more or less.

Now, Judge, the sentencing parameters in this case are relatively simple. On the murder charge which we are going to ask you to merge all of the murder sentencings into one count, that being Count 2, that's the intentional killing with exceptionally brutal and heinous behavior indicative of wanton cruelty, and Judge, that is potential sentence of 100 years because of the heinous and brutal finding.

THE COURT: So the range there is really 20 to 100?

MR. TOMCZAK: That's correct, Judge. But with the heinous and brutal, Judge, according to 730 ILCS 5/5-8-2, it would be not less than 60, not more than a hundred.

THE COURT: So it is 60 to 100?

MR. TOMCZAK: Correct.

THE COURT: Mr. Jaquays, is that your understanding?

MR. JAQUAYS: That is my understanding.

MR. TOMCZAK: The other two counts we're asking for a merger on are going to be Count 10 on the aggravated sexual assault and Count 13 which is the home invasion count. Those, Judge, because the law says you can only give extended sentences on the greater charge, the maximum there would be 30, and that is consecutive to the murder charge.

THE COURT: So --

MR. TOMCZAK: 10 and 13 are concurrent to each other, consecutive to the murder.

THE COURT: Right, and the other counts. Okay.

MR. TOMCZAK: They will merge.

THE COURT: They will merge like your Count 2. You're asking for sentencing on Count 2, 10 and 13?

MR. TOMCZAK: You got it, Judge. That's exactly it and within the parameters that I talked about.

THE COURT: And those your understanding is would run concurrent but consecutive to the sentence on the murder charge?

MR. TOMCZAK: Yes, sir. Yes, sir, Judge.

THE COURT: Is that also your understanding, Mr. Jaquays?

MR. JAQUAYS: It is, Judge.

THE COURT: Go ahead.

MR. TOMCZAK: Judge, while we are in aggravation I am going to make a few comments, and I'm not going to take a lot of your time up. Your Honor has heard so much of this evidence and has listened so closely during this entire pre-trial and trial we're not going to belabor the point so to speak.

But let's look at the background of this individual for a minute through the PSI,

your Honor. You've got an aggravated discharge of a firearm, 8/28/96. Very close to the period of time involving this particular case. So we know we have to worry about this individual not only from this conviction but as far as firearms are concerned and relative to the safety of others.

We have a resisting of a police officer in his background, so apparently the policemen also are not worthy of any respect.

We have robbery, so we know that the property of others is also fair game to this particular defendant.

And we also have an aggravated battery charge which happens while he is incarcerated, so even being incarcerated does not keep this individual from being violent to other individuals.

There has been some statements about being expelled his sophomore year in the PSI, but just as soon allow you to rely on the PSI for that.

In that regards, Judge, at 16 years old this particular defendant has shown us

what he can do at a young age. And as you begin to consider what to do in sentencing, you've got to consider what this guy can do the older he gets and what he might do in the latter part of his life because if the younger part of his life is an indication of what this guy's potential is, this is a dangerous individual and he will continue to be dangerous well into his senior citizen years.

As far as Jennifer Happ is concerned, Judge, you know it is so often in our business we realize that bad things happen to good people. Sometimes the worst happens to the best people, and I think that that has a lot to do with Jennifer Happ in this case. But what this particular defendant did and the victim impact statement I think very eloquently states it mostly at the beginning, what did he do? Well, he took Jenn from her life that she was living here in our community. He took her from her family. He took her from her friends. He took her from the children she taught, and then he took her from her future.

But that wasn't enough for this

particular defendant. Here in court his testimony he tried to take her reputation away, and that's particularly I think offensive. You sat through it. We all heard it, and I'll leave it to your judgment as to the impact that would have. He spread his lies all over this Court, Judge, all over your Court, all over your courtroom, and we all had to sit and listen to it. We all had to listen to it.

We have an individual here, your Honor, who is I submit to the Court, and I am going to ask you, Judge, as you sat through listening to his testimony on the witness stand, so much of what we do comes from here, comes from the heart, and I'll ask your Honor as you decide the sentence, as you decide to sentence this individual today, did you get one scintilla of a feeling that that guy had any remorse in him? Did you get one feeling of decency, one feeling of concern for others, one feeling of conscious humanity for lack of a better term?

This particular individual is completely devoid of all the things that we call human, and I don't mean to be offensive, your

Honor, but I believe it to be as true as it can be. From the acts in this case itself, from the cut mark to the throat, to the rape, to the murder, to the testimony, to the custody, to the background that this guy has, there is nothing here, Judge, in mitigation. That's because he just doesn't have it in him.

Your Honor, your parameters are 130 years, but I am going to coin a phrase from Mrs. Happ that she said at the beginning of her victim impact statement and she said it six times. Never again. Never again. He is 21, 22 years old, your Honor, and I'm asking you without recommending a specific term of years -- I don't do that and you know why I don't do that, but the reality is here, Judge, remember Mrs. Happ. Never again. Never again let this guy out because if he's out, there is going to be another Jennifer Happ. It doesn't matter if he is incarcerated. It doesn't matter if he is in the custody of law enforcement. Nothing matters to this individual except his own gratification.

Judge, on behalf of the people of Will County I'm asking you to never again, never

again let this individual out on our streets in this county again. Sentence him as you see fit, Judge.

THE COURT: All right. Thank you.

Mr. Jaquays.

MR. JAQUAYS: Thank you, your Honor.

It's not often I don't know what to say.

I don't know what to say. I agree with Mr. Tomczak. Bad things happen to good people, and apparently in this case the worst happened to one of our best.

I have read the presentence report, Judge. I read all of those letters, and it was a difficult experience to say the least. I'm not here to deprecate the memory of Jennifer Happ because it shouldn't be, and every bit of praise that has been given to her is undoubtedly deserved. She undoubtedly was a good person. We have all suffered a loss because of her death.

But we're here now on the aggravation and mitigation hearing, and when Mr. Tomczak talks about, you know, my client's past criminal history or what happened in the

jail, I don't know what happened in the jail. I don't know if it was a fight. I don't know that. I don't know if your Honor has enough facts before you to make that conclusion.

I do know that my client was 17 years old when this took place. I do know my client has steadfastly maintained his innocence, so I am not sure exactly how I address the issue of lack of remorse. How do you say you're sorry for something you say you didn't do? I don't know. Is he sorry that Jennifer, Jennifer Happ is dead? He has expressed that, but he has maintained his innocence, and I as his attorney do likewise.

Judge, I just ask you to consider all of the facts. Consider the fact that I think in this case certainly you have to follow the jury's finding. Certainly you have to take into consideration what occurred, the nature of Miss Happ's death. I understand that you also have to take into consideration my client's age. We know that nobody is of the same person forever. We learn that through our own experiences. We know good or bad sometimes it goes one way, sometimes

it goes the other, but I don't know that any of us are the same person at 17 and then at 27 and then at 37, 47 or whatever. I just ask you to exercise reason, your conscience, your experience in setting an appropriate sentence, Judge. Thank you.

THE COURT: Anything further?

MR. TOMCZAK: No.

THE COURT: All right. Well, Mr. Lusby, you have every right to tell me whatever is on your mind at this time and you can feel free to do that. Is there anything you'd like to say?

THE DEFENDANT: Your Honor, to Jennifer's family I'm sorry for her being dead, your Honor, but I -- I can't say I'm sorry for what they saying I did because I didn't do it, your Honor. I left that house that lady was alive. The fight in the jail, you know, I fight, we have problems. I -- I been a little rough around the edges. I can't say I ain't, but I ain't no killer, your Honor. I ain't no rapist, and for those times that I was out that this happened, I never -- it was never come up that I killed or raped anybody else in the five years or whatever they say I was

out. I don't know, your Honor. That's all I got to say.

THE COURT: All right. Well, this is a case that is a very difficult case from the standpoint of the facts of the injuries and of the method of murder of the victim. It certain -- certainly the defendant's age is a factor at the very least to the extent that he is not eligible for the imposition of capital punishment based solely because of his age, because but for his age at under the age of 18, certainly this -- these are the type of things, let me put it that way, that I have seen that all the attorneys that are in this trial have seen as facts that would -- that could be considered capital punishment activities.

But I cannot, I cannot ignore the fact that Miss Happ was terrorized and sexually assaulted and humiliated and executed in her own home, and this was clearly a depraved act by you, Mr. Lusby, and it shows absolutely no respect for human life. It is ironic to me I guess that this Miss Happ was working to provide a positive influence on children in the area and the area

that you lived in and even children that were -- would be yours or your nieces or nephews or other family members might have been influenced positively by this woman, but your actions saw that that didn't happen.

So it is very difficult for me to consider any leniency in this case. It is very difficult for me to see any factors in mitigation. I have gone through the section on mitigation. There are no factors in mitigation that apply.

I have gone through the factors in aggravation and those factors there are many that apply, and I sincerely believe that the appropriate sentence is a sentence that will see that this does not occur outside of the Department of Corrections again. This is a choice that you made at a young age and I know that choices, youthful choices can be -- are not, you know, sometimes are sometimes in very very poor judgment, but this is not one that can be taken back, and this is not one that can be considered minor, and this is not one that can be considered for anything but setting your future

in the Department of Corrections.

From what I've seen here from everything that I have seen and heard in this trial this is a life you chose, a life of carrying weapons, a life of showing no respect for human life, and I am not at all uncomfortable in imposing the maximum sentence on the murder of 100 years. The consecutive sentence on the other two Class X offenses again the manner and method of this crime makes me convinced that it is not for me to minimize it in any way, and as a consequence I will impose an additional consecutive 30 year sentence on each of these offenses. So that is the order of the Court. Certainly you have every right to appeal the sentence.

Mr. Jaquays.

MR. JAQUAYS: Judge, I am going to be filing a motion for reconsideration of your sentence, and I would ask if you can give me until December 15 to do that, Judge.

THE COURT: You need to review transcripts for that purpose?

MR. JAQUAYS: I do, and I have some other

going to explain his appellate rights to him, Mr. Jaquays? Do I need to go through his appellate rights?

MR. TOMCZAK: Not until after the reconsideration.

MR. JAQUAYS: Not until after reconsidering.

THE COURT: Fine. Court is in recess.

MR. TOMCZAK: Thank you, your Honor. Thank you for your time on this matter.

THE COURT: Let's get it straight. He is sentenced on Counts --

MR. TOMCZAK: 2, 10 and 13.

THE COURT: Right, he is sentenced on Count 2 and the other counts which would be -- let me get this done first, please. Counts 1 and 3, 4 and 5 the judgment and 6, 7, 8 the judgment of conviction that I entered at the -- on the jury's verdict will merge into the sentence on Count 2. On Count -- he is sentenced to 30 on Count -- that is a hundred on Count 2, 30 on Count 12 with 9, 10, 11 merged into the --

MR. TOMCZAK: If I may, Judge.

THE COURT: -- with the sentence on 12.

MR. TOMCZAK: Sorry, your Honor. I just

wanted to make sure. You're trying to make good court minutes here.

Jake, so it's by agreement so we understand the sentence, you might not agree with it, this is what we heard. On Count 2 he has a hundred. On Count 10 and 13 he has 30 years each on those counts to be served consecutive to the hundred. He is looking at 130.

THE COURT: I was going to sentence him on brutal and heinous on aggravated but that probably should go back to the nonextended term under the statute.

MR. TOMCZAK: Right.

THE COURT: So he is sentenced on Count 10 to 30 years. The others, that would be 9, 11, 12 merge into Count 10.

MR. TOMCZAK: Right.

THE COURT: He is sentenced to -- let's see. I have 13, then I changed it to 15. You're suggesting 13 is correct?

MR. TOMCZAK: 13, right.

THE COURT: He is sentenced to 30 years on Count 13. That will run concurrent to the sentence I imposed on Count 10 but consecutive to

the sentence I imposed on Count 2.

MR. JAQUAYS: Talking about 130 total?

THE COURT: I'm talking about 130 total, the maximum allowable by law.

MS. BOGGS: 14 and 15.

THE COURT: 14 and 15 merge into Count 13.

MS. BOGGS: That sounds like that's right, Judge.

MR. TOMCZAK: Thank you, your Honor. Sorry for the interruption, Judge.

THE COURT: Oh, that's fine. Glad we got it straight.

MR. JAQUAYS: Thank you, Judge.

THE COURT: We're in recess.

MS. BOGGS: For the record 1 through 4 are withdrawn.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THIS CAUSE ON THIS DATE.)

STATE OF ILLINOIS)
) ss:
COUNTY OF W I L L)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs. NO. 01 CF 664
ASHANTI G. LUSBY,
Defendant.

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE GERALD R. KINNEY, Judge of the Circuit Court of Will County, Illinois, on the 15th day of January, 2003.

APPEARANCES:

MS. JANINE BOGGS
Assistant State's Attorney
for the Plaintiff;

MR. EDWARD R. JAQUAYS
Assistant Public Defender
for the Defendant.

Colleen E. Moriarty, CSR
Official Court Reporter
14 West Jefferson Street, #450
Will County Courthouse
Joliet, Illinois 60432

THE COURT: Mr. Lusby, Ashanti Lusby, 01 CF 664. He's present in custody of the Illinois Department of Corrections. His mother is present here. Mr. Jaquays is here representing him. We have got Ms. Boggs for the People and the family of the victim are also here. Show everyone is present for this hearing.

Mr. Jaquays, go ahead.

MR. JAQUAYS: Judge, thank you. This comes forward on our motion to reconsider the sentence. As the Court knows, Judge, we have previously filed for new trial and reconsideration with respect to his finding of guilty, but following your sentencing, and on the hearing on aggravation and mitigation we made extensive arguments, Judge, and I am incorporating all that argument today.

Again, in my written motion, Judge, I believe it sets forth the basis of our motion to reconsider and I would -- I know the Court had opportunities to read that and I would ask the Court to reconsider the sentence based upon previous arguments for reasons set forth in my written motion.

THE COURT: Ms. Boggs.

MS. BOGGS: Basically State wishes very briefly to directed its argument towards element number three and four dealing with the defendant's youthful age, excessiveness of

the sentence and the fact he was a minor at the time of the offense. I believe the Court properly considered his subsequent activities because he has continued to commit violations of law in making its determination that a maximum sentence was appropriate as well as the consideration of the facts of this case and the heinous brutality of those facts. The final issue really deals with the issue on whether consecutive sentences were appropriate.

Counsel cited a case. I've had an opportunity to review it. It gives a very good analysis consecutive of the Unified Code of Corrections. This is clearly a Section A situation. State believes -- we believe that's what the Court's findings were. The one highlighted case does indicate it would like the Court for reviewing purposes to make those findings of record. I think the evidence clearly supports the Court's position that the Court must have found that these activities were part of a single course of conduct, home invasion, aggravated assault, and death of the victim. All were close in time to her actual death. There's clearly evidence of that, and we think that the Court's finding was that pursuant to Subsection A of these were incidents that were part of a single course of contact, one of which is a Class X murder offense and that there was severe bodily harm inflicted. One of the offenses is an

aggravated criminal sexual assualt which is here that triggers the offense of murder, plus aggravated criminal sexual assault. Those are clearly elements that the Court can impose consecutive sentences for when they are part of a single course of conduct, I believe, although I don't think there is an extensive finding on record of that. I believe based on the evidence and the Court's decision here that must have been the Court's findings and I'd ask the Court to stand on its previous findings and deny the motion.

THE COURT: It falls within Subsection A, mandatory consecutive?

MS. BOGGS: That's correct

THE COURT: I did do -- I made that finding at the time that I was following the sentencing statute with regard to being a consecutive sentence.

Mr. Jaquays, anything further?

MR. JAQUAYS: Nothing.

THE COURT: All right. I tink these motions are required prior to a thorough appellate review. It's always difficult for the Trial Judge because you prepare yourself for sentencing like this, you sit down and you look at everything. You look at the law and look at the sentencing Code, because it's confusing, and you try to fashion the sentence appropriate and consisten with the sentencing Code

and appropriate to the facts. I believe I felt comfortable with my sentence at the time. I believe I followed the law as I understood it and took into account all the factors both in aggravation and in mitigation that apply here. So show the motion to reconsider sentence presented and argued and denied.

MR. JAQUAYS: I would ask the Court to be directed to file a notice of appeal on behalf of Mr. Lusby and appoint the State Appellate Defender.

THE COURT: All right, show that the Clerk is directed to file a notice of appeal on behalf of Defendant Lusby and the Appellate Public Defender will be appointed to represent Mr. Lusby in the appeal of the cause.

MS. BOGGS: Two housekeeping matters, there are two old cases, 01 CF 998 -- at the time that this case occurred while the defendant was in custody for this offense -- People at this time would move to nolle prosequi that offense.

THE COURT: All right, so the record --

MS. BOGGS: One more, 98 CF 664, petition to revoke his probation pending, we ask the pending petition be withdrwan be terminated unsuccessfully.

THE COURT: Show that the People through Ms. Boggs withdraw the petition to revoke the defendant's probation and it terminates unsuccessfully.

STATE OF ILLINOIS)
)SS
COUNTY OF WILL)

FILED
2015 FEB 20 PM 1:19
CLERK OF CIRCUIT COURT
WILL COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

People
Plaintiff
vs
Ashanti Lusby
Defendant

CASE NO: 01 CF 564

COURT ORDER

This case comes on defendant's motion for leave to file a successive post-conviction petition. State has filed an objection. Court has reviewed the motion & objection & denies defendant's motion for leave to file a successive post-conviction petition since it does not set forth a valid legal basis.

Clerk to inform defendant of this ruling within 10 days & of his rights under Supreme Court Rule 651(b)

Attorney or Party, if not represented by Attorney
Name _____
ARDC # _____
Firm Name _____
Attorney for _____
Address _____
City & Zip _____
Telephone _____

Dated: Feb 20, 2015

Entered: _____
Judge

A64

PAMELA J. MCGUIRE, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

White – Court Yellow – Plaintiff Pink – Defendant **17 D Revised 06/06**

3-15-0189

COURT DOCKET - WILL COUNTY CIRCUI 02/25/15 11:13:47 WCCH 1 CSP04
Date: 2/24/2
Time: 14/23
Page: 1

Homicide

2001 CF 000664 Judge: CARLSON DAVID M From 2/20/2015 To 99/9
User: DDFS
Wsid: CCLKCR1
All Entries

Case Names Attorney Names
VS
LUSBY ASHANTI G JAQUAYS EDWARD RAYMOND

Date	
2/20/2015	See Order Signed
2/20/2015	CF - Appeal Notice / Defendant SCR 651 Feb 20,2015 Judge CARLSON Document CFAPNSCR Was Printed
2/20/2015	People present by COLLEEN M. GRIFFIN. Defendant is not present. Matter comes on for hearing on Defendant's motion for leave to file successive post conviction petition. State has filed an objection. Court has reviewed the motion and objection and denies the Defendant's motion for leave to file a successive post conviction petition. See order signed. Clerk to notify. Judge:CARLSON DAVID M Rep:KLEBENOW LAURA Clerk:DDFS M

In the Circuit Court of the TWELFTH Judicial Circuit
WILL County, Illinois
(Or in the Circuit Court of Cook County).

THE PEOPLE OF THE STATE OF ILLINOIS)
v.)
ASHANTI LUSBY)
Defendant/Appellant

No. 01 CF 664

Notice of Appeal

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

(1) Court to which appeal is taken: [redacted] THIRD DISTRICT: 1004 COLUMBUS STREET. OTTAWA, IL. 61350

(2) Name of appellant and address to which notices shall be sent:
Name: ASHANTI LUSBY - R16921
Address: P.O. BOX 1000 · MENARD, IL. 62259

(3) Name and address of appellant's attorney on appeal:
Name: N/A
Address: N/A
If appellant is indigent and has no attorney, does he want one appointed?
YES

(4) Date of judgment or order: FEBRUARY 20 2015

(5) Offense of which convicted: MURDER · HOME INVASION · SEXUAL ASSAULT

(6) Sentence: 130 YRS

(7) If appeal is not from a conviction, nature of order appealed from:
SUCCESSIVE POST-CONVICTION

Signed Ashanti Lusby
(May be signed by appellant, attorney for appellant, or clerk of circuit court)

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 9, 2019, the **Brief and Appendix of Respondent-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

Deborah Nall
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
1stdistrict.eserve@osad.state.il.us

David Robinson
Chief Deputy Director
State's Attorneys Appellate Prosecutor
Gary Gnidovec
Staff Attorney
3rddistrict@ilsaap.org

James W. Glasgow
Will County State's Attorney
Colleen Griffin
Assistant State's Attorney
cgriffin@willcountyillinois.com

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen duplicate paper copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Leah M. Bendik
LEAH M. BENDIK
Assistant Attorney General