No. 130015

In the Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. EUGENE SPENCER, Petitioner-Appellant.	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-20-0646 There heard on Appeal from the Circuit Court of Cook County, Illinois, No. 14 CR 1785 Hon. Stanley J. Sacks, Presiding

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS
IN SUPPORT OF APPELLANT

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Points and Authorities

INTEREST OF *AMICUS CURIAE*

Amicus Curiae the **ACLU of Illinois ("ACLU-IL")** is a private, nonprofit, nonpartisan organization supported by a membership of approximately 50,000 individuals throughout the State. Its purpose is to protect through litigation, advocacy, and public education the rights and liberties guaranteed by the United States and Illinois Constitutions. Among these is the right of criminal defendants to receive sentences that comply with the requirements of the Illinois Constitution and/or United States Constitution, a right that is central to the legal questions raised in this case. This Court has granted ACLU-IL permission to appear as *amicus* in numerous cases before this Court. See, *e.g.*, *People v. Redmond & Molina*, Nos. 129201, 129327 (Consol.); *Rowe v. Raoul*, 2023 IL 129248; *People v. Sneed*, 2023 IL 127968; *People v. McCavitt*, 2021 IL 125550; *People v. Morger*, 2019 IL 123643; *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186; *Perry v. Dep't of Fin. & Pro. Regul.*, 2018 IL 122349; *People v. Releford*, 2017 IL 121094.

Amicus seeks to ensure that sentencing practices are lawful and just in the State of Illinois. Practices that violate the constitutional rights of individuals sentenced in Illinois damage communities and compromise public trust in the legal system that is supposed to keep them safe and ensure them justice. *Amicus* believes it is essential that courts ensure that criminal sentences are administered fairly and judiciously and in a manner that respects human dignity and freedom, and that takes into account individuals' culpability for their charged offense and their potential to be rehabilitated and to return as useful and contributing members of their community and society.

STATEMENT OF FACTS

After a simultaneous trial before separate juries, Eugene Spencer ("Spencer," "Defendant," or "Appellant") and his codefendant Qawmane Wilson were convicted of first degree murder, attempt murder, and home invasion for the death of Yolanda Holmes and for injuries inflicted upon Curtis Wyatt. (R. 682). Spencer, who was twenty years old at the time of the offense, was sentenced to an aggregate term of 100 years in prison. (SUP R. 807-08).

Spencer and Wilson were sentenced together. In aggravation against Spencer, the State presented testimony regarding his disciplinary record at Cook County Jail. (SUP R. 705). According to Steven Wilensky, the Director of Inmate Discipline, Spencer had received tickets for possession of homemade alcohol, three instances of battery, three instances of indecent exposure, and possession of a weapon. (SUP R. 713-24). Wilensky admitted that Spencer was held accountable for these infractions at a jail hearing where he was not represented by counsel. (SUP R. 724-27). When given an opportunity to speak in allocution, Spencer stated: "the jail taught me how to be a better person. It's been a while since I caught any cases." (SUP R. 765).

In mitigation, trial counsel emphasized that Spencer was only twenty years old at the time of his offense and that the Court should consider the youth and attendant characteristics of emerging adults such as Spencer. (SUP R. 784-86). In support, counsel cited *People v. House*, where the court noted that "the designation that after age 18 an individual is a mature adult appears to be somewhat arbitrary" and thus held that a life sentence imposed upon a nineteen-year-old defendant violated the Illinois proportionate penalties clause. 2019 IL App (1st) 110580-B, ¶ 55, ¶ 64; see also *People v. House*, 2021

IL 125124, ¶ 9. Trial counsel also argued that the trial court should cap Spencer's sentence at forty years because our Supreme Court held in *People v. Buffer* that sentences longer than forty years are *de facto* life sentences that cannot be imposed upon a juvenile defendant. 2019 IL 122327, ¶ 42. (SUP R. 786).

Trial counsel further argued that Spencer was vulnerable to manipulation and that Wilson used him like a "puppet." (SUP R. 787-88). Counsel presented evidence about Spencer's background and upbringing. (SUP R. 787). Spencer grew up in the Robert Taylor Homes public housing project with his mother and siblings. (SUP R. 788). Spencer's father was mostly absent during Spencer's childhood and was physically abusive when he was present. (SUP R. 788). When the Robert Taylor Homes closed down, Spencer and his family "couch-surfed" between houses and experienced homelessness. (SUP R. 788). When Spencer's mother passed away, Spencer was homeless on a regular basis. (SUP R. 788).

Given his unstable housing and family situation, Spencer was unable to attend school on a regular basis and eventually stopped going to school altogether in the eleventh grade. (SUP R. 788-89). Spencer also struggled with an intellectual disability that further hampered his academic progress. (SUP R. 788-89). Trial counsel noted that Spencer did not have a criminal record prior to this incident. (SUP R. 789).

Responding to trial counsel's request that the trial court consider Spencer's youth and attendant characteristics in sentencing, the trial court remarked that Spencer was not a juvenile at the time of the offense and that it would therefore not consider Spencer's status as an emerging adult in determining his sentence, because there was no ruling on the issue from the Illinois Supreme Court. (SUP R. 797). The trial court stated that it had considered

rehabilitative potential and statutory factors in aggravation and mitigation, without specifying the factors it had considered. (SUP R. 797-98). The court stated that Wilson and Spencer were "fairly young guys" but immediately countered that they were also "grown up [men]." (SUP R. 798). The court also asserted that Spencer was not a puppet and that nobody forced Spencer to commit the crime. (SUP R. 799-800).

Spencer was sentenced to fifty years for first degree murder, twenty-five years for attempt murder, and twenty-five years for home invasion, for an aggregate sentence of 100 years. (SUP R. 807-08). Spencer received 2,231 days of sentencing credit towards his sentence. (SUP R. 808). Trial counsel filed a motion to reconsider sentence arguing that because Spencer was twenty years old at the time of the offense, the trial court should have considered the *Miller* factors, as codified in 730 ILCS 5/5-4.5-105 of the Illinois Code of Corrections, at sentencing. (C. 1283-85). The trial court denied the motion to reconsider sentence, commenting that Spencer's life sentence was "well earned" because he had murdered his friend's mother for money. (SUP R. 825-26).

On direct appeal, Spencer argued, *inter alia*, that his 100-year aggregate sentence violated the proportionate penalties clause because it constituted a *de facto* life sentence imposed upon an emerging adult. *People v. Spencer*, 2023 IL App (1st) 200646-U, ¶ 135. The majority held that Spencer was not serving a *de facto* life sentence because he was eligible for parole after twenty years and thus had a meaningful opportunity at release before the forty-year floor for a *de facto* life sentence. *Id*. ¶¶ 142-43.

The dissent found that the majority improperly closed the door to as-applied constitutional challenges to youth sentences under the proportionate penalties clause. The dissent found that the majority "errs by analyzing this issue as if the proportionate penalties

clause and the eighth amendment are identical. [Citation.] They are not." *Id.* ¶ 162. The dissent stated that future discretionary parole eligibility under the revised parole statute does not preclude Illinois an as-applied challenge under the proportionate penalties clause. *Id*. ¶¶ 164-66 (Hyman, J., dissenting). Justice Hyman observed that the Court should find that Spencer should raise his as-applied challenge "in postconviction proceedings as directed in *Harris*, 2018 IL 121932 ¶ 48." *Id.* ¶ 157. (Hyman, J., dissenting).

This Court granted leave to appeal on November 29, 2023.

SUMMARY OF ARGUMENT

The proportionate penalties clause of article I, section 11 of the Illinois Constitution has defined the constitutional limits of criminal sentences in Illinois for over 200 years. It encompasses two guiding principles—proportionality and rehabilitation—that are unique to the Illinois charter. The clause "provides a check on the judiciary, *i.e.*, the individual sentencing judge, as well as the legislature" by allowing a reviewing judge to ensure that sentences imposed in Illinois do not violate those principles. *People v. Clemons*, 2012 IL 107821, ¶ 45.

Appellant, who was twenty years old at the time of his offense, presented facts to his sentencing judge relating to his youth and attendant circumstances. The trial judge refused to consider them and imposed a 100-year sentence. According to the appellate court, appellant was initially entitled to judicial review of that sentence under the proportionate penalties clause—but only until June 1, 2019. Being sentenced after that day, he lost a decades-old right because a change in the parole statute made him eligible for a parole review twenty years into his sentence. He traded the right to have a judge determine whether his penalty is unconstitutional right now for the possibility that, in twenty years

and with his 100-year sentence intact, a politically-appointed parole board might decide to release him eighty years early as a matter of executive grace.

This Court should not allow a 200-year-old constitutional right to be so easily discarded. Particularly not here, where the lower court denied the right by improperly applying an eighth amendment standard to a state proportionate penalties clause challenge. The court below joins a trend of cases that conflate the Illinois constitutional guarantee with a standard that arose in the eighth amendment juvenile sentencing context; while that parallel federal standard informs the proportionate penalties clause, it does not supplant or diminish the independent Illinois provision that is both older and broader. This Court has held, directly contrary to the court below, that challenges brought under the proportionate penalties clause are not limited to "*de facto* life sentences" as eighth amendment challenges are. The holding below that parole eligibility removes a sentence's "*de facto* life" status is thus irrelevant to appellant's state constitutional challenge.

In any event, eligibility for illusory parole review in the distant future does not transform a 100-year sentence into anything but a "*de facto* life sentence," or otherwise justify depriving appellant of constitutional judicial review. Discretionary parole review is different from judicial review in its purpose, structure, timing, and outcome, and was never intended to supplant judicial review. This is particularly crucial because the lower court's ruling, if allowed to stand, would take the right of review away from every juvenile defendant. Because every defendant under twenty-one is now statutorily eligible for parole in twenty years or less, none of them may challenge the constitutionality of their sentence, no matter its length or the nature of their individual circumstances. Using the eighth amendment, and the statutory reforms it inspired, to erase judicial review of youth

sentences under the Illinois Constitution would be a perverse inversion of a line of jurisprudence meant to expand scrutiny of youth and attendant circumstances in sentencing—not take it away.

This Court should reverse the lower court's ruling and permit appellant to bring his as-applied proportionate penalties clause challenge in a new sentencing hearing or post-conviction proceeding.

ARGUMENT

I. The Illinois Constitution's Proportionate Penalties Clause is an Independent Constraint on Sentencing Authority that is Broader than the Eighth Amendment.

A. Illinois Courts are Duty-Bound to Independently Interpret and Enforce Provisions of the Illinois Constitution.

As the state's high court, this Court is duty-bound to construe provisions of the Illinois Constitution independently from provisions of the United States Constitution to ensure that the former are more than "mere mirrors of federal protections." See *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1356 (1982). As Justice William J. Brennan wrote in his seminal article *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977), "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." See also *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (stating federal jurisprudence does not hinder the state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."); Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1315 (2017) ("[A]s the ultimate arbiters of state

law," state supreme courts in particular "have the prerogative and duty to interpret their state constitutions *independently*." (Emphasis in original.))

Constitutional history underscores the centrality of positive, state-based constitutional jurisprudence to our federal system. Indeed, "[t]he lesson of history" is that "the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions," not the other way around. See Brennan, *supra*, at 501; see also Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 496 (1984). The federal Bill of Rights was added to meet the populace's demands for the guarantees against the federal government matching those that individuals enjoyed against their state governments. Utter, *supra*, at 496. Even after the adoption of the Bill of Rights, many states copied large parts of their declarations of rights from the constitution of other states and not the federal charter. *Id.* at 496-97; see also Robert F. Williams, *The Law of American State Constitutions*, 20-21 (Oxford U.P. 2009) (noting that states sought the protections of the federal Bill of Rights to ensure that rights already guaranteed in state constitutions would be similarly protected from federal intrusion). The Illinois Constitution in 1818 was no exception, being modeled after the state constitutions of New York, Kentucky, and Ohio. See Frank Kopecky & Mary Sherman Harris, *Understanding the Illinois Constitution*, Ill. Bar Found., at 2 (2010 ed.).

Independent enforcement of state constitutional rights also squares with the fundamentally different functions of the state and federal charters: whereas the U.S. Constitution is a "negative restriction on the states' power to act in certain ways," state constitutions provide an independent source of "rights and liberties to be effectuated to the

fullest." Alan B. Handler, *Expounding the State Constitution*, 35 Rutgers L. Rev. 202, 205 (1983). The U.S. Supreme Court, applying negative rules over a large geographic area, has reason to enforce federal constitutional provisions cautiously. See Jeffrey Sutton, *51 Imperfect Solutions: States & the Making of American Constitutional Law*, 175 (Oxford U.P. 2018). State supreme courts have no such need to apply a "federalism discount" in applying and enforcing their state constitutional guarantees, and can thus ensure that they fully express the positive rights they endow. *Id.*

The state courts, then, must fill the interstices in the framework of federal rights to provide citizens with the full promise of rights under law. Indeed, the U.S. Supreme Court relies on them to do so. "Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary." Brennan, *supra*, at 502-03.

Independent enforcement of state constitutional guarantees is also good policy: it allows states to fashion positive and innovative approaches to individual rights beyond those guaranteed by the baseline of the U.S. Constitution. It also establishes those rights as a bulwark against the expansion of federal power, and erosion of rights at a federal level, beyond what the history and values of a state will tolerate. If state provisions simply merge with their federal analogues, those provisions become a nullity and lose their protective force. See, *e.g.*, William W. Berry, III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1249 (2020).

B. The Proportionate Penalties Clause is Unique to the Illinois Constitution and Deeply Rooted in History.

Throughout history, this Court has frequently recognized additional protections provided by state constitutional provisions with unique text or history suggesting that they

exceed the scope of their federal counterparts. See, *e.g.*, *Lippman v. People*, 175 Ill. 101, 112 (1898) (referring to the Illinois Constitution's warrants requirement as "a step beyond the constitution of the United States, in requiring the evidence of probable cause to be made a permanent record in the form of an affidavit"); *Gregg v. Rauner*, 2018 IL 122802, ¶¶ 40-41 (stating removal clause in article V, section 10 of the Illinois Constitution differed from article II, section 4 of the U.S. Constitution); *People v. Fitzpatrick*, 158 Ill. 2d 360, 367 (1994) (Illinois Constitution's confrontation clause "clearly, emphatically and unambiguously requires a 'face to face' confrontation."). In some cases the Court has given independent force even to state constitutional provisions that are similar or identical to their federal counterparts where state history, tradition, and state jurisprudence demand. See, *e.g.*, *People v. Washington*, 171 Ill. 2d 475, 485-86 (1996); *People v. McCauley*, 163 Ill.2d 414, 440-41 (1994).

The proportionate penalties clause contained in article I section 11 of the Illinois Constitution is one provision of the charter with an unquestionably independent pedigree. Although similar in concept to the eighth amendment to the U.S. Constitution, its text is unique. The history of its drafting further underscores its independence. As a result, Illinois courts have long recognized it as a unique and independent source of rights grounded firmly in the Illinois charter.

1. *The plain language of the proportionate penalties clause has always been more expansive than that of the eighth amendment.*

As this Court has stated, "[t]he best guide to interpreting the Illinois Constitution is the document's own plain language." *People v. Purcell*, 201 Ill. 2d 542, 549 (2002). On its face, the plain language of article 1, section 11 of the Illinois Constitution is broader than its closest federal parallel, the eighth amendment. While both provisions apply where the

government has imposed a penalty on a criminal defendant, "[t]he two provisions are not mirror images." *Clemons*, 2012 IL 107821, ¶ 36. The Illinois proportionate penalties clause extends well beyond the eighth amendment's tripartite prohibition of "excessive bail," "excessive fines," and "cruel and unusual punishments." See U.S. Const., amend. VIII.

In its original iteration in 1818, before the eighth amendment was applied to the states, the proportionate penalties clause of the Illinois Constitution read, in relevant part: "All penalties shall be proportioned to the nature of the offense, the true design of all punishment being to reform, not to exterminate mankind." Ill. Const. 1818, art. VIII, § 14. The subsequent revisions of the clause in 1848 and 1870 retained language similar to that of the 1818 version, all centered on clarifying that punishment's real purpose was reform rather than "exterminat[ion]." See Ill. Const. 1848, art. XIII, § 14; Ill. Const. 1870, art. II, § 11.

In 1970, Illinois amended its constitution to include new language in the proportionate penalties clause intended "to provide a limitation on penalties beyond those afforded by the eighth amendment." See *Clemons*, 2012 IL 107821, ¶ 39. The current version reads, in relevant part: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. This amendment introduced two distinct sections, or "limitations," to criminal penalties. See *Clemons*, 2012 IL 107821, ¶ 37; *People v. Gleckler*, 82 Ill. 2d 145, 162 (1980) ("And we are constitutionally required to consider both the circumstances of the offense and the character of a defendant" (citing Ill. Const. 1970, art. I, § 11)). The first limitation mirrors the earlier iterations of the clause from the 19th century, emphasizing that criminal penalties should correspond proportionately to the

seriousness of the offense.[1] The newer limitation adds that courts must administer penalties with the aim of rehabilitating the offender. In other words, the Illinois Constitution unambiguously requires punishments to be both proportionately retributive and rehabilitative—concepts that do not appear in the text of the eighth amendment. This is a departure from the approach taken by most other states, which largely modeled their punitive constitutional provisions on the eighth amendment's prohibition on "cruel" and/or "unusual" punishment. See William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1227-1239 (2019).

2. *The historical context surrounding the proportionate penalties clause's ratification underscores the framers' intent that it be interpreted and applied independently.*

The divergence of the proportionate penalties clause language from its federal counterpart reflects a conscious choice by its framers in 1970 to expand upon eighth amendment protections that had by then been in existence—and incorporated into other state charters—for many decades. During the 1970 Constitutional Convention, Leonard Foster proposed amending the 1870 language to add that all penalties should aim to "restore the offender to useful citizenship." 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1391 (statements of Delegate Foster) (hereinafter "Proceedings"). Foster suggested this amendment to "clarify the constitutional language" on criminal penalties, adding that "*[t]raditionally the constitution has stated that a penalty should be proportionate to the nature of the offense.* I feel that with all we've learned about penology

[1]Although the wording of the first clause was changed from "[a]ll penalties shall be proportioned to the nature of the offense" to "[a]ll penalties shall be determined * * * according to the seriousness of the offense," the debates of the Sixth Illinois Constitutional Convention do not evince any intent on the part of the framers to change the meaning of the first clause. See 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1380-81, 1391-96, 1413-26.

that somewhere along the line we ought to indicate that *in addition to* looking to the act that the person committed, *we also should look at the person who committed the act and determine to what extent he can be restored to useful citizenship*." (Emphasis added.) Proceedings 1391 (statements of Delegate Foster). While he delegated the determination of the weight of rehabilitation in sentences to the legislature and courts, he anticipated that his amendment would "lead to the major thrust being towards rehabilitation rather than just punishment." Proceedings 1392 (statements of Delegate Foster).

Foster's amendment sparked some debate, especially about its impact on capital punishment and whether judges must explain their sentences. Proceedings 1414-16. Despite this, the focus on rehabilitation in Foster's amendment gained broad support among the framers, some of whom observed that "the objective of rehabilitation is a laudable" goal. Proceedings 1392 (statements of Vice President Smith). In addition, the 1970 revision to the proportionate penalties clause removed from the clause the phrase, "the true design of all punishment being to reform, not to exterminate mankind." Ill. Const. 1818, art. VIII, § 14. The omission of the phrase "not to exterminate mankind" suggests that the framers contemplated protection of all defendants, not just those facing sentences of death or life imprisonment.

The absence of comparison to the eighth amendment during debates of the proportionate penalties clause suggests the framers viewed the Illinois provision as a separate and independent provision. The framers did not discuss at length the eighth amendment in relation to the proportionate penalties clause. They did not explore how rehabilitation intersected with the negative constitutional prohibitions of the eighth amendment, nor did they discuss how the clause aligned with the federal rights framework.

This was in stark contrast with other provisions of the Illinois Constitution whose debate explicitly and repeatedly referenced federal counterparts.

3. *Illinois' historical commitment to proportional and rehabilitation-focused penalties led to its early establishment of a separate juvenile justice system with a rehabilitative focus*.

Any examination of the proportionate penalties clause in the juvenile context must account for the "longstanding distinction made in this state between adult and juvenile offenders" running through Illinois history. *People v. Leon Miller*, 202 Ill. 2d 328, 341 (2002). Illinois breathed life into its historical commitment to proportional and rehabilitation-focused punishment with the establishment of the American juvenile justice system. In 1899, Illinois created the world's first juvenile court through the Illinois Juvenile Court Act. Fundamental to this new court system was the principle that "young defendants have a greater rehabilitative potential" than older defendants. *Leon Miller*, 202 Ill. 2d at 341-42. By focusing on rehabilitation rather than solely punishment, this new system "marked a new era of juvenile justice." Patrick N. McMillin, *From Pioneer to Punisher: America's Quest to Find Its Juvenile Justice Identity*, 51 Hous. L. Rev. 1485, 1490 (2014). Inspired by Illinois' pioneering approach, by 1932, there was a juvenile court system in nearly every state. Korine L. Larsen, *With Liberty and Juvenile Justice for All: Extending the Right to A Jury Trial to the Juvenile Courts*, 20 Wm. Mitchell L. Rev. 835, 843 (1994).

C. Illinois Courts Have Long Recognized the Proportionate Penalties Clause as an Independent Constraint on Judicial and Legislative Sentencing Authority.

This Court has repeatedly and clearly recognized the distinct power of article I, section 11's proportionate penalties clause. As early as 1894 the Court recognized the clause as a check on the legislature's power to prescribe criminal sentences. In *People ex rel. Bradley v. Illinois State Reformatory*, the Court remarked that while a legislature is

authorized to prescribe criminal punishments, it nonetheless "must be regarded that its action represents the general moral ideas of the people," and Illinois courts may hold that a sentence violates the proportionate penalties clause, among other reasons, if it "is so wholly disproportioned to the offense committed as to shock the moral sense of the community." 148 Ill. 413, 421-22 (1894).

This Court has defined the clause's application to sentencing in more recent years as well. See *Leon Miller*, 202 Ill. 2d at 336. In *Leon Miller*, the Court affirmed the trial court's refusal to apply a statutorily mandated natural life sentence to a fifteen-year-old defendant, and holding that the relevant sentencing statutes driving his punishment were unconstitutional under the proportionate penalties clause as applied to defendant. *Id.* at 343. This Court noted that the three sentencing statutes that controlled defendant's sentence (the Juvenile Court Act of 1987, the accountability statute, and the multiple murderer sentencing statute), converged to ensure that "a court never considers the actual facts of the crime, including the defendant's age at the time of the crime or his or her individual level of culpability," before imposing a sentence. *Id.* at 340. This evasion of constitutional scrutiny could not stand; the Court thus considered the defendant's age and personal characteristics, and the circumstances of his crime (where he acted as a mere lookout), to determine that the statutorily mandated sentence was "particularly harsh and unconstitutionally disproportionate." *Id.* at 341.

This Court reiterated that a sentence violates the proportionate penalties clause if "the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *Id.* at 338. Sentences also violate the clause if "similar offenses are compared and the conduct that creates a less serious

threat to the public health and safety is punished more harshly," or if "identical offenses are given different sentences." *Id.* The Court acknowledged that it had "never defined what kind of punishment constitutes 'cruel,' 'degrading,' or 'so wholly disproportioned to the offense as to shock the moral sense of the community," and explicitly declined to fix criteria for the sentences that might qualify. *Id.* at 339. The Court instead emphasized the need for flexibility: "as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Id.*

This Court further expanded on its analysis of the clause—and highlighted its divergence with the eighth amendment—in *People v. Clemons*, a proportionate penalties clause case that was not based on defendant's age or on a life sentence. 2012 IL 107821, ¶ 40. In *Clemons*, this Court held that concurrent 25-year sentences mandated by the armed robbery statute were unconstitutional because that statute violated the proportionate penalties clause as applied to defendant, because it subjected him to a harsher penalty than he would face if charged for identical conduct under a different statute. *Id.*

Justice Theis first explained that constitutional review of sentences goes beyond merely ensuring that sentences comport with relevant sentencing statutes: to the contrary, "[t]he constitutional mandate set forth in article I, section 11, provides a check on the judiciary, *i.e.*, the individual sentencing judge, as well as the legislature, which sets the statutory penalties in the first instance." *Id.* ¶ 29. The Court rejected the State's argument that the Court's appeal to "common sense and sound logic" in past opinions interpreting the proportionate penalties clause were a "questionable origin" from which to begin an analysis. *Id.* ¶ 45. The Court explained that "[c]ommon sense and sound logic need not be strangers to the law," and indeed were key underpinnings of the Court's proportionate

penalties clause analysis—in particular the notion that "divergent sentences for similar conduct and intent [are] irrational." *Id.* [Citation.]

The Court also explicitly abrogated all prior case law suggesting that the "proportionate penalties clause offers the same protections as the eighth amendment." *Id.* ¶¶ 35, 36 (abrogating *People v. McDonald*, 168 Ill. 2d 420, 455 (1995), which had characterized article I section 11 as "synonymous with the cruel and unusual punishment clause of the eighth amendment to the United States Constitution."). Justice Theis explained that while the eighth amendment and proportionate penalties clauses both concerned criminal penalties, "the two provisions are not mirror images." *Id.* ¶ 36. The opinion examined the 1970 convention in detail—in particular the addition of the unique requirement that penalties in Illinois must be determined "with the objective of restoring the offender to useful citizenship"—in ruling that the proportionate penalties clause "went beyond the framers' understanding of the eighth amendment and is not synonymous with that provision." *Id.* ¶¶ 39-40.

D. The U.S. Supreme Court Defined the Eighth Amendment's Parallel Constraint on Sentencing in *Miller v. Alabama*, Albeit Restricted to a Limited Class of Defendants and Sentences.

In the years after *Leon Miller*, the Supreme Court of the United States also articulated a parallel standard for evaluation of sentences under the eighth amendment, albeit confined to a far more limited class of defendants—and sentences—than those covered by the proportionate penalties clause. The *Miller* standard, as it came to be known, barred life sentences for youth under eighteen absent a hearing to examine the defendant's "youth and attendant characteristics." *Miller v. Alabama*, 567 U.S. 460, 483 (2012).

The *Miller* standard arose out of several progressively broader Supreme Court rulings refining the prohibition against imposition of death (and natural life) sentences on juveniles. First the Court ruled that the eighth amendment prohibits capital sentences for juveniles who commit murder. See *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005). The Court later expanded its ruling, holding that the eighth amendment prohibits mandatory life sentences for juveniles who commit nonhomicide offenses as well. See *Graham v. Florida*, 560 U.S. 48, 82 (2010). In 2012 the Court further expanded its ruling in *Miller*, holding that the eighth amendment also prohibits mandatory life sentences for juveniles. 567 U.S. 460, 489 (2012). The Court later clarified that, in addition to its substantive ruling, *Miller* has a "procedural component" as well: the eighth amendment "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." See *Montgomery v. Louisiana*, 577 U.S. 190, 209-10 (2016).[2]

In all these cases, the Supreme Court framed its constitutional analysis within the eighth amendment's negative prohibition, which "guarantees individuals the right not to be subjected to excessive sanctions," *i.e.* those appropriately characterized under the eighth amendment's text as "cruel and unusual." See, *e.g.*, *Miller*, 567 U.S. at 469 (citing *Roper*, 543 U.S. at 560). In *Miller* the Court explained that the constitutional prohibition was rooted in two separate eighth amendment interests: avoiding unfair sentences to specific classes of individuals, and applying special care when imposing the most serious penalties

[2] This Court has examined the history of Eighth Amendment/*Miller* protections in numerous opinions (see, *e.g.*, *Buffer*, 2019 IL 122327, ¶ 27; *People v. Reyes*, 2016 IL 119271; *People v. Wilson*, 2023 IL 127666, ¶ 30; *People v. Davis*, 2014 IL 115595, ¶ 43), though further discussion of the eighth amendment standard is beyond the scope of this brief.

(death or life in prison). See *Miller,* 567 U.S. at 469-80.

The majority in *Miller* first examined a strand of eighth amendment jurisprudence that evolved to prevent "mismatches between culpability of a *class* of offenders and the severity of a penalty." [Emphasis added.) *Id.* at 469-71. The Court noted that children, as a group, are widely recognized to have diminished culpability because of their "lack of maturity and underdeveloped sense of responsibility," their vulnerability to "negative influences and outside pressures," and the fact that their personality traits are "less fixed" than those of adults. *Id.* at 470-71. The Court noted that the eighth amendment demanded that courts look beyond these "common sense" propositions to "developments in psychology and brain science", which "continue to show fundamental differences between juvenile and adult minds." *Id.* at 471-72 (citing *Graham,* 560 U.S. at 68, and *Roper,* 543 U.S. at 570). The Court reasoned that scientific findings regarding "transient rashness, proclivity of risk, and inability to assess consequences" both lessened children's "moral culpability" and increased the odds that their "deficiencies will be reformed." *Id.* at 472.

The *Miller* standard did not entitle all defendants—or even all young defendants—to an individualized examination of their personal characteristics, however. It was explicitly "categorical" in its application. *Miller* solidified a rigid definition of the class of defendants entitled to the benefit of this emerging set of facts: children who had not yet reached their eighteenth birthday at the time of their offense. In *Roper,* the Court explained that "clear, predictable, and uniform constitutional standards are especially desirable" in applying the eighth amendment. 543 U.S. at 594 (O'Connor, J., dissenting). The Court reflected that while drawing a bright line at age eighteen is imperfect, the eighth amendment demanded a strict categorical rule for the sake of predictability and ease of

administration:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. * * * The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Id. at 574.

The Supreme Court reinforced the importance of this bright line rule in *Graham*, which explicitly rejected an individualized approach weighing the age and crime circumstances of each defendant, even if it would "allow courts to account for factual differences between cases." 560 U.S. at 77. The Court instead adopted *Roper*'s "categorical" approach, holding that:

> [A] clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.

Id. at 74-75 (citing *Roper*, 543 U.S. at 574). *Miller* adopted this reasoning as well. See *Miller*, 567 U.S. at 470-71.

In addition to being age-restricted, *Miller*'s constitutional analysis of juvenile sentences was also confined only to the most severe of sentences: death or life in prison. The Court merged its analysis of children's class-wide diminished culpability with a second strand of constitutional reasoning demanding that "sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." See *id.* at 471-75. The Court expanded that concern to mandatory life-without-parole sentences for juveniles, which it analogized to death sentences given that children

receiving such sentences would likely die in prison. See *id.* The two strands of constitutional reasoning thus came together, the Court explained, to "teach that *in imposing a State's harshest penalties*, a sentencer misses too much if he treats *every child* as an adult." (Emphasis added.) *Id.* at 477

The *Miller* holding predictably led to a proliferation of eighth amendment challenges to juvenile life sentences nationwide. Illinois was no exception, especially after this Court held that *Miller*—and the eighth amendment's requirement of a hearing to determine juvenile defendants' youth and attendant characteristics—applied retroactively to cases on collateral review. See *People v. Davis*, 2014 IL 115595, ¶¶ 39, 42. Defendants who were young enough, and faced sentences that were harsh enough, were able to bring successful challenges under the federal standard. See, *e.g.*, *People v. Reyes*, 2016 IL 119271; *Buffer*, 2019 IL 122327, ¶ 27. Those who fell outside the *Miller* standard's well-defined boundaries tried, and failed, to obtain the eighth amendment's protection. See, *e.g.*, *People v. Harris*, 2018 IL 121932, ¶ 61; *People v. Hayes*, 2020 IL App (1st) 172848-U, ¶ 15.

The Illinois state legislature also enacted sentencing legislation designed to comply with the requirements of the eighth amendment as articulated in *Miller*. In February 2015, House Bill 2471 was introduced in the General Assembly and enacted as Public Act 99-69, adding section 5-4.5-105 to the Unified Code of Corrections. Pub. Act 99-69 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105). This statute provided a new sentencing scheme for defendants under the age of 18 when they committed their offenses. Before any sentence is imposed, subsection (a) requires the sentencing court to consider several "additional factors in mitigation in determining the appropriate sentence." 730 ILCS 5/5-

4.5-105(a). As this Court held, "[t]his list is taken from and is consistent with *Miller*'s discussion of a juvenile defendant's youth and its attendant characteristics." *Buffer*, 2019 IL 122327, ¶ 36.[3]

In *People v. Reyes*, 2016 IL 119271 (*per curiam*), this Court further clarified that *Miller*'s holding barring juveniles from mandatory natural life sentences includes mandatory *de facto* life sentences as well—*i.e.* those that impose "a mandatory term-of-years sentence that cannot be served in one lifetime." *Id.* ¶ 9. After a string of appellate court cases offered conflicting definitions of what constitutes a *de facto* life sentence for eighth amendment purposes, this Court weighed in, hewing to the categorical approach of the *Miller* standard it was applying and "choos[ing] to draw a line at 40 years." *Buffer*, 2019 IL 122327, ¶ 40. This Court drew this bright line based on the legislature's attempt to "compl[y] with the requirements of *Miller*"—in particular, its decision to impose a forty-year mandatory minimum sentence for juvenile first-degree murderers who would qualify for natural life imprisonment if they committed their crime as an adult. See *id.* ¶ 39. This Court reasoned that, if the Illinois legislature saw fit to imprison juveniles for forty years for the most serious of crimes, a prison sentence imposed on a juvenile of less than forty years "does not constitute a *de facto* life sentence in violation of the eighth amendment," while sentences over that 40 years benchmark were forbidden under the *Miller* standard. *Id.* ¶ 41.

[3] As discussed further below, the Illinois legislature also expanded its attention to consideration of youth and attendant circumstances when it enacted legislation guaranteeing parole review youth as old 21 years of age at the time of their offense. 730 ILCS 5/5-4.5-115(b).

E. The *Miller* Standard Informs Proportionate Penalties Clause Review, But Does Not Supplant or Diminish It.

In addition to expanding the federal sentencing protections available to Illinois defendants, *Miller* also increased courts' attention to social science research surrounding juvenile brain development more broadly, including in cases applying the proportionate penalties clause. See, *e.g.*, *Harris*, 2018 IL 121932. This was predictable and appropriate: Illinois juveniles enjoy eighth amendment rights, and even in instances where the eighth amendment does not apply the U.S. Constitution defines the constitutional "floor" upon which more expansive proportionate penalties clause jurisprudence is built. Relatedly, the evolving science that formed the basis of *Miller* and its progeny directly informs the "concepts of elemental decency and fairness" and "moral sense of the community" that are the basis of judicial review of criminal sentences under the proportionate penalties clause. *Leon Miller*, 202 Ill. 2d at 339.

Miller did not and could not, however, supplant the broader and more established proportionate penalties clause constraints on sentencing in Illinois, which long predated *Miller*. Indeed, Illinois courts have taken care to distinguish the proportionate penalties clause from the *Miller* test in important respects. For example, Illinois courts have repeatedly underscored the proportionate penalties clause's independence from the eighth amendment standard by holding that *Miller* did not announce a new rule of law sufficient to establish cause for failing to raise a proportionate penalties clause challenge in a pre-*Miller* postconviction petition. In *People v. Dorsey*, for example, this Court denied defendant leave to file a successive postconviction petition challenging his sentence as inconsistent with *Miller*'s restrictions on youth sentences, holding that "*Miller*'s announcement of a new substantive rule under the eighth amendment does not provide

cause for a defendant to raise a claim under the proportionate penalties clause." 2021 IL 123010, ¶ 74. This Court went on to hold that the *Miller* holding's "unavailability prior to 2012 at best deprived defendant of some helpful support for his state constitutional law claim." *Id.*; see also *People v. Moore*, 2023 IL 126461, ¶ 42 (holding that defendant had the "essential legal tools" to raise a proportionate penalties clause challenge based on Illinois law predating *Miller*). The proportionate penalties clause governed sentencing in Illinois before *Roper, Graham*, or *Miller*, and those opinions did not replace or diminish it.

This Court also highlighted the proportionate penalties clause's independence in *Harris*, which provided guidance to defendants raising as-applied challenges to their sentences under the Illinois guarantee. In *Harris*, this Court rejected an eighteen-year-old defendant's eighth amendment challenge to his statutorily mandatory seventy-six year sentence. The Court explained that defendant's challenge was done in by the "imprecise categorical rule" cutting off *Miller* protections at a defendant's eighteenth birthday, even though doing so disallows consideration of emerging scientific research on young adult brain chemistry for youth over eighteen. *Harris*, 2018 IL 121932, ¶ 60. Because defendant was on the wrong side of that line, his challenge failed under the eighth amendment standard.

The Court did not dispatch with defendant's proportionate penalties challenge, however, and its treatment of defendant's parallel proportionate penalties clause claim under the same facts illustrates the distinction between the provisions. This Court noted that defendant's eighth amendment challenge to the sentencing statute determining his penalty was necessarily a facial challenge because it merely sought to extend *Miller* protections to defendants over eighteen. *Id.* ¶ 61. With age the only factor barring

application of the *Miller* standard to defendant, the Court could simply make its decision based on the face of the statute and knowledge of defendant's age—no other fact finding was necessary. By contrast, the Court ruled that defendant had an as-applied challenge under the proportionate penalties clause that warranted fact-finding. The Court remanded for further development of the record to determine "how the evolving science on juvenile maturity and brain development that helped form the basis for the *Miller* decision applies to defendant's specific facts and circumstances." See *id.* ¶ 46. This shows that the age cutoff is not the only difference between the *Miller* standard and the proportionate penalties clause. If the Illinois provision was simply an age-neutral extension of *Miller*, or "*Miller* for young adults," then the Court would have treated it as a facial challenge identical to the eighth amendment claim it dismissed. See also, *e.g.*, *People v. Wilson*, 2023 IL 127666 (overruling award of new sentencing hearing based on *Miller* claim, but remanding to address whether defendant appropriately raised separate proportionate penalties claim).

Most recently, in *People v. Hilliard*, this Court underscored that the bright line rules animating the eighth amendment standard articulated in *Miller* do not serve to limit sentence challenges under the proportionate penalties clause. 2023 IL 128186. As this Court recognized, "a defendant may challenge a sentence of any length" under the Illinois Constitution, which likewise "does not limit a proportionate penalties challenge to just juveniles or individuals with life sentences." *Id.* at ¶ 29.

F. Some Courts Have Conflated the Proportionate Penalties Clause and Eighth Amendment, Including Recent Opinions That Effectively Eliminate Constitutional Review of Sentences Based on Youth and Attendant Factors.

Despite the clear textual, historical, and jurisprudential basis for the proportionate penalties clause's distinction and independence from the eighth amendment, some courts

have continued to conflate the two standards, to frame the proportionate penalties clause as a mere extension of the federal *Miller* standard, and generally to give short shrift to the Illinois Constitution's protection against sentences violating the principles of "proportionality" and "rehabilitation." See, *e.g.*, *People v. Pollard*, 2016 IL App (5th) 130514, ¶ 51 (holding the proportionate penalties clause does not provide greater protection than the eighth amendment); see also *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 55 (explaining eighth amendment and proportionate penalties arguments are analyzed by the same standards).

A trend of recent cases has typified this phenomenon with harmful effect; by conflating the federal and state constitutional standards, and ignoring the force of the proportionate penalties clause, they have used *Miller* to diminish the Illinois Constitution and announced a rule that would effectively eliminate constitutional review of youth sentences in Illinois. See, *e.g.*, *People v. Elliott*, 2022 IL App (1st) 192294; *People v. Kendrick*, 2023 IL App (3d) 200127.

The opinion in *Kendrick*—a proportionate penalties clause challenge to a nineteen-year-old defendant's sixty-year sentence—is illustrative of the perils of conflating the eighth amendment and proportionate penalties clause. While acknowledging that "defendant does not raise an eighth amendment claim," the court stated that "a review of eighth amendment jurisprudence *** helps explain" the proportionate penalties clause challenge. *Id.* ¶ 30. In the ensuing discussion of the as-applied challenge the court erased nearly all distinction between the federal and state provisions, insinuating that sentencing challenges under the Illinois Constitution are just "*Miller* challenges." The court remarked that "*Miller* and its progeny establish that a defendant raising a claim under the

proportionate penalties clause must show that he (1) was under 21 years of age at the time of the offense, and (2) received a mandatory natural or *de facto* life prison sentence." *Id.* ¶ 40. This test reflects a fundamental confusion about the scope of the federal and state provisions. *Miller*—an eighth amendment case involving a defendant charged in Alabama—does not establish any Illinois constitutional principle. Moreover, while the age cutoff for actual *Miller* challenges (*i.e.*, those brought pursuant to the eighth amendment) is indeed eighteen, this court has not set a categorical age cutoff at twenty-one for as-applied sentencing challenges—under the proportionate penalties clause or the eighth amendment. To the contrary, it has explicitly stated that there is no age cutoff for challenges under the proportionate penalties clause. See *Hilliard*, 2023 IL 128186, ¶ 29.

The *Kendrick* court acknowledged that defendant's sixty-year sentence "would have constituted a mandatory *de facto* life sentence under *Miller* if it had been imposed prior to June 1, 2019." 2023 IL App (3d) 200127, ¶ 43. However, the court pointed out that in 2017 the Illinois legislature revised parole review standards for young adults twenty-one and younger at the time of their offense. See 730 ILCS 5/5-4.5-115(b). Because defendant was sentenced after the new parole statute went into effect, he was eligible for parole review in twenty years. This, the court reasoned, meant that defendant's sixty-year sentence was no longer a "*de facto* life sentence" according to the improperly merged eighth amendment/proportionate penalties clause standard the court applied. 2023 IL App (3d) 200127, ¶ 43. The *Kendrick* court thus announced a sweeping categorical rule that is patently inconsistent with the proportionate penalties clause's individualized approach: "a defendant who is sentenced after June 1, 2019 may not raise an as-applied constitutional challenge to his sentence under the proportionate penalties clause." *Id.* ¶ 42; see also *Elliott*,

2022 IL App (1st) 192294, ¶ 56 (holding that twenty-year-old defendant's 70-year sentence "does not implicate *Miller*" because of defendant's statutory eligibility for parole, and therefore rejecting his *proportionate penalties clause* challenge, described by the court as an "as-applied constitutional challenge based on *Miller*.").

II. This Court Should Grant Appellant the Opportunity to Challenge the Constitutionality of His Sentence Under the Proportionate Penalties Clause.

A. The Court Below Conflated the Proportionate Penalties Clause and Eighth Amendment, and Effectively Eliminated Constitutional Review of Sentences Based on Youth and Attendant Factors.

The majority in this case followed *Kendrick* and *Elliott*, improperly conflating the proportionate penalties clause with the eighth amendment to diminish proportionate penalties clause review, and to bar defendant from judicial review of his sentence.

The majority first held that the sentencing provisions of 730 ILCS 5/5-4.5-105 of the Illinois Code of Corrections—which codified *Miller*'s eighth amendment standard and required consideration of specified youthful factors in sentencing—did not apply to Spencer because he was over eighteen at the time of his offense. *Spencer*, 2023 IL App (1st) 200646-U, ¶¶ 120-33. It then acknowledged that the proportionate penalties clause could permit some sort of sentencing inquiry that was expanded beyond what was statutorily required, at least as to age. The court held that it "has not foreclosed youthful offenders between 18 and 19 years old from raising as-applied proportionate penalties clause challenges to life sentences based on the evolving science on juvenile maturity and brain development," and that, in that respect, the proportionate penalties clause "offers a broader path to the same type of relief" as *Miller*. *Id.* ¶¶ 138, 140.

However, the court proceeded to pivot back to the *Miller* eighth amendment

framework and use it—along with legislative reforms it inspired—to limit the scope of the proportionate penalties clause. Indeed, the court stated that "defendant's sentencing challenge is based on *Miller*," even though the sentence was challenged under the proportionate penalties clause, not the eighth amendment. *Id.* ¶ 136. It adopted the *Kendrick* court's inaccurate test, stating that "a defendant raising a claim under the proportionate penalties clause must show that he (1) was under 21 years of age at the time of the offense, and (2) received a mandatory natural or *de facto* life prison sentence." *Id.* ¶ 140.

With this framework in place, the court held that Spencer's claim was barred not by his age, but by sentence type. Specifically, the court held that the implementation of section 5/5-4.5-115(b) of the Illinois Code of Corrections on that date foreclosed review. *Id.* ¶ 142. That legislation, "enacted in response to emerging case law to address 'youthful offenders under the age of 21'" entitled Spencer to a parole review after twenty years. *Id.* (citing *Kendrick*, 2023 IL App (3d) 200127, ¶ 37). Thus, while Spencer's 100-year sentence "would have constituted a mandatory *de facto* life sentence under *Miller*" prior to June 1, 2019, his newfound eligibility for parole review after twenty years meant he "did not receive a *de facto* life sentence." *Id.* ¶¶ 141, 143. Without a *de facto* life sentence his "as applied constitutional challenge based on *Miller*"—that is to say his constitutional challenge based on the proportionate penalties clause—"necessarily fails." *Id.* ¶ 143.

Under the majority's reasoning Spencer's 100-year sentence is no longer subject to an as-applied constitutional challenge because of a) a categorical *de facto* life sentence restriction imported from *Miller*'s eighth amendment standard; and b) his eligibility for parole twenty years into his sentence. The length of Spencer's 100-year sentence—and indeed the length of any sentence imposed on a defendant under the age of twenty-one—

is immaterial under the majority's reasoning, since all defendants will be eligible for parole at some point before the forty-year threshold that defines a *de facto* life sentence. Mr. Spencer and other defendants under twenty-one at the time of their post-2019 offenses are blocked from constitutional judicial review whether they receive a sentence of forty, 100, or 1000 years.

B. Proportionate Penalties Clause Challenges Are Not Limited to *De Facto* Life Sentences.

First and foremost, proportionate penalties clause challenges, unlike those brought under the eighth amendment *Miller* standard, are not limited to *de facto* life sentences, or to any particular sentence length. *See Hilliard*, 2023 IL 128186, ¶ 29. So the majority's suggestion that Spencer's as-applied proportionate penalties clause challenge to his 100-year sentence "necessarily fails" because it is not a "*de facto* life sentence" is simply wrong. To the contrary, "a defendant may challenge a sentence of any length" under the Illinois Constitution, which likewise "does not limit a proportionate penalties challenge to just juveniles or individuals with life sentences." *Id*.

C. Categorical Denial of Constitutional Review Violates the Proportionate Penalties Clause.

The majority's rule eliminates as-applied constitutional challenges to youth sentences, no matter the length, by effectively resetting the end-date of lengthy sentences to the earliest date of parole review. This removes the judicial check on sentencing authority that is the core purpose of the proportionate penalties clause. As this Court held in *Clemons*, "[t]he constitutional mandate set forth in article I, section 11, provides a check on the judiciary, *i.e.*, the individual sentencing judge, as well as the legislature, which sets the statutory penalties in the first instance." 2012 IL 107821, ¶ 29. In *Leon Miller*, this Court was specifically concerned with statutory interference with this judicial discretion.

This Court insisted upon application of the proportionate penalties clause where the sentencing statutes at issue converged to ensure that "a court never considers the actual facts of the crime, including the defendant's age at the time of the crime or his or her individual level of culpability," which the Court found to be an unacceptable removal of judicial review. *Leon Miller*, 202 Ill. 2d at 340. The same is true here, as the rule announced by the majority would result in a statute—a parole statute designed to extend protections available to youthful defendants, no less—cutting an entire class of young defendants off from a constitutional review to which they were previously entitled. The proportionate penalties clause will not allow it.

Foreclosing review of Mr. Spencer's sentence is inconsistent with the broader history and spirit of the proportionate penalties clause as well. The proportionate penalties clause is not merely a mirror or extension of the *Miller* standard as some courts inaccurately suggest. It is an independent constitutional provision with deep historical roots long predating the *Miller* opinion. It articulates a positive right animated by twin interests absent the eighth amendment's prohibition against "cruel and unusual punishment," including particular emphasis on rehabilitation and returning defendants to useful citizenship. The categorical prohibition inherent in the majority's ruling reflects a fundamental abdication of constitutional judicial review that prevents courts from holding sentences to these standards.

The majority's rigid categorical denial of judicial review evokes the "bright lines" and "imprecise categorical rules" held to be "especially desirable" under the eighth amendment case law, but which this Court has rejected in the proportionate penalties clause context. See *Roper*, 543 U.S. at 594 (O'Connor, J., dissenting); see also *Harris*, 2018 IL

121932, ¶ 60. This Court rejected the strict age limitation of the *Miller* rule, for example, authorizing a claim allowing "the record be sufficiently developed in terms of *** facts and circumstances" for purposes of evaluating as-applied challenges under the proportionate penalties clause. See *Harris*, 2018 IL 121932, ¶ 39 (rejecting eighth amendment challenge to eighteen-year-old young adult sentence but remanding proportionate penalties challenge to allow development of record); see also *People v. Clark*, 2023 IL 127273, ¶ 87 (holding Illinois Supreme Court "has not foreclosed 'emerging adult' defendants between eighteen and nineteen years old from raising as-applied proportionate penalties clause challenges to life sentences based on the evolving science on juvenile maturity and brain development"); *People v. House*, 2021 IL 125124, ¶¶ 31-32 (remanding to allow development of record for consideration of as-applied constitutional claim); *People v. Thompson*, 2015 IL 118151, ¶ 44 (suggesting nineteen-year-old could raise as-applied challenge to mandatory life sentence in postconviction proceeding). This court has recently reaffirmed that proportionate penalties clause challenges are not limited by age, or by sentence length. *Hilliard*, 2023 IL 128186, ¶ 29.

The majority's rule is also inconsistent with the fluid review standard this court has designed to evolve with community standards of decency. See *Leon Miller*, 202 Ill. 2d at 339. Blocking a whole category of sentences from review prevents this court from considering evolving "concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Id*. To the contrary, the majority's ruling fixes that moral sense at a single point in time, shutting the judiciary's eyes to all future developments in science, law, and politics (including changes to the parole review board and state parole system as a whole), and other fields of human endeavor that might reflect on the culpability and

rehabilitative potential of defendants before Illinois courts. Openness to changing information is particularly crucial in this context, as it has been "evolving science" on youthful brain development that has fueled judicial sentencing reforms. See *Spencer*, 2023 IL App (1st) 200646-U, ¶ 140; *Harris*, 2018 IL 121932, ¶ 46.

D. The Legislature Did Not Intend the Parole Statute to Supplant or Limit Judicial Review of Youth Sentences.

The parole statute the majority uses to gut judicial review—which was intended to expand opportunities for individualized sentences, not take them away—is not a reasonable basis upon which to eclipse the application of a time-honored provision of the Illinois Constitution.

The legislature has the power to define a criminal offense and fix the punishment, whereas "'the imposition of the sentence within the limits prescribed by the legislature is purely a judicial function.'" *People v. Gates*, 2023 IL App (1st) 211422, ¶ 39 (quoting *People v. Lewis*, 88 Ill. 2d 129, 196 (1981) (Ryan, J., dissenting, joined by Goldenhersh, C.J., and Clark, J.)). The parole statute the majority uses to eviscerate judicial review cannot invade on this key judicial function. It does not even purport to do so. To the contrary, the statute itself declares that it is not intended to limit judicial review in any way:

> Nothing in this Section shall be construed as a limit, substitution, or bar on a person's right to sentencing relief, or any other manner of relief, obtained by order of a court in proceedings other than as provided in this Section.

730 ILCS 5/5-4.5-115(o).

Nor does the statute reflect an exercise of the legislature's power to "prescribe the limits" of the punishment for the offense Spencer committed in a way that would support a resolution as extreme as the majority suggests. It does not shorten or otherwise impact the duration of any sentence or class of sentences, nor does it bear on a sentence's validity.

It only sets the schedule for discretionary parole review years into the sentence imposed, in this case more than two decades after sentencing. Setting the conditions of parole is "a legislative function relating to prison government and discipline and is not a part of the judicial sentence," an "act of clemency and grace" subject to change at virtually any time. *People ex rel. Kubala v. Kinney*, 25 Ill. 2d 491, 494 (1962).

The history of the parole statute suggests that it was designed to extend consideration of individualized youthful sentencing characteristics beyond what was authorized by *Miller*—not drastically limit the judicial sentencing review that gives life to those factors. The statute was described during debates as a continuation of the legislature's response to the notion, expressed in *Miller*, "that juvenile offenders are simply wired differently and have a propensity, much more so than older offenders, to be rehabilitated." 100th Ill. Gen. Assem., Senate Proceedings, May 31, 2017, at 31 (statements of Senator Harmon). There was no indication in the debate that the statute was meant to track *Miller*'s limitations; to the contrary, the application of the parole statute to defendants up to age twenty-one demonstrates the legislature's eagerness to go beyond them. And the debate of the parole statute certainly do not reflect any desire to preempt judicial review under the proportionate penalties clause. Neither the proportionate penalties clause nor the Illinois Constitution came up during the debate at all. Senator Raoul explicitly mentioned that the legislature "ought to empower the Prisoner Review Board—*and judges*—to use their discretion to evaluate individual circumstances." (Emphasis added.) 100th Ill. Gen. Assem., Senate Proceedings, May 31, 2017, at 35 (statements of Senator Raoul).

E. Review by a Parole Board is Not a Substitute for Constitutional Judicial Review.

"'[T]he imposition of the sentence within the limits prescribed by the legislature is purely a judicial function.'" *Gates*, 2023 IL App (1st) 211422, ¶ 39 (citations omitted). It is also the judiciary's function to determine the constitutionality of a sentence imposed, whether consistent with the legislature's will or not. See *Clemons*, 2012 IL 107821, ¶ 29. Under the majority's view, Mr. Spencer is no longer entitled to the constitutional inquiry the Illinois Constitution would have required if Mr. Spencer was sentenced before June 1, 2019. See *Spencer*, 2023 IL App (1st) 200646-U, ¶ 143.

What Mr. Spencer surrenders because of this accident of timing is substantial: he foregoes an opportunity for immediate judicial determination whether his 100-year sentence is unconstitutional as applied to his personalized facts. The supposed benefit rendering this review unnecessary is that twenty years in the future a parole review board (not a judge) will have the option (not a constitutional duty) to decide whether defendant will serve the remaining eighty years of his sentence (not make any judgment about the sentence itself). See *id.* But Mr. Spencer's distant parole review opportunity is no replacement for judicial review. Far from a core judicial function of constitutional gravity, parole is "a matter of grace and executive clemency." *Hill v. Walker*, 241 Ill. 2d 479, 486 (2011). The parole review itself is not performed according to constitutional standards; indeed, it is not performed by a judge at all, but a board of political appointees whose composition in twenty years is a mystery. A prisoner has no due process right to a parole hearing. *Id.* at 487. Because parole is not a right, no review is available if the board denies it. *Dorsey*, 2021 IL 123010, ¶ 56.

Swapping parole eligibility for judicial review also diminishes Mr. Spencer's rights through sheer delay. Mr. Spencer gets precisely two rolls of the parole review dice during his 100-year sentence: one in twenty years, another a decade later, and zero attempts during the remaining seventy years of his sentence if he is unsuccessful. 730 ILCS 5/5-4.5-115(b) & (m). Mr. Spencer's presentation of mitigating facts relating to "youth" will be far less persuasive at age forty than at age twenty. The facts he manages to marshal in support of his rehabilitative potential will be decades older than they are now. Potential witnesses may be deceased or impossible to locate, and evidence that may be compelling now (information related to schooling, childhood trauma, and past diagnoses) will lose their force with the passage of time. Mr. Spencer will have lived as much of his life in prison as he has up to the point of sentencing: he will be asking the court to evaluate a different person in a fundamentally changed environment, yet the remaining eighty years of his life will hang in the balance. As one court remarked, "[t]he lengthy 20-year waiting period before an even seeking parole renders the opportunity close to 'meaningless' rather than 'meaningful.'" *Gates*, 2023 IL App (1st) 211422, ¶ 49.

Whether the "grace" of parole release will favor Mr. Spencer in twenty years is an uncertain proposition at best. See *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 8 (1979) ("In parole releases *** few certainties exist."). If the board elects to accept his review request, current parole statistics suggest Mr. Spencer will more than likely not receive parole. In 2022, the board granted only twenty-nine total parole requests, with only four resulting in parole. State of Ill. Prisoner Rev. Bd., *46th Annual Report* (Jan. 1 to Dec 31, 2022), https://prb.illinois.gov/content/dam/soi/en/web/prb/documents/prb22anlrpt.pdf. Similarly, in 2021, forty-six

requests for review were granted, with eighteen resulting in parole. State of Ill. Prisoner Rev. Bd., *45th Annual Report* (Jan. 1 to Dec. 31, 2021), https://prb.illinois.gov/content/dam/soi/en/web/prb/documents/prb21anlrpt.pdf. There has never been a year where close to half of even the granted requests for parole review that were granted resulted in actual release; in 2017, not a single one out of fifty-six parole petitions was granted. State of Ill. Prisoner Rev. Bd., *41st Annual Report* (Jan. 1 to Dec. 31, 2017), https://prb.illinois.gov/content/dam/soi/en/web/prb/documents/prb17anlrpt.pdf.

Indeed, it is unlikely that defendants with strikingly long sentences—like Mr. Spencer's 100 years—will earn the favor of the parole board. The parole review standards in Section 5-4.5-115(j) provide three scenarios wherein the board shall not parole an eligible person, one of which is "the eligible person's release at that time would deprecate the seriousness of his or her offense or promote disrespect for the law." 730 ILCS 5-4.5-115(j)(2). This is an invitation to parole board members who are so inclined to simply deny parole in cases with high sentences on the theory that the offense was simply too "serious" to permit parole.

This was precisely why the First District appellate court recently found that a defendant sentenced to life for a crime he committed at age eighteen (under a previous version of the parole statute) was entitled to judicial review under the proportionate penalties clause despite his eligibility for parole review. *People v. Carrasquillo,* 2023 IL App (1st) 211241. The trial court denied defendant's petition for rehearing on the grounds that his eligibility for parole made his sentence ineligible for review under the proportionate penalties clause. *Id.* ¶ 41. Defendant's experience serves as a case study in the treatment lengthy sentences get before the parole board: defendant had been denied more than *thirty*

times. This fact, the appellate court observed, was "no coincidence." *Id.* ¶ 50. This was because by imposing a lengthy sentence (200-600 years) "the sentencing judge was sending a message to the Board that Mr. Carrasquillo should not be granted parole even if he were eligible." *Id.* ¶ 50. Despite significant evidence presented in defendant's favor—even testimony from his former prosecutor—the Board "repeatedly denied Mr. Carrasquillo parole because doing so would 'deprecate the serious nature of the offense.'" *Id.* Finding it decisive that the sentence was challenged under the proportionate penalties clause rather than the eighth amendment, the Court found that mere eligibility for parole did not render defendant's sentence ineligible for review, vacated the sentence, and remanded for rehearing consistent with the Illinois Constitution. *Id.* ¶¶ 47, 59.

The appellate court followed a similar approach in *Gates*, 2023 IL App (1st) 211422. In *Gates*, the court found that statutory parole eligibility does not bar proportionate penalties clause review of young adult sentences. See *id.* ¶¶ 45-47. The majority criticized *People v. Elliott* (discussed above as the first appellate court to rule that parole eligibility foreclosed constitutional review) as "seriously flawed." *Id.* ¶ 44. Noting the fundamental differences between judicial review and a future parole review, the Court held that "categorizing parole as some type of pilot release is misconceived." *Id.* It went on to note that Illinois' "parole scheme does not afford offenders like [defendant] access to the courts or a meaningful opportunity for release," and thus did not impact eligibility for sentencing review. *Id.* ¶ 47.

Other state supreme courts have similarly recognized the illusory nature of parole. For instance, in *State v. Patrick*, a juvenile offender, who was seventeen years old at the time of his crime, brought a state and federal constitutional challenge to the trial court's

failure to consider his youth before it imposed a life sentence—with the possibility of parole in thirty years. 172 N.E.3d 952 (Ohio 2020). The Ohio Supreme Court held that parole eligibility did not diminish the constitutional duty to consider a juvenile offender's youth as a mitigating factor at sentencing. *Id.* at 960. The Ohio Supreme Court discussed the illusory nature of parole eligibility (Ohio's parole release rate was only 10.2 percent), as well as the lengthy wait before review, as reasons why it did not impact a defendant's eligibility for constitutional review. *Id.* at 959-60. The Court remarked that "parole eligibility for the first time in [a juvenile defendant's] 50s while under a life sentence should not be confused with the opportunity for *judicial* release." *Id.* at 960.

The Iowa Supreme Court likewise held that a sixty-year sentence of a juvenile offender violated *Miller* because the sentence was the "practical equivalent of life without parole" even though defendant had distant future parole eligibility. *State v. Ragland*, 836 N.W. 2d 107, 121-22 (Iowa 2013). The court explained that "the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole." *Id.* at 120. It elaborated that "[t]he spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible," and that the Court must take seriously "the profound sense of what a person loses by beginning to serve a lifetime of incarceration as a youth." *Id.*; see also *Bonilla v. Iowa Board of Parole*, 930 N.W. 2d 751, 772-73 (Iowa 2019) (explaining parole reviews involving "repeated incantations of ritualistic denials" could "convert a potentially valid sentence into the functional equivalent of an unconstitutional life without possibility of parole.").

A distant future parole review is so drastically different from an *ex ante* judicial review that it cannot possibly serve as its substitute. The proceedings are different in purpose, structure, timing, and outcome. And fundamentally, foreclosing judicial review stands to rob defendant of recognition that their sentence was unconstitutional, which parole review can never accomplish. As one scholar aptly put it, "if the possibility of parole does not afford an inmate a true expectation of release, why should it render valid an otherwise invalid sentence?" Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 Cardozo L. Rev. 1031, 1059 (2014).

F. Spencer's Sentence is a *De Facto* Life Sentence.

While the Illinois Constitution "does not limit a proportionate penalties challenge to *** individuals with life sentences," (*Hilliard*, 2023 IL 128186 at ¶ 29), Mr. Spencer's sentence is a *de facto* life sentence in any event. This Court has established forty years as the length above which juvenile and young adult sentences are considered *de facto* life. *Buffer*, 2017 IL App (1st) 142931, ¶ 62. Mr. Spencer was sentenced to a total of 100 years in prison for his alleged crimes: fifty years for first-degree murder, twenty-five years for attempt first-degree murder, and another twenty-five years for home invasion. Based on this Court's previous rulings, this is a *de facto* life sentence. For all the reasons stated above, mere eligibility for non-judicial parole review in the future does not shorten a defendant's sentence or evaluate the sentence's validity, and it is not an adequate substitute for constitutional review to which a defendant is entitled. See *Gates*, 2023 IL App (1st) 211422, ¶ 70 ("[T]he possibility for parole does not preclude Gates from serving a *de facto* life sentence, and so his 48-year sentence amounts to a *de facto* life sentence."); *Carrasquillo*, 2023 IL App (1st) 211241, ¶ 51 (defendant's "sentence of 200 to 600 years

is the functional equivalent of a life without parole sentence *** [lower] court manifestly erred in denying his petition on the basis that [defendant] was eligible for parole").

G. This Court Should Permit Appellant to Raise an As-Applied Challenge to His Sentence Pursuant to the Proportionate Penalties Clause.

As Justice Hyman observed in his dissent below, it is crucial that courts "hear claims like Spencer's and never abdicate our duty to review 'the gravity of [a person's] offense in connection with the severity of the statutorily mandated sentence within our community's evolving standard of decency.'" *Spencer*, 2023 IL App (1st) 200646-U, ¶ 166 (citing *Leon Miller*, 202 Ill. 2d at 340). Mr. Spencer presented individualized facts in mitigation of his sentence relating to youth and attendant circumstances that the trial court ignored, and the appellate court improperly insulated this decision from review under the Illinois Constitution. This Court should permit Mr. Spencer to present the necessary facts to mount an as-applied challenge to his 100-year sentence under the proportionate penalties clause, either through a resentencing hearing in the trial court below or through a post-conviction proceeding as directed by *People v. Harris*.

Dated: May 3, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 345 and 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 41 pages and 12,149 words.

/s/ Alexis Picard
Alexis Picard

Counsel for Amicus Curiae

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned, an attorney, certifies that on May 3, 2024, he caused the foregoing **Motion for Leave** and the attached **Brief of the American Civil Liberties Union of Illinois as *Amicus Curiae* in Support of Mr. Spencer** to be filed with the Clerk of the Supreme Court of Illinois using the Court's electronic filing system and that the same was served to the following:

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Within five days of acceptance by the Court, the undersigned also states that she will cause thirteen copies of the Brief of *Amicus Curiae* to be mailed with postage prepaid to the following address:

Clerk of the Supreme Court of Illinois
Supreme Court Building
200 E. Capital Ave.
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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.

/s/ Kevin M. Fee, Jr.
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