No. 123010

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DERRELL DORSEY, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-15-1124. There on appeal from the Circuit Court of Cook County, Illinois , No. 96 CR 21035. Honorable William G. Lacy, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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E-FILED
2/23/2021 8:23 AM
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ARGUMENT

Reversal Is Warranted Where Derrell Dorsey's *Pro Se* Successive Post-Conviction Petition Established Prejudice for His Claim That The Imposition Of A 76-Year Prison Sentence With Eligibility For Day-For-Day Sentencing Credit, For Offenses Committed When He Was 14 Years Old, Constitutes An Unconstitutional *De Facto* Life Sentence

Applicable Law

The State concedes that, at the preliminary leave-to-file stage of successive post-conviction proceedings, Derrell Dorsey only needs to make a *prima facie* showing of cause and prejudice to warrant further proceedings. (St. Br. 1, 13-14) (citing *People v. Smith*, 2014 IL 115946, ¶35). The State argues, however, that Dorsey is unable to make this preliminary showing because his eligibility for statutory sentence credit precludes an *ultimate* finding that his 76-year sentence constitutes a *de facto* life sentence. (St. Br. 14-31). The State's overly broad argument overlooks the procedural posture of this case and fails to address the narrow question raised in Dorsey's opening brief, *i.e.*, whether eligibility for sentencing credit should be considered at the leave-to-file stage of successive post-conviction proceedings. Where the receipt of day-for-day credit is uncertain and highly individualized in its application, Dorsey urges this Court to establish a bright-line rule that eligibility for statutory sentence credit should not be considered at the leave-to-file stage.

Cause and Prejudice

A. Dorsey established prejudice where his 76-year sentence constitutes a *de facto* life sentence because day-for-day sentencing credit is irrelevant at the leave-to-file stage of successive post-conviction proceedings.

1. Eligibility for sentencing credit is not part of the sentence.

In his opening brief, Derrell Dorsey argued that the First District Appellate Court's opinions in *People v. Peacock*, 2019 IL App (1st) 170308, ¶¶17-19, *People v. Thornton*, 2020 IL App (1st) 170677, and *People v. Daniel*, 2020 IL App (1st) 172267, ¶¶21-26, support a conclusion that eligibility for statutory sentence credit is irrelevant to a whether a defendant has a *de facto* life sentence at the leave-to-file stage of successive post-conviction proceedings.

(Def. Br. 10-25). In its response brief, the State identifies no decision from any Illinois court disagreeing with the reasoning of *Peacock*, *Daniel*, or *Thornton*. Furthermore, the State turns a blind eye to the fact the law has become more favorable to Dorsey since the filing of his opening brief. Specifically, the First and Sixth Divisions of the First District Appellate Court, which had not previously published opinions addressing the relevance of sentence credit to a determination of whether a particular sentence constitutes a *de facto* life sentence, recently determined that eligibility for sentence credit should not be considered. *See People v. Hill,* 2020 IL App (1st) 171739*,* ¶41 (finding defendant's eligibility for statutory sentence credit irrelevant to determining whether he had a *de facto* life sentence); *see also People v. Quezada*, 2020 IL App (1st) 170532, ¶¶7-9 (same).

In *Hill*, a jury found the 15-year-old defendant guilty of two counts of first-degree murder and one count of attempt first-degree murder. *Hill,* 2020 IL App (1st) 171739 at ¶1. The trial court imposed a natural-life sentence for murder, consecutive to a 30-year sentence for attempt murder. *Id*. The defendant's sentence was found unconstitutional following his initial post-conviction proceedings, and the trial court resentenced him to two concurrent 54-year sentences for murder, consecutive to a six-year sentence for attempt murder. *Id.* On appeal from resentencing, the defendant argued that his new 60-year aggregate sentence was still an unconstitutional *de facto* life sentence, even though he was eligible for statutory sentence credit. *Id*. The First Division of the First District Appellate Court found that the defendant had an unconstitutional *de facto* life sentence. *Id*. at ¶51.

In so doing, *Hill* rejected the State's argument that the defendant's eligibility for day-for-day sentence credit precluded a finding that the defendant's 60-year sentence constituted a *de facto* life sentence. *Hill,* 2020 IL App (3d) 171739 at ¶3. The appellate court wrote, "The 30 year minimum assumes" the defendant's "future behavior in prison will be pristine, a product of mere speculation that cannot masquerade as fact."*Hill,* 2020 IL App (3d) 171739 at ¶3. *Hill* thus recognized that the receipt of statutory sentence credit is uncertain, effectively adopting

the reasoning of *Peacock*, *Thornton*, and *Daniel*.

Likewise, in *Quezada*, the Sixth Division of the First District Appellate Court found that the defendant's 68-year sentence constituted a *de facto* life sentence, even though he was eligible for day-for-day sentence credit. *Quezada*, 2020 IL App (1st) 170532 at ¶21. The appellate court held, "[W]e take the matter out of the hands of the [Department of Corrections] and ensure that the defendant does not serve a sentence that is incompatible with our [S]upreme [C]ourt's pronouncements in *Buffer*." *Id.* at ¶17. Thus, like *Peacock*, *Quezada* emphasized that application of sentence credit is both uncertain and outside of the control of the court.

The new appellate opinions in *Hill* and *Quezada* provide compelling support for applying the reasoning of *Peacock* here. This is particularly true where the Fourth Division of the First District Appellate Court reaffirmed *Peacock* since the filing of Dorsey's opening brief.

In *People v. Figueroa*, a jury found the 17-year-old defendant guilty of first-degree murder and armed robbery, and the trial court imposed a 75-year sentence. 2020 IL App (1st) 172390, ¶¶7, 13. On appeal from the denial of leave to file a successive post-conviction petition, the defendant argued that he had sufficiently shown that he had an unconstitutional *de facto* life sentence for purposes of establishing cause and prejudice. *Id*. at ¶18. In remanding for a new sentencing hearing, the appellate court found *Peacock* well-reasoned, concluding, "[W]e adhere to *Peacock* and *Thornton*[.]" *Id*. at ¶35.

Even though *Hill*, *Quezada*, and *Figueroa* embrace the reasoning of *Peacock*, the State argues that *Peacock* was wrongly decided. Specifically, the State argues that Dorsey would serve less than 40 years in prison if he received all of the sentence credit for which he is eligible, and that, therefore, *Peacock* is inconsistent with *People v. Buffer,* 2019 IL 122327. (St. Br. 18). Contrary to the State's assertion, this Court's focus, in *Buffer*, was on the sentence imposed, not the sentence ultimately served. In *Buffer*, this Court held that the defendant's 50-year sentence was a *de facto* life sentence, because the sentence imposed by the trial court "was greater than 40 years[.]" *Buffer*, 2019 IL 122327 at ¶42. This language focuses on the sentence imposed.

See Hill, 2020 IL App (1st) 171739 at ¶37 (finding that "the language in *Buffer* focuses on the sentence 'imposed' not the sentence served"). The State is unable to establish that the reasoning of *Peacock* is somehow inconsistent with this Court's opinion in *Buffer.*

In an attempt to support its argument, the State alleges that eligibility for sentence credit is akin to eligibility for parole, and that, therefore, like parole, eligibility for sentence credit constitutes a meaningful opportunity for release consistent with *Miller*. (St. Br. 19-23). This Court should reject the State's attempt to analogize sentence credit to parole. Unlike the receipt of sentence credit, which is based on compliance with prison rules (*Peacock*, 2019 IL App (1st) 170308 at ¶19; *Figueroa*, 2020 IL App (1st) 172390 at ¶32; *Lane v. Sklodowski,* 97 Ill. 2d 311, 320 (1983)), release on parole is based on demonstrated rehabilitation. *See Figueroa,* 2020 IL App (1st) 172390 at ¶¶30-32 (finding that, unlike parole, sentence credit is unrelated to rehabilitation); *see also People v. Brown*, 60 Ill. App. 2d 447, 450 (1st Dist. 1965) (recognizing parole is based on demonstrated rehabilitation); *People v. Griffin*, 8 Ill. App. 3d 1070, 1072 (5th Dist. 1972) (same).

The State further argues that the opinion of the Supreme Court of the United States in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)*,* supports a conclusion that eligibility for sentence credit is an adequate substitute for parole. The State observes that, in *Montgomery,* the Court found that States need not "relitigate sentences . . . in every case where a juvenile offender received mandatory life without parole," because "a *Miller* violation" may be remedied "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (St. Br. 18) (citing *Montgomery*, 136 S. Ct. at 736).

The above-cited portion of *Montgomery* fails to support a conclusion that sentence credit serves the same purpose as parole. While *Montgomery* explicitly stated that an opportunity for parole might remedy a *Miller* violation (*Montgomery*, 136 S. Ct. at 736), it said nothing about sentence credit providing the same type of meaningful opportunity for early release provided by parole. Where *Montgomery* did not address the propriety of using sentence credit as a substitute

for parole, it fails to support the State's argument.

The State additionally argues that this Court's opinions in *People v. Patterson*, 2014 IL 115102, and *People v. Reyes*, 2016 IL 119271, support a conclusion that reviewing courts should look to the availability and amount of sentence credit in determining whether a particular defendant has a *de facto* life sentence. (St. Br. 16-19, 25). According to the State, *Patterson* and *Reyes* emphasized the number of years the defendants would have to serve before becoming statutorily eligible for release based on the receipt of sentence credit. (St. Br. 25). Although *Patterson* noted the number of years the defendant would have to serve with available sentence credit, this Court's ultimate ruling was based on the total sentence imposed. *See Patterson*, 2014 IL 115102 at ¶110 (finding that the 36-year term itself did not constitute a *de facto* life sentence). In *Reyes*, this Court also discussed the number of years the defendant would be required to serve with available good-conduct credits, but did not squarely address whether this figure, or the imposed sentence, was determinative under *Miller*. *Reyes*, 2016 IL 119271 at ¶¶10, 12. Because application of sentence credit would not have impacted the determinations of whether the defendants's sentences were equivalent to life without parole, *Patterson* and *Reyes* fail to support a conclusion that sentence credit is a sufficient substitute for parole.

The State concedes that the conclusion reached in *Peacock*, *Thornton*, *Daniel, Hill, Quezada,* and *Figueroa* – that the possibility of sentencing credit is too uncertain to be relevant to whether a defendant has a *de facto* life sentence – is consistent with the manner in which Illinois courts treat sentence credit in the guilty plea context. (St. Br. 24). The State asserts, however, that sentencing credit should not be treated in the traditional manner here because, "unlike the guilty plea context, the length of time that the offender must spend in prison before he obtains an opportunity for release is the central question under *Miller*." (St. Br. 24). As discussed, the relevant question is whether the receipt of sentence credit is, among other things, sufficiently certain to provide a meaningful opportunity for early release. In the guilty plea context, Illinois courts have held that "day-for-day good-conduct provisions" do not "require

a defendant to serve half of his or her sentence," (*People v. Powers*, 2011 IL App (2d) 090292, ¶10), thus recognizing that the receipt of statutory sentencing credit is uncertain and outside of the court's control. The State fails to explain how the receipt of sentence credit is somehow more certain in the context of a *Miller* claim than in the context of a guilty plea.

The State asserts that the sentence credit scheme allows for a "fairly accurate assessment of the offender's length of imprisonment at the time of sentencing," because sentence credit may only be revoked if the conduct itself was serious enough to be classified as a major offense or accompanied by more serious misconduct. (St. Br. 21, 28). As in *Figueroa*, the State's argument overlooks "the myriad infractions that may result in the loss of good-conduct credits[.]"*Figueroa*, 2020 IL App (1st) 172390 at ¶30. "Infractions that may subject an inmate to the loss of good-conduct credits include damaging or misusing State property (six months), disobeying a direct order (six months), gambling (three months), insolence (three months), unauthorized movement (one month), abuse of privileges (three months), possession of money or unauthorized property (three months), and filing a frivolous lawsuit (six months)." *Id*. at ¶31 (citing 20 Ill. Adm. Code § 504 Appendix A & Table A (eff. Apr. 1, 2017)). These types of infractions do not necessarily evidence serious misconduct and "have little bearing on whether" the defendant "has matured to the point of being able to safely reenter and contribute to society." *Id.* at ¶32.

This Court should adopt the reasoning of *Figueroa* and conclude that the receipt of sentence credit is uncertain and unrelated to rehabilitation. *Figueroa*, 2020 IL App (1st) 172390 at ¶32; *People ex rel. Colletti v. Pate*, 31 Ill. 2d 354, 357 (1964); *Peacock*, 2019 IL App (1st) 170308 at ¶19; *Thornton*, 2020 IL App (1st) 170677 at ¶22; *Daniel*, 2020 IL App (1st) 172267 at ¶¶24-25; *Hill*, 2020 IL App (1st) 171739 at ¶37. Indeed, the State highlights the uncertain nature of sentence credit, in a footnote, writing that Dorsey could be eligible for additional credit based on his participation in programs and courses while incarcerated. (St. Br. 21). The possibility of additional credit only highlights the need for further proceedings.

In a further attempt to support its argument that the receipt of sentence credit is predictable, the State argues that Dorsey has "miscontrue[d] the day-for-day credit scheme." (St. Br. 25). However, in finding *Peacock* well-reasoned, the appellate court in *Hill* specifically examined the regulatory provisions currently relied upon by the State in support of its argument. After examining those regulations, *Hill* concluded:

> The Department of Corrections' regulations, promulgated at the express instruction of the General Assembly, confirm the rationale of *Peacock*: "the trial court has no control over the manner in which a defendant's good conduct credit is earned or lost." . . . *Statutory day-for-day credit provides nothing more than a baseline, and the baseline can be altered by the General Assembly's express grant of discretionary authority to the Department of Corrections*.

Hill, 2020 IL App (1st) 171739 at ¶41 (citing *Peacock*, 2019 IL App (1st) 170308 at ¶19) (emphasis added). *Hill* thus supports a conclusion that *Peacock* properly construed the regulations as establishing that the receipt of statutory sentence credit is uncertain and entirely within the control of the Department of Corrections. The appellate court reached same conclusion in *Figueroa* and *Quezada*. *See Figueroa*, 2020 IL App (1st) 172390 at ¶¶29-32 (finding the receipt of sentence credit uncertain); *see also Quezada*, 2020 IL App (1st) 170532 at ¶17 (same). The recent appellate opinions in *Hill*, *Figueroa* and *Quezada* support a conclusion that Dorsey has not misconstrued the applicable statutory scheme.

The State further argues that, like parole, sentence credit is "designed to encourage rehabilitation[.]" (St. Br. 21). The authority cited by the State in support of its argument fails, however, to support its conclusion. In *People v. Kolzow*, 319 Ill. App. 3d 673 (1st Dist. 2001), the appellate court explicitly held, for instance, that "good-time credit programs are designed *to promote prison discipline*[.]" *Kolzow*, 319 Ill. App. 3d at 679 (emphasis added). While *Kolzow* also wrote that statutory sentence credit schemes provide prisoners incentives "to conform their behavior to what society will accept," (*Kolzow*, 319 Ill. App. 3d at 679), the context surrounding this statement makes clear that *Kolzow* did not conclude that sentence credit is designed to facilitate rehabilitation. After stating that sentence credit is used as an incentive

to conform a prisoner's behavior, *Kolzow* found that the behavior affected by sentence credit is compliance with prison rules, writing, "[I]t is reasonable that persons who are subjected to a penitentiary sentence may need more incentives *to conform their behavior to prison rules*." *Kolzow*, 319 Ill. App. 3d at 679 (emphasis added). *Kolzow*'s statement that sentence credit incentivizes conformance of prisoner behavior to societal norms thus relates to what type of behavior society accepts from a prisoner while incarcerated, *i.e.,* adherence to the prison rules.

While the State attempts to analogize sentence credit to parole, it recognizes in its brief that, unlike the receipt of sentence credit, release on parole is based on consideration of the entirety of the defendant's conduct. (St. Br. 31) ("A parole board's decision 'involves a synthesis of record facts and personal observation filtered through the experience of the decision maker and leading to a predictive judgment as to what is best both for the individual inmate and for the community.'") (citing *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 7 (1979)). Consideration of the entirety of a defendant's conduct "is critical in the sense that it reflects the degree to which the inmate is prepared to adjust to parole release." *Greenholtz*, 442 U.S. at 15. Where the receipt of sentencing credit is not based on the totality of a defendant's conduct, it has no bearing on his preparedness to reenter society, and thus fails to provide a meaningful opportunity for release as contemplated by *Miller*.

In his opening brief, Dorsey argued that the Department of Corrections has wide latitude to revoke sentence credit with little or no process afforded to the defendant. (Def. Br. 20). In response, the State contends that sentence credit is not easily revoked where the Department of Corrections must follow a "multistep process" before revoking credit. (St. Br. 26-27).

The State declines to address that, in *Figueroa*, the First District Appellate Court found that the Department of Corrections need only clear a "low evidentiary bar" in order to revoke credit. *Figueroa*, 2020 IL App (1st) 172390 at ¶30. The State also overlooks that prisoners

are not entitled to counsel to assist in challenging the findings of the investigating and reviewing officers, or in preparing a defense to alleged rule violations. In this regard, the regulations of the Department of Corrections regarding sentence credit are entirely distinguishable from the statute governing parole for persons under 21 at the time of the offense. In parole proceedings, prisoners are appointed counsel. 730 Ill. Comp. Stat. Ann. 5/5-4.5-115(e). Furthermore, while the Department of Corrections allows prisoners to challenge disciplinary findings through a grievance procedure (St. Br. 29), prisoners are only afforded an opportunity to appear before a grievance officer if their claim is found to have merit, and they are precluded from calling witnesses, even though the grievance officer may do so. 20 Ill. Adm. Code 504.830. Grievance proceedings fail to ensure the high level of reliability provided by parole proceedings. 730 Ill. Comp. Stat. Ann. 5/5-4.5-115(e), (h) (stating that an indigent prisoner eligible for parole "will be appointed counsel," and has a right to make a statement at the parole hearing); *see also Fillmore v. Taylor*, 2019 IL 122626, ¶¶58-67 (finding that disciplinary hearing resulting in loss of good-time credits violated the prisoner's due process rights).

The State additionally argues that, in *United States v. Mathurin*, 868 F.3d 921, 935 (11th Cir. 2017), the Eleventh Circuit Court of Appeals found that the receipt of sentence credit is based on rehabilitation. (St. Br. 34). *Mathurin* involved consideration of a federal statue related to sentence credit, but did not address the Illinois scheme relevant here. Unlike as in this case, the award of sentence credit, in *Mathurin*, was based on a review of the defendant's overall conduct during a particular time period. 18 U.S.C. §3624. Furthermore, *Mathurin* is inconsistent with *Buffer's* holding that a sentence of more than 40 years imposed upon a juvenile constitutes a *de facto* life sentence. *See Mathurin*, 868 F.3d at 935 (finding that 57-year sentence, with possibility of release after 50-years, was not a *de facto* life sentence). The State's reliance upon *Mathurin* is misplaced.

Johnson v. Franzen, 77 Ill. 2d 513 (1979), *People v. Lindsey*, 199 Ill. 2d 460 (2002), and *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017), cited by the State (St. Br. 18-21), also fail to support a conclusion that sentence credit is an adequate substitute for parole. In *Franzen* and *Lindsey*, this Court did not consider: (1) if statutory sentence credit is relevant to whether a sentence constitutes a *de facto* life sentence; or (2) whether sentence credit is an adequate substitute for parole. *See Franzen*, 77 Ill. 2d at 518-23 (finding defendant was eligible for day-for-day credit for time served after the effective date of the day-for-day statute, but not for time served prior to that); *see also Lindsey*, 199 Ill. 2d at 477-80 (finding defendant was not entitled to day-for-day sentence credit). *Steilman* is an out-of-state case that does not address whether Illinois' sentence credit scheme is an adequate substitute for parole. *See Steilman*, 407 P.3d at ¶¶19-23 (considering whether defendant's 110-year sentence constituted a *de facto* life sentence in the "unusual circumstance" that defendant was eligible for both day-for-day good-conduct credit and additional credit from an unrelated case).

In sum, eligibility for sentence credit is an inadequate substitute for parole and should not be considered at any time in determining whether a particular sentence constitutes a *de facto* life sentence, particularly at the leave-to-file stage.

2. Consideration of sentencing credit involves factual matters inappropriate for review at the leave-to-file stage.

The State asserts that adopting the rationale of *Peacock* – that it is unconstitutional to impose upon a juvenile convicted of an adult offense a sentence of more than 40 years' imprisonment, regardless of the defendant's eligibility for sentence credit (*Peacock*, 2019 IL App (1st) 170308 at ¶¶19-20) – "would prohibit (or invalidate) every sentence imposed on a juvenile offender that is more than 40 years, regardless of the opportunity for release that the legislature provided through guaranteed statutory credit." (St. Br. 34). Dorsey agrees that a sentence of over 40 years is unconstitutional despite a juvenile defendant's eligibility for sentence credit. (Def. Br. 16-25); *see also* pages 1-10, *supra*. However, this Court need not

make this determination to warrant further proceedings in this case.

In his opening brief, Dorsey argued that any conclusion about the application of day-for-day credit is premature at the leave-to-file stage. (Def. Br. 25-26). Because the amount of credit any particular petitioner receives is a highly individualized determination, conclusions about the impact of sentence credit should not be made until the petitioner has had an opportunity to present evidence with the assistance of counsel. *See People v. Sanders,* 2016 IL 118123*,* ¶42 (finding factual determinations are prematurely made prior to an evidentiary hearing) (citing *People v. Coleman,* 183 Ill. 2d 366, 390 (1998)). Any allegation regarding actual time served is necessarily speculative, and to the extent this Court finds that the receipt of credit should be considered at all, needs further development. (Def. Br. 25); *see also Smith*, 2014 IL 115946 at ¶29 (holding that post-conviction petitioners should not be "required to establish cause and prejudice conclusively prior to being granted leave to file a successive petition[.]").

Dorsey further argued in his opening brief that the trial court's desire to keep him in prison for 76 years, until he is 90 years old, contradicts the rationales of *Miller* and *Buffer*. (Def. Br. 26). In response, the State writes that the sentencing court's intent at the time of sentencing is "irrelevant," because a *Miller* violation may be remedied by "providing a juvenile offender an opportunity for release." (St. Br. 33). As discussed, Dorsey has been provided no meaningful opportunity for early release. (Def. Br. 16-25); *see also* pages 1-11, *supra*. This Court should establish a bright-line rule prohibiting the consideration of eligibility for sentence credit at the leave-to-file stage.

B. Even if this Court considers eligibility for statutory sentence credit, Dorsey established prejudice where his long sentence violates Illinois' Proportionate Penalties Clause.

In his opening brief, Dorsey argued that his lengthy term-of-years sentence also violates the proportionate penalties clause of the Illinois Constitution. (Def. Br. 26-34). In response, the State claims that Dorsey has forfeited this argument where, according to the State, Dorsey did not raise a proportionate penalties argument on direct appeal from the denial of leave to

file a successive petition. (St. Br. 36). This Court should reject the State's argument.

On appeal from the denial of leave to file a successive petition, Dorsey argued that his 76-year *de facto* life sentence is unconstitutional, where it was imposed without full consideration of the *Miller* sentencing factors. (Op. App. Br. 10-20). In support of his argument, Dorsey cited the Eighth and Fourteenth Amendments to the federal constitution, and the proportionate penalties clause of the Illinois constitution. (Op. App. Br. 11). He alleged that his *de facto* life sentence is unconstitutional under *Miller*, and alternatively that, if his sentence could not be considered a *de facto* life sentence under *Miller*, it is still unconstitutionally disproportionate. (Op. App. Br. 15-19). Where Dorsey raised a proportionate penalties claim below, this issue is not procedurally barred.

Even though it claims Dorsey never previously argued that his sentence violates Illinois' proportionate penalties clause, the State additionally asserts that Dorsey's argument is "barred by the doctrine of *res judicata*." (St. Br. 36). In an attempt to support its argument, the State observes that, on direct appeal from trial, Dorsey raised an excessive sentence argument containing a citation to "the language of the penalties provision." (St. Br. 37-38). The fact that Dorsey raised a related but distinct sentencing argument, on direct appeal from trial, fails to preclude him from arguing now – on appeal from the denial of leave to file a sucessive post-conviction petition – that he made a *prima facie* showing of a proportionate penalties violation for purposes of establishing cause and prejudice. *See People v. La Pointe*, 2018 IL App (2d) 160903, ¶50 (finding defendant's *Miller*-based proportionate penalties claim was not "automatically foreclosed" by defendant's excessive sentence argument on direct appeal).

Initially, an excessive sentence argument is a sufficiently different type of proportionate penalties claim than the type of proportionate penalties claim presently raised before this Court. Specifically, in order to succeed on an excessive sentence argument, a defendant must establish that the sentencing court abused its discretion in imposing the sentence (*People v. Stacey,* 193 Ill. 2d 203, 209-10 (2000)), while success on a *Miller*-based proportionate penalties claim

requires that the defendant's sentence is constitutionally disproportionate, regardless of whether the sentencing court acted outside of its discretion. *See People v. Leon Miller*, 202 Ill. 2d 328, 340-42 (2002) (finding that defendant's mandatory natural-life sentence was unconstitutionally disproportionate). *Res judicata* is inapplicable here. *See, e.g., People v. Cleveland*, 342 Ill. App. 3d 912, 914-15 (2d Dist. 2003) (finding *res judicata* inapplicable where defendant raised an ineffective-assistance claim in a post-conviction petition that was "sufficiently different" from the ineffective-assistance claim raised on direct appeal).

Additionally, the State's argument regarding *res judicata* is logically inconsistent with its argument regarding forfeiture. On one hand, in the context of forfeiture, the State is claiming that Dorsey's prior citation to the proportionate penalties clause is insufficient to establish that he raised the present issue below; on the other hand, in the context of *res judicata*, the State is claiming that Dorsey's prior citation to the proportionate penalties clause is sufficient to establish that he previously raised a proportionate penalties argument on direct appeal. The State cannot have it both ways, particularly where it failed to argue in the appellate court below that Dorsey's proportionate penalties argument was procedurally barred. The State has forfeited its argument regarding forfeiture. *See People v. McKown*, 236 Ill. 2d 278, 308 (2010) (finding the State forfeited its forfeiture argument by failing to raise it in the appellate court).

In addressing the merits of Dorsey's proportionate penalties claim, the State argues that *Miller* cannot "provide cause for a defendant to raise a claim under the Illinois Constitution's penalties provision." (St. Br. 38). However, both this Court and the Illinois Appellate Court have held that *Miller* is sufficient to establish cause for a proportionate penalties claim. *See People v. Thompson*, 2015 IL 118151, ¶¶9-11, 17, 44 (holding that petitioner's *Miller*-based proportionate penalties claim was inappropriately raised under section 2-1401, but that the claim was appropriate for a successive post-conviction petition); *see also People v. Minniefield*, 2020 IL App (1st) 170541 at ¶¶24, 31 (finding that *Miller* established cause for defendant's post-conviction claim that his *de facto* life sentence was unconstitutional under both the federal

and state constitutions); *see also People v. Johnson*, 2020 IL App (1st) 171362, ¶12 (same); *People v. Ruiz*, 2020 IL App (1st) 163145, ¶¶28-29 (same); *People v. Daniels*, 2020 IL App (1st) 171738, ¶¶2, 22-23 (same); *People v. Ross*, 2020 IL App (1st) 171202, ¶21 (same); *People v. Franklin*, 2020 IL App (1st) 171628, ¶46 (same); *People v. Carrasquillo*, 2020 IL App (1st) 180534, ¶108 (same). Dorsey sufficiently established cause for a proportionate penalties claim.

Citing the Second District Appellate Court's opinion in *La Pointe*, the State claims that *Miller*'s prior unavailability "at best deprived" Dorsey "of some helpful support for" a proportionate penalties claim. (St. Br. 39). In *La Pointe*, the defendant was convicted of a first-degree murder that he committed when he was 18 years old. *La Pointe*, 2018 IL App (2d) 160903 at ¶¶2, 19. The trial court sentenced the defendant to life imprisonment without parole. *Id*. at ¶10. On direct appeal, the appellate court reduced the defendant's sentence to 60 years, but this Court reversed the appellate court's opinion, effectively reinstating the original life sentence. *Id*. at ¶¶12-14. In a successive post-conviction petition, the defendant subsequently argued, pursuant to *Miller*, that his life sentence was unconstitutional. *Id*. at ¶¶19, 26.

On appeal from the denial of leave to file a successive petition, the Second District Appellate Court held that the defendant failed to establish cause for his proportionate penalties challenge. *La Pointe*, 2018 IL App (2d) 160903 at ¶60. In so holding, the appellate court found that *Miller*'s unavailability at the time the defendant filed his initial post-conviction petition "did not prevent defendant from contending [in his initial petition] that the trial court's alleged failure to consider his youth as a factor in mitigation violated the proportionate-penalties clause." *Id.* at ¶59. The appellate court recognized that *Miller* constitutes a "new substantive rule of constitutional law," but concluded the defendant's proportionate penalties claim did "not rest on the new substantive legal rule that *Miller* created." *Id.* at ¶¶57-58. *La Pointe* explained that the only support for the defendant's proportionate penalties argument was that the trial court failed to consider his young age as a factor in mitigation. *Id.* at ¶57. *La Pointe* is distinguishable.

In this case, Dorsey argued that the sentencing court failed to consider the mitigating factors associated with youthfulness, including the higher rehabilitative capacity of children than adults, and how that impacted the imposed sentence. Moreover, the sentencing court never mentioned Dorsey's potential for rehabilitation, and the imposed sentence provides no opportunity for early release based on demonstrated rehabilitation, even though the sentencing court made no finding that Dorsey was permanently incorrigible. (Def. Br. 26-27). Dorsey's proportionate penalties claim thus rests on the substantive rule of law set forth in *Miller*, *i.e.*, that children are "constitutionally different" than adults for purposes of sentencing. *Miller*, 567 U.S. at 471. Dorsey's reliance upon *Miller* was sufficient to establish cause for raising a *Miller*-based proportionate penalties claim in a successive petition.

Regarding prejudice, the State argues that "the sole question" regarding Dorsey's proportionate penalties claim "is whether the trial court abused its discretion and imposed a sentence that exceeds constitutional limits." (St. Br. 40). The State's argument is legally and factually flawed. Contrary to the State's assertion, a sentence may be unconstitutionally disproportionate, even in the absence of an abuse of discretion. *See Leon Miller*, 202 Ill. 2d at 340-42 (finding the defendant's sentence unconstitutionally disproportionate, even though the trial court was statutorily *required* to impose it). Additionally, the relevant question before this Court regarding prejudice is whether Dorsey made a *prima facie* showing of an unconstitutionally disproportionate sentence. *See Figueroa*, 2020 IL App (1st) 172390 at ¶21 ("Defendant has also shown prejudice by demonstrating that his sentence is unconstitutional.").

Further, the State concedes that the sentencing court made no finding here of irreparable corruption. (Tc. 131-32). The absence of such a finding contributes to a *prima facie* showing of prejudice. *See People v. Holman*, 2017 IL 120655, ¶46 ("Under *Miller* and *Montgomery*, 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."). Dorsey

made a *prima facie* showing that his sentence violates Illinois' proportionate penalties clause, and thus established prejudice for filing a successive petition.

The State further concedes that Dorsey has demonstrated rehabilitation while in prison. It argues, however, that Dorsey's rehabilitative efforts while incarcerated are irrelevant "to determining whether the trial court . . . imposed a penalty within constitutional limits." (St. Br. 41). Dorsey's conduct while incarcerated supports a conclusion that Dorsey is not beyond the possibility of rehabilitation, and thus that he should have an opportunity for early release based on demonstrated rehabilitation. *See Leon Miller*, 202 Ill. 2d at 340-43 ("A life sentence without the possibility of parole implies that under any circumstances" the juvenile defendant "is incorrigible and incapable of rehabilitation for the rest of his life"); *see also People v. Gipson,* 2015 (1st) 122451, ¶72 (holding that, whether a sentence violates the proportionate penalties clause, "demands consideration of the defendant's character[.]").

The State additionally concedes that the court below declined to consider arguments based on scientific studies, because they were not introduced in the circuit court. The State contends, however, that the appellate court's refusal to consider arguments based on studies from outside of the trial record is consistent with *Miller* where, according to the State, *Miller* is based on "longstanding societal recognition that children are different from adults, not scientific research." (St. Br. 39). The State's argument ignores the plain language of *Miller*. In *Miller*, the Court explained that its opinions in *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005), and *Graham v. Florida*, 560 U.S. 48, 68 (2010), recognizing that children are different than adults, "rested not only on common sense . . . *but on science and social science as well*." *Miller*, 567 U.S. at 471 (emphasis added). Moreover, the State declines to address that, in *People v. McKown* and *People v. Huddleston*, 212 Ill. 2d 107, 134-35 (2004), this Court found that reviewing courts may consider not only the record, but "sources outside the record, including legal and scientific articles[.]" *McKown*, 226 Ill. 2d at 272; *Huddleston*, 212 Ill. 2d at 134-35.

C. Dorsey made at least a *prima facie* showing that his sentencing hearing was unconstitutional under *Holman*.

In his opening brief, Dorsey argued that his *pro se* allegation that his sentencing hearing was unconstitutional must be taken as true at the leave-to-file stage of successive post-conviction proceedings, and was thus sufficient, on its own, to make a *prima facie* showing of cause and prejudice. (Def. Br. 35). The State declines to address this argument, limiting its response to Dorsey's alternative argument that, to the extent it is required, Dorsey conclusively established that his sentencing hearing was unconstitutional under *Holman*.

In arguing that Dorsey's sentencing hearing complied with *Holman*, the State observes that the sentencing court considered Dorsey's young age during pre-trial motions, that defense counsel mentioned Dorsey's age at sentencing, that the sentencing court reviewed the pre-sentence investigation report ("PSI"), and that the sentencing court explicitly found Dorsey's youth to be a factor in mitigation. (St. Br. 40). This Court, and the Illinois Appellate Court, have held, however, that a review of the PSI, combined with general consideration of the defendant's age, is insufficient under *Miller;* the sentencing court is required to consider all of the mitigating attributes of youth and how they apply to the particular defendant. *See Holman*, 2017 IL 120655 at ¶44 ("We have long held that age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance."); *see also Hill*, 2020 IL App (1st) 171739 at ¶ 46 ("Mere awareness of a defendant's youth does not establish that the court specifically considered youth and its attendant characteristics when determining a sentence."); *People v. Harvey*, 2019 IL App (1st) 153581, ¶13 (same); *Peacock*, 2019 IL App (1st) 170308 at ¶¶23-24 (same); *Thornton*, 2020 IL App (1st) 170677 at ¶25 (same); *Daniel*, 2020 IL App (1st) 172267 at ¶28 (same); *Figueroa*, 2020 IL App (1st) 172390 at ¶37; *Quezada*, 2020 IL App (1st) 170532 at ¶20 (same); *Hill,* 2020 IL App (1st) 171739 at ¶46 (same). The State fails to establish that the sentencing court complied with *Holman*.

The State contends that "the trial court carefully weighed the myriad factors" required by *Miller*. (St. Br. 41). The State concedes, however, that the sentencing court focused on the severity of the crime and Dorsey's status as a gang member, and that the court failed to consider Dorsey's higher rehabilitative capacity, his rehabilitative potential, or how those factors impacted the imposed sentence. (St. Br. 7; Def. Br. 36-37). The trial court thus failed to fully consider the sentencing factors set forth in *Holman* and codified in 730 ILCS 5/5-4.5-105 (a) (1-9).

Finally, the State argues that the disparity between Dorsey's sentence and the maximum sentence that could be imposed upon a juvenile offender in the same situation today "does not make" Dorsey's "sentence unconstitutional." (St. Br. 42). As discussed in Dorsey's opening brief, it is fundamentally unfair that Dorsey has no opportunity for early release based on demonstrated rehabilitation, where a modern day juvenile in Dorsey's shoes would have two opportunities to demonstrate rehabilitation during his first 30 years in prison. (Def. Br. 32).

D. This Court should remand Dorsey's case for a new sentencing hearing, or alternatively, for further post-conviction proceedings.

The State does not dispute that this Court has the authority to remand Dorsey's case for a new sentencing hearing, or for further post-conviction proceedings. This Court may also vacate Dorsey's 76-year sentence and reduce it to a term that complies with *Buffer*. IL S. Ct. R. 615(b); *see also Hill*, 2020 IL App (1st) 171739 at ¶52.

Conclusion

Where Derrell Dorsey established cause and prejudice for his juvenile sentencing issue in his successive post-conviction petition, this Court should vacate the circuit court's order denying Dorsey leave to file a successive post-conviction petition and remand his case for a new sentencing hearing or reduce Dorsey's sentence. Alternatively, this Court should remand for further post-conviction proceedings, or for an opportunity to prove actual rehabilitation at an evidentiary hearing by retroactively applying section 5-4.5-115(b) here.

CONCLUSION

For the foregoing reasons, Derrell Dorsey, Petitioner-Appellant, respectfully requests that this Court reverse the appellate court's order affirming the denial of leave to file a successive post-conviction petition, and remand his case for a new sentencing hearing or reduce Dorsey's sentence, or alternatively reverse the circuit court's order and remand for further post-conviction proceedings, or a third-stage evidentiary hearing for purposes of determining whether Dorsey is retroactively entitled to a parole hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 19 pages.

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No. 123010

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DERRELL DORSEY, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-15-1124. There on appeal from the Circuit Court of Cook County, Illinois , No. 96 CR 21035. Honorable William G. Lacy, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 23, 2021, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Kelly Kuhtic
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