

No. 131560
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of
	)	Illinois, No. 2-24-0284.
Plaintiff-Appellant,	)	
	)	There on appeal from the Circuit Court
-vs-	)	of the Sixteenth Judicial Circuit, Kane
	)	County, Illinois, No. 14 CF 76.
	)	
DIMITRI GREEN-HOSEY,	)	Honorable
	)	Elizabeth K. Flood,
Defendant-Appellee.	)	Judge Presiding.
	)	

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUES PRESENTED FOR REVIEW

- I. Whether manifest error remains the appropriate standard of review for assessing a trial court's grant of postconviction relief following a third-stage evidentiary hearing, where fact-finding and credibility determinations were involved.
- II. Whether Judge Flood's determination that Dimitri Green-Hosey was entitled to a new sentencing hearing following a third-stage evidentiary hearing was appropriate where she heard uncontradicted expert testimony that connected evolving brain science to Dimitri's particular characteristics, including his adverse childhood experiences, rendering him more akin to a juvenile than an adult at the time of his offenses, and Dimitri's initial sentencing hearing was not *Miller* compliant.

STATUTES AND RULES INVOLVED

Ill. Const. 1970, art. I, § 11

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

SUPPLEMENTAL STATEMENT OF FACTS

The State's brief adequately sets forth the relevant pretrial, trial, and direct appeal proceedings. (St. Br. 2-24) Any other facts relevant to the issues on appeal from those proceedings will be included, if needed, together with a citation to the record in the argument section of this brief. However, the State's rendition of Dimitri Green-Hosey's original sentencing hearing and the postconviction proceedings fails to provide this Court with all of the relevant information necessary to address the issues presented. Thus, the following facts concerning Dimitri's sentencing, the postconviction proceedings, Judge Flood's order granting Dimitri relief, and the State's appeal are necessary for consideration of whether the postconviction court manifestly erred.

On January 14, 2014, Dimitri Green-Hosey¹ and his older brother, Jaquan Green-Hosey, were both arrested and charged with first degree murder, felony murder, and armed robbery for the January 13, 2014, death of Arin Williams, a marijuana dealer, who was shot and killed in the back hallway of La Torta Mexican Restaurant in Aurora. (C. 36-39; R. 330-331, 367-368) At the time of the offense, Dimitri was 18 years, eight months, and 18 days old—April 27, 1995, to January 13, 2014. (CI. 4)

Roughly two years after Dimitri and Jaquan were arrested, Jaquan pled guilty in exchange for a 25-year sentence under the condition that he testify against his younger brother. (E. 40-47; C. 201-204) After a jury trial,² Dimitri was found guilty of both first degree murder and armed robbery. (C. 241, 247-250) The jury also found that Dimitri personally discharged a firearm

¹ It should be noted that throughout the record, direct and State appeals, State's brief, and on the IDOC website, Dimitri Green-Hosey is also referenced as Demitri Green-Hosey.

² For more facts surrounding the jury trial, please see *People v. Green-Hosey*, 2019 IL App (2d) 170110-U.

during the commission of those offenses. (C. 241, 247)

Sentencing and Motion to Reconsider Sentence

At sentencing, it was agreed that Dimitri's multiple murder convictions merged into the first degree murder with a firearm conviction and that the sentence for the armed robbery conviction had to be served consecutive to the sentence imposed on the first degree murder. (R. 727-728) It was also agreed that Dimitri was subject to a mandatory firearm add-on of 25 years to life on both sentences, making the minimum possible sentence an aggregate of 76 years—45 years on the first degree murder and 31 years on the armed robbery. (R. 728)

In light of the mandatory minimums, firearm add-ons, and consecutive sentencing, defense counsel did not argue any mitigating factors on Dimitri's behalf, and instead told the court that "its really not going to make much of a difference" and "what difference does it make." (R. 758) After counsel's remarks, Dimitri made a brief statement in allocution, stating:

"Well, first of all, I would like to apologize to Arin Williams' family. I wish it never happened. If I could go back to that day and change things, I would. And I'm sorry. I truly am.

And to the Court, you know, all I would like to say is, you know, I'm not asking for your sympathy in my sentencing. I'm not asking for, you know, the Court, you know, to sympathize with me or nothing. You know, when you pray for rain, sometimes you got to deal with the mud. And that's all I would like to say." (R. 761)

The court sentenced Dimitri to 60 years for first degree murder, 35 years plus the 25-year firearm add-on, and 45 years for armed robbery, 20 years plus another 25-year firearm add-on. (C. 260-265; R. 769) The two sentences were ordered to be served consecutively for an aggregate term of 105 years' imprisonment. (C. 260-265; R. 769)

In handing down Dimitri's 105-year sentence, the court found that none of the enumerated statutory factors in mitigation found at 730 ILCS 5/5-5-3.1 applied. (R. 761-762) The court

did not consider any other statutory or non-statutory factors in mitigation. (R. 761-770)

In aggravation, the court noted that, while Dimitri had minimal criminal history and no adult history, he had a 2008 juvenile adjudication for battery and “did not take the [juvenile] Court’s orders to heart and ended up doing 60 days in jail before his probation was terminated.” (R. 762) The court also found that a more severe sentence was necessary in this case to deter others from committing the same offense, though the court acknowledged that “240 years” of efforts to deter others through sentencing had “yet to prevent” people from misusing guns and drugs or “from thinking that they can take what isn’t theirs when they want to and when they want to and how they want to. And we have yet to prevent people from senselessly taking the lives of other individuals. Whether those individuals are innocent or not innocent, they still deserve to be alive.” (R. 762-763) The court reiterated its belief that no one was thrilled to be in court for sentencing and that the court, its staff, the individuals in the gallery, and counsel were all missing out on a great victory for Chicago due to a senseless killing and Dimitri’s “greed.”³ (R. 764) Lastly, the court expressed concern that Dimitri’s “thought process” that led to the offense, which the court believed showed a lack of respect for Williams as a human being and Williams’ property, “might never change.” (R. 765-766) The court further found that Dimitri’s sentence needed to send a message to “deter people from using guns in selfish manners where they are not thinking of anyone but their own selfish pleasure.” (R. 768)

Dimitri filed a timely motion to reduce the sentence and asked the court to consider *Miller v. Alabama*, 567 U.S. 460 (2012), and similar cases. (C. 268-271) The motion alleged

³Dimitri was sentenced on November 4, 2016, while Chicago was celebrating the Chicago Cubs first World Series win in over 108 years. See <https://www.cbsnews.com/pictures/world-series-2016-chicago-cubs-victory-parade/#:~:text=in%20108%20years.,Grant%20Park,Champion%20Chicago%20Cubs%20Day%E2%80%9D%20statewide>. (Last visited April 26, 2026).

that the court failed to take into account Dimitri's youth and the mitigating factors associated with it, rendering Dimitri's 105-year sentence cruel and unusual—highlighting a variety of youth-based mitigating factors that defense counsel believed had not been taken into consideration at sentencing, such as: Dimitri's personality characteristics, home life, lack of a prior criminal history despite Dimitri being homeless and on his own since he was 13 years old, the circumstances surrounding the shooting, Dimitri's status as receiving social security disability for mental behavioral health problems since he was five or six years old, the fact that half of Dimitri's family had substance abuse problems, and that Dimitri was abused by his father as a child when his father was not in prison. (C. 269-271; R. 774-776, 779-780)

The trial court denied the motion to reduce sentence and declined to consider the *Miller* factors, finding that the *Miller* decision “is a bright line rule *** and they made it at 18.” (C. 278; R. 780-792) The court also found that the 25-year firearm add-ons were mandatory and that “it is to interpret the law and apply the law***not to legislate from the bench, nor will I do so, nor will I accept the invitation to do so unless mandated by my Supreme Court or Appellate Court.” (R. 781) The court found that the sentencing statutes mandate that 25 years be added onto each of Dimitri's sentences for first degree murder and armed robbery and “[t]hat's a mandate that I have that I cannot go away from.” (R. 782) The trial court agreed that Dimitri's 105-year aggregate sentence “somewhat equal[ed] a *de-facto* life sentence,” and, noted that Dimitri was “a very young man,” acknowledging that he had rehabilitative potential. (R. 785, 789) The court also acknowledged that it “did not like the sentence that [it had] to give,” but it felt “compelled” by law to impose the aggregate 105-year sentence. (R. 791) Finally, the court called on the legislature to consider making the firearm enhancements and consecutive sentencing discretionary for young adults over the age of 18, stating, “it is time for the legislature

to take a look at the sentencing and allow the courts to attempts [*sic*] to formulate a sentence on a case-by-case basis and not handcuff the courts by requiring mandatory sentences that basically do give a *de-facto* life sentence.” (R. 790-791)

Direct Appeal

Dimitri appealed both his conviction and sentence and the appellate court affirmed. *People v. Green-Hosey*, 2019 IL App (2d) 170110-U, ¶¶ 3, 71-72. Specifically, the appellate court found that the sentencing statutes were not unconstitutional, facially or as-applied to Dimitri, and that the trial court did not abuse its discretion at sentencing. *Id.* ¶¶ 46-55. In its ruling, the appellate court also addressed the proportionate penalties clause, as-applied application of *Miller v. Alabama*, and the facial constitutionality of the sentence itself. *Id.* ¶¶ 46-62. At that time, the appellate court found that Dimitri’s 105-year sentence did not shock the community and that it did not violate the proportionate penalties clause before finding that the record was not sufficiently developed to address Dimitri’s as-applied challenge. *Id.*

Postconviction proceedings and the State’s appeal

On March 5, 2021, Dimitri timely filed a petition for postconviction relief, alleging, in essence, that his sentence violated the proportionate penalties clause as a *de-facto* life sentence and that the sentencing court did not consider multiple facets of Dimitri’s upbringing and adverse childhood experiences, including: physical, mental, and sexual abuse, lack of stable housing, lack of food, foster care placements, domestic violence and drug use in the home, and mental health placements. (C. 340-377) A letter signed by Patricia Hosey, Dimitri’s mother, an academic article regarding adolescent maturity and the brain, and an affidavit from Dimitri detailing his efforts to obtain records through the freedom of information act were attached to his initial petition. (C. 378-388)

On April 20, 2021, Judge Tegeler advanced Dimitri's petition to the second-stage of postconviction proceedings and appointed the public defender. (C. 395) Before defense counsel filed an amended postconviction petition, the case was reassigned to Judge Flood for second-stage proceedings. (C. 402)

On June 17, 2022, Dimitri filed an amended postconviction petition alleging that he was entitled to a new sentencing hearing due to the trial court's failure to consider his youth and attendant characteristics. (C. 406-412) Dimitri attached a report from Dr. James Garbarino, a specialist in the field of child and adolescent development, that connected evolving brain science to Dimitri's specific circumstances based on his adverse childhood experiences. (E. 51-70) In his report, Dr. Garbarino provided a developmental analysis of Dimitri based on evolving brain science, Dimitri's social history, and Dimitri's results on the adverse childhood experiences scale. (E. 51-70; E. 883 v4) After applying Dimitri's particular circumstances to the evolving brain science, Dr. Garbarino concluded that Dimitri should be "viewed from the perspective provided by the *Miller v. Alabama* Supreme Court decision" and that "immaturity is compounded for individuals, like Dimitri, who have experienced a high level of adversity growing up (and whose brain development is thus slowed relative to individuals who have not experienced a high level of childhood adversity)." (E. 56-57)

In response, the State filed a motion to dismiss Dimitri's petition, (C. 414-441), arguing that the *Miller* safeguards should not apply to Dimitri because his sentence did not shock the moral sense of the community; he failed to make a substantial showing that at the time of the murder and armed robbery, his specific characteristics, those related to youth, level of maturity, and brain development, placed him in the same category as juvenile offenders described in *Miller*; the sentencing hearing was *Miller* compliant; and that the court could not grant the

relief requested and, at most, could only advance the proceedings to a third-stage hearing. (C. 421-441)

The court denied the State's motion to dismiss and advanced Dimitri's petition for a third-stage evidentiary hearing. (C. 499-501) Specifically, the postconviction court found that Dr. Garbarino's report was sufficient, Dimitri made a substantial showing that his individual characteristics required the application of *Miller*, and Dimitri's original sentencing hearing was not *Miller* compliant. (C. 499-501; R. 796-804)

On October 13, 2023, Dr. James Garbarino testified on Dimitri's behalf, without any objection from the State, as an expert in developmental psychology. (R. 813-872)

Dr. Garbarino informed the court that he sent Dimitri the adverse childhood experiences ("ACE") questionnaire as well as a list of life history questions, wherein he asked Dimitri to respond in writing and instructed Dimitri to be as honest as possible and to disclose everything pertaining to what he was being asked. (R. 822-823) Then, after Dr. Garbarino received Dimitri's ACE questionnaire and other written responses, he began to draft his initial developmental analysis report and sent follow-up questions to Dimitri as needed. (R. 822-823) Once that process was complete, Dr. Garbarino finalized his developmental analysis report. (R. 823) Dr. Garbarino confirmed that he did not verify the information Dimitri provided him and explained that his role was as an analyst, not as an investigator, and that he was "just an education witness trying to make sense of the information that I have without engaging in a full-scale investigation." (R. 860)

Dr. Garbarino clarified that while he did not verify the information he was provided, in the course of his analysis he did review the contents of Dimitri's 2019 appellate decision and noted that regardless of what the legislature intended it "must not impinge on my

understanding developmentally what's appropriate," and "considering the armed robbery and the homicide as separate crimes doesn't make much sense psychologically however legally mandated it is." (R. 849)

In addition to reviewing Dimitri's ACE responses and direct appeal, Dr. Garbarino also reviewed Dimitri's IDOC records and a note from Ms. Sturghill, a mental health counselor at IDOC. (R. 858-859) Dr. Garbarino agreed that he did not contact IDOC to request Dimitri's mental health records or medical records from Ms. Sturghill, but for the purposes of his analysis, it was sufficient to know that Dimitri had some treatment for depression, as that is something that is predicted by the ACE scale and Ms. Sturghill's note was merely confirmatory. (R. 859-860) Dr. Garbarino also stated that he did not order any neuropsychological testing of Dimitri and reiterated that ordering such testing fell outside the scope of what he was doing here. (R. 861-862)

Dr. Garbarino explained that following the decision in *Miller v. Alabama*, he was asked to work on resentencing cases that were covered under *Miller* in multiple jurisdictions around the country, leading to a standard format that "covered the developmental science issues that are embedded in the *Miller* ruling and the extension of the *Miller* protections upward" of age 18 based on that developmental science. (R. 820-821)

In preparation of Dr. Garbarino's report and at Dr. Garbarino's request, Dimitri completed the ACE Scales questionnaire, responding yes to all 10 questions posed. (R. 826-827) Dr. Garbarino explained that "the Adverse Childhood Experiences Scale is a series of 10 questions, some of which have more than one part, asking about experiences growing up." (R. 824) All questions are "yes or no" and it is Dr. Garbarino's practice to always ask for an explanation or example and details anytime an individual provides a yes answer to one of the questions in order to provide some context for the response. (R. 824) The ACE Scales are widely used

throughout the country, even endorsed by the Center for Disease Control and Prevention, and have been found “incredibly predictive of life difficulties” including, “substance abuse, suicidal behavior, depression, violent behavior” as well as a wide range of health problems, cardiovascular problems, certain kinds of cancer, and life expectancy. (R. 824-826) Based on tens of thousands of people responding to the ACE Scales, Dr. Garbarino stated that it was known that “only 1/10th of 1 percent, one in a thousand people scored 8, 9, and 10.” (R. 826) This “helps individualize the understanding of how much adversity a person had knowing that the level of adversity is very powerful in predicting late-in-life difficulties.” (R. 826)

Dr. Garbarino explained that based on Dimitri’s responses and his score of 10, only one in one thousand people report that much adversity. (R. 827) Dr. Garbarino also explained that each question that an individual responds, “Yes,” to “contributes to threats to normal development,” before addressing the specifics of each of Dimitri’s adverse childhood experiences, sexual abuse from a foster mother, physical abuse from his father, emotional abuse from his mother, witnessing domestic violence and substance abuse, parental incarceration, and how those experiences adversely impacted Dimitri’s “pathway developmentally.” (R. 828-831) Dr. Garbarino informed the court that since his April 2021 report on Dimitri “a very significant white paper was issued by the Center for Law, Brain & Behavior that deals with the post-18 issues” and that in “August of 2022, the American Psychological Association Council of Representatives voted to -- 166 to 6 to argue that the developmental science is clear and settled that 18- to 21-year-olds should be protected from execution as a follow-up to the *Roper versus Simmons* decision.” (R. 833) After review of the evolving brain science and Dimitri’s particular circumstances, Dr. Garbarino opined within a reasonable degree of psychological certainty that:

“[Dimitri’s] specific experience of adversity and trauma in the social environment in which he was growing up placed him at extremely high risk for delinquent violent behavior.

That -- that the crime that he committed -- is -- in a way makes sense, given his accumulation of adversity, his experiences of trauma, his -- the morally corrupting affects of gang life and so on.

So I think that, coupled with the fact that at age 18 he is in this category that developmental research says have had difficulty making good decisions, executive function, as it’s called, and managing emotions, affective -- affective emotional issues, affective regulation issues.

So I think the conclusion was that the current status of science would say that, given his experience, he should be sentenced with respect to the juvenile protections.” (R. 834-835)

Dr. Garbarino’s full report on Dimitri was admitted into evidence without objection. (R. 839-840; E. 51-70)

Dr. Garbarino’s report detailed the developmental science and brain development attributable to juvenile and emerging adults—18 to 25 years old—citing to multiple academic studies and published literature concluding that the brain is not fully developed until roughly the age of 25 and that development can be delayed based on the adversity an individual experiences. (E. 51-56) Due to the present understanding of emerging adult brain development, legislatures in other jurisdictions have begun amending the penal code to require the consideration of the *Miller* factors up to the age of 23, and the death penalty is forbidden until at least the age of 26. (E. 51-56)

Dr. Garbarino explained that when he was writing his report for Dimitri he considered the facts of the offense in “the most limited way,” and the severity of the offense was also viewed in a limited fashion because he was “unaware of research that shows that the severity of the crime has much predictive power for predicting rehabilitation and transformation.” (R. 847) Dr. Garbarino clarified that his focus was not so much on what a defendant did but why

the defendant did it. (R. 847) Throughout his testimony, Dr. Garbarino reiterated that his “emphasis tends to be on what I think makes sense from a developmental point of view, understanding that there are legal, moral, political issues that may affect sentencing rules and regulations.” (R. 848-849) Dr. Garbarino opined that there is a clear scientific basis for extending the *Miller* protections beyond juveniles, but explained that he is not of the opinion that “no individual between 18 and 25 should be considered eligible for life or *de facto* life sentence unless there is a realistic possibility of release.” (R. 843-844)

In Dr. Garbarino’s expert opinion, Dimitri would not reach brain maturation until between the ages of 25 and 26 years old. (R. 844) Dr. Garbarino formed this opinion “based on the science that says you can’t presume brain maturation until about age 25, coupled with developmental science and neuroscience that says the experience of adversity tends to slow down the process of maturation due to its effect on what’s called white matter in the brain.” (R. 844-845)

Similar to Dr. Garbarino’s testimony, Dr. Garbarino concluded in his report that Dimitri “should be viewed from the perspective provided by the *Miller v. Alabama* Supreme Court Decision” and commented on how he felt each of the *Miller* factors applied specifically to Dimitri and his particular circumstances. (E. 56- 68) Notably, Dr. Garbarino found that:

“[A]t age 18, Dimitri was encountering the world with an immature brain. This immaturity figures prominently in the problems of poor decision making (‘executive function’) and managing emotions (‘affective regulation’) that characterize adolescents and individuals in the ‘emerging adulthood’ periods of life. This immaturity is compounded for individuals, like Dimitri, who have experienced a high level of adversity growing up (and whose brain development is thus slowed relative to individuals who have not experienced a high level of childhood adversity).” (E. 57)

“The resilience picture for Dimitri is challenging, given the weight of adversity he carried into adulthood and his intellectual limitations (his reading was assessed at a fourth grade level in 2021). He has been diagnosed with depression and

anxiety (for which he has been prescribed medications—Although he is still young (age 25) and thus a ‘work in progress,’ Demetri has begun to make progress towards rehabilitation and positive transformation.” (E. 65-66)

“Demitri has only recently reached the age at which brain maturity can be presumed. He now can use this mature brain to begin the processes of productive and developmentally enhancing activities. With an ACE score of ten, Demitri has a lot to process, so the more he applies himself to developmentally enhancing activities the better.” (E. 67)

Dr. Garbarino concluded that Dimitri was not one of the rare irreparably corrupt individuals and his *de facto* life sentence of 105 years was developmentally inappropriate given Dimitri’s particular circumstances and experiences, based on contemporary developmental science. (E. 68)

On December 15, 2023, the postconviction court granted Dimitri’s petition and ordered a new sentencing hearing, finding that Dimitri proved that the *Miller* factors applied to him and his original sentencing hearing was not *Miller* compliant. (R. 898) In both her oral and written rulings, Judge Flood made several specific findings of fact. (R. 898; C. 499-501, 545-548) As a part of the court’s ruling, Judge Flood incorporated the court’s factual findings from its ruling on the State’s motion to dismiss pertaining to Dimitri’s original sentencing hearing’s lack of *Miller* compliance. (C. 499-501, 548)

The court found Dr. Garbarino’s testimony to be credible and that, after review of the 27 reports admitted by the State, the reports were not identical and did not impact Dr. Garbarino’s credibility or render his opinion incredible in this case. (C. 546-548) The court further found that the self-reported information Dimitri provided to Dr. Garbarino regarding his adverse childhood experiences was consistent with the presentence investigation report, and Dr. Garbarino’s opinion that “to a reasonable degree of psychological certainty, [Dimitri’s] experience of adversity and trauma left him at a high risk of delinquent and violent behavior, and at age 18, his executive functioning was not fully developed and he had difficulty managing emotions,

such that his characteristics as a juvenile should have been considered at sentencing” were “well-founded on facts and based on [Dr. Garbarino’s] expertise.” (C. 546-548)

Based on the above findings and conclusions, Judge Flood granted Dimitri postconviction relief in the form of a new sentencing hearing. (C. 545-548; R. 898)

The State filed a motion to reconsider and, in the course of argument, the State conceded that the *Miller* considerations can extend to 18- or 19-year-olds and that Dimitri’s original sentencing hearing was not *Miller* compliant, stating:

“It has never been the State’s position that *Miller* doesn’t extend to 18 or 19 year olds. It’s the State’s position it only extend[s] to [them] under the proportionate penalties clause. How does that extend? There are three things that need to be found. One of them was that the sentence wasn’t *Miller* compliant. It was never the State’s position that the sentencing hearing was *Miller* compliant. We never argued that. We argued the other two points. One being the sentence doesn’t shock the moral sense of the community which is a requirement under the proportionate penalties clause claim; and the second thing was that it was the defendant’s burden to plead and prove. The defendant’s burden to plead and prove his specific and individual characteristics require that application of *Miller* because he is more like a juvenile.” (R. 917)

The court denied the State’s motion to reconsider, stating it reviewed its own ruling, the cases cited by both parties, and the prior pleadings finding that there was sufficient evidence presented. (C. 568; R. 918-919) The court also reiterated that it had “not made any finding as to the applicability of a parole statute or the minimum sentence should this move forward to sentencing hearing. Those are factors that were outside of the Court’s consideration in applying the law to whether this should proceed -- or , whether the third stage relief should be granted. As to any issues regarding the sentencing itself, those will be addressed at the sentencing hearing.” (R. 918-919)

The State appealed the court’s postconviction ruling, and the appellate court affirmed. (C. 573); *People v. Green-Hosey*, 2025 IL App (2d) 240284, ¶¶ 75-76. Specifically, the appellate

court found that the postconviction court's decision was not manifestly erroneous, noting that the "record belies the State's assertion that the court abdicated its role to determine credibility or hold defendant to his burden to make a substantial showing in support of his petition." *Id.*

¶ 45. Further, the appellate court found that it was appropriate for the postconviction court to find that the information Dimitri provided to Dr. Garbarino was not inconsistent with the information he had already provided in the presentence investigation report, and that there "was no obvious basis here to suggest that the information was incorrect simply because [Dimitri] provided it." *Id.* ¶ 47. The appellate court also upheld the postconviction court's factual and credibility findings in relation to Dr. Garbarino's testimony, area of expertise, and opinion.

Id. ¶¶ 50-52. Lastly, the appellate court held:

"As such, while an as-applied proportionate penalties claim requires a showing that the sentence is so disproportionate to the offense as to be cruel, degrading, or shocking to the moral conscience of the community, that showing is implicitly satisfied for an emerging adult offender challenging a life sentence based on *Miller* if he or she demonstrates *** that individual circumstances require application of *Miller* and the original sentencing hearing lacked *Miller* safeguards. In other words, a life sentence without parole is shocking to the moral sense of the community if it was imposed upon an emerging adult defendant who has established that (1) the science underlying *Miller* and its progeny applies to his or her specific facts and circumstances and (2) his or her age and youth-attendant circumstances were not considered at the original sentencing hearing before that life sentence was imposed." *Id.* ¶ 59.

The appellate court affirmed the decision of the postconviction court and remanded the case for resentencing, noting that it was "not implying that [Dimitri] is precluded from receiving the same sentence under current law" at a new sentencing hearing. *Id.* ¶¶ 73-76.

ARGUMENT

I. Based on this Court’s longstanding precedent, a circuit court’s grant of postconviction relief following a third-stage evidentiary hearing is reviewed for manifest error.

Manifest error is the appropriate standard of review for assessing a circuit court’s grant of postconviction relief following a third-stage evidentiary hearing. *See People v. Coleman*, 2013 IL 113307, ¶ 98 (a court’s decision to grant or to deny postconviction relief after an evidentiary hearing is reviewed for manifest error), citing *People v. Morgan*, 212 Ill. 2d 148, 155 (2004) (“Where, as here, the circuit court has held an evidentiary hearing on a postconviction petition at which the court was required to consider new evidence and weigh the credibility of witnesses, we will disturb the circuit court’s judgment only if it is manifestly erroneous.”) As such, this Court should review the postconviction court’s grant of relief—a new sentencing hearing—following a third-stage evidentiary hearing for manifest error.

In its opening brief, the State asks this Court to review the postconviction court’s grant of relief following a third-stage evidentiary hearing with a new bifurcated standard, rather than the longstanding and established standard of manifest error. (St. Br. 24, 27-30) In doing so, the State claims that this Court has “not previously articulated the standard of review for a circuit court’s granting of relief on a postconviction claim following a third-stage evidentiary hearing.” (St. Br. 24, 27-30) The State argues that anytime a postconviction court *grants* a petitioner any relief, this Court should review that grant *de novo*, arguing that the postconviction court’s determination that any relief is warranted is a legal conclusion that a constitutional error occurred at the petitioner’s trial or sentencing. (St. Br. 24, 27-30) The State also posits that anytime a postconviction court *denies* a petitioner relief, that denial is not a legal conclusion and is solely a factual determination that should be reviewed for manifest error. (St. Br. 24,

27-30) Lastly, the State agrees that the current standard of manifest error is appropriate for the review of the circuit court's factual and credibility determinations. (St. Br. 24, 27-30) For the reasons argued here, this Court should reject the State's proposed bifurcated and delineated standard of review and find that the established standard of manifest error remains appropriate for evaluating the grant or denial of relief following a third-stage evidentiary hearing.

It should be noted that the State did not request a different or bifurcated standard of review in the appellate court nor was it mentioned in the State's petition for leave to appeal to this Court. (A.C. St. Op. Br. 17; St. PLA) (a copy of the State's Appellate Court brief and PLA are in the appendix). Consequently, the State has forfeited any argument that the standard of review used by the appellate court was erroneous. *People v. Guy*, 2025 IL 129967, ¶¶ 54-64 (declined to excuse forfeiture where the State failed to raise the issues in the appellate court or in the petition for leave to appeal). Accordingly, even if this Court had not already determined the appropriate standard of review, the State failed to preserve their request for a different standard of review and the State's request should be denied.

Forfeiture aside, the State also conceded that manifest error was the appropriate standard of review in the appellate court and cannot change course now. (A.C. St. Op. Br. 17) Notably, in the appellate court the State posited:

“When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved, the reviewing court will not reverse a circuit court's decision unless it is manifestly erroneous **** If no such determinations are necessary at third stage, *i.e.*, no new evidence is presented and the issues presented are pure questions of law, the reviewing court will apply a *de novo* standard of review, unless the judge presiding over postconviction proceedings has some special expertise or familiarity with the trial or sentencing of the defendant and that familiarity has some bearing upon disposition of the postconviction petition.” (internal quotations and brackets omitted) (A.C. St. Op. Br. 17)

Indeed, the State instructed the appellate court to review the issues before it for manifest

error in its opening brief. The State also did not raise the issue in its petition for leave to appeal. (St. PLA); *see People v. Guy*, 2025 IL 129967, ¶¶ 54-64 (this Court declined to consider an argument made by the State because the State had conceded the issue in the appellate court and failed to include the issue in its petition for leave to appeal); *see also Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2011 IL 111611, ¶ 63 (“While this court does not require a fully developed argument in a petition for leave to appeal, a party must raise an argument with sufficient grounds to show there is an issue.”). Thus, the State’s request for a bifurcated standard of review should be denied as the State already conceded that manifest error is the appropriate standard of review in this case.

Nevertheless, even if this Court were to excuse the State’s forfeiture and prior concession, the State’s argument for a bifurcated standard should still be rejected by this Court. On its face, the State’s proposed bifurcated standard, and its proposed delineation between a grant or a denial of relief, is fundamentally unfair. If this Court were to adopt the State’s proposal and differentiate between a reviewing court’s assessment of a grant of postconviction relief versus its denial, the scales would always tip in the State’s favor, affording the court more deference when the State prevails on a postconviction claim and less deference when a defendant prevails. The scales of justice are to remain balanced, not tipped, and especially not in the favor of the party whose liberties are never at risk. Thus, the State’s proposed delineated model of review does nothing to promote fairness, uphold our constitutional guarantees, or promote justice.

A postconviction court’s decision to grant or deny relief almost always requires the court to make fact and credibility determinations and to then apply those determinations to the law. In doing so, a postconviction court is deciding whether or not a constitutional violation

occurred based on the record, evidence, testimony, and facts presented during an evidentiary hearing. There is no difference in the court's process or analysis when it grants or denies relief to suggest that a different standard of review should apply depending on the court's ultimate decision. As such, the State's proposed bifurcated standard of review serves no functional purpose and should be denied.

Further, this Court's precedent belies the State's assertion that this Court has never established a standard of review for the grant of postconviction relief. (St. Br. 27-30) Rather, this Court has consistently held that the circuit court's decision to grant or deny relief after an evidentiary hearing is reviewed for manifest error. *See People v. Coleman*, 2013 IL 113307, ¶ 98 (a court's decision to grant or to deny postconviction relief after an evidentiary hearing is reviewed for manifest error), citing *People v. Morgan*, 212 Ill. 2d 148, 155 (2004) ("Where, as here, the circuit court has held an evidentiary hearing on a postconviction petition at which the court was required to consider new evidence and weigh the credibility of witnesses, we will disturb the circuit court's judgment only if it is manifestly erroneous."); *see also People v. Coleman*, 183 Ill. 2d 366, 379-389 (1998) (holding that manifest error standard of review is applicable under the Post Conviction Hearing Act when reviewing the propriety of an order granting or denying relief at conclusion of evidentiary stage). As such, the State's assertion that no standard of review has ever been established by this Court for the grant of postconviction relief lacks merit, and the appropriate standard of review in this case is manifest error.

The State's reliance on *Spencer*, *Morgan*, and *Swensen*, amongst other non-postconviction cases, does nothing to advance the State's argument that this Court should adopt a new bifurcated standard. (St. Br. 27-30)

In *Spencer*, a direct appeal, this Court reviewed the defendant's as-applied challenge

to his 100-year sentence wherein he argued that it violated the proportionate penalties clause simply because he was young, 20 years old, and it was a *de facto* life sentence, despite his eligibility for parole after serving 20 years under the youth parole act. *People v. Spencer*, 2025 IL 130015, ¶¶ 1, 23-46. Spencer’s as-applied challenge was raised for the first time on appeal, and this Court reviewed the issue *de novo*. *Id.* ¶¶ 14-25. Unlike this case, the *Spencer* Court had no factual findings, credibility determinations, or rulings from the trial court to defer to or to evaluate for manifest error. Accordingly, there was only a legal determination to be made, which is obviously reviewed *de novo*. Indeed, “the term ‘*de novo*’ means that the court reviews the matter anew—the same as if the case had not been heard before and as if no decision had been rendered previously.” *Freeburg Cmty. Consol. Sch. Dist. No. 70 v. Country Mut. Ins. Co.*, 2021 IL App (5th) 190098, ¶ 80, quoting *Ryan v. Yarbrough*, 355 Ill. App. 3d 342, 346 (2d Dist. 2005). As such, in a case like *Spencer*, where no decision had been rendered by the trial court, *de novo* review is appropriate. But, that is not the situation in this case. Here, unlike *Spencer*, this Court does have factual findings, credibility determinations, and a decision that Dimitri’s original sentencing hearing was unfair based on his particular characteristics. Thus, the circumstances in *Spencer* are wholly inapposite to the case at hand.

Next, *Swensen*, a direct appeal involving an as-applied challenge to the constitutionality of a criminal statute asserting that the defendant’s particular act, speech, that gave rise to his charge fell outside of what a properly drawn statute could cover. *People v. Swensen*, 2020 IL 124688, ¶ 19. Swensen’s challenge was entirely based on first amendment protections surrounding freedom of speech and the government’s inability to restrict expression because of its message, ideas, subject matter, or content. *Id.* ¶ 18. Like *Spencer*, the *Swensen* Court reviewed the defendant’s challenge *de novo*. *Id.* ¶ 19. However, the nature of the challenge

and the facts presented in *Swensen* are completely distinguishable from this case. The *Swensen* Court solely needed to address whether Swensen's charged speech was protected under the first amendment based on the testimony presented at trial; if so, the statute was invalid as-applied to the defendant, if not, the statute was valid as-applied to the defendant. *Id.* ¶¶ 17-33. In this vein, the trial court and the court of review were similarly situated and the only deference that the *Swensen* Court needed to afford to the trial court was its credibility determination that the victim's testimony regarding Swensen's speech was more credible than Swensen's testimony regarding his own conduct. *Id.* ¶¶ 19, 36-40.

Lastly, in *Morgan*, a pretrial fairness act appeal, this Court was tasked with determining the appropriate standard of review following a circuit court's detention decision due a disagreement between the appellate court districts. *People v. Morgan*, 2025 IL 130626, ¶¶ 1, 32-37. In *Morgan*, contrary to the State's argument that a bifurcated standard is appropriate here, the *Morgan* Court expressly found that when live witness testimony is presented at a hearing, the circuit court's ultimate decision, in addition to any underlying factual findings supporting that decision, will not be disturbed on review unless it is found to be contrary to the manifest weight of the evidence. *Id.* ¶ 54. Indeed, the *Morgan* Court acknowledged that when cases "must be decided on the basis of their unique facts and also because the circuit court is in the best position to assess the credibility of live witnesses and weigh the evidence presented in conjunction with the relevant statutory factors, we have held that a reviewing court will not disturb a circuit court's *** finding unless they are found to be against the manifest weight of the evidence." *Id.* ¶ 38.

Accordingly, none of the cases relied on by the State support this Court deviating from the established standard of manifest error as the appropriate standard of review for the grant

of postconviction relief following an evidentiary hearing where the court has heard expert testimony, reviewed new evidence, and made factual and credibility determinations.

In sum, the State's proposed standard of review does not comport with this Court's, or any Illinois court's, precedent when reviewing a postconviction court's final determination, regardless of whether the court granted or denied relief, following a third-stage evidentiary hearing. *See Morgan*, 212 Ill. 2d at 155 ("Where, as here, the circuit court has held an evidentiary hearing on a postconviction petition at which the court was required to consider new evidence and weigh the credibility of witnesses, we will disturb the circuit court's judgment only if it is manifestly erroneous."); *see also People v. Ruiz*, 177 Ill. 2d 368, 384 (1997) (same); *People v. Ortiz*, 235 Ill. 2d 319, 336 (2009) (same); *Coleman*, 183 Ill. 2d at 385 (same); *People v. Mendoza*, 2024 IL App (1st) 231588, ¶ 31 (same); *People v. English*, 2013 IL 112890, ¶ 23 (same); and *Coleman*, 2013 IL 113307, ¶ 98 (same). As such, manifest error is the established and appropriate standard of review for assessing a circuit court's decision to grant or deny postconviction relief following a third-stage evidentiary hearing. Indeed, the State already conceded that manifest error is the appropriate standard before the appellate court based on established precedent and has forfeited any claim that a different standard should be applied. Thus, consistent with existing precedent and in the interest of fairness, this Court should reject the State's proposed bifurcated standard of review and review the postconviction court's grant of relief following an evidentiary hearing for manifest error.

II. Judge Flood’s ruling that Dimitri Green-Hosey was entitled to a new sentencing hearing was not manifestly erroneous and was based on uncontradicted expert testimony that connected evolving brain science to Dimitri’s particular characteristics, including his adverse childhood experiences, rendering him more akin to a juvenile than an adult at the time of his offenses, and the trial court did not consider the *Miller* factors during his initial sentencing hearing.

The Honorable Elizabeth Flood properly granted Dimitri Green-Hosey a new sentencing hearing following an evidentiary hearing on his postconviction claim that his sentence, as-applied to him, violated the proportionate penalties clause of the Illinois Constitution. At that evidentiary hearing, Dr. James Garbarino, an expert in the field of child and adolescent development, testified that he utilized emerging research findings on brain development from adolescence into the 20s in determining that adolescent brains lack prefrontal cortex development. After review of Dimitri’s adverse childhood experiences (“ACE”) questionnaire, life history, explanations, follow-up questions and responses, Dr. Garbarino concluded that Dimitri was developmentally more like a juvenile than an adult based on his particular circumstances and “should be sentenced with respect to the juvenile protections.” (R. 834-835; E. 59-68) Dr. Garbarino also concluded that, at the time of the offense, Dimitri’s immaturity was compounded due to the high levels of adversity Dimitri experienced as a child leading up to his 18th birthday. (E. 57; R. 834-835) As a result, Dr. Garbarino opined that Dimitri’s brain development was “slowed relative to individuals who have not experienced a high level of childhood adversity.” (E. 57) All of the evidence presented by Dimitri at the third-stage proceedings was uncontradicted, and the opposite conclusion is not clearly evident, plain, or indisputable. As such, the postconviction court’s ruling was not against the manifest weight of the evidence and the appellate court was correct to affirm. Therefore, the decision of the appellate court should be affirmed and the case remanded for a new sentencing hearing as ordered.

As argued above, the appropriate standard of review in this case is manifest error. *People*

v. Coleman, 2013 IL 113307, ¶ 98 (a court’s decision to grant or to deny postconviction relief after an evidentiary hearing is reviewed for manifest error), citing *People v. Morgan*, 212 Ill. 2d 148, 155 (2004) (“Where, as here, the circuit court has held an evidentiary hearing on a postconviction petition at which the court was required to consider new evidence and weigh the credibility of witnesses, we will disturb the circuit court’s judgment only if it is manifestly erroneous.”). A decision is manifestly erroneous when the necessity of the opposite conclusion is “clearly evident” from the record. *People v. English*, 2013 IL 112890, ¶ 23. Importantly, this Court is tasked with reviewing the postconviction court’s decision for manifest error—not in the light most favorable to the State. *Coleman*, 2013 IL 113307, ¶ 98.

A reviewing court must “afford great deference to the factfinder’s assessment of a witness’s credibility because the factfinder is in a better position ‘to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence.’” *People v. Carter*, 2022 IL App (1st) 210261, ¶ 49, quoting *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). The manifest error standard of review is highly deferential and applies because the postconviction judge “is able to observe and hear the witnesses at the evidentiary hearing and, therefore, occupies a position of advantage in a search for the truth [that] is infinitely superior to that of a tribunal where the sole guide is the printed record.” *Coleman*, 183 Ill.2d at 384 (1998) (internal quotation omitted); see *People v. Carter*, 2021 IL App (4th) 180581, ¶ 74 (holding it was not the reviewing court’s role “to second-guess the trial court based on [the reviewing court’s] own interpretation of the testimony contained in a cold record”).

As such, should this Court entertain the State’s request to impose a bifurcated standard of review when assessing the postconviction court’s grant of relief, *de novo* review of the

postconviction court's determination that relief was warranted would not change this Court's analysis of the issues presented here. The postconviction court's factual findings and credibility determinations were not manifestly erroneous and, consequently, even under *de novo* review, the court's application of those facts in determining that Dimitri was entitled to a new sentencing hearing was not erroneous.

A. The Postconviction Hearing Act and the Proportionate Penalties Clause.

The Postconviction Hearing Act provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1 (2021); *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). The Act provides a three-stage process for adjudicating postconviction petitions. *People v. English*, 2013 IL 112890, ¶ 23. “At [the evidentiary] stage, the circuit court must determine whether the evidence introduced demonstrates that the petitioner is, in fact, entitled to relief.” *People v. Domagala*, 2013 IL 113688, ¶ 34. At the evidentiary hearing, the petitioner bears the burden of showing, by a preponderance of the evidence, that a constitutional right has been violated. *People v. Coleman*, 2013 IL 113307, ¶ 92; *see People v. Houar*, 365 Ill. App. 3d 682, 686 (2d Dist. 2006) (“Proof by a preponderance of the evidence means that the fact at issue *** is rendered more likely than not.”). Because the circuit court is the fact-finder at this hearing, “it is the court’s function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts.” *People v. Domagala*, 2013 IL 113688, ¶ 34; *see also People v. English*, 2013 IL 112890, ¶ 23.

One of the ways an individual can challenge his conviction or sentence in a postconviction petition is through the proportionate penalties clause. The proportionate penalties clause of the Illinois Constitution requires that “[a]ll 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. 1, §11. As the appellate court explained in *People v. Gipson*, 2015 IL App (1st) 122451, the proportionate penalties clause affords broader protection than the Eighth Amendment. *Id.* at ¶¶ 69-78; *People v. Clemons*, 2012 IL 107821, ¶¶ 36–41 (observing that the requirement of the proportionate penalties clause — that penalties be determined “with the objective of restoring the offender to useful citizenship” — was new to the 1970 Constitution, and “the framers intended, with this additional language, to provide a limitation on penalties beyond those afforded by the eighth amendment”). Indeed, this Court has held that the “limitation on penalties” in this clause goes “beyond the framers’ understanding of the eighth amendment and is not synonymous with that provision.” *People v. Clemons*, 2012 IL 107821, ¶ 40.

Here, Dimitri Green-Hosey, in both his initial and amended post-conviction petitions, asserted that the sentencing statutes and his 105-year aggregate sentence violated the proportionate penalties clause of the Illinois Constitution. (C. 340-390, 407-412) In support of his petition, Dimitri attached an article from Health and Human Services detailing adolescent maturity and the brain, (C. 379-387), and an April 15, 2021, report from Dr. James Garbarino, a developmental psychologist detailing specific factors in Dimitri’s life that led to Dimitri’s brain being less developed than that of other 18-year-olds who had not experienced similar adverse life experiences. (E. 51-70) Following a third-stage evidentiary hearing, the court agreed and granted Dimitri a new sentencing hearing.

B. Emerging adults may bring *Miller*-based, as-applied, proportionate penalties challenges to their mandatory *de facto* life sentences.

Contrary to the State’s arguments presented in their opening brief, this Court 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. (St. Br. 49-54); *People v. Thompson*, 2015 IL 118151, ¶¶ 43-44 (19-year-old defendant sentenced to a term of natural life in prison); *People v. Harris*, 2018 IL 121932, ¶¶ 1, 48 (18-year-old defendant sentenced to 76 years' imprisonment). These emerging adult claims are an extension of *Miller* claims, based on the proportionate penalties clause of the Illinois Constitution. *Harris*, 2018 IL 121932, ¶ 45. While *Miller v. Alabama*, 567 U.S. 460 (2012), does not automatically apply to all emerging adult offenders, caselaw is clear that there are circumstances, with a fully-developed record, where an as-applied *Miller*-based proportionate penalties challenge may be raised. Dimitri raised such a claim in his petition, which was granted following a third-stage evidentiary hearing.

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. *People v. Clark*, 2023 IL 127273, ¶¶ 72-73 (the reasoning in *Miller* applies when a young defendant is sentenced to a mandatory life or *de facto* life sentence where the court did not have the discretion to consider the characteristics of youth in mitigation); *People v. Hilliard*, 2021 IL App (1st) 200112, ¶ 25 (“clear from *Miller* and its progeny is that [*Miller*-based claims in postconviction proceedings] must satisfy two initial threshold requirements: the defendant must be (1) either a minor or young adult offender and (2) sentenced to a natural or *de facto* life sentence”). As such, emerging adults may bring *Miller*-based, as-applied, proportionate penalties challenges to their *de facto* life sentences. See *Miller v. Alabama*, 567 U.S. 460 (2012); *People v. House*, 2021 IL 125124, ¶¶ 31-32, 43; *People v. Harris*, 2018 IL 121932, ¶ 48; *People v. Thompson*, 2015 IL 118151, ¶ 38. Indeed, *House*, *Harris*, and *Thompson* created a roadmap for emerging adults, like Dimitri, who are serving potentially unconstitutional sentences and are thus entitled to develop a record for an as-applied

constitutional challenge.

According to that roadmap, the emerging adult must show that their brain and maturity was like a juvenile's, and that their youth was not properly considered at sentencing, as required by *Miller* and its progeny. See *House*, 2021 IL 125124, ¶¶ 27-29; *Harris*, 2018 IL 121932, ¶¶ 45-48. *Miller*-based proportionate penalties claims must further show that the defendant was sentenced to a natural or *de facto* life sentence. *People v. Hilliard*, 2021 IL App (1st) 200112, ¶ 25 (citing *Miller*, 567 U.S. at 479; *People v. Buffer*, 2019 IL 122327, ¶ 27; *Thompson*, 2015 IL 118151, ¶¶ 43-44; and *Harris*, 2018 IL 121932, ¶ 48). Initial postconviction petitions are appropriate vehicles for bringing *Miller*-based, as-applied proportionate penalties claims. *People v. Herring*, 2022 IL App (1st) 210355, ¶ 27 (citing *Harris*, 2018 IL 121932, ¶ 48, and *Thompson*, 2015 IL 118151, ¶ 44).

The State argues that a *Miller*-based challenge is incompatible with the proportionate penalties clause and that this Court has “never endorsed any *Miller*-like procedural requirement for young-adult offenders under the proportionate penalties clause. And the Court ultimately did foreclose the possibility of an as-applied proportionate penalties challenge based on a young-adult offender's ‘age at the time of his offense and the evolving science on juvenile maturity and brain development.’” (St. Br. 51-54), citing to *People v. Williams*, 2024 IL 127304, ¶ 31. However, that is not exactly what the *Williams* Court stated. In actuality, the *Williams* Court held that:

“An emerging adult postconviction petitioner who simply cites his age at the time of the offense and the evolving science on juvenile maturity and brain development does not state the gist of an as-applied claim that a mandatory life sentence violates the proportionate penalties clause of the Illinois Constitution. Adopting defendant's position that a 22-year-old serving a mandatory life sentence can advance his petition to the second stage by citing brain research without placing it in the context of his personal circumstances would effectively negate the factual pleading requirements of section 122-2

of the Act.” *Id.* ¶ 31.

Rather, in affirming the dismissal, the *Williams* Court found that Williams’ “petition articulated a legal argument that is impressively detailed for a *pro se* petitioner, but the legal assertions are not a substitute for particular facts and circumstances related to defendant.” *Id.* ¶ 32. As such, the *Williams* decision by no means foreclosed the possibility of an emerging adult raising a *Miller*-based as-applied challenge. Thus, contrary to the State’s claim, emerging adults, like Dimitri, may bring *Miller*-based, as-applied, proportionate penalties challenges to their mandatory *de facto* life sentences.

Here, Dimitri was convicted of crimes that occurred when he was 18 years old. (C. 264-265) On November 4, 2016, Judge Tegeler imposed consecutive sentences of 35 years for first degree murder with an added 25 years for personally discharging a firearm causing death, and 20 years for armed robbery with an added 25 years for personally discharging a firearm. (C. 264-265; R. 768-769) In total, Dimitri received an aggregate sentence of 105 years in prison for first degree murder and armed robbery. (R. 769; C. 260-265) Even with truth-in-sentencing credit on the armed robbery conviction, that was a *de facto* life sentence. *See Buffer*, 2019 IL 122327, ¶ 42; *People v. Wilson*, 2022 IL App (1st) 192048, ¶ 95 (*Buffer* applies to emerging adults). Because Dimitri was sentenced in 2016, he cannot take advantage of youthful-offender parole. *See* 730 ILCS 5/5-4.5-115(b) (2021) (only sentences imposed after June 1, 2019 are eligible for youthful-offender parole). Further, because the trial court was required to sentence Dimitri to a term of imprisonment of more than 40 years, Dimitri’s sentence constitutes a mandatory *de facto* life sentence under *Miller*. *People v. Clark*, 2023 IL 127273, ¶ 72. Here,

Dimitri must live to age 117 before he will be eligible for release.⁴ Thus, Dimitri received a mandatory *de facto* life sentence without any meaningful opportunity for release and is able to challenge his sentence under *Miller*.

In sum, based on this Court's precedent, the postconviction and appellate courts did not err in finding that emerging adults, like Dimitri, who received a mandatory life or *de facto* life sentence may raise a proportionate penalties *Miller*-based challenge based on their particular facts and circumstances. As such, the ruling of the postconviction and appellate courts should be affirmed.

C. Dimitri proved that, due to his particular characteristics, he was more akin to a juvenile than an adult at the time of the offense and that his brain development was delayed based on evolving brain science and his own adverse childhood experiences. As such, the court did not err in finding that Dimitri was entitled the protections contemplated in *Miller*.

The postconviction court properly granted Dimitri's as-applied proportionate penalties claim after considering the testimony and evidence presented at the evidentiary hearing and at sentencing. Additionally, a reviewing court "may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct." *People v. Brown*, 2017 IL App (1st) 142877, ¶ 39. Viewing the postconviction court's decision in conjunction with the record as a whole, the State cannot meet its burden of showing that the postconviction court manifestly erred. Thus, the postconviction and appellate courts' rulings should be affirmed.

The State argues that Dimitri "failed to prove any mitigating circumstance other than

⁴ Dimitri's current projected MSR date is April 14, 2112. See Illinois Department of Corrections Individual in Custody Search, available at https://www.idoc.state.il.us/subsections/search/inms_print.asp?idoc=Y17618. This Court may take judicial notice of the IDOC website. *Cordrey v. Prisoner Review Bd.*, 2014 IL 117155, ¶ 12 n. 3.

that he was immature because he was 18 when he committed the offenses.” (St. Br. 35) The State also argues that the court erred in relying on Dimitri’s unverified and unsworn statements made to Dr. Garbarino. (St. Br. 35-49) However, in making these arguments, the State is again attempting to minimize the significance of Dr. Garbarino’s testimony and opinions, while also failing to account for the corroborating evidence of Dimitri’s claims within the record, including the sworn testimony of Jaquan Green-Hosey, Jakkar Green-Hosey, and Dimitri himself. (R. 313-353, 613-676) In actuality, all of the arguments presented by the State are nothing more than a thinly-veiled attempt to convince this Court to reweigh the evidence and second-guess the postconviction court’s credibility and fact determinations. However, in suggesting this, the State ignores the fact that this Court must “afford great deference to the factfinder’s assessment of a witness’s credibility because the factfinder is in a better position ‘to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence.’” *People v. Carter*, 2022 IL App (1st) 210261, ¶ 49, quoting *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

Here, Dimitri presented the court with uncontroverted expert testimony from Dr. James Garbarino regarding evolving brain science surrounding emerging adults and, specifically, Dimitri’s immaturity and brain development in light of the high levels of adverse childhood experiences. (R. 813-872) Through Dr. Garbarino, Dimitri also presented the court with scientific information on how those adverse experiences “slowed [Dimitri’s brain development] relative to individuals who have not experienced a high level of childhood adversity.” (E. 57; R. 844-845) In doing so, Dimitri provided the court with details regarding his particular experiences and how those experiences determined his adverse childhood experiences (“ACE”) score, thereby impacting his overall development.

Here, Dr. Garbarino testified that developmental neuroscience research recognizes that an individual's development can be slowed down by adversity and negative experiences stating, "Each one of them contributes to threats to normal development." (R. 827-828) Based on Dr. Garbarino's communications with Dimitri, and Dimitri's responses on the ACE questionnaire, Dr. Garbarino learned that Dimitri experienced 10 adverse events during his childhood and adolescence, including emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, parental separation, domestic violence, living with substance abuse, living with mental illness, and parental incarceration. (E. 51-70; R. 827) Dr. Garbarino testified regarding Dimitri's individual characteristics, and his report was admitted into evidence. (R. 813-872; E. 51-70) Dr. Garbarino found, and brain science supports, that having exposure to all 10 factors slowed Dimitri's development so that, at age 18, he would respond more immaturely than the average 18-year-old. (E. 57, R. 827-828, 833-835; C. 379-387) Dr. Garbarino testified with specificity about each of the circumstances in Dimitri's childhood leading up to this offense, which took place in 2014 when Dimitri was 18 years old, and how an ACE score of 10, the number of "yes answers" on the ACE questionnaire, is predictive of "substance abuse, suicidal behavior, depression, [and] violent behavior." (R. 824-831)

Dr. Garbarino tendered these findings in a report specific to Dimitri, which was filed as an exhibit to Dimitri's postconviction petition. (E. 51-70; R. 340) Dr. Garbarino also testified to recent academic studies, including a white paper issued by the Center for Law, Brain & Behavior that dealt with post-18-year-old issues that was published after he drafted his report for Dimitri, to support his ultimate findings regarding Dimitri's development. (R. 833-834, 842-843; E. 51-59) (A copy of the White Paper is appended to this brief).

Dr. Garbarino's report and expert testimony were not contradicted by any evidence

from the State. Dr. Garbarino explained how Dimitri's particular characteristics impacted his brain development and why neuroscience supports the ultimate conclusion that Dimitri's brain was not fully developed at the age of 18. Dimitri's specific adverse experiences, age, characteristics, and responses all support the extension of *Miller* protections to Dimitri in this case. (R. 835; E. 67-68)

After the evidentiary hearing, the court found Dr. Garbarino's report, testimony, and findings to be credible, uncontradicted, and particularized to Dimitri. (C. 545-548) This evidence established that Dimitri's 105-year prison term for an offense he committed at age 18, absent the *Miller* considerations, violated the proportionate penalties clause of the Illinois constitution. Therefore, based on the uncontroverted testimony and evidence presented, Dimitri met his burden and the postconviction court was correct to order a new sentencing hearing in this case.

Next, the State challenges the postconviction court's reliance on Dr. Garbarino's testimony in finding that Dimitri was entitled to the protections contemplated in *Miller*. (St. Br. 35-49) In making this argument, the State claims that the entirety of Dr. Garbarino's testimony was based on unverified and unsworn facts provided by Dimitri. (St. Br. 35-49) Accordingly, the State complains in its opening brief that Dimitri did not testify regarding his own adverse childhood experiences and that this information was presented exclusively through Dr. Garbarino's expert testimony. (St. Br. 35-49) However, throughout all of its argument, the State forgets that it had the opportunity to cross-examine Dr. Garbarino and present its own evidence to rebut Dimitri's claims. Additionally, it should be noted that the State did not object to Dr. Garbarino testifying regarding Dimitri's adverse childhood experiences, nor did the State present any evidence to contradict anything that Dimitri reported to Dr. Garbarino despite having the complete contents of Dr. Garbarino's report, his notes, Dimitri's ACE questionnaire, the record,

and Dimitri's PSI well in advance of the third-stage evidentiary hearing. (R. 813-895; C. 504-509, 517, 519-520; CI. 4-13)

In making these arguments the State also ignores the fact that there is evidence in the record that directly and indirectly supported Dimitri's reporting of adverse childhood experiences and corroborated the information that Dimitri provided to Dr. Garbarino. There is also nothing in the prior record or presentence investigation report that contradicted or refuted any of the information Dr. Garbarino testified to, and the record along with both reports were generally consistent with one another and supportive of Dimitri's report of his adverse childhood experiences. (E. 51-70; CI. 4-13) Both the presentence investigation report and Dr. Garbarino's report highlight that Dimitri has been consistent in reporting his life-history and experiences and support Dimitri's claims of childhood homelessness, DCFS involvement, time in foster care, his father's incarceration, physical abuse, and questionable family support. (CI. 7-8; E. 59-61)

Conveniently, the State ignored the sworn testimony of Jaquan Green-Hosey, Jakkar Green-Hosey, and Dimitri Green-Hosey during the course of the jury trial, wherein each of the young men testified regarding their own, and Dimitri's, homelessness, drug use and frequent drug purchases, and Dimitri's receipt of monthly social security disability checks up until his arrest. (R. 316, 318-319, 337-341, 347, 621, 631, 640-641) This sworn testimony from all three brothers directly corroborates Dimitri's reporting that he was homeless, that he was exposed to physical and emotional abuse and neglect, that he lacked stability, that he was exposed to drugs at a young age, that he abused substances from a young age, and that his mental health issues required institutionalization when he was young.

Further, the State, unlike Dr. Garbarino during the preparation of his report, could have utilized the subpoena power of the courts to obtain and present information such as DCFS

records, school records, medical records, or witnesses to rebut any of the evidence provided by Dr. Garbarino or detailed in his report. *People v. Boston*, 2016 IL 118661, ¶¶ 38-39 (State's Attorney has the statutory power to subpoena information and documents). Indeed, the State even had the necessary information for the issuance of subpoenas pertaining to Dimitri's prior hospitalizations and current mental health treatment in IDOC from his initial petition and affidavit detailing his efforts to obtain corroborating records through the Freedom of Information Act. (C. 340-378, 388) As such, the State's failure to present any evidence to rebut the information presented by Dimitri pertaining to his specific characteristics, brain science, and Dr. Garbarino's conclusion that Dimitri was more like a juvenile than an adult negates the State's argument that any of the information provided by Dimitri to Dr. Garbarino was unreliable. The court clearly made a credibility determination and accepted Dr. Garbarino's testimony, expertise, and findings pertaining to Dimitri and his uncontroverted and unchallenged particular characteristics.

Here, after reviewing all of the evidence and exhibits, the postconviction court found, "Dr. Garbarino's testimony to be credible, and his opinions to be well-founded on facts and based on his expertise." (C. 548) The court further found that Dimitri "made a substantial showing that his individual characteristics require the application of *Miller*," and incorporated its prior ruling that Dimitri's original sentencing hearing was not *Miller* compliant. (C. 548) Contrary to the State's argument, the postconviction court did not err and did not assume facts to be true absent support. (St. Br. 35-49) The postconviction court conducted a third-stage evidentiary hearing where it listened to uncontradicted testimony regarding Dimitri's specific characteristics and experiences, made credibility determinations, and, after review of all of the evidence and argument presented, found that Dimitri met his burden and ordered a new sentencing hearing

in compliance with *Miller*. (C. 548)

In reality, each of the arguments posed by the State is essentially asking that this Court reweigh the credibility and fact determinations made by the postconviction court. This is evidenced by the State's attempt to undermine the postconviction court's credibility findings regarding Dr. Garbarino while also completely ignoring the brain science presented to the court. As fact-finder, the postconviction court is free to accept or reject as much or as little of a witness's testimony as it pleases, even when they are "experts." See *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67; *People v. McCullum*, 386 Ill. App. 3d 495, 504 (1st Dist. 2008); *People v. Baker*, 253 Ill. App. 3d 15, 30 (1st Dist. 1993). However, a "trial court may not simply draw different conclusions from the testimony of an otherwise credible and unimpeached expert witness." *People v. Kando*, 397 Ill. App. 3d 165, 196 (1st Dist. 2009) (The Appellate Court found the trial court had no basis in rejecting the experts' opinions because there was no substantial disagreement among the testifying experts, and there was no evidence the experts failed to consider relevant authorities or information concerning the defendant, or ignored information that was contrary to their opinion.).

In sum, the record is clear that Dimitri proved that, due to his particular characteristics, he was more akin to a juvenile than an adult at the time of the offense and that his brain development was delayed based on evolving brain science and his own adverse childhood experiences. As such, the court did not err in finding that Dimitri was more akin to a juvenile at the time of the offense and, therefore, was entitled to the protections contemplated in *Miller*.

D. The court did not err in finding that Dimitri's sentencing hearing was not *Miller*-compliant.

The postconviction court correctly determined, and the appellate court correctly affirmed, that Dimitri's sentencing hearing was not *Miller*-compliant because Judge Tegeler, admittedly,

did not adequately consider Dimitri's youth and attendant circumstances before imposing a *de facto* life sentence. That violated the proportionate penalties clause. True, Judge Tegeler said he looked at Dimitri's personal life, examined the PSI, heard the evidence at the sentencing hearing, and considered that Dimitri was young. (R. 761-770, 781-787) However, Judge Tegeler unequivocally stated, "I would also note that the *Miller* decision, which has be[e]n discussed, is a bright line rule that both the Supreme Court of Illinois and the United States Supreme Court basically stated they knew that they were making a bright line rule but they had to make it at some point, and they made it at 18. And in Mr. Green-Hosey's case, he was above the age of 18 when he committed this offense." (R. 783) Aside from Judge Tegeler's acknowledgment, the State also conceded during Dimitri's postconviction proceedings that his sentencing hearing was not *Miller*-compliant. (R. 917) As such, the postconviction and appellate courts did not err in finding that Dimitri's sentencing hearing was not *Miller*-complaint.

Constitutional compliance requires a judge to give full, meaningful consideration to the *Miller* factors. *E.g.*, *People v. Wilson*, 2022 IL App (1st) 192048, ¶ 101 ("being aware of evidence relevant to the *Miller* factors is wholly distinct from considering those factors as mitigating, or carefully considering the prospect of a defendant's rehabilitative potential"), quoting *People v. Zumot*, 2021 IL App (1st) 191743, ¶ 40. Here, Judge Tegeler did not give full, meaningful consideration to the *Miller* factors, and while he acknowledged Dimitri's age, it was only to discuss *Miller*'s bright line rule and the reason that he would not consider those factors at sentencing. At best, any reference Judge Tegeler made to the factors contained in *Miller* were nothing more than lip service.

Judge Tegeler's remarks at sentencing and at the motion to reconsider sentence hearing show that he saw Dimitri as a fully-formed adult, not an emerging adult whose brain was still

maturing. That runs afoul of *Miller* on a fundamental level. *See Miller*, 567 U.S. at 472-73 (emphasizing that youth is the most important consideration when fashioning an appropriate sentence for children). The judge signaled that he saw Dimitri no differently than any other adult defendant being punished for committing murder and that it was his job to view him no differently. (R. 783)

At the sentencing hearing, Judge Tegeler said, “[I]t takes a unique mind to decide that I am going to put a gun on me, I am going to think about this, on how I’m going to accomplish this robbery, I am going to walk across a parking lot, I am going to walk into a restaurant, I am going to take this property, and I am going to make sure that this man never sees the light of day.” (R. 766-767) Judge Tegeler further said, “[S]omehow we have to send a message and deter people from using guns in selfish manners where they are not thinking of anyone but their own selfish pleasure.” (R. 768) It was not until the motion to reconsider sentence hearing that Judge Tegeler even addressed Dimitri’s age and noted Dimitri was “above the age of 18” at the time of the offense, with no further consideration. (R. 783)

Absent from the judge’s remarks is any mention of Dimitri’s inability to appreciate risks and consequences. *See Miller*, 567 U.S. at 471-73, 479-80 (discussing ways children’s diminished culpability and greater prospects for reform make them constitutionally different from adults, and holding that sentencing judge must consider those differences). To the extent that any of Judge Tegeler’s comments about Dimitri’s age, family life, or personal life can be viewed as consideration of a *Miller* factor, they show that he misapplied it. *Miller* factors are mitigation; Judge Tegeler used this factor as aggravation, as he expressly found no factors in mitigation, and stated, “it’s not been a great personal life or family life.” (R. 761, 787); *see Miller*, 567 U.S. at 477-78, 489 (age and age-related characteristics are mitigating circumstances);

see also People v. Royer, 2020 IL App (3d) 170794, ¶ 29 (trial court “contradicts the edict of *Miller* and its progeny” by considering one of the *Miller* factors as aggravation).

Moreover, Judge Tegeler’s repeated use of the choices-and-consequences theme and the need for deterrence show that the sentence he imposed was driven primarily by the need for retribution. In so many words, Judge Tegeler’s sentencing decision rested on the premise that because Dimitri committed an adult crime, after he had turned 18 years old, he had to do adult time. But for youth who commit crimes, retribution is diminished because they are categorically less culpable for their actions. *Miller*, 567 U.S. at 472 (citing *Graham v. Florida*, 560 U.S. 48, 71 (2010), and *Roper v. Simmons*, 543 U.S. 551, 571 (2005)). In refusing to consider Dimitri’s age, or any factors in mitigation, Judge Tegeler overlooked this bedrock tenet of youth-sentencing jurisprudence.

In sum, Dimitri made a substantial showing that (1) he was an emerging adult who was developmentally no different from an adolescent, (2) he received a *de facto* life sentence, and (3) Judge Tegeler did not meaningfully consider Dimitri’s youth and attendant circumstances at the sentencing hearing. Thus, Dimitri made a substantial showing of an as-applied proportionate penalties violation and met his burden after third-stage proceedings. That entitles him to a new sentencing hearing on the claim and the postconviction court’s order should be affirmed.

E. The postconviction and appellate courts did not err in finding that Dimitri’s mandatory *de facto* life sentence was implicitly cruel, degrading, or so wholly disproportionate to his offenses that it shocked the conscience of the community once it found that he was entitled to the safeguards contemplated by *Miller* and its progeny based on his particular characteristics and that his original sentencing hearing was not *Miller*-compliant.

The appellate court did not err in finding Dimitri’s sentence was implicitly cruel, degrading, or so wholly disproportionate to shock the moral sense of the community. An as-applied proportionate penalties claim requires a showing that the sentence is so disproportionate

to the offense as to be cruel, degrading, or shocking to the moral conscience of the community, and that showing is implicitly satisfied for an emerging adult offender challenging a life sentence based on *Miller* if he demonstrates that his individual circumstances require application of *Miller* and the original sentencing hearing lacked *Miller* safeguards. *People v. Garcia*, 2024 IL App (2d) 210488-B, ¶ 15, quoting *People v. Cortez*, 2021 IL App (4th) 190158, ¶ 47. Dimitri did just that. Accordingly, the appellate court did not err in affirming the postconviction court's determination that Dimitri met his burden and was entitled to a new sentencing hearing.

Here, the postconviction court specifically addressed the appellate court's 2019 finding that it could not reach Dimitri's as-applied challenge due to an insufficient record. (C. 545) The postconviction court, after hearing, determined that Dimitri proved his individual characteristics require the application of *Miller*, his initial sentencing hearing was not *Miller*-compliant, and that Dimitri was entitled to a new sentencing hearing. (C. 545-548) Contrary to the State's argument, the postconviction court made all of the necessary findings to support its determination that Dimitri was entitled to a new sentencing hearing, and no additional finding that Dimitri's sentence shocked the moral sense of the community was required. (St. Br. 30-49, 54-62; C. 545-548) Rather, based on the factual findings that the postconviction court made, it is presumed that Dimitri's sentence met this standard and the appellate court was correct to affirm. Therefore, the postconviction and appellate courts should be affirmed and this case should be remanded for resentencing pursuant to the postconviction and appellate courts' orders.

The State argues that Dimitri "failed to prove that the statutorily mandated minimum sentences for his offenses—45 years for first degree murder committed with a firearm and 31 years for armed robbery committed while discharging a firearm that caused a death – violate the proportionate penalties clause as applied to his murder and robbery." (St. Br. 30) In making

its argument, the State focuses heavily on the legislature’s mandate in “evaluating whether a mandatory minimum penalty shocks the moral sense of the community as applied to a particular defendant’s offense.” (St. Br. 31) In taking this approach, the State completely misconstrues the issue before this Court—whether Dimitri is entitled to a new sentencing hearing based on evolving brain science applied to *his* particular characteristics that rendered him more akin to a juvenile than an adult at the time of the offense, not just as applied to the particular offense. Under the State’s strictly offense-based approach it would be nearly impossible for any defendant to make a substantial showing of a constitutional violation at a third-stage postconviction proceeding, particularly as it pertains to an as-applied proportionate penalties claim. (St. Br. 31-40) Clearly, the State is wrong because “an as-applied challenge is dependent on the particular facts and circumstances of the challenging party.” *People v. Hilliard*, 2023 IL 128186, ¶ 21. A defendant bringing an as-applied challenge to a mandatory sentencing statute must ultimately overcome the presumption that the statute is constitutional by clearly establishing that the statute is invalid as applied to him. *Id.* Here, contrary to the State’s arguments, Dimitri did just that when he presented uncontroverted expert testimony that his brain development was “slowed relative to individuals who have not experienced a high level of childhood adversity,” and that his particular characteristics required the safeguards contemplated in *Miller*. (E. 56-57; R. 545-548)

The State further argues that Dimitri failed to clearly establish that his sentences were cruel, degrading, and so wholly disproportionate to his offenses as to shock the moral sense of the community and attempts to define what constitutes a cruel or degrading sentence as a sentence outside of the legislative mandate and “universe” of legislative considerations. (St. Br. 30-32) However, this Court has repeatedly “declined to set out a specific definition of a

cruel or degrading sentence because, as our society evolves, so too do our concepts of elemental decency and fairness which shape the moral sense of the community.” (Internal quotations omitted) *People v. Clark*, 2023 IL 127273, ¶ 51, quoting *People v. Miller*, 202 Ill. 2d 328, 329 (2002).

Here, the postconviction court determined, after making credibility findings, reviewing the record, and weighing the evidence presented, that Dimitri clearly showed, from a developmental standpoint, he had the characteristics of a juvenile at the time of the offense and his original sentencing hearing was not *Miller*-compliant. (C. 545-548) Indeed, Dimitri’s sentence was imposed without any consideration for Dimitri’s youth and attendant characteristics and the State conceded as much during the postconviction proceedings. (R. 917) As such, in light of his particular characteristics, Dimitri’s sentence of 105 years is implicitly cruel and degrading. Therefore, the postconviction and appellate courts should be affirmed and this case remanded for a new sentencing hearing as ordered.

The postconviction court was correct in ruling that Dimitri was entitled to a new sentencing hearing without the “need for a separate showing that a sentence ‘shocks the moral sense of the community.’” (C. 545) The court did not need to make an express finding that a sentence imposed shocked the moral sense of the community as long as the court found the following:

“(i) under *Harris*, a young adult defendant must plead, and ultimately prove, that his or her individual characteristics require the application of *Miller*;

(ii) if, and only if, the young adult makes this showing, then the trial court goes on to consider whether the initial sentencing hearing complied with *Miller*, following our supreme court’s guidance in *Holman* and this court’s analysis in *Croft*; and

(iii) if the initial sentencing hearing was *Miller*-compliant, then the trial court can reject the defendant’s claim (as the courts did in *Holman* and *Croft*); or if the initial sentencing hearing was not *Miller*-compliant, then the trial court should order resentencing.” *People v. Ruiz*, 2020 IL App (1st) 163145, ¶ 52,

citing *People v. Harris*, 2018 IL 121932.

Here, Dimitri satisfied all three procedural hurdles established by this Court and, accordingly, the court correctly ordered that he be resentenced. (C. 546-547) Indeed, once Dimitri satisfied these procedural hurdles and demonstrated that his individual characteristics were like those of a juvenile, the receipt of a life sentence without the *Miller* safeguards is cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community. *See People v. Garcia*, 2024 IL App (2d) 210488-B, ¶ 14; *see also People v. Wilson*, 2022 IL App (1st) 192048, ¶ 87.

As such, while an as-applied proportionate penalties claim requires a showing that the sentence is so disproportionate to the offense as to be cruel, degrading, or shocking to the moral conscience of the community, that showing is implicitly satisfied for an emerging adult offender challenging a life sentence based on *Miller* if he demonstrates that his individual circumstances require application of *Miller* and the original sentencing hearing lacked *Miller* safeguards. *People v. Garcia*, 2024 IL App (2d) 210488-B, ¶ 15, quoting *People v. Cortez*, 2021 IL App (4th) 190158, ¶ 47. In other words, a life sentence without parole is shocking to the moral sense of the community if it was imposed upon an emerging adult defendant who has established that (1) the science underlying *Miller* and its progeny applies to his specific facts and circumstances and (2) his age and youth-attendant circumstances were not considered at the original sentencing hearing before that life sentence was imposed.

Further, recent developments show that our society has evolved to the point that it does shock the moral sense of the community to impose life sentences on defendants who were in their teens, and thus had still-developing brains, at the time of their offense, unless they are one of the rare youthful offenders who is incapable of rehabilitation. The evolution

in thinking about these emerging adults was set in motion by the United States Supreme Court decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005). In those cases, the Court, citing scientific studies regarding adolescent brain development, recognized certain “distinctive attributes of youth” of constitutional significance that diminish the justification for imposing the harshest sentences on juvenile offenders who commit terrible crimes:

“First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as well formed as an adult’s; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.” *Miller*, 567 U.S. at 471–72, citing *Graham*, 560 U.S. at 68, and *Roper*, 543 U.S. at 569 (internal quotation marks, citations, and alteration marks omitted).

The Court went on to hold that it violates the eighth amendment’s prohibition on “cruel and unusual punishments” for a court to sentence a juvenile offender to life imprisonment without parole, unless the sentencing court considered in mitigation those distinctive attributes of youth, and found that the particular defendant was the rare juvenile whose crime reflected “irreparable corruption.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), citing *Miller*, 567 U.S. at 471; *see also People v. Buffer*, 2019 IL 122327, ¶¶ 24, 40–42 (applying *Miller* to *de facto* life without parole sentence); *People v. Holman*, 2017 IL 120655, ¶¶ 40, 46 (applying *Miller* to discretionary life without parole sentence, and holding that the trial court must consider “the defendant’s youth and its attendant characteristics” before imposing a discretionary life sentence).

The research relied upon in *Roper*, *Graham*, and *Miller* has since been supplemented by research showing that the brains of young adults continue to develop into their 20s. *See*

People v. House, 2019 IL App (1st) 110580-B, ¶¶ 41-73 (*House II*) (PLA allowed, January 29, 2020) (extending the reasoning of *Miller* to a 19-year-old defendant with a mandatory life sentence, analyzing the issue under Illinois’s proportionate penalties clause). While this Court reversed the ruling in *House* granting the defendant a new sentencing hearing, it did so on the basis that the record needed “further development” on the issue of the defendant’s maturation because the trial court made no factual findings on that issue. *House*, 2021 IL 125124, ¶ 29. Accordingly, this Court remanded for further postconviction proceedings. *Id.* Thus, this Court has implicitly recognized that life sentences imposed on emerging adults, like Dimitri, can violate the proportionate penalties clause.

Further, in *People v. Jones*, 2021 IL App (1st) 180996, the appellate court held that a 19-year-old’s *de facto* life sentence of 50 years’ imprisonment violated the Illinois proportionate penalties clause, and remanded for a new sentencing hearing requiring consideration of the *Miller* factors and evolving science on juvenile brain development. *Id.* at ¶ 32. Imposing a life sentence upon a young adult offender without considering the distinctive attributes of youth articulated in *Miller* is a violation of the Illinois proportionate penalties clause. *Id.*

While it is true that the legislature mandated certain sentencing provisions for first degree murder, armed robbery, and the personal discharge of a firearm during those offenses, the legislature enacted those provisions for the general population as a whole, not with any particular individual in mind. Indeed, the very purpose of an as-applied proportionate penalties challenge is to assess the constitutionality of a trial or sentence with a particular individual in mind based on the specific facts and characteristics applicable to that individual, not the general population, and not exclusively based on the seriousness of offense committed. *People v. Thompson*, 2015 IL 118151, ¶ 37 (“By definition, an as-applied constitutional challenge

is dependent on the particular circumstances and facts of the individual defendant or petitioner.”). The idea that a sentence automatically comports with the proportionate penalties clause, simply because it was mandated by the legislature for a particular offense undermines the very spirit of the proportionate penalties clause which requires an individual approach. To approach the proportionate penalties clause any other way would render it entirely useless and no one, regardless of their particular facts and circumstances, would ever be able to make a showing that their sentence was cruel, degrading, or shocking to the moral conscience of the community against the legislatively mandated sentencing scheme.

In sum, as is clear by the cases cited above, Illinois courts have recognized that *de facto* life sentences can violate the proportionate penalties clause for emerging adults. Accordingly, the trial court erred when it sentenced Dimitri to a *de facto* life sentence that denied him any meaningful chance at rehabilitation and release. As such, the postconviction court was correct in its determination that Dimitri’s *de facto* life sentence is unconstitutional as-applied to him under the proportionate penalties clause of the Illinois Constitution and, contrary to the State’s argument, the appellate court was correct to affirm. Here, Dimitri clearly showed that his sentence is so disproportionate to the offense as to be cruel, degrading, or shocking to the moral conscience of the community. The postconviction court found that the science underlying *Miller* and its progeny applied to Dimitri’s specific facts and circumstances and that Dimitri’s age and youth-attendant circumstances were not considered at his original sentencing hearing before his mandatory *de facto* life sentence was imposed. Thus, the postconviction and appellate courts did not err in finding that the cruel, degrading, or disproportionate nature of Dimitri’s sentence was implicitly satisfied.

F. The State’s arguments regarding the constitutionality of the mandatory minimum sentences for Dimitri’s offenses at a resentencing hearing is premature, is not an issue properly before this Court, and does nothing more than seek an advisory opinion in advance of a resentencing hearing.

The State dedicated a substantial portion of its brief to addressing the constitutionality of the mandatory minimum sentences and whether Dimitri has proven that he should be sentenced below the mandatory minimum at resentencing. (St. Br. 30, 34, 40-49) However, these arguments are premature and it appears that, in making these arguments, the State is actually seeking an advisory opinion from this Court on sentencing issues that are better reserved for the sentencing court on remand. (St. Br. 30, 34, 40-49) Further, it should be noted that in making these arguments, the State asks this Court to “reverse the appellate court’s judgment holding that the legislatively mandated 45-year minimum sentence for first degree murder and 31-year minimum sentence for armed robbery violate the proportionate penalties clause as applied to petitioner’s offenses under *Miller v. Alabama*,” but no such ruling exists. (St. Br. 25) Similarly, the trial court also did not make this ruling. (R. 918-919) Rather, both the postconviction and the appellate courts were clear that nothing about the grant of relief suggested that Dimitri could not receive the same 105-year sentence after the sentencing court considered the *Miller* factors as a part of fashioning an appropriate sentence for Dimitri’s offenses. (R. 918-919); *People v. Green-Hosey*, 2025 IL App (2d) 240284, ¶¶ 73-76.

In support of this argument, throughout its brief, the State relies heavily on *People v. Hilliard*, 2023 IL 128186, to argue that Dimitri’s “constitutional challenge to his mandatory minimum sentences” failed to show any violation of the proportionate penalties clause or that his mitigating circumstances would render the mandatory minimum sentences shocking to the conscience of the community based on the seriousness of his offenses. (St. Br. 30-62) However, in *Hilliard*, the defendant was sentenced to a total of 40 years, after the application

of a 25-year firearms enhancement, and, therefore, did not receive a life sentence or a *de facto* life sentence. *Id.* ¶ 40. As the defendant in *Hilliard* did not receive a mandatory or discretionary life sentence, or even a *de facto* life sentence, his proportionate penalties claim is wholly distinguishable from Dimitri's. Further, unlike Dimitri, Hilliard failed to provide any evidence outside of his chronological age at the time of the offense to show that he was more like a juvenile than an adult offender. *Id.* ¶ 32. Rather, in direct contrast to *Hilliard*, Dimitri presented expert testimony regarding evolving brain science, its connection to his chronological age, and its impact on his neurological development in light of his adverse childhood experiences. Additionally, unlike *Hilliard*, the trial court here had no option but to sentence Dimitri to a mandatory *de facto* life sentence. Thus, the State's reliance on *Hilliard* is misplaced and Dimitri's proportionate penalties challenge to his mandatory *de facto* life sentence was properly presented to the postconviction court.

Further, the State concedes that this issue is not properly before this Court, thereby suggesting that the State is seeking nothing more than an advisory opinion on the matter, in a footnote, stating:

“This brief addresses the constitutionality of the legislatively mandated minimum sentences for petitioner's offenses because petitioner did not challenge – and the appellate court did not address – the constitutionality of the 60- and 45-year sentences he actually received for first degree murder and armed robbery, only the sentencing scheme under which they were imposed.” (St. Br. 25, n. 5)

Accordingly, the arguments presented by the State in relation to this issue lack merit at this juncture. Both of the lower courts found that, based on his individual characteristics, Dimitri was entitled to the *Miller* protections for sentencing juvenile offenders and should receive a new sentencing hearing that is *Miller* compliant, thereby granting Dimitri postconviction relief—without any suggestion that Dimitri should be or must be sentenced to anything below

the mandatory minimum. *People v. Green-Hosey*, 2025 IL App (2d) 240284, ¶¶ 73-76. Indeed, that is an issue to be decided by the sentencing court, as an exercise of discretion, after its full consideration of the *Miller* factors in mitigation measured against any factors in aggravation and the severity of the offense. Any complaint that arises from the court's use of that discretion can be appropriately raised in a future appeal, if need be.

Conclusion.

Here, the postconviction court heard expert testimony, reviewed the court record including the trial and sentencing transcripts, and made factual and credibility determinations regarding Dr. Garbarino's testimony, Dimitri's particular characteristics, the evolving brain science that supported the finding that Dimitri's brain development was akin to a juvenile at the time of the offense, Dimitri's ACE questionnaire responses, and the information previously contained within the presentence investigation report before it determined that Dimitri was entitled to a new sentencing hearing. (C. 545-548) The State is distracting from the real issue, a grant of postconviction relief in the form of a new sentencing hearing, and is attempting to re-litigate constitutional issues that have already been granted and decided. Through all of its arguments, the State is still, in essence, asking this Court to make new credibility and factual findings. Dimitri made a substantial showing that (1) he was an emerging adult who was developmentally no different from an adolescent, (2) he received a mandatory *de facto* life sentence, and (3) Judge Tegeler did not meaningfully consider his youth and attendant circumstances at the sentencing hearing. Once Dimitri proved that he was entitled to the protections contemplated by *Miller* and that he was not afforded those safeguards at his original sentencing hearing, Dimitri's sentence was implicitly shocking to the moral sense of the community. Thus, Dimitri made a substantial showing of an as-applied proportionate penalties violation and met his burden

after third-stage proceedings. That entitles him to a new sentencing hearing on the claim and the postconviction and appellate courts' orders should be affirmed.

CONCLUSION

For the foregoing reasons, Dimitri Green-Hosey, defendant-appellee, respectfully requests that this Court affirm the judgment of the appellate court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 50 pages.

/s/Toni Lea Heniff
TONI LEA HENIFF
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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of
	)	Illinois, No. 2-24-0284.
Plaintiff-Appellant,	)	
	)	There on appeal from the Circuit Court
-vs-	)	of the Sixteenth Judicial Circuit, Kane
	)	County, Illinois, No. 14 CF 76.
	)	
DIMITRI GREEN-HOSEY,	)	Honorable
	)	Elizabeth K. Flood,
Defendant-Appellee.	)	Judge Presiding.
	)	

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4/15/21

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RE: Demitri Green-Hosey DOB: 4/27/95

As requested, I am providing a developmental analysis of Demitri Green-Hosey. I reviewed his social history (including the Adverse Childhood Experiences Scale).

Let me be clear on two important points. First, I am not offering any clinical diagnoses of Demitri, but rather providing an analysis of his development pathway from infancy to adolescence and emerging adulthood (to which the diagnoses offered by clinicians can contribute). Second, I am not excusing Demitri's behavior (but rather offering an explanation of how it arose from his life circumstances and experiences over the course of his 18 years before the crime for which he was sentenced to 105 years.

Demitri was 18 at the time of the crime for which he is seeking re-sentencing. Thus, he was not covered by the Supreme Court's *Miller v. Alabama* decision (and follow up decisions such as *Montgomery v. Louisiana* and *Tatum v. Arizona*), which set the limit for special protections at age 17. However, current developmental science research teaches us that individuals in the 18-25 age range should not be treated in the same way as "adult" offenders.

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Developmental science has continued to evolve since the *Roper v. Simmons* decision in 2005 and the *Miller v. Alabama* decision in 2012. Current developmental science teaches that individuals in their early 20's should not be treated in the same way as "adult" offenders—whether the issue be life without parole sentences or capital punishment. One of the principal authors of the American Psychological Association's amicus brief in the *Simmons* and *Miller* cases (Laurence Steinberg) has acknowledged that accepting age 18 as the cutoff for inclusion in the special, protected category for sentencing purposes was an error, because the research indicates the same issues of immaturity of thinking and feeling that plague adolescents under the age of 18 continue to plague them (albeit with decreasing effect) beyond age 18 until brain maturity solidifies in the mid-20s. Gary Melton (one of the most distinguished figures in the field of psychology and law) puts it this way regarding the American Psychological Association brief that provided the foundation for the *Miller* decision, the authors of that brief "tend to understate the 'immaturity' of *young adults* (people within the 18- to 25-year-old range), who also have a high rate of antisocial and risky behavior and who are far more similar to than different from 16- and 17-year-olds."

The research underlying this conclusion has emerged primarily because the brain imaging technology necessary to study this phenomenon did not become readily available until the late 1990s, and not until half a decade later was it applied on a widespread basis for *developmental* studies (as opposed to *clinical* studies focusing on brain injuries and disease).

Thus, the age of 18 as a legal "bright line" is not in accord with the current findings of research in developmental science. This research reveals that human brain maturation is ordinarily not complete until the mid-20's, approximately age 25, and that

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16-25 year olds are a distinct developmental class as compared with individuals both 15 and younger and 26 and older.

Adolescent brains are immature—an immaturity that extends into early adulthood. This includes the frontal lobes which play a crucial role in making Green-Hosey decisions, controlling impulses, focusing attention for planning, and managing emotions. Science now understands that the process of maturation involves three components of brain function: “gray matter” - the outer layer of the brain, “white matter connections” - the brain cells serving as the “wiring” between neurons, and activity in the chemicals or “neurotransmitters” that execute messages within the brain. All three are compromised in an individual under the age of 25. Measures of brain function and structure employing sophisticated technology support this new scientific recognition.

As noted earlier, of special relevance in understanding properly the behavior and thinking of youth charged with murder is the fact that social conditions and experience affect the development of “white matter.” This speaks to the double whammy experienced by youths who are involved in violent crime: they suffer from both the general limitations of unformed brains *and* the disadvantaged functioning that arises from their adverse childhood experiences.

What is more, the hormonal conditions of such youths contribute to impaired brain function (relative to adults) in matters of assessing and taking risks, emotional intensity, and dealing with peers (including social rejection). All of these considerations underlie the current scientific recognition that extended adolescents (people in their early 20's) are a special class. The process of brain maturation is not complete in any persons until they reach their mid 20's.

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All of this has come to fruition with the development of a two specialized area of research commonly referred to as "late adolescence" or "emerging adulthood." The former term emphasizes that adolescence does not end at age 18 and in fact continues into the early 20s. The second term comes at the issue from the other end of the spectrum, and recognizes that adulthood is not attained at age 18 or 21, but rather emerges in this period, not to be fully formed until the mid-20s. Thus, it is more appropriate to speak of "emerging adulthood" rather than "early adulthood," because the latter term suggests that a line has been crossed into adulthood. In contrast, "emerging" adulthood more accurately reflects that fact individuals in the age range 18-25 are not adults (from the perspective of development), but rather manifest a mix of adolescent and adult characteristics and functioning.

An influential review of this developmental issue was published in 2000 in the American Psychological Association's premier journal (*American Psychologist*) by Jeffrey Arnett, under the title "Emerging Adulthood." Arnett's summary of research findings includes the following:

"Although there is a voluminous literature on adolescent risk behavior and relatively little research on risk behavior in emerging adulthood (Jessor, Donovan, & Costa, 1991), the prevalence of several types of risk behavior peaks not during adolescence but during emerging adulthood (ages 18-25). These risk behaviors include unprotected sex, most types of substance use, and risky driving behaviors such as driving at high speeds or while intoxicated (Arnett, 1992; Bachman, Johnston, O'Malley, & Schulenberg, 1996)."

These studies deal with youth in "normal" social environments, in which their likely exposure to opportunities for "risk

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behaviors" is confined to sex, substance abuse and dangerous driving. In socially toxic environments (like communities immersed in gangs and gang violence) the "opportunities" for high-risk behaviors extends to criminal acts including homicide.

Note that all the research citations date from the post 1984 period. This is "new evidence," from that perspective. This has led to new institutional recognition of the need to consider "emerging adulthood" as a distinct period in human development. The Society of Clinical and Adolescent Psychology (Division 53 of the American Psychological Association, of which I am a member and elected Fellow) created a Special Interest Group on "Emerging Adulthood" in 2015 in recognition of the new research being conducted that documented the particular developmental phenomena and issues identified by Jeffrey Arnett in 2000. The mission of this group:

"The Emerging Adulthood Special Interest Group (EA SIG) of the Society of Clinical Child and Adolescent Psychology is dedicated to the promotion of policy, practice, research, and training directly relevant to the psychological assessment and treatment of individuals 18 to 25 years of age."

Note that this is a special interest group of the Society of Clinical Child and **Adolescent** Psychology. This evolution of research dealing with "emerging adulthood" supports generally an extension of the developmental principles recognized in both *Roper* and *Miller* to adolescents beyond age 18 to include individuals in their early to mid- 20's. By way of example, Legislation passed in California to amend the penal code (sections 3051 and 4801) in 2015, requires that parole boards apply the *Miller* principles up to age twenty-three. Any individual should not be considered eligible for imposition of

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the death penalty until (at least) age 26, when brain maturation has been accomplished and fully adult “executive function” and “affective regulation” are consistently present and available. In the years immediately following the 18th birthday there is a clear deterioration of function in emotionally arousing and stressful situations (fear, anger, and lust, for example). This is the conclusion of research using brain imaging technology conducted by Alexandra Cohen and her colleagues. Legal considerations aside, this provides a clear *scientific* basis for extending the *Miller* protections upward from age 18, most notably because most murders committed by young offenders occur in precisely such conditions of emotional arousal.

Having established that Demitri ***should*** be viewed from the perspective provided by the *Miller v. Alabama* Supreme Court decision, let me comment on how the “Miller factors” apply in his case.

In the *Miller* case, the Supreme Court laid out five grounds for offering special sentencing protections parole for juveniles:

- *Immaturity, impetuosity, less capacity to consider future consequences, and related characteristics that impair juveniles’ ability to make decisions.

- *A family and home environment from which a child cannot extricate himself or herself.

- * The circumstances of the offense, including the role the youth played and the influence of peer pressure.

- * Impaired legal competency that puts juveniles at a disadvantage in dealing with police or participating

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in legal proceedings.

*The youth's potential for rehabilitation.

As we shall see, **these issues are present in the case of Demitri Green-Hosey. He was 18 at the time of the violence directed at Arin Williams, and thus, his behavior reflected impulsiveness and limited consideration of consequences due to his immature brain development. His behavior was the result, in part, of the disrupted family relationships that impaired his development. He was operating in a social environment ("urban war zone") in which criminal and anti-social activity was common as part of a general estrangement from "mainstream" experiences. And finally, the nature of his behavior at age 18 could not accurately predict what he can become as a mature adult, because his potential for rehabilitation was masked by his youth and the social environment he inhabited at the time of his crime.**

**Immaturity, impetuosity, less capacity to consider future consequences, and related characteristics that impair juveniles' ability to make decisions.*

As noted earlier, at age 18, Demitri was encountering the world with an immature brain. This immaturity figures prominently in the problems of poor decision making ("executive function") and managing emotions ("affective regulation") that characterize adolescents and individuals in the "emerging adulthood" periods of life. This immaturity is compounded for individuals, like Demitri, who have experienced a high level of adversity growing up (and whose brain development is thus slowed relative to individuals who have not experienced a high level of childhood adversity).

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His experience with school was difficult. He reports, "I use to really try had in school. I felt as if my teacher never tried to help me. From 3 grade to 11 grade I was in behavior school til I drop out. I never had to do no work I just got pasted. I was told I had ADHD in and depressive disorder...When I was 10 or 11 years old I was put in a mental facility. From the time we come back from DCFS I went to behavioral disability and learn disability school."

**A family and home environment from which a child cannot extricate himself or herself.*

The federal government's Centers for Disease Control has endorsed an approach to risk accumulation that focuses upon the impact of ten "Adverse Childhood Experiences." These risk factors are assessed through a series of ten questions, including inquiries about childhood experience of physical, sexual, and psychological maltreatment, poverty, domestic violence, household substance abuse, parental separation or divorce, depression or suicide in a family member, and incarceration of a family member. While not encompassing all possible negative influences on development (e.g. the impact of racism and educational impairment) these ten factors have proved to be powerful in accounting for differences in negative outcomes extending into adulthood—e.g. accounting for 65% of the variation in suicide attempts, 55% of the variation in substance abuse, 45% of the variation in depression and 30% of the variation in violent behavior.

For purposes of understanding the lives of the "general population," it may be sufficient to report measures of health and well-being in which the lives of adults who had an ACE score of zero (some 36% of the general population), one

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(26%), two (16%), or three ACE's (10%) are compared with those with four or more (13% of the population). But in the case of appreciating the developmental damage experienced by many individuals who commit acts of severe violence, it is necessary to appreciate the impact of extraordinarily high scores that are rare in the general population, but relatively common in this group. *Only 7% of the general population have a score of five or more: 4% have an ACE score of five; 2% have a score of six; less than 1% have a score of seven or eight; 01% have a score of nine or ten.* Among defendants involved in murder cases it is not uncommon to have such unusually high scores.

In 2020, when Demitri responded to the ten ACE questions his score was 10—putting him in the worst .01% of the American population.

Being emotionally abused or fearing that you would be harmed (Item #1): He reports being verbally humiliated: "My mother use to tell me I never be shit in life. My father use to tell me all I am going to be good at was selling drugs. I never become nothing."

Being physically assaulted in the home as a form of discipline (Item #2): He reports being beaten.

Being sexually abused (Item #3): "When I was 4 or 5 years old me and my brothers and sisters was taken from my parents by the State (DCFS). When I was 7 years old we was take again by DCFS. I lived with this care giver who use to molest me She use to make me have oral sex with her to eat."

Experiencing emotional neglect (Item #4): "I don't remember my mother or father ever telling me they love me."

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Parental rejection has been termed a "psychological malignancy" on the basis of extensive international research conducted by Ronald Rohner and his colleagues. Their research concludes that parental rejection accounts for 25% of the variance in bad outcomes for children and youth. Clearly Reginal felt rejected by his father and by his mother. Demitri reports that he was rejected by his parents: "When I was 13 years old my mother put me out of her house. I bounce from friends house to juvenile centers from the age of 13 to 18 years old."

Experiencing physical neglect (Item #5): "It was never no food in the house so around 10 or 11 I started to sell drugs to help feed my little sister. When my father found out what I was doing he beat me and told me I only had to sell to him."

Experiencing parental separation (Item #6): Demitri's father was incarcerated and his parents experienced separation.

Witnessing domestic violence (Item #7): "When I came back from DCFS I use to see my father beat my mother. My father use to get high and beat my mother and me and my brothers and sisters."

Living with his substance abuser (Item #8): "My mother and father use drugs when I was a child."

Living with a household member who was depressed or mentally ill or suicidal (Item #9): "My father had mental illness and was in prison most of my life."

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Having a family member who went to prison (Item #10): As noted in Item #9, his father was locked up for most of Dimitri's life.

When asked how common he thought it was for kids to score eight or more on the ACE Scale he replied "Common 'cause everybody went through the same things.." When asked about American kids in general he replied, "Most of us are poor so we going to have hard times." Kids know the world they know, and often over generalize it to life in general.

When asked what word comes to mind when he hears the word "mother," Dimitri replied, "drugs, pain." When asked about "father," his response was "I hate him." He says this of his parents, "Where was the love that. Saw other kids get? My mother never hug me 'til I got locked up."

**The circumstances of the offense, including the role the youth played and the influence of peer pressure.*

The crime for which Dimitri was sentenced took place in the company of his older brother Jaquan (who, at age 20, received a sentence of 25 years and was not the actual shooter—that being Dimitri). It involved robbing drugs from a dealer and killing him in the process.

In conventional legal terms, Dimitri made many "bad choices." However, this rendering is developmentally naïve, in the sense that it neglects to put them in the context of what is known about the decision-making process in youth. The purpose of my evaluation is to put Dimitri and his choices in such a developmental perspective. Indeed, the patently self-defeating and ultimately lethal nature of these choices is, in a real sense, the whole point of the *Miller* analysis. Why? Because they

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exemplify the problems with “executive function” and “affective regulation” that form the foundation of the Supreme Court’s requirement that we must bring a developmental perspective to all such “choices” made by youth (up to age 26 at least when brain maturation can be presumed). Thus, while Demetri’s role in the violence for which he is incarcerated is a clear fact, it (and his history of bad “choices”) is also a complex matter psychologically. Beyond the developmental issues it reflects the morally corrupting effects of growing up in an urban war zone, with the corresponding development of the “war zone mentality.”

An understanding of Demetri’s behavior and development requires an appreciation of the impact of growing up in a context of extreme community violence. Let me offer a metaphor. Without any conceptual framework the following list of numbers appears to be nothing more than a list of number: 1, 3, 5, 7, 11, 17. With a simple framework, the numbers appear to be “odd” numbers. However, if we are told that the number 2 is actually the list and the numbers 9 and 15 are not the concept of “odd numbers” no longer accounts for the set of numbers. It is only with the application of the concept of “prime numbers” (defined as numbers that are divisible only by themselves or the number 1) that we can validate both the connection among these numbers *and* the fact that the number 13 can be “predicted” to lie between 11 and 17. In a similar way, it is necessary to see the full developmental links between the elements of the social environment in which Demetri grew up and the way he thought about and acted with respect to violence and “mainstream” community values and standards. The concept of “growing up in an urban war zone” serves this function.

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Demitri grew up in a social environment in which he was exposed to a high level of community violence. This high level of violence constitutes what I have identified as an "urban war zone" in my research. For example, in a study conducted in Chicago, it was found that in neighborhoods like that in which Demitri was living, 63% of the elementary school children report having witnessed a shooting. This is the level of exposure found in studies in war-torn Lebanon and among Palestinian children during the peak years of political violence in the West Bank and Gaza strip. It also leads to a world view in which witnessing community violence becomes "normal."

He experienced trauma as a child. When asked if he had ever witnessed a shooting growing up, as he responded that he did at age 10. When asked how common he thought it was for kids in his neighborhood to have witnessed a shooting by the time they were 10 years of age, he responded that he thought "everyone" had, "It was normal." This is one consequence of living in an "urban war zone": community violence becomes normalized and an expectable feature of life. The social environment in which Demitri grew up was dominated by gangs (e.g. he reports, "Latin Kings, GD, Vice Lords and SD"). His own gang experience illustrates this. "Join a gang or get killed anyway. Pick the one that is winning."

Trauma linked to community violence shaped his thinking and feelings as a youth, and it takes substantial resocialization to move beyond the resulting "war zone mentality." Demitri first witnessed community violence when he was a child, and by the time he was 18 knew many people who had been killed. By virtue of geography, Demitri was exposed to community violence, drug dealing and crime. He reports, "When I turned 15 years old I saw my best friend get killed over two bags of weed." This led to him joining a gang (the Latin Kings): "When

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my best friend got killed I had nowhere to go so I join a gang to protect me and my little sister. I sold drugs and did anything they told me to make sure me and my little sister would be safe and I can have somewhere to go put my head down at."

Demitri regularly carried a gun: "If I was going somewhere I felt I need one."

This is what it means to live in "an urban war zone," chronic trauma, and all it entails for child and adolescent development, including a pessimistic and fatalistic view of life. So it is, that growing up in a war zone often leads to the development of a "war zone mentality," particularly among males.

The key elements of the "war zone mentality" are extreme sensitivity to threat ("hyper vigilance"—being highly attuned to verbal and physical threats) and a high probability of responding to perceived threat with aggression (including preemptive assault— "get them before they get you.") These two factors often provide the basis for the rapid escalation of conflicts to flourish among youth exhibiting the "war zone mentality." And, they are particularly relevant in understanding the behavior of males in adolescence and emerging adulthood. Male culture and biology predispose them to being vulnerable to social factors that promote aggression.

Like many kids growing up in such an environment in an American city, he was drawn into life on the streets, and these experiences supported the development of the war zone mentality that shapes the way violence is employed in interpersonal conflict as a psychological reality in the lives of young offenders like Demitri Green-Hosey. He reports that after he was released from detention at age 18 he returned to drug dealing: "I came home and sold drugs. I had just had my

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first child and need money to take of use. I sold wee and ills for the next 7 months,. Then I end up locked up for this case."

Impaired legal competency that puts juveniles at a disadvantage in dealing with police or participating in legal proceedings.

Demitri reports that, "My experience in custody was bad. They put me in a room by myself for almost a year when I first go locked up I never had time to talked to my lawyer. None of my family had talked to me. No one came to Court." This isolation certainly impeded his ability to participate effectively in his defense.

**The youth's potential for rehabilitation.*

In an important sense, the process of rehabilitation for youth with high ACE scores is a matter of resilience. Emmy Werner's classic review of research on resilience (the ability to recover from and overcome adversity in life) indicates several foundations:

- *at least average intellectual ability
- *at least one person growing up who is 'crazy' about you
- *demonstrating some special talent or ability
- *educational experiences that enhance development
- *a supportive community
- *a positive attitude about dealing with life

The resilience picture for Demitri is challenging, given the weight of adversity he carried into adulthood and his intellectual limitations (his reading was assessed at a fourth grade level in 2021). He has been diagnosed with depression and anxiety (for which he has been prescribed medications—

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Zoloft and Buspar). But he does have family support (his brother in particular) and expressed a positive attitude about dealing with the issues in his life. His experience of having been sexually abused by his foster mother itself is a major challenge to be over come. For a boy to be removed from his family is itself traumatic; to compound the trauma by being molested while in the "care" of the State is horrible, as is evident in Demetri's account of this and the overall horror of his life as a child: "I was sexually abused by my foster mother. She use to threaten me with death and the promise of never seeing my brother or sister again. I was forced to go into her room at night and I had to perform oral sex on her and she on me. She use to make me stand in the bathtub naked as she played with my penis. When I didn't do what she said I was locked in the bathroom for days. I told my brother. He told me it was okay that what boys do with women. So I never told no one what she did to me."

It has been seven years since the crime for which he was sentenced to 105 years. Demetri's future should be informed by the wisdom of the Supreme Court's decision in *Miller v. Alabama*. The bleak prospects he presented at the time of the crime and his trial should not doom him. While he is still too young at age 25 to know for sure how he will turn out in terms of rehabilitation and positive transformation, he does not appear to be one of the "rarest" of young offenders incapable of significant improvement. In my 2018 book *Miller's Children*, I have explored the criteria for including a particular young person in this "rarest" category, namely psychopaths and individuals so profoundly developmentally damaged that they cannot profit from intervention, maturation, and spiritual development to achieve a positive identity and status as an adult "safe" for release into the community. Demetri does not appear to fit either category of "exceptions."

Green-Hosey, D.

Although he is still young (age 25) and thus a “work in progress,” Demitri has begun to make progress towards rehabilitation and positive transformation. I expect that this process will continue. He says this of how he sees life now: “He says of his progress in recovering: “From when I first came to prison I was mad. I can see the growth and in me. I had a job for a little bit, and am in school. I completed anger management. I’m trying to change to become better, I only been in two fights in four years. My last one was 9.13.19. I know I change in becoming a better person and trying to be something better every day and I have no more gang involvement at all.”

His disciplinary record since 2017 includes multiple infractions for violations of rules regarding property and management, and three infractions involving aggression (“fighting” and “Intimidation or Threat”).

Conclusion: Demitri has only recently reached the age at which brain maturity can be presumed. He now can use this mature brain to begin the processes of productive and developmentally enhancing activities. With an ACE score of ten, Demitri has a lot to process, so the more he applies himself to developmentally enhancing activities the better.

Clinical psychologist Carol Holden has offered a useful framework for determining whether or not an individual is a Green-Hosey candidate for Miller re-sentencing (or is in the rare category of the “irreparably corrupt”). She identifies 14 considerations:

- *poor disciplinary history, with little evidence of improvement
- *ongoing criminal behavior

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- *violence, predatory behavior
- *continuing gang involvement
- *failure to benefit from educational programming
- *poor work record
- *failure to benefit from psych/self-help programming
- *lack of insight, lack of treatment amenability
- *criminal attitudes
- *lack of remorse
- *callous-unemotional traits
- *current antisocial personality disorder, psychopathy
- *assessed high risk for recidivism
- *ongoing substance use, mental illness

While Demitri has not completed the process of rehabilitation and positive transformation, he appears to be heading in the right direction, and therefore is not one of the rare "irreparably corrupt" individuals identified by the Supreme Court in *Miller v. Alabama*, for whom a life without possibility of parole is warranted. His current de facto life sentence (of 105 years) is thus developmentally inappropriate. I believe that a re-sentencing decision that permits his eventual release from prison is a wise, sound, reasonable, and "safe" decision, in keeping with the knowledge base of contemporary developmental science.

Professional Background and Credentials:

I am a developmental psychologist who is a member and Fellow of the American Psychological Association—and its Division on Developmental Psychology. From 1989-1990, I served as president of the Association's Division on Child, Youth and Family Services. I am currently Emeritus Professor of Human Development at Cornell University and of

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Psychology at Loyola University Chicago. Previously I was Maude C. Clarke Professor of Psychology at Loyola University Chicago. Prior to this I served as Elizabeth Lee Vincent Professor of Human Development at Cornell University in Ithaca, New York and from 1985 to 1994, as President of the Erikson Institute for Advanced Study in Child Development in Chicago, a graduate school and research center.

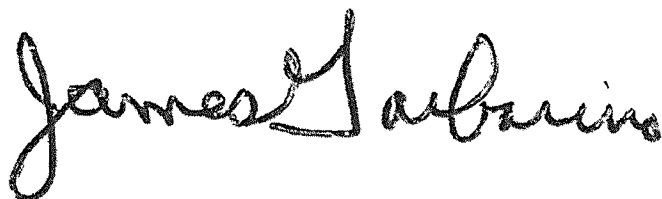
I am the author of over 100 scholarly articles and book chapters dealing with family, child, and adolescent development issues, with an emphasis on violence and trauma, and I am the author or editor of 26 books including *Miller's Children: Why Giving Teenage Killers a Second Chance Matters for All of Us* (2018), *Listening to Killers: Lessons Learned from My 20 Years as a Psychological Expert Witness in Murder Cases* (2015), *Lost Boys: Why Our Sons Turn Violent and How We Can Save Them*. (1999), *Children and the Dark Side of Human Experience* (2008), *See Jane Hit: Why Girls Are Becoming More Violent and What We Can Do About It* (2006), *And Words Can Hurt Forever: How to Protect Adolescents from Bullying, Harassment and Emotional Violence* (2003), *What Children Can Tell Us* (1989), *The Psychologically Battered Child* (1986), *Children in Danger: Coping with the Consequences of Community Violence* (1992), *No Place To Be A Child: Growing Up in a War Zone* (1991), *Raising Children in a Socially Toxic Environment* (1995), *Adolescent Development: An Ecological Perspective*. (1985).

My work with children and youth experiencing severe violence has included communities across the United States and war zones across five continents. I was the first recipient of the C. Henry Kempe Award from the National Conference on Child Abuse and Neglect. In 1989, I received the American Psychological Association's Award for Distinguished

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Professional Contributions to Public Service, and in 1995, the Dale Richmond Award from the American Academy of Pediatrics, specifically honoring my work in the field of community violence and trauma. I have served as a consultant to a wide range of organizations, including the American Medical Association, the National Committee to Prevent Child Abuse, and the FBI. I have received awards for my empirical research, including in 1992, from the Society for Psychological Study of Social Issues.

Since 1994, I have served as a psychological expert in more than 300 murder cases, including 125 "Miller" re-sentencing cases. I have been qualified as an expert in developmental psychology in jurisdictions including Florida, Pennsylvania, Illinois, New Jersey, New York, South Carolina, Connecticut, Michigan, Oregon, South Carolina, Indiana, Virginia, Washington, DC, and Georgia.

A handwritten signature in black ink, reading "James Sabatino". The signature is written in a cursive, flowing style with a large initial "J".

1. Did a parent or other adult in the household **often** ...
Swear at you, insult you, put you down, or humiliate you?
or
Act in a way that made you afraid that you might be physically hurt?
(Yes) No If yes enter 1 1
2. Did a parent or other adult in the household **often** ...
Push, grab, slap, or throw something at you?
or
Ever hit you so hard that you had marks or were injured?
(Yes) No If yes enter 1 1
3. Did an adult or person at least 5 years older than you **ever**...
Touch or fondle you or have you touch their body in a sexual way?
or
Try to or actually have oral, anal, or vaginal sex with you?
(Yes) No If yes enter 1 1
4. Did you **often** feel that ...
No one in your family loved you or thought you were important or special?
or
Your family didn't look out for each other, feel close to each other, or support each other?
(Yes) No If yes enter 1 1
5. Did you **often** feel that ...
You didn't have enough to eat, had to wear dirty clothes, and had no one to protect you?
or
Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?
(Yes) No If yes enter 1 1
6. Were your parents **ever** separated or divorced?
(Yes) No If yes enter 1 1
7. Was your mother or stepmother:
Often pushed, grabbed, slapped, or had something thrown at her?
or
Sometimes or often kicked, bitten, hit with a fist, or hit with something hard?
or
Ever repeatedly hit over at least a few minutes or threatened with a gun or knife?
(Yes) No If yes enter 1 1
8. Did you live with anyone who was a problem drinker or alcoholic or who used street drugs?
(Yes) No If yes enter 1 1
9. Was a household member depressed or mentally ill or did a household member attempt suicide?
(Yes) No If yes enter 1 1
10. Did a household member go to prison?
(Yes) No If yes enter 1 1
- Now add up your "Yes" answers: 10 This is your ACE Score

PEOPLE'S EXHIBIT # 29A
FOR IDENTIFICATION

Foster care/Sister I

I was sexually abused by my foster mother she use to threaten me with death and the promise of never seeing my Brother or Sister again. I was forced to ~~enter~~ go into her room at night and I had to perform oral sex on her and she on me she use to make me stand ~~and~~ in the bathtub naked as ~~she~~ she played with my penis when I didn't do what she said I was locked and the Bathroom for Days I told my Brother he told me it was okay that what boys do with women. So I now told ~~me~~ he and what we did to make sure I came back from D.C. I use to see my father beat my mother. He use to beat my mother and beat me and my Brother and Sister. It was hard to feel and the house so around 10:30 I ~~stayed~~ started to sell Drugs to help feel my interest.

PEOPLE'S EXHIBIT # 29B
FOR IDENTIFICATION

(My experience in Custody was bad
 They put me and a room by my self
 for almost a year when I first got locked
 up. I never had time to talk to
 my lawyer. None of my family had
 talked to me. No one came to
 court. I just now got back talking
 to them.)

The resilience picture for Demetri is
 Challenging.

From when I first came to prison I was
 mad I can't see the ~~good~~ growth and me
 I had a job for a little bit, am and
 school. I completed anger management.
 I'm trying to change to become better.

I only been in two fights in 4
 years my last one was 9, 13, 19. I send
 you my disciplinary tracking card.

I know I change in becoming
 a better person am trying to be
 something better every day and I have
 no more gang involvement at all.

PEOPLE'S EXHIBIT # 29C
 FOR IDENTIFICATION

- 1 When asked if he had ever witnessed a shooting growing up, as he responded that he did at age 10 when asked how common he thought it was for kids in his neighborhood to have witnessed a shooting by the time they were 10 years of age he responded ~~that it was~~ "everyone had it was normal"
- 2 The social environment in which Demitri grew up was dominated by gangs. L.A. King, G.D., Vice Lords, and S.D.
His own gang experience illustrates this
Join a gang or get killed anyway pick the ~~best~~ one that is winning
- 3 When I turned 15 years old I saw my best friend get killed over two bags of weed. This led him to joining a gang the L.A. King
- 4 Demitri regularly carried a gun IF I was going so were I felt I need one

PEOPLE'S EXHIBIT # 29D
FOR IDENTIFICATION

- 1 my father had mentally illness an was in prison most of my life.
- 2 when asked how common he thought it was for kids to score eight or more on the Ace scale he replied.
Common cause everybody want thought the say thing. Broke trying to find the next meal.
- 3 when asked about american kids in general he replied. most of use are poor so we going to have hard times.
- 4 when asked what word comes to mind when he hears the word mother Demitri replied.
Drugs, pain
- 5 when asked about father, his response was
~~I~~ I hate them no love their
- 6 He say this of his parent xx
where was the love that i saw other kids get my mother never hug me to I got locked up.

(10f2)

PEOPLE'S EXHIBIT # 29E
FOR IDENTIFICATION

From the age of 13 to 18 years old. When I turned 15 years old I saw my Best Friend get killed over two Bags of weed. When my Best Friend Got Killed. I had No where to go! So I Join a gang to Protect me and my Little Sister. I Sold Drugs and did anything they told me to make sure me and my little Sister would be Safe and I can have some where to go put my head Down at. When I was 17 years old I went to a Juvenile Center and was put out of School. They Sent me to audit Facility when I was 18 years old. I came home and Sold Drug. I had just had my First child and need money to take care of us. I Sold weed and pills for the next 7 month. Then I end up ~~and~~ locked up for this case. That all I can remember.

PEOPLE'S EXHIBIT # 29F
FOR IDENTIFICATION

I have (5) Brothers and (5) Sisters who lived with me growing up. My Mother and Father use Drugs when I was a child. When I was 4 or 5 years old me and my Brothers and Sisters was taken from my Parents. By the State (D.C.F.S) when I was 7 years old we was taken again By (D.C.F.S). I lived with this Carer given who use to molest me. She use to make me have oral sex with her to eat. When I turn 8 or 9 years old we went back to live with my Mother. I started to sell ~~Drugs~~ at 11 years old to Help Feed my little Sisters. My Mother stoped using Drugs the second time she got us back. But my Father kept using Drugs. My Father use to get high and Beat my Mother and me and my Brother an Sister. When I was 10 or 11 years old I was put and a mental facility. When I come home my Mother took me an my little Sister out and got us a Big Cake. She took me to Get Some Game because I miss Christmas. From the time we come back from (D.C.F.S) I went to behavior disability an ~~learn~~ learn disability School. When I was 13 years old my Mother put me out her House. I Run away from Family house and Juvenile centers.

PEOPLE'S EXHIBIT # 296
FOR IDENTIFICATION

when my father found out what
 I was doing, he ~~was~~ beat me and
 told me I only had to sell to him.
 I don't remember my mother telling
 me they told me my mother
 use to tell me I never be shut in
 life. My father use to tell me all
 am going to be good at was selling
 Drugs. I never become nothing. I use
 to really try hard in school. I
 felt as if my teachers never tried
 to help me from 3rd grade to 11th grade.
 I was kicked out of school to I drop out.
 I never had to do no work. I
 just got paid. I was told I
 had ~~ADHD~~ ADHD in some depressive disorder.
 (I started school again. Then later I
 sent my grade level and scores to
 you)

PEOPLE'S EXHIBIT # 39M
 FOR IDENTIFICATION

(B33539)

Hello again! I am sorry I missed you during rounds. I had the wrong cell number for you. But I received your letter and am sending that email Request for you as well. Below is the info you asked for.

Medication:

Zoloft (100mg BID)
 Buspar (15mg BID)

Diagnosis : (unspec = unspecified)

psych - unspec depressive disorder
 unspe. anxiety disorder

MHP - unspec. depression (depressive disorder with Cluster B traits.

If you need anything else, before our next session please write me.

Regards,

PEOPLE'S EXHIBIT # 291
 FOR IDENTIFICATION

MHP (Ms. Sturgill)

IDOC#: Y17618

Housing Unit: D:09:49

Test Scores:

Date: 3/19/21

Grade Level

Reading: 4.0

Math: 3.0

Average: 3.5

✓ Scored below 6.0 ^{remaining} placed on Mandatory ABE waiting list. You will be contacted when it is time for you to attend school.

Scored 6.1 – 7.9 placed on Advance ABE waiting list. You will be contacted when it is time for you to attend school.

Scored 8.0 + placed on GED waiting list. You will be contacted when it is time for you to attend school.

Scored 8.0 in both Reading and Math, and I have your GED or HS Diploma on file; placed on Barber College waiting list. You will be contacted when it is time for you to attend school.

Scored 8.0 in both Reading and Math, but I DO NOT have your GED or HS Diploma on file. I cannot place you on the Barber College waiting list until I receive proof of your GED or HS Diplomas

Scored below 8.0 in both or either Reading or Math. Cannot be placed on Barber College waiting list. Write me in 45 days to be retested.

Ms. Costabile / Principal



PEOPLE'S EXHIBIT # 291
FOR IDENTIFICATION

incident/summ#/inst.

Ticket Type

Offense Codes, Descriptions

Disciplinary Action

5/5/2017	202 Damage Or Misuse of Property	<u>Guilty</u>	1 Months C Grade/Level
201701678/1-STA	308 Contraband/Unauthorized Property	<u>Guilty</u>	1 Months Commissary Restriction
Major	313 Disobeying a Direct Order	<u>Guilty</u>	
	404 Violation Of Rules	<u>Guilty</u>	
	Comments: warden bulletin 2014-24		
12/4/2017	304 Insolence	<u>Guilty</u>	1 Months C Grade/Level
201703429/1-STA	313 Disobeying a Direct Order	<u>Guilty</u>	1 Months Commissary Restriction
Major			
8/14/2018	214 Fighting	<u>Guilty</u>	1 Months C Grade/Level
201802030/1-STA	215 Disobeying a Direct Order Essential to	<u>Guilty</u>	1 Months Segregation
Major	Safety and		1 Months Commissary Restriction
12/16/2018	313 Disobeying a Direct Order	<u>Guilty</u>	Verbal Reprimand
201803032/1-STA			
Minor			
1/3/2019	215 Disobeying a Direct Order Essential to	<u>Guilty</u>	1 Months C Grade/Level
201900030/2-STA	Safety and		1 Months Segregation
Major			Other : SMI
			1 Months Commissary Restriction
4/2/2019	308 Contraband/Unauthorized Property	<u>Guilty</u>	1 Months C Grade/Level
201900819/1-STA			1 Months Commissary Restriction
Major			
9/13/2019	214 Fighting	<u>Guilty</u>	1 Months C Grade/Level
201902566/1-STA			15 Days Segregation
Major			Other : SMI
10/24/2019	104 Dangerous Contraband	<u>Deleted</u>	1 Months Commissary Restriction
201902832/1-STA	Comments: TATTOO CONTRABAND		
Major	202 Damage Or Misuse of Property	<u>Guilty</u>	
	308 Contraband/Unauthorized Property	<u>Guilty</u>	
	402 Health,Smoking Or Safety Violations	<u>Guilty</u>	
10/24/2019	201 Concealment of Identity	<u>Guilty</u>	Other : SMI
201902819/1-STA	211 Pos. or Sol. of U/A Personal Information	<u>Guilty</u>	1 Months Yard Restriction
Major	Comments: USING ANOTHER I/M ID		
	303 Giving False Information To An	<u>Not Guilty</u>	
	Employee		
7/26/2020	206 Intimidation Or Threats	<u>Guilty</u>	45 Days Segregation
202001701/1-STA	304 Insolence	<u>Guilty</u>	Other : SMI
Major	313 Disobeying a Direct Order	<u>Guilty</u>	
12/29/2020	310 Abuse Of Privileges	<u>Guilty</u>	Verbal Reprimand
202100072/1-STA	404 Violation Of Rules	<u>Guilty</u>	
Minor	Comments: 3 way calling		

Run Date: 2/22/2021 11:53:56

Page 1 of 1

PEOPLE'S EXHIBIT # 29K
FOR IDENTIFICATION

CERTIFICATE of ACHIEVEMENT

Demitri Green-Hosey

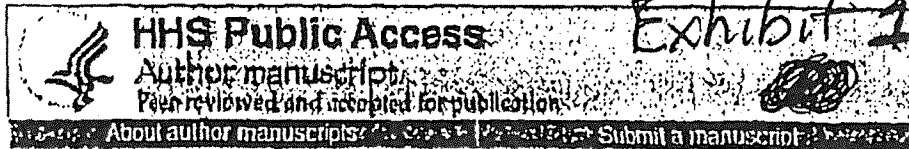
HAS SUCCESSFULLY COMPLETED THE
Anger Management Program
at Stateville Correctional Center

MARCH 6
2020

Alice Fitzgerald, Psy D, LCP
SIGNED, Alice Fitzgerald, Psy D, LCP

PEOPLE'S EXHIBIT # 296
FOR IDENTIFICATION

UCF-07.6



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Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy

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Abstract

Go to:

Longitudinal neuroimaging studies demonstrate that the adolescent brain continues to mature well into the 20s. This has prompted intense interest in linking neuromaturation to maturity of judgment. Public policy is struggling to keep up with burgeoning interest in cognitive neuroscience and neuroimaging. However, empirical evidence linking neurodevelopmental processes and adolescent real-world behavior remains sparse. Nonetheless, adolescent brain development research is already shaping public policy debates about when individuals should be considered mature for policy purposes. With this in mind, in this article we summarize what is known about adolescent brain development and what remains unknown, as well as what neuroscience can and cannot tell us about the adolescent brain and behavior. We suggest that a conceptual framework that situates brain science in the broader context of adolescent developmental research would help to facilitate research-to-policy translation. Furthermore, although contemporary discussions of adolescent maturity and the brain often use a deficit-based approach, there is enormous opportunity for brain science to illuminate the great strengths and potentialities of the adolescent brain. So, too, can this information inform policies that promote adolescent health and well-being.

Keywords: Adolescent, Health policy, Neuroscience, Neuroimaging, Judgment

In the last decade, a growing body of longitudinal neuroimaging research has demonstrated that adolescence is a period of continued brain growth and change, challenging longstanding assumptions that the brain was largely finished maturing by puberty [1-3]. The frontal lobes, home to key components of the neural circuitry underlying "executive functions" such as planning, working memory, and impulse control, are among the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life [2]. This finding has prompted interest in linking stage of neuromaturation to maturity of judgment. Indeed, the promise of a biological explanation for often puzzling adolescent health risk behavior has captured the attention of the media, parents, policymakers, and clinicians alike. Although such research

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argue that empirical support for a causal relationship between neuromaturational processes and real-world behavior is currently lacking [4].

Despite the lack of empirical evidence, there has been increasing pressure to bring adolescent brain research to bear on adolescent health-and-welfare policy. For example, in the policy process, adolescent brain immaturity has been used to make the case that teens should be considered less culpable for crimes they commit; however, parallel logic has been used to argue that teens are insufficiently mature to make autonomous choices about their reproductive health [5]. This apparently conflicting use of neuroscience research evidence highlights the need for brain scientists, neurocognitive psychologists, and adolescent health professionals to work together to ensure appropriate translation of science for policy. Failing to proactively define or engage in a discussion about the role of neuroimaging research in policy may catalyze a course of action many adolescent health professionals would not endorse.

In this review, we begin by outlining historical attempts to use developmental benchmarks as measures of adolescent maturity. (When we refer to "maturity" we do not intend to suggest the end of development, but rather use this as shorthand for the achievement of adult-like capacities and privileges.) We then briefly summarize what is known about adolescent brain development, and what is unknown. (For in-depth reviews of adolescent brain development, and more nuanced discussions of research findings, which are beyond the scope of this review, see [6] and [7]). We provide an overview of what neuroimaging research can and cannot tell us about the adolescent brain and behavior. We then highlight the current use of the brain sciences in adolescent health policy debates. Finally, we outline a strategy for increasing the utility of brain science in public policy to promote adolescents' well-being.

A Historical Perspective on Development and Maturity

Go to:

Throughout history there have been biological benchmarks of maturity. For example, puberty has often been used as the transition point into adulthood. As societal needs have changed, so too have definitions of maturity. For example, in 13th century England, when feudal concerns were paramount, the age of majority was raised from 15 to 21 years, citing the strength needed to bear the weight of protective armor and the greater skill required for fighting on horseback [8]. More recently, in the United States the legal drinking age has been raised to 21, whereas the voting age has been reduced to 18 years so as to create parity with conscription [9]. Similarly, the minimum age to be elected varies by office in the U.S.: 25 years for the House of Representatives, 30 years for the Senate, and 35 years for President. However, individuals as young as 16 can be elected Mayor in some

~~municipalities. The variation evident in age-based definitions of maturity illustrates that most are~~
developmentally arbitrary [9]. Nonetheless, having achieved the legal age to participate in a given activity (e.g., driving, voting, marrying) often comes to be taken as synonymous with the developmental maturity required for it.

Age-based policies are not exceptional; policies are frequently enacted in the face of contradictory or nonexistent empirical support [10]. Although neuroscience has been called upon to determine adulthood, there is little empirical evidence to support age 18, the current legal age of majority, as an accurate marker of adult capacities. Less clear is whether neuroimaging, at present, helps to inform age-based determinations of maturity. If so, can generic guidelines be established, or is individual variation so great as to preclude establishing a biological benchmark for adult-like maturity of judgment?

Brain Development in Adolescence

Go to:

Current studies demonstrate that brain structures and processes change throughout adolescence and, indeed, across the life course [11]. These findings have been facilitated by imaging technologies such as structural and functional magnetic resonance imaging (sMRI and fMRI, respectively). Much of the popular discussion about

adolescent brain development has focused on the comparatively late maturation of the frontal lobes [12], although recent work has broadened to the increasing "connectivity" of the brain.

Throughout childhood and into adolescence, the cortical areas of the brain continue to thicken as neural connections proliferate. In the frontal cortex, gray matter volumes peak at approximately 11 years of age in girls and 12 years of age in boys, reflecting dendritic overproduction [7]. Subsequently, rarely used connections are selectively pruned [6] making the brain more efficient by allowing it to change structurally in response to the demands of the environment [13]. Pruning also results in increased specialization of brain regions [14]; however, the loss of gray matter that accompanies pruning may not be apparent in some parts of the brain until young adulthood [2,15,16]. In general, loss of gray matter progresses from the back to the front of the brain with the frontal lobes among the last to show these structural changes [3,6].

Neural connections that survive the pruning process become more adept at transmitting information through myelination. Myelin, a sheath of fatty cell material wrapped around neuronal axons, acts as "insulation" for neural connections. This allows nerve impulses to travel throughout the brain more quickly and efficiently and facilitates increased integration of brain activity [17]. Although myelin cannot be measured directly, it is inferred from volumes of cerebral white matter [18]. Evidence suggests that, in the prefrontal cortex, this does not occur until the early 20s or later [15,16].

The prefrontal cortex coordinates higher-order cognitive processes and executive functioning. Executive functions are a set of supervisory cognitive skills needed for goal-directed behavior, including planning, response inhibition, working memory, and attention [19]. These skills allow an individual to pause long enough to take stock of a situation, assess his or her options, plan a course of action, and execute it. Poor executive functioning leads to difficulty with planning, attention, using feedback, and mental inflexibility [19], all of which could undermine judgment and decision making.

Synaptic overproduction, pruning and myelination—the basic steps of neuromaturation—improve the brain's ability to transfer information between different regions efficiently. This information integration undergirds the development of skills such as impulse control [20]. Although young children can demonstrate impulse control skills, with age and neuro-maturation (e.g., pruning and myelination), comes the ability to *consistently* use these skills [21].

Evidence from animal studies suggests that the neural connections between the amygdala (a limbic structure involved in emotional processing, especially of fear and vigilance) and the cortices that comprise the frontal lobes become denser during adolescence [22]. These connections integrate emotional and cognitive processes and result in what is often considered to be "emotional maturity" (e.g., the ability to regulate and to interpret emotions). The evidence suggests that this integration process continues to develop well into adulthood [23]. Steinberg, Dahl, and others have hypothesized that a temporal gap between the development of the socioemotional system of the brain (which experiences an early developmental surge around puberty) and the cognitive control system of the brain (which extends through late adolescence) underlies some aspects of risk-taking behavior [24,25]. This temporal gap has been compared with starting the engine of a car without the benefit of a skilled driver [25].

Adolescent Neuropsychology: Linking Brain and Behavior

Go to:

As detailed above, across cultures and millennia, the teen years have been observed to be a time of dramatic changes in body and behavior. During adolescence, most people successfully navigate the transition from dependence upon caregivers to self-sufficient adult members of society. Where specifically, along the maturational path of cognitive and emotional development, individuals should be given certain societal rights and responsibilities continues to be a topic of intense interest. Increasingly, neuroscience has been called on to inform

this question.

Impulse control, response inhibition, and sensation seeking.

Among the many behavior changes that have been noted for teens, the three that are most robustly seen across cultures are: (1) increased novelty seeking; (2) increased risk taking; and (3) a social affiliation shift toward peer-based interactions [13]. This triad of behavior changes is seen not only in human beings but in nearly all social mammals [13]. Although the behaviors may lead to danger, they confer an evolutionary advantage by encouraging separation from the comfort and safety of the natal family, which decreases the chances of inbreeding. The behavior changes also foster the development and acquisition of independent survival skills [13].

Studying the link between behavioral changes and brain changes has been greatly facilitated by recent advances in neuroimaging technology and behavioral assessments. One challenge has been to identify the fundamental units of emotion and cognition and how they combine to determine more complicated "real-world" behaviors. For instance, younger adolescents are less likely than older adolescents to wait a given period of time to receive a larger reward [26]. This tendency can be studied using experiments in which the subject is asked questions such as whether they would rather receive \$800 now or \$1,000 in 12 months. By varying the amount of monetary difference and/or time between the transactions, an "indifference point" can be calculated to quantify an individual's tendency to prefer the "here and now" to some future reward. There is an extensive literature characterizing effects of age, gender, intelligence quotient (IQ), and other variables on this phenomenon, which is termed "delay discounting" [26,27]. However, more recent work has demonstrated that delay discounting is determined in part by the more fundamental traits of impulse control and future orientation, each with their own neural representations and developmental trajectories [28]. Furthermore, future orientation itself is a multidimensional construct involving cognitive, affective, and motivational systems.

Studies using fMRI are beginning to contribute to this parsing of behavior into more fundamental units by characterizing different neural representations and maturational courses for separate but related concepts such as impulse control and sensation seeking. Whereas sensation seeking changes seem to reflect striatal dopamine changes related to the onset of puberty, impulse control, as discussed previously, is more protracted and related to maturational changes in the frontal lobe [21].

"Hot" and "cold" cognition

Perhaps because of the relative ease of quantifying hormonal levels in animal models, it is tempting to attribute all adolescent behavioral changes to "raging hormones." More nuanced investigations of adolescent behavior seek to understand the specific mechanisms by which hormones affect neural circuitry and to discern these processes from nonhormonal developmental changes. An important aspect of this work is the distinction between "hot" and "cold" cognition. Hot cognition refers to conditions of high emotional arousal or conflict; this is often the case for the riskiest of adolescent behaviors [29]. Most research to date has captured information in conditions of "cold cognition" (e.g., low arousal, no peers, and hypothetical situations). Like impulse control and sensation seeking, hot and cold cognition are subserved by different neuronal circuits and have different developmental courses [30]. Thus, adolescent maturity of judgment and its putative biological determinants are difficult to disentangle from socioemotional context.

What We Do Not Know About Brain Development In Adolescence

Go to:

In many respects, neuroimaging research is in its infancy; there is much to be learned about how changes in brain structure and function relate to adolescent behavior. As of yet, however, neuroimaging studies do not allow a chronologic cut-point for behavioral or cognitive maturity at either the individual or population level. The ability to designate an adolescent as "mature" or "immature" neurologically is complicated by the fact that

development have not been well delineated [5].

Neuroimaging has captured the public interest, arguably because the resulting images are popularly seen as “hard” evidence whereas behavioral science data are seen as subjective. For example, in one study, subjects were asked to evaluate the credibility of a manufactured news story describing neuroimaging research findings. One version of the story included the text, another included an fMRI image, and a third summarized the fMRI results in a chart accompanying the text. Subjects who saw the brain image rated the story as more compelling than did subjects in other conditions [31]. More strikingly, simply referring verbally to neuroimaging data, even if logically irrelevant, increases an explanation’s persuasiveness [32].

Despite being popularly viewed as revealing the “objective truth,” neuroimaging techniques involve an element of subjectivity. Investigators make choices about thickness of brain slices, level of clarity and detail, techniques for filtering signal from noise, and choice of the individuals to be sampled [5]. Furthermore, the cognitive or behavioral implications of a given brain image or pattern of activation are not necessarily straightforward. Researchers generally take pains to highlight the correlative nature of the relationship; however, such statements are often misinterpreted as causal [5]. Establishing a causal relationship is more complicated than it might, at first, seem. For example, there is rarely a one-to-one correspondence between a particular brain region and its discrete function; a given brain region can be involved in many cognitive processes, and many types of cognitive processes may be subserved by a particular brain structure [33].

Some neuroscientists lament that the technology has been used too liberally to draw conclusions where there is little empirical basis for interpreting the results. For example, a 2007 *New York Times* Op-Ed piece reported the results of a study in which fMRI was used to view the brains of 20 undecided voters while they watched videos of presidential candidates; they had previously rated the candidates on a scale of 1 to 10 from “very unfavorable” to “very favorable” [34]. The results of the brain scans were interpreted as reflecting the inner thoughts of the participants. For instance, “[w]hen viewing images of [Senator Clinton], these voters exhibited significant activity in the anterior cingulate cortex, an emotional center of the brain that is aroused when a person feels compelled to act in two different ways but must choose one. It looked as if they were battling unacknowledged impulses to like [Senator] Clinton” [34]. The editorial drew a swift response from several neuroscientists who believed that, in addition to subverting the standard peer review process before presenting data to the public, the investigators did not address the issue of reverse inference [35]. In neuroimaging terms, reverse inference is using neuroimaging data to infer specific mental states, motivations, or cognitive processes. Because a given brain region may be activated by many different processes, careful study design and analysis are imperative to making valid inferences [36,37]. In symbolic logic terminology, reverse inference errors are related to the “fallacy of affirming the consequent” (e.g., “All dogs are mammals. Fred is a mammal. Therefore, Fred is a dog.”).

In sum, neuroimaging modalities involve an element of subjectivity, just as behavioral science modalities do. A concern is that high-profile media exposures may leave the mistaken impression that fMRI, in particular, is an infallible mind-reading technique that can be used to establish guilt or innocence, infer “true intentions,” detect lies, or establish competency to drive, vote, or consent to marriage.

The adolescent brain in context

Neuroimaging technologies have made more information available about the structure and function of the human brain than ever before. Nonetheless, there is still a dearth of empirical evidence that allows us to anticipate behavior in the real world based on performance *in the scanner* [5]. Linking brain scans to real-world functioning is hampered by the complex integration of brain networks involved in behavior and cognition. Further hindering extrapolation from the laboratory to the real world is the fact that it is virtually impossible to parse the role of the brain from other biological systems and contexts that shape human behavior.

across the lifespan, is a function of multiple interactive influences including experience, parenting, socioeconomic status, individual agency and self-efficacy, nutrition, culture, psychological well-being, the physical and built environments, and social relationships and interactions [38-42]. When it comes to behavior, the relationships among these variables are complex, and they change over time and with development [43]. This causal complexity overwhelms many of our "one factor at a time" explanatory and analytic models and highlights the need to continually situate research from brain science in the broader context of interdisciplinary developmental science to advance our understandings of behavior across the lifespan [44].

Adolescent Maturity and Policy In the Real World: Scientific Complexity Meets Policy Reality Go to:

The most prominent use of neuroscience research in adolescent social policy was the 2005 U.S. Supreme Court Case, *Roper vs. Simmons*, which has been described as the "*Brown v. Board of Education* of 'neurolaw,'" recalling the case that ended racial segregation in American schools [45]. In that case, 17-year-old Christopher Simmons was convicted of murdering a woman during a robbery. Ultimately, he was sentenced to death for his crime. Simmons' defense team argued that he did not have a specific, diagnosable brain condition, but rather that his still-developing adolescent brain made him less culpable for his crime and therefore not subject to the death penalty. *Amicus* briefs were filed by, among others, by the American Psychological Association (APA) and the American Medical Association (AMA) summarizing the existing neuroscience evidence and suggesting that adolescents' still-developing brains made them fundamentally different from adults in terms of culpability.

The AMA brief argued that: "[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains. To a degree never before understood, scientists can now demonstrate that adolescents are immature not only to the observer's naked eye, but in the very fibers of their brains" [46]. (Notably, the brief submitted by the AMA et al., implied a causal link among brain structure, function, and behavior in adolescence [5]). The neuroscientific evidence is thought to have carried significant weight in the Court's decision to overturn the death penalty for juveniles [47].

In a dissenting opinion in that case, Justice Antonin Scalia reflected on a 1990 brief filed by the APA in support of adolescents' right to seek an abortion without parental consent (*Hodgson v. Minnesota*). In this case, the APA argued that adolescent decision making was virtually indistinguishable from adult decision making by the age of 14 or 15. Scalia pointed out this seeming inconsistency: "[The APA] claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, [the APA] has previously taken precisely the opposite position before this very Court. Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them, are ill-equipped to determine which view of science is the right one" [48]. Although one can make the case that the "cold cognitive" context in which abortion-related decisions are made encourages more mature judgment than the "hot cognitive" context of a murder, Scalia's comments highlight the peril of leaving nonscientists to arbitrate and translate neuroscience for policy.

The Supreme Court used neuroimaging research to protect juveniles from the death penalty based on reduced capacity and consequently reduced culpability. A year after *Roper vs. Simmons* was decided, the same logic was extended to limit adolescent sexual behavior. In 2006, the State of Kansas used its interpretation of adolescent neuroscience research to expand the state's child abuse statute to include any consensual touching between minors under the age of 16 years. Although scientists may be reticent to apply their research to policy, in some cases, policy makers are doing it for them.

Some argue that one must only look to the use of early-life brain science to anticipate what happens when brain science is overgeneralized [49]. In the early 1990s, there were several high-profile studies that suggested that there was rapid growth brain growth and plasticity in the first 3 years of life and, therefore, that "enriched"

environments could hasten the achievement of some developmental milestones [50]. This research was used to perpetuate the idea that videos, classical music, and tailored preschool educational activities could give a child a cognitive advantage before the door of neural plasticity swung shut forever [49]. One could imagine that such a perspective would discourage the allocation of resources for school-aged children and adolescents because, if this were true, after early childhood it would simply be "too late." The use of neuroscientific research to support "enriched" environments demonstrates that if neuroscientists do not direct the interpretation and application of their findings (or the lack of applicability), others will do it for them, perhaps without the benefit of their nuanced understanding. A proactive approach to research and research-to-policy translation that includes neuroscientists, adolescent health professionals, and policy makers is an important next step.

Toward a Policy-Relevant Neuroscientific Research Agenda

Go to:

Public policy is struggling to keep up with burgeoning interest in cognitive neuroscience and neuroimaging [51]. In a rush to assign biological explanations for behavior, adolescents may be caught in the middle. Policy scholar Robert Blank comments, "We have not kept up in terms of policy mechanisms that anticipate the implications beyond the technologies. We have little evidence that there is any anticipatory policy. Most policies tend to be reactive" [51]. There is a need to situate research from the brain sciences in the broader context of adolescent developmental science, and to find ways to communicate the complex relationships among biology, behavior, and context in ways that resonate with policymakers and research consumers.

Furthermore, the time is right to advance collaborative, multidisciplinary research agendas that are explicit in the desire to link brain structure to function as well as adolescent behavior and implications for policy [52].

Ultimately, the goal is to be able to articulate the conditions under which adolescents' competence, or demonstrated maturity, is most vulnerable *and* most resilient. Resilience, it seems, is often overlooked in contemporary discussions of adolescent maturity and brain development. Indeed, the focus on pathologic conditions, deficits, reduced capacity, and age-based risks overshadows the enormous opportunity for brain science to illuminate the unique strengths and potentialities of the adolescent brain. So, too, can this information inform policies that help to reinforce and perpetuate opportunities for adolescents to thrive in this stage of development, not just survive.

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White Paper on the Science of Late Adolescence

A Guide for Judges, Attorneys, and Policy Makers

Neuroscience continues to be a rapidly evolving domain of research. This document reflects at the time it was produced the mainstream of developmental neuroscience of adolescence, late adolescence, and emerging young adulthood.

Contact

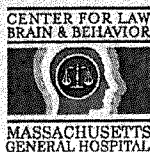
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Executive Summary

The United States Supreme Court decision in *Jones v. Mississippi* (2021)¹ almost certainly signals the end of further expansion at this time by SCOTUS of Eighth Amendment protections to juveniles.² *Jones v. Mississippi* held that a sentencing court need not make a specific finding that a youth is “permanently incorrigible” or even articulate a specific *Miller v. Alabama* rationale for a sentencing decision guided by factors provided in *Miller v. Alabama*.³ It was enough that the sentencing judge understood that he or she had discretion to consider the *Miller* factors and made an individualized sentencing decision—a very low bar.⁴

In addition, the legal framework established by the *Roper-Graham-Miller-Montgomery* line of SCOTUS cases in barring execution for juvenile capital offenses,⁵ Life Without Parole (JLWOP) for juvenile non-homicide cases,⁶ and mandatory LWOP for juvenile homicide cases⁷ has been incorporated to varying degrees into state statutes and case law and offers at least the possibility for a more robust application of *Miller*. The *Miller* approach also remains viable for pursuing expansion of those categorical protections to age 18 and beyond, and perhaps for raising the age of full criminal culpability.

The *Miller* framework’s focus on “transient immaturity” also offers a way of asserting protections for young offenders in individual cases.⁸ Arguably, shifting the focus from “permanent incorrigibility” (which cannot be predicted in a scientifically reliable manner) to “transient immaturity” (which is already established by robust developmental research and neuroscience) may provide opportunities for counsel and courts at trial/sentencing phases and upon appellate review. It may also encourage prosecutors to consider research-based diversion and community-based intervention programs as alternatives to traditional charging decisions and sentencing recommendations.

Similarly, the explicit reliance in these SCOTUS cases upon developmental neuroscience and behavioral science offers models for using science to advance broad evidence-based law and policy reforms regarding juveniles and emerging young adults. This White Paper reports the latest developmental and brain science to inform judges, attorneys, and policy makers about

¹ *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

² For purposes of this White Paper, the following terms are used to describe young people of different ages: (a) *juveniles*: broadly, persons between 13–17; (b) *early adolescents*: persons ages 10–15; (c) *middle adolescents*: persons ages 16–17; (d) *late adolescents*: persons ages 18–21; and (e) *young adults*: persons ages 22–25.

³ *Jones*, 141 S. Ct. at 1311.

⁴ *Id.*

⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶ *Graham v. Florida*, 560 U.S. 48 (2010).

⁷ *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016) (extending *Miller* retroactively).

⁸ *Miller*, 567 U.S. at 479.

critical research developments.⁹ This White Paper is intended to facilitate science-informed decision-making and application of updated research findings in law and public policy bearing upon adolescence and criminal proceedings.

In the landmark case *Miller v. Alabama* (2012), the United States Supreme Court eliminated mandatory life-without-parole sentences for murders committed by youth under age 18.¹⁰ This decision was informed by an evolving understanding of adolescent brain development and behavioral research. Since then, scientific research has emerged which reinforces the reasoning of the *Miller* decision and, if its implications are accepted, extends much of the science that resonated with the *Miller* court to late adolescents (ages 18–21).

Maturation of brain structure, brain function, and brain connectivity continues throughout the early twenties.¹¹ This ongoing brain development has profound implications for decision-making, self-control and emotional processing. For example, new neuroscience research reveals that during emotionally charged situations, late adolescents (ages 18–21) respond more like younger adolescents (ages 13–17) than like young adults (ages 22–25) due to differences in brain maturation.¹²

Compared to young adults above age 21, late adolescents (ages 18–21) also take more risks and engage in more sensation-seeking behavior.¹³ Due to differences in brain development, late adolescents are more likely than young adults to respond to immediate outcomes and are less likely to delay gratification.¹⁴ The presence of peers can intensify these behaviors, and the brains of late adolescents are more responsive to peer involvement than those of young adults.¹⁵ Late adolescents are also more easily swayed by adult influence and coercion than their adult counterparts.¹⁶ These developmental differences in behavior have direct implications for legal decision-making, including waiving *Miranda* rights, susceptibility to false confessions, and making ill-advised trial decisions (e.g., plea decisions).

9 See Appendix A for a foundational review of the science. For an extensive review of brain and socio-behavioral research and its policy implications, see also National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing Opportunity for All Youth*. (2019), <https://doi.org/10.17226/25388>; Institute of Medicine and National Research Council, *Investing in the Health and Well-Being of Young Adults* (2015), <https://doi.org/10.17226/18869>.

10 *Miller*, 567 U.S. at 480.

11 Leah Somerville, *Searching for Signatures of Brain Maturity: What Are We Searching For?*, 92 *Neuron* 1164, 1164–67 (2016).

12 Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 *Psych. Sci.* 549 (2016); Marc D. Rudolph et al., *At Risk of Being Risky: The Relationship Between “Brain Age” Under Emotional States and Risk Preference*, 24 *Developmental Cognitive. Neurosci.*, 93, 93–106 (2017); B. J. Casey et al, *Development of the Emotional Brain*, 29 *Neurosci. Letters* 693 (2019).

13 Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 *Psych., Pub. Pol’y, & L.* 410 (2017).

14 Michelle Achterberg et al, *Frontostriatal White Matter Integrity Predicts Development of Delay of Gratification: A Longitudinal Study*, 36 *J. Neurosci.* 1954 (2016); Samuel Hawes et al, *Modulation of Reward-Related Neural Activation on Sensation Seeking Across Development*, 147 *Neuroimage* 763 (2017).

15 Dustin Albert, Jason Chein & Laurence Steinberg, *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 *Current Directions Psych. Sci.* 114 (2013); Ashley Smith et al, *Age Differences in the Impact of Peers on Adolescents’ and Adults’ Neural Response to Reward*, 11 *Developmental Cognitive Neurosci.* 75 (2015).

16 Hayley Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice*, 23 *Psych., Pub. Pol’y, & L.*, 118, 118–130 (2017).

Adversity, racism, and poverty also have a profound impact on health, quality of life, and criminal justice involvement.¹⁷ As discussed below, adolescents who have experienced adversity, racism, and poverty are significantly overrepresented in juvenile and criminal justice systems. However, while these experiences pose developmental challenges, they do not dictate fate, as late adolescents are also remarkably resilient, and their developing brains are poised for positive learning through interventions and rehabilitation.¹⁸

For late adolescents engaged in criminal behavior, research consistently indicates that most will not continue to offend and become adult repeat offenders through their twenties, thirties, and beyond.¹⁹ This has significant implications for both policy and the legal system. For example, this high rate of desistance from even serious or persistent adolescent offending as youth move into their early to mid-twenties renders it impossible to reliably predict, based on current science, which individual youth will continue to offend into adulthood and which will desist as they mature. There is certainly no basis in science to reliably determine that an individual youth at the time of sentencing in adolescence is incapable of rehabilitation (or even unlikely to achieve it) over the course of a lifetime.

While *Jones v. Mississippi* (2021) held that a sentencing court need not make a formal finding of “permanent incorrigibility” in considering a JLWOP sentence,²⁰ the *Miller* factors remain applicable and key to articulating the “transient” nature of adolescence generally and applying those factors in the individual case before the court. Science cannot divine which “rare” adolescent may be “permanently incorrigible,” but it can identify the characteristically “transient characteristics” of adolescence.

One inherent challenge to incorporating science into litigation and decision-making lies in the application of research developed in studies on groups of subjects to the circumstances, conduct, and developmental trajectories of individual persons before the court. This is sometimes referred to as the “Group to Individual” conundrum. For example, developmental brain science can provide “on average” group-level descriptions of brain development and maturation which can be supplemented by consideration of the specific individual characteristics at issue in the legal context. This, of course, is a challenge that is familiar in the practice of medicine, where physicians must apply research based upon groups to diagnose and treat individuals.

In cases involving adolescents and late adolescents (ages 18–21), research applied in individual cases must be derived from studies in multiple domains including neuroscience, social determinants of misconduct, peer affiliations and social networks, developmental trajectories, and individual characteristics (e.g., cognitive capacities, physical maturation, emotional characteristics, learning style, family dynamics).

17 Scott Lorch & Elizabeth Enlow, *The Role of Social Determinants in Explaining Racial/Ethnic Disparities in Perinatal Outcomes* 79 *Pediatric Resch.* 141 (2016).

18 B.J Casey et al, *Making The Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, 5 *Ann. Rev. Criminology* (forthcoming 2022).

19 Off. Juv. Just. Delinq. Prot., *Law Enforcement & Juvenile Crime: Arrests by Offense, Age, and Gender*, U.S. Dept. Just. (Oct. 21, 2019), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1 [<https://perma.cc/T6H7-3LWX>].

20 *Jones v. Mississippi*, 141 S. Ct. 1307, 1309 (2021).

This Guide is intended to support attorneys and judges in familiarizing themselves with the contours of the relevant science and how it can be applied to individual cases. A working knowledge of developmental and brain science allows attorneys and judges to make best use of what a juvenile defendant's life course, circumstances of an alleged offense, and expert evaluations and opinions can tell them to assist in understanding a defendant.²¹ For attorneys, this facilitates preparing a case, educating the legal finder of fact, and making optimal use of expert testimony. For judges, this facilitates science-informed decision-making at all trial and appellate phases of a case involving a juvenile or young adult.²²

The goal is to position each individual young defendant within a developmental trajectory comprised of biological, psychological, and social domains. A significant majority of cases will ultimately reflect "transitory immaturity," a feature of adolescence which will resolve as adolescents mature, resulting in desistance from criminal misconduct. Science-informed decision-making and evidence-based interventions can guide rehabilitation and reduce recidivism (thereby improving community safety) while avoiding or minimizing the negative impact of common responses (such as overuse of detention and incarceration) that can inadvertently compromise positive youth development and increase recidivism.

A better understanding of late adolescent brain and behavioral development can transform how the legal system and policy makers respond to late adolescents who offend. By educating decision-makers and advocates, this White Paper informs the criminal justice system and policy makers through providing an updated research perspective on late adolescence and supporting public safety by reducing recidivism through developmentally aligned accountability and empirically based processes and interventions.

21 Readers conducting forensic evaluations or using these evaluations in legal proceedings can find guidance in generating or relying upon them from sources including Antoinette Kavanaugh & Thomas Grisso, *Evaluations for Sentencing of Juveniles in Criminal Court* (2020).

22 For a review of aspects of "developmental evidence" and application of the *Miller* factors, see Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*, 22 *Psych. Pub. Pol'y & L.* 235, 235–249 (2016); See also Thomas Grisso, *Three Opportunities for the Future of Juvenile Forensic Assessment*, 46 *Crim. Just. & Behav.* 1671 (2019), <https://doi.org/10.1177/0093854819883671>

Juveniles	Ages 13–17
Early Adolescence	Ages 10–15
Middle Adolescence	Ages 16–17
Late Adolescence	Ages 18–21
Young Adults	Ages 22–25

Age Ranges Defined for Purposes of this White Paper

Introduction

In a series of landmark decisions starting in 2005, the United States Supreme Court ruled that no one can be put to death,²³ receive a sentence of Life Without Parole for a non-homicide offense,²⁴ or receive a sentence of mandatory Life Without Parole for an offense committed prior to age 18.²⁵

In drawing the line at age 18, the Supreme Court continued a tradition of raising the age at which Eighth Amendment protections against cruel and unusual punishment are applied. As Justice Stevens recognized in his concurring opinion in *Roper v. Simmons*, the holding reaffirmed the principle that “evolving standards of decency ... have driven [the Court’s] construction of this critically important part of the Bill of Rights,” and recognized that “[i]f the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today.”²⁶

Jones v. Mississippi (2021) held that the requirements of *Miller v. Alabama* (2012) are satisfied if a juvenile’s sentence of Life Without Parole (JWOP) is imposed after an individualized hearing. Notably, the *Jones* majority did not reinforce the *Miller* court’s view that this sentence should be “uncommon” and reserved for the “rare” youth deemed “permanently incorrigible.” Indeed, the *Jones* decision held that a sentencing judge need not make a specific finding that a juvenile is “permanently incorrigible” or even make formal findings of fact in support of a discretionary sentencing decision. However, SCOTUS did not explicitly strike down the *Miller* factor framework, acknowledged that states may set their own standards and protections more stringently than the *Jones* approach²⁷ (which many states have), and left undisturbed the concept of the “transient immaturity” of youth reflected in decisions from *Roper* (2005) through *Montgomery v. Louisiana* (2016).²⁸

²³ *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁴ *Graham v. Florida*, 560 U.S. 48 (2010).

²⁵ *Miller v. Alabama*, 567 U.S. 460 (2012).

²⁶ *Roper*, 543 U.S. at 1205.

²⁷ *Jones v. Mississippi*, 141 S. Ct. 1307, 1322 (2021).

²⁸ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)

The *Jones* court abandoned any consideration of “evolving standards of decency” that might lead to the abolition of JLWOP outright, although case law and statutes in many states since *Miller* have taken that step. Other states have established minimum sentences²⁹ to be served before juvenile homicide offenders are afforded the requirement set by the *Miller* court for a “meaningful” opportunity to demonstrate that they have achieved rehabilitation.

The *Jones* court paid scant attention to the scientific foundations of the *Roper* through *Montgomery* line of cases. By contrast, prior to the dilution by *Jones* of protections afforded to juvenile offenders, SCOTUS Eighth Amendment rulings about sentencing youthful offenders had drawn heavily from advances in social sciences and neurodevelopmental research.³⁰ The Court cited scientific publications when it ruled that the Eighth Amendment prohibits the death penalty for those under age 18 at the time of their capital offense;³¹ prohibits life without the possibility of parole (LWOP) for non-homicide offenders under age 18 at the time of their offense;³² and prohibits *mandatory* life imprisonment without parole for those under age 18 at the time of the offense, even for homicide offenses.³³

From those scientific studies it cited, the Court reached the conclusion that youth are less morally culpable, more susceptible to peer pressure, and more amenable to positive change. Indeed, SCOTUS had absolutely barred for juveniles as a class both execution and life without possibility of parole for non-homicide offenses, reflecting a strong “children are different” approach to Eighth Amendment constitutional doctrine.

The *Miller* majority stepped back from this categorical “children are different” approach when it barred mandatory LWOP but permitted it for a presumably very small number of “permanently incorrigible” youth based on a judge’s discretion following an individualized sentencing hearing. In doing so, however, the *Miller* Court reaffirmed the law’s recognition that “relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness which may dominate in younger years can subside.”³⁴

Although the *Jones* majority did not focus upon the “transient immaturity” of youth, legislative and case law developments among the states implementing *Miller* suggest the concept of “transient immaturity” may be central to incorporating into litigation and policy advocacy the continuing developments in science. While there is no scientifically reliable basis to predict that a youthful offender is “permanently incorrigible,” there is a robust scientific basis, as described

29 Litigation continues to clarify at what point a lengthy minimum mandatory sentence for a juvenile offender violates the *Miller* requirement there be afforded a “meaningful” opportunity to demonstrate achievement of rehabilitation. The disparity among states of minimum mandatory terms to be served range from less than two decades to four or more decades, resulting in a problematic “justice by geography” situation where sentenced youthful offenders may serve sentences for the same offenses that differ by decades before a putatively “meaningful” case review.

30 See, e.g., *Miller*, 567 U.S. at 471 (noting relevance of studies in Am. Psychologist and other journals for the reasoning in *Roper* and *Graham*).

31 *Roper v. Simmons*, 543 U.S. 551 (2005).

32 *Graham v. Florida*, 560 U.S. 48 (2010). *Graham* held that states must provide “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* at 75.

33 *Miller* 567 U.S. at 460.

34 *Id.* at 1195–96 (internal citations omitted).

in this Guide, to identify the “transient immaturity” of youth and emerging young adults and the normal process of self-desistence from criminal misconduct that occurs with maturation. The *Miller* factors still serve as a framework for organizing and explaining this research and as a means for accounting for the hallmarks of youthful immaturity, the circumstances of their offenses, and their greater prospects for self-desistence with maturation alone or with the support of empirically-based interventions.

This White Paper reviews recent scientific research establishing that these same “signature qualities of youth” extend into the period of *late adolescence* (ages 18–21). Since the Supreme Court decided *Miller v. Alabama* in 2012, more than one hundred new publications have explored the brain’s development throughout late adolescence. Over 1,000 legal cases have referenced the same or similar neuroscience to that discussed in *Miller*, with many citing newer scientific articles as well.³⁵ Roughly half of these cases concerned individuals who were 18 years old or older at the time of the offenses for which they were charged.

In addition to their implications for legal challenges, the scientific findings reported in this White Paper are relevant for criminal justice policy. Late adolescents (ages 18–21) and young adults (ages 22–25) make up approximately 10–12% of the U.S. population,³⁶ yet this age group accounts for 23% of all arrests.³⁷ Late adolescents also make up 20% of incarcerated persons.³⁸ Youth of color are disproportionately represented,³⁹ as half of incarcerated 18–24

35 Francis X. Shen, et al., *Justice for Emerging Adults after Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. Rev. Online (forthcoming 2022) (examining how the science proffered in *Miller* has been cited in subsequent cases).

36 Population estimates vary depending upon demographic data sources and years the samples were derived. See Just. Policy Inst., *Improving Approaches to Serving Young Adults in the Justice System* 3 (2016) (9.9% of U.S. population); see also Annie E. Casey foundation, *Kids Count Data Center* <https://datacenter.kidscount.org/> (last visited April, 17, 2021) (similar). Alternatively, one could calculate this percentage by combining population data sources: for example, the U.S. Census Bureau projected a total U.S. population of 326,971,407 on January 1, 2018. U.S. Census Bur., *Census Bureau Projects U.S. and World Populations* (Dec. 28, 2017), <https://www.census.gov/newsroom/press-releases/2017/new-years-2018.html> [<https://perma.cc/8MKP-FUHU>]. The Center for Education Statistics estimated a population of 30,600,000 18- to 24-year-olds for the same date. Nat’l Ctr. For Ed. Statistics, *Indicator 1: Population Distribution* (Feb. 2019), https://nces.ed.gov/programs/raceindicators/indicator_RAA.asp [<https://perma.cc/9XZQ-YRY9>] (last visited Dec. 12, 2020). 30,600,000 divided by 326,971,407 equals about 9.36%.

37 See Office of Juvenile Justice and Delinquency Prevention, *Estimated number of arrests by offense and age group*, U.S. Dep’t of Justice (2019), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1 [<https://perma.cc/T6H7-3LWX>] (last visited Apr. 18, 2021). To calculate the percentage of offenses committed by those between 18 and 24 for each year between 2015 to 2019, add total offenses for the 18 to 20 age group and the total offenses for the 21 to 24 age group, then divide that total by the total number of offenses for all ages. Results are (rounded to the hundredths place): 19.88% for 2019, 21.69% for 2018, 23.15% for 2017, 24.62% for 2016, and 25.67% for 2015. Averages for the past five years of data were derived by adding these five percentages together and then dividing by 5 to get 23.002%. A five-year annual average was used to reflect continuity. Worth noting, however, is the declining trend: Each year from 2015 to 2019, the percentage of crimes committed by those between 18 and 24 decreased. Alternatively put, in 2019, 19.88% of all arrests in the U.S. were for offenses committed by individuals from 18 to 24 years old, a percentage slightly less than in the previous four years. This arrest data was cross-checked with FBI data available for 2016 (last available year) which also resulted in an arrest rate calculation of 24.62%. See Crim. Just. Servs. Div., *2016 Crime in the United States*, Fed. Bur. Investigation (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-20> [<https://perma.cc/NWQ2-HYGW>] (last visited Dec. 12, 2020).

38 Just. Policy Inst., *Improving Approaches to Serving Young Adults in the Justice System* 1 (2016), http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_report_summary_improving_approaches_to_serving_young_adults_in_the_justice_system.pdf [<https://perma.cc/NPU6-YUYR>] (last visited Apr. 18, 2021).

39 *Id.* at 2 (“The data show ... that young adults of color are disproportionately impacted by the justice system.”).

year-olds are people of color.⁴⁰ Additionally, many of these incarcerated late adolescents and young adults face long sentences. Almost 40% of the individuals serving the longest prison sentences in the United States were incarcerated before age 25, and 56% of those serving the longest sentences are Black.⁴¹

Research in neuroscience, psychology, and law have contributed to an evolving understanding of both behavioral and brain development during adolescence. This contemporary research has direct implications for juvenile justice policy and practice.⁴² This White Paper assembles and synthesizes both foundational and recent scientific developments to provide an updated overview of the science of late adolescence.

Foundational background information summarizing contemporary research on adolescent brain development is presented in Appendix A for readers who would benefit from a primer or refresher on the basic neuroscience.⁴³ This paper presents a synthesis of the brain and behavioral science most relevant for understanding legal and policy implications of these areas of research. The science is organized by the distinguishing characteristics of youth identified as critical factors by SCOTUS in *Miller* and is subsequently reflected, further developed, or limited.

Post-*Miller* activity involving juvenile defendants⁴⁴ and defendants ages 18 and older largely reflects actions taken by state courts and legislatures.⁴⁵ We anticipate that, particularly following the *Jones* decision in Spring 2021, most legal and legislative activity in this area will continue to occur at the state rather than federal level. The *Miller* factors have made their way into state case law and policy debates and so continue to be relevant. The *Miller* factors that serve as the organizing factors for the science presented in this paper are:

Immaturity, Impetuosity, and Risk-taking The “hallmark features” of adolescence include “immaturity, impetuosity, and a failure to appreciate risks and consequences.”

40 *Id.* at 1.

41 Urban Inst., *A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prisons* (2017), <https://apps.urban.org/features/long-prison-terms/demographics.html> [<https://perma.cc/CQ6V-QP3L>] (last visited Apr. 18, 2021).

42 B.J. Casey et al, *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*, 16 Ann. Rev. L. & Soc. Sci. 9.1 (2020); B.J. Casey et al, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, 5 Ann. Rev. Criminology (forthcoming 2022); Leark, R. A. (2021). *An Introduction to the Special Issue on the Death Penalty Among Teen-Aged Offenders*. 7 J. Pediatric Neuropsych. 1–2 (2021).

43 The authors acknowledge that contemporary neuroscience increasingly focuses upon neural circuit connections and extraordinarily complex interactions among brain regions rather than merely attribution of functions to “lobes” or other specific brain areas. However, the published research often references structure and function of specific brain areas and so the reporting of brain research will often make references to specific brain areas.

44 By 2020, courts or legislatures in at least 19 states had barred Life Without Parole for juvenile defendants. See, e.g., *Diatchenko v. Dist. Att’y for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013); *State v. Bassett*, 428 P.3d 343 (Wash. 2018). For a review of post-*Miller* actions by state courts and legislatures, see Gina Kim, *State-by-State Abolition of Juvenile Life without Parole Sentences in the United States since Miller v. Alabama* (2012), (2019) (Ph.D. dissertation, Columbia University; available through Academic Commons, Columbia University Libraries).

45 For a review of post-*Miller* use of neuroscience in litigation involving late adolescents, see Francis Shen et al, *Justice for Emerging Adults after Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L.Rev. Online (forthcoming 2021).

Peer Involvement/Influence “[T]he family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional . . . the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.”

Understanding Legal Proceedings Deficits in legal understandings were described as: “the incompetencies associated with youth” including an “inability to deal with police officers or prosecutors (including on a plea agreement)” and “incapacity to assist his own attorneys.”

Greater Potential for Rehabilitation The greater potential of adolescents for rehabilitation was first recognized in *Roper*. This greater potential for positive change and the absence of a scientific basis to reliably identify that “rare” youth whose “permanent incorrigibility” warrants LWOP continue to present a challenge to sentencing courts.

Jones v. Mississippi (2021) held that a separate finding of “permanent incorrigibility” is not required in a discretionary sentencing to LWOP.⁴⁶ However, opportunities to inform sentencing procedures and decisions with the science presented in this White Paper remain due to: (a) the long-standing recognition of the “transient immaturity” of youth” resulting in diminished culpability; (b) the common self-desistance from misconduct as youth mature; and, (c) law requiring analysis using the so-called *Miller* factors in these cases. The science is also relevant to adolescents older than the current “bright line” of age 18 for criminal culpability.

Especially in state cases, there are opportunities to inform legislatures, sentencing procedures, and individual case sentencing decisions with the science presented in this White Paper, particularly in state proceedings. Each of these distinguishing characteristics are discussed below for middle to late adolescents in light of broadly accepted leading research.

Readers who want further description of foundational neuroscience are directed to Appendix A at page 47 for a summary.

⁴⁶ *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2021).

Section I: Miller Factor 1

Immaturity, Impetuosity, Risk-taking

First Miller factor: The “hallmark features” of adolescence include “immaturity, impetuosity, and a failure to appreciate risks and consequences.”

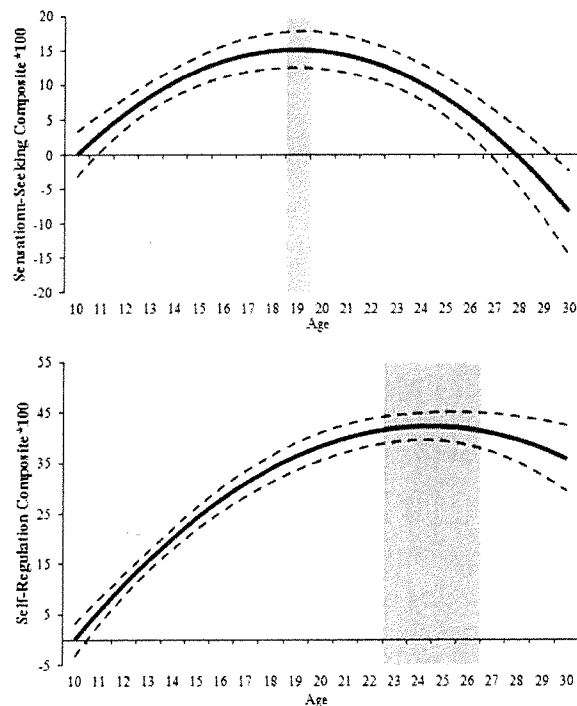


Figure 1: Steinberg et al. 2017. Age differences in sensation seeking (top) and self-regulation (bottom). Sensation seeking peaks in late adolescence. Self-regulation stabilizes in young adulthood.

Adolescence is a dynamic lifespan period characterized by changes in brain structure and brain function. In *Miller v. Alabama*, the United States Supreme Court explicitly referenced adolescents’ tendency toward immaturity, impetuosity, and irresponsibility.⁴⁷ The predisposition for sensation seeking, hypersensitivity to immediate rewards, and present-focused decision-making peaks in middle to late adolescence and then declines in young adulthood. Further, capacities for self-regulation also improve with age and stabilize in young adulthood (Figure 6).⁴⁸ This is in part due to changes in brain function and connectivity and to improved executive functioning as the prefrontal cortex matures.

⁴⁷ *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

⁴⁸ Laurence Steinberg et al, *Around The World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation* 21 *Developmental Sci.* 10.1111 (2018).

The brain continues to be malleable throughout the lifespan, and this malleability may be enhanced during adolescence as compared to adulthood. This means that the adolescent brain can change in response to experiences and is developmentally primed to do so. When an adolescent is subjected to positive influences, this can have advantageous implications for brain development and for positive personal development as manifested by enhanced sensitivity to social and emotional information that promotes learning about oneself, one's peers, and societal norms.⁴⁹

Adolescents exhibit increased impulsivity and risk-taking, as compared to adults. Elevations in risk-taking decisions and behaviors are found among adolescents across cultures. Enhanced risk-taking is developmentally normative and can be adaptive in certain contexts.⁵⁰ For example, risk-taking in academic or social contexts can promote positive outcomes such as exploring new intellectual pursuits, skills and interests, or forming new healthy friendships. However, enhanced risk-taking can also lead to negative outcomes such as health risk behaviors or legal risks.

Compared to adults, middle adolescents and late adolescents are more likely to engage in behaviors that risk their lives and wellbeing.⁵¹ Many health risk behaviors peak in late adolescence and young adulthood. This includes risk-taking behaviors and risk-related outcomes such as reckless driving, unprotected sex, and unintentional injuries.⁵² Further, overdose deaths and substance misuse peak in late adolescence and early adulthood.⁵³

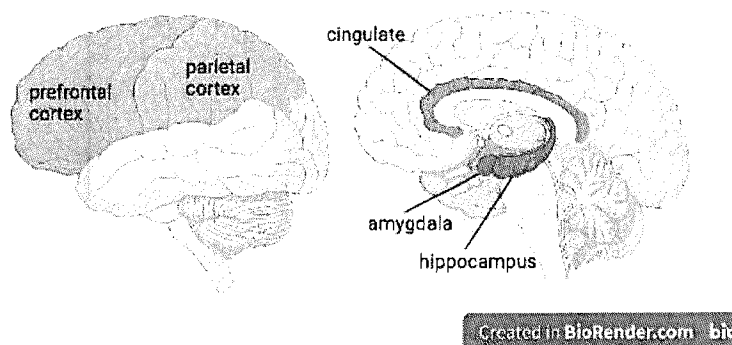


Figure 2 Brain Anatomy. Left image depicts a lateral view of the brain (side view from the outside). Right image depicts a medial view of the brain (side view from the middle inside).

- 49 Crone, E. A., & Dahl, R. E. *Understanding Adolescence as a Period of Social-Affective Engagement and Goal Flexibility*, 9 *Nature Rev. Neurosci.* 636, 636–650 (2012).
- 50 Natasha Duell & Laurence Steinberg, *Positive Risk-Taking in Adolescence*, 13 *Child Development Perspectives* 48, 48–52 (2019).
- 51 Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *Development Rev.* 78 (2008).
- 52 Teena Willoughby et al, *Examining the Link Between Adolescent Brain Development and Risk-Taking From a Social-Developmental Perspective (Reprinted)*, 89 *Brain & Cognition* 70 (2014).
- 53 Andrea Stone et al, *Review of Risk and Protective Factors of Substance Use and Problem Use in Emerging Adulthood*, 37 *Addictive Behav.* 747, 747–775 (2012).

Executive Functioning

The term “executive function” is used to describe the cognitive processes of controlling and regulating behavior and encompasses working memory, inhibitory control, and cognitive flexibility.⁵⁴ Connections within the prefrontal cortex and across more distributed brain networks (including the parietal cortex and subcortical regions) facilitate executive function, self-control, and emotion regulation. These connections continue to develop through early adulthood.⁵⁵ Therefore, behaviors associated with executive functions continue to develop throughout the transition from adolescence and into adulthood. This explains why late adolescents can be more impulsive in certain contexts and why their self-control abilities are vulnerable to disruption from emotional cues or heated contexts.⁵⁶

“Working memory” is a type of executive function which continues to develop during adolescence. Working memory is a type of short-term memory that allows individuals to actively hold information in mind. It is important for remaining cognizant of present actions, past actions, and future actions. It is also important for processing conversations and social contexts, understanding instructions, creative thinking, charting a course of action, decision-making, and problem-solving.⁵⁷ Working memory allows us to take in new information and incorporate that information when devising a plan and considering alternatives to a plan. Parts of the prefrontal cortex (including the middle and inferior frontal regions) and regions within distributed brain networks (including subcortical regions), support working memory. The developmental fine-tuning of this circuitry facilitates improvements in working memory over time.⁵⁸

Basic working memory abilities mature before adolescence, but more complex and challenging working memory capacities associated with continued brain development continue to mature through late adolescence⁵⁹ and into young adulthood. Compared to adults, working memory capacities are still developing through late adolescence, which can create vulnerabilities to interference and disruption. Specifically, emotional contexts can transiently disrupt working memory in late adolescence and young adulthood.⁶⁰ Research findings demonstrate that

- 54 In scientific and medical literatures, the terms “executive function” and “cognitive control” are both used to describe higher order behaviors that are important for self-control, decision-making, and complex thinking. We use the phrase “executive function” in this White Paper because the term is used regularly expert testimony and appears in hundreds of legal cases. See Akira Miyake et al, *Assessment of Executive Functions In Clinical Settings: Problems And Recommendations*, 21 Sem. Speech & Language 0169 (2000).
- 55 Jennifer Silvers et al, *vPFC–vmPFC–amygdala Interactions Underlie Age-Related Differences in Cognitive Regulation of Emotion*, 27 Cerebral Cortex 3502 (2017).
- 56 B. J. Casey, *Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior*, 66 Ann. Rev. Psych. 295 (2015).
- 57 Working memory: The state of the science (Robert Logia, Valeria Camos, & Nelson Cowan eds., 2020).
- 58 Monica Rosenberg et al, *Behavioral and Neural Signatures of Working Memory in Childhood*, 40 J. Neurosci. 5090 (2020).
- 59 Theodore Satterthwaite et al, *Functional Maturation of the Executive System During Adolescence*. 33 J. Neurosci. 16249, 16249–16261 (2013).
- 60 Madeline Lee Pe et al, *Interference Resolution Moderates the Impact of Rumination and Reappraisal on Affective Experiences in Daily Life*, 27 Cog. & Emotion 492, 492–501 (2013); Lanciano Curci et al, *Negative Emotional Experiences Arouse Rumination and Affect Working Memory Capacity*. 13 Emotion 867, 867–880 (2013); Alan Anticevic et al, *Resisting Emotional Interference: Brain Regions Facilitating Working Memory Performance During Negative Distraction*, 10 Cog., Affective, & Behav. Neurosci. 159, 159–173 (2010)

individuals ages 20–30⁶¹ have more disrupted working memory during periods of emotional stimulation, suggesting that emotional contexts can compromise their cognition, but the influence of emotional context is less disruptive for older adults.⁶²

Hot/Cold Cognition and Reward Sensitivity

Decision-making Middle adolescents and late adolescents are more likely than adults to change how they make decisions when they are faced with emotional contexts as compared to more neutral conditions where they are given time to think through a problem. Adolescents are cognitively similar to adults in certain contexts, like how by age 16 they perform comparably to adults when they are given adequate time for reasoned and thoughtful deliberation to consider consequences and make decisions.⁶³ However, during adolescence, youth experience a hypersensitivity to emotional content while still developing the purposeful problem-solving that comes with adulthood. Because adolescents exhibit different responses in the brain during decision-making, while exerting self-control, and when engaging emotion regulation, adolescent behavior is highly sensitive to emotional contexts. This renders adolescents susceptible to emotionally driven decisions, impulsive behavior, and poor judgment.⁶⁴

Self-Control Behavioral studies demonstrate that adolescents are hypersensitive to emotional contexts, and this sensitivity to emotional information can interfere with self-control. Researchers have tested the ability of adolescents and adults to engage in self-control in emotional contexts by utilizing the Emotional Go/NoGo test. The Emotional Go/NoGo test is a test of cognitive control in which participants are instructed to press a button in response to target images (e.g., calm faces) but withhold responses to other types of images (e.g., happy faces). Research shows that adolescents are worse than adults at inhibiting responses to emotional stimuli, but they perform similarly to adults when neutral stimuli are presented.⁶⁵ Adolescents, more so than children and adults, show impaired self-control when inhibiting responses to negative and positive emotional cues.⁶⁶ For example, adolescents are more likely to make a self-control error when seeing a happy smiling face, compared to a neutral calm face. Notably, emotional cues continue to influence self-control through the mid-twenties.⁶⁷

61 The age ranges for the sample group were 20–30 years and 60–75 years.

62 Susanne Scheibe & Fredda Blanchard-Fields, *Effects of Regulating Emotions on Cognitive Performance: What Is Costly for Young Adults Is Not So Costly for Older Adults*, 24 *Psych. & Aging* 217 (2009).

63 Brend Figner et al, *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk-Taking in the Columbia Card Task*, 35 *J. Experimental Psych.: Learning, Memory & Cog.* 709 (2009).

64 Steinberg, *supra* note 51 (“This account is consistent with a growing body of work on structural and functional changes in the prefrontal cortex, which plays a substantial role in self-regulation, and in the maturation of neural connections between the prefrontal cortex and the limbic system, which permits the better coordination of emotion and cognition. These changes permit the individual to put the brakes on impulsive sensation-seeking behavior and to resist the influence of peers, which, together, should diminish risk-taking.”).

65 Leah Somerville et al, *Frontostriatal Maturation Predicts Cognitive Control Failure to Appetitive Cues in Adolescents*, 23 *J. Cog. Neurosci.* 2123, 2123–2134 (2011); Nim Tottenham et al, *Behavioral Assessment of Emotion Discrimination, Emotion Regulation, and Cognitive Control in Childhood, Adolescence, and Adulthood*, 2 *Frontiers Psych.* 39 (2011).

66 Casey, *supra* note 12.

67 Dienke Bos et al, *Distinct and Similar Patterns of Emotional Development in Adolescents and Young Adults*, 62 *Development Psychobiology* 591, 591–500 (2020).

Research also indicates that middle adolescents and late adolescents are more sensitive to sustained emotional arousal states than older adults. This vulnerability to emotional context has been found to persist through early adulthood.⁶⁸ In research studies, late adolescents had diminished cognitive abilities under sustained negative emotional arousal relative to adults age 22–25, but late adolescents performed similarly to 22–25 year-olds in neutral and positive emotional arousal conditions.⁶⁹ For example, during “threat states” in which individuals anticipated the possibility of hearing an aversive sound, late adolescents (ages 18–21) exhibited patterns of brain activity that were more similar to the adolescent group (ages 13–17) than the adult group (ages 22–25). This included reduced connectivity between distributed brain regions that are activated when exerting self-control, including the prefrontal cortex.⁷⁰

Social and Emotional Regulation The impact of enhanced emotional influence on adolescent behavior is also observed within the context of peer interactions. As adolescents mature, they are better able to inhibit emotionally-driven impulses that arise in the presence of peers.⁷¹ This means adolescents are more likely to react impulsively when faced with potential social rewards or friendly peers. This can be seen, for example, in middle and late adolescents’ more frequent unprotected sex.⁷²

The ability to use effective cognitive strategies to regulate emotion in social situations increases with age into the mid-twenties and helps to explain why the ability to regulate emotions for social cues develops over time.⁷³ Studies of explicit emotion regulation ask participants to use cognitive strategies to change their emotional responses, such as by reinterpreting a situation or imagining the situation to be farther away in time or space. These studies have reported developmental differences in the use of effortful self-regulatory strategies to manage strong feelings. Research indicates that the strategies individuals use to regulate their emotions change throughout development, and that adolescents use less beneficial or less helpful emotional regulation strategies than adults.⁷⁴

Long-term Planning and Future Oriented Decision-making

Middle and late adolescents evaluate risks and benefits differently than those in their late twenties and thirties. While adults tend to integrate potential consequences of decisions, middle adolescents and late adolescents exhibit less future-oriented decision-making. These age-related differences in behavior are associated with ongoing development of structural and functional connectivity between the prefrontal cortex, a region important for self-control, and the striatum, a region important for reward processing.

68 See, e.g., Cohen, *supra* note 12.

69 The three comparison groups included adolescents (age 13–17), late adolescents (age 18–21), and young adults (age 22–25). *Id.*

70 For a more complete discussion of functional connectivity, see *infra*, Section II on page 18.

71 For additional information on the effect of peer influence, see *infra*, Section IV page 38.

72 Willoughby, *supra* note 52.

73 Jennifer Silvers et al, *Age-Related Differences in Emotional Reactivity, Regulation, and Rejection Sensitivity in Adolescence*, 12 *Emotion* 1235 (2012).

74 Klee De France & Tom Hollenstein, *Emotion Regulation and Relations to Well-Being Across the Lifespan*, 55 *Development Psych.* 1768 (2019).; Oliver John & James Gross, *Healthy and Unhealthy Emotion Regulation: Personality Processes, Individual Differences, and Life Span Development*, 72 *J. Personality* 1301 (2004).

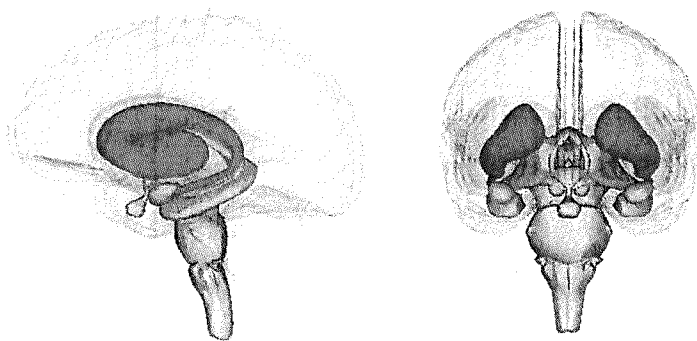


Figure 3 Striatum. The striatum is illustrated in red, showcasing a view from the side (left) and from the front (right) of the brain.

Relative to adults, late adolescents tend to plan for the short-term rather than the future. Future orientation increases with age. However, compared to adults both middle adolescents and late adolescents are more focused on immediate gains and rewards rather than potential long-term consequences.⁷⁵ These age groups are also less likely than adults to identify and consider potential future consequences of their actions.⁷⁶ Late adolescents are especially susceptible to making poor decisions due to privileging short-term rewards over future risks.

To explore the capacity to delay gratification, researchers ask individuals to decide between receiving a small reward sooner or a larger reward later. This measures how much a person devalues a reward based on how long they must wait to receive it. The tendency to delay gratification (choose larger but later rewards) increases with age.⁷⁷ Middle and late adolescents particularly often struggle with delaying gratification. A large-scale study of 900 individuals found that adolescents are more likely to prioritize immediate rewards over long-term outcomes, and delay of gratification improves continuously from age 14 to 22.⁷⁸

Adolescents who are worse at delaying gratification are more prone to real world risk-taking, such as experimentation with drugs like tobacco, alcohol, and marijuana.⁷⁹ This may also account for why middle adolescents and late adolescents are more likely to engage in risky behaviors that lead to immediate rewards, such as reckless driving, unprotected sex, and dangerous behavior resulting in unintentional injuries.^{80 81}

This age-related preference for more immediate rewards is associated with developmental differences in brain function. In a research study conducted in individuals ages 11–31, delay of gratification increased with age and middle and late adolescents were more likely to choose

75 Laurence Steinberg et al, *Age Differences in Future Orientation and Delay Discounting*, 80 *Child Development* 28 (2009).

76 Daniel Read & Nicoleta Read, *Time Discounting Over the Lifespan*, 94 *Org. Behavior. & Human Decision Proc.* 22, 22–32 (2004).

77 Steinberg, *supra* note 75.

78 Daniel Romer et al, *Can Adolescents Learn Self-Control? Delay of Gratification in the Development of Control Over Risk-Taking*, 11 *Prevention Sci.* 319, 319–330 (2010).

79 *Id.*

80 Steinberg, *supra* note 51.

81 Willoughby, *supra* note 52.

immediate rewards than adults. Older individuals (ages 25–31) were more likely to simultaneously activate both the striatum and prefrontal cortex, which was associated with a decreased tendency to prefer immediate rewards.⁸²

One interpretation of this effect is that the development of the prefrontal cortex is associated with reduced impulsivity, which, in turn, enhances the ability to make decisions that adequately weigh future outcomes. Developing connectivity between the striatum and prefrontal cortex may also influence future-oriented decision-making. For example, adults ages 25–30 exhibit enhanced brain connectivity between regions in the prefrontal cortex and striatum, and they are better at delaying gratification than both middle and late adolescents.⁸³ Longitudinal research testing of individuals ages 8–26 demonstrates that the strengthening of white matter connections between the prefrontal cortex and striatum may also account for why individuals are better able to delay gratification as they age.⁸⁴

As a result of strengthening connections, adults may be more likely than adolescents or late adolescents to use the prefrontal cortex to regulate reward-related regions and decrease impulsive responses to reward. Ongoing development of functional and structural connectivity can also explain why future-oriented decision-making increases with age from ages 10 to 25.⁸⁵ The ability to delay gratification continues to develop during adulthood.

While adolescents typically privilege immediate rewards over long-term consequences, there are cases where adolescents can be more patient than adults. For example, when faced with a decision that requires an individual to integrate evidence over time, adolescents are more willing to wait for information before making a choice when a high-value reward is at stake.⁸⁶ This suggests that reward motivation may actually render adolescents less impulsive in certain situations.

82 Anastasia Christakou et al, *Maturation of Limbic Corticostriatal Activation and Connectivity Associated With Developmental Changes in Temporal Discounting*, 54 *Neuroimage* 1344 (2011); Wouter van den Bos et al, *Adolescent Impatience Decreases with Increased Frontostriatal Connectivity*, 112 *Proc. Nat'l Acad. Sci.* E3765 (2015).

83 Christakou, *supra* note 82.

84 Michelle Achterberg et al, *Frontostriatal White Matter Integrity Predicts Development of Delay of Gratification: A Longitudinal Study*, 36 *J. Neurosci.* 1954 (2016).

85 Bos, *supra* note 82.

86 Theresa Teslovich et al, *Adolescents Let Sufficient Evidence Accumulate Before Making a Decision When Large Incentives Are at Stake*, 17 *Development Sci.* 59, 59–70 (2014).

Section II: Miller Factors 2 and 3

Family and Home, Peer Influence

Second and third Miller factors: “the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional . . . the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.”

Impact of Adversity on Late Adolescent Brain Development

A growing body of research demonstrates that the early life environment significantly influences the developing brain. Middle and late adolescents involved in the criminal justice system have experienced childhood adversity and trauma at higher rates than the general population.⁸⁷ Some research estimates that up to 90% of justice-involved youth have experienced at least one adverse experience and that more than 20% meet criteria for post-traumatic stress disorder (PTSD).⁸⁸ This far exceeds the prevalence of PTSD in the general population in which approximately 5% of adolescents and 3.6% of adults meet criteria for post-traumatic stress disorder.⁸⁹

These experiences influence behavioral development and have consequences for brain development.⁹⁰ Additionally, environmental social determinants, including racism and poverty, have a profound impact on health, quality of life, and criminal justice involvement.⁹¹ For example, while nearly 4 out of every 10 children are poor for one year or more before they reach the age of 18, justice-involved youth are even worse off and are much more likely to be raised in poverty.⁹² While many youth are resilient and childhood adversity does not set a determined destiny, exposure to stress and adversity during childhood and adolescence can produce long-term changes in both brain and behavior.⁹³

87 Jessica Craig et al, *A Little Early Risk Goes a Long Bad Way: Adverse Childhood Experiences and Life-Course Offending in the Cambridge Study*, 53 J. Crim. Just. 34 (2017); Michael Baglivio et al, *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. Juv. Just. (2014).

88 Carly Dierkhising et al, *Trauma histories among justice-involved youth: Findings from the National Child Traumatic Stress Network*, 4 Eur. J. Psychotraumatology 20274 (2013).; Karen Abram, et al, *PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth*, OJDP Juv. Just. Bulletin (U.S. Dept. Just. Off. Juv. Justice & Delinquency Prev., Washington, D.C.), June 2013.

89 Nat'l Inst. Health, *Post-Traumatic Stress Disorder (PTSD)* (2019), <https://www.nimh.nih.gov/health/statistics/post-traumatic-stress-disorder-ptsd> [<https://perma.cc/M53J-QDD7>].

90 Jenifer Siegel et al, *Exposure to Violence Affects the Development of Moral Impressions and Trust Behavior in Incarcerated Males*, 10 Nature Comm. 1 (2019).

91 Lorch & Enlow, *supra* note 17.

92 Caroline Ratcliffe, *Child Poverty and Adult Success* (Urban Inst., Washington, D.C.) September, 2015 at 855–902.

93 Panagiota Pervanidou & George Chrousos, *Metabolic Consequences of Stress During Childhood and Adolescence*, *Metabolism*, 61 Clinical & Experimental 611, 611–619 (2012); Lisa Eiland & Russel Romeo, *Stress and the Developing Adolescent Brain*, 249 Neuroscience 162, 162–171 (2013); Lovallo, W. R. (2013). *Early Life Adversity Reduces Stress Reactivity and Enhances Impulsive Behavior: Implications for Health Behaviors*. 90 Int. J. Psychophysiology 8, 8–16.

Neurobiological changes during adolescence enhance vulnerability to the maladaptive effects of stress and adversity, and these effects can influence cognitive processes such as emotion regulation, impulsivity, and executive function.⁹⁴ Early life stress can impact the development of emotional regions, including the amygdala and striatum, and self-control regions, such as the prefrontal cortex. Exposure to early adversity is also associated with impaired reward processing, and youth who report early life adversity exhibit differences in the brain's structural connections that are important for learning from rewards.⁹⁵

However, while adversity results in increased risk of poor outcomes, exposures to adversity do not dictate a fate.⁹⁶ Adolescence is a dynamic period of the lifespan that is shaped by interactions with both environmental and social factors.⁹⁷ Most adolescents' brain and behavioral responses can adapt to the many challenges that they face.⁹⁸ Moreover, the effects of psychosocial stress on the brain are not permanent, and these temporary changes in brain function can be reversed after reductions of stress occur.⁹⁹ As discussed further below, many young adults positively adapt despite adversity during childhood because they also have individual characteristics (e.g., intelligence, adaptability, ready engagement with others) or access to social circumstances (e.g., family stability and care, access to quality education, medical and behavioral health care, positive community activities) that buffer them from exposures to adversity and/or support a high degree of resilience.

Adversity comes in many forms and can result in psychological trauma, violence, poverty, neglect, and maltreatment.¹⁰⁰ These negative experiences during development increase the risk for psychopathology in late adolescence.¹⁰¹ The extent of the impact on brain and behavioral development depends on the number and severity of adverse events that an individual encounters during early life.¹⁰²

94 Nim Tottenham & Adriana Galván, *Stress and the Adolescent Brain: Amygdala-Prefrontal Cortex Circuitry and Ventral Striatum as Developmental Targets*, 70 *Neuroscience & Biobehavioral Rev.* 217 (2016).

95 Bryan Kennedy et al, *Accumbens Frontal Tract Integrity is Related to Early Life Adversity And Feedback Learning*. 46 *Neuropsychopharmacology* 2288, 2288–2294 (2021).

96 See generally Emmy Werner, *What Can We Learn about Resilience from Large-Scale Longitudinal Studies?*, in *Handbook of Resilience in Children* 87–102 (S. Goldstein & R. B. Brooks ed., 2013); Caitlin Cowan et al, *The Lasting Impact of Early-Life Adversity on Individuals and Their Descendants: Potential Mechanisms and Hope for Intervention*. 15 *Genes, Brain, & Behavior* 155, 155–168 (2015).

97 Courtney Simmons et al, *Responsible Use of Open-Access Developmental Data: The Adolescent Brain Cognitive Development (ABCD) Study*. 32 *Psych. Sci.* 866 (2021).

98 *Id.*

99 Conor Liston et al, *Psychosocial Stress Reversibly Disrupts Prefrontal Processing and Attentional Control*. 106 *Proc. Nat. Acad. Sci.* 912, 912–917 (2008).

100 Ronald Kessler et al, *Childhood Adversities and Adult Psychopathology in the WHO World Mental Health Surveys*, 197 *Brit. J. Psychiatry* 378 (2010); Lucy Fitton et al, *Childhood Maltreatment and Violent Outcomes: A Systematic Review and Meta-Analysis of Prospective Studies*. 21 *Trauma, Violence, & Abuse* 754, 754–768 (2020).

101 R. C. Kessler, K. A. McLaughlin, J. G. Green, M. J. Gruber, N. A. Sampson, A. M. Zaslavsky & C. Benjet, *Childhood adversities and adult psychopathology in the WHO World Mental Health Surveys*, 197 *Brit. J. Psych.* 378 (2010).

102 Joan Luby et al, *Association Between Early Life Adversity and Risk for Poor Emotional and Physical Health in Adolescence: A Putative Mechanistic Neurodevelopmental Pathway*, 171 *JAMA Pediatrics* 1168, 1168–1175 (2017).

Contemporary psychological models¹⁰³ have classified early life adversity along two dimensions: exposure to *threat* and exposure to *deprivation*. Exposure to threat includes exposure to violence or abuse. Exposure to deprivation encompasses exposure to poverty, lack of resources, lack of access to mental stimulation and/or diminished parental or social support.¹⁰⁴ These different types of adversity (threat and deprivation) are associated with distinct effects on brain development and behavior.

Exposure to threat has the greatest impact on the brain processes that are involved in detecting threats, learning from emotional information, and regulating emotions.¹⁰⁵ This includes subcortical regions (such as the amygdala and striatum) as well as connections between subcortical systems and the prefrontal cortex. A 2019 study assessed differences between adolescents who were and were not exposed to child abuse.¹⁰⁶ When viewing emotional images, children who had been abused exhibited enhanced co-activation between the amygdala and the ventromedial prefrontal cortex, regions important for emotional regulation. Differences in brain activity in abused children also predicted the presence and severity of psychiatric symptoms two years later.

Exposure to deprivation most often influences the development of brain systems important for language development and executive function, such as the prefrontal and parietal cortex. Deprivation can be a result of growing up in an impoverished environment. Researchers found that youth growing up in poverty tended to display differences in the development of brain structure. Youth living in low socioeconomic environments are more likely to have smaller volume in subcortical regions such as the hippocampus (a region important for memory formation).¹⁰⁷

A large-scale study of individuals ages 3–20 found that cortical development is also influenced by parental education and family income.¹⁰⁸ Adolescents from disadvantaged backgrounds have less cortical surface area in regions important for language, memory, and executive function. These differences in the brain could account for why underprivileged youth as a group exhibit worse cognitive performance than peers from high-resource backgrounds. Socioeconomic status also relates to differences in functional recruitment of the prefrontal cortex during tasks testing executive function.¹⁰⁹

103 Katie McLaughlin et al, *Childhood Adversity and Neural Development: A Systematic Review*, 1 Ann. rev. Developmental psych. 277 (2019). But see Karen Smith & Seth Pollak, *Rethinking Concepts and Categories for Understanding the Neurodevelopmental Effects of Childhood Adversity*, 16 Persp. psych. sci. 67, 67–93 (2021) (presenting an alternative neurodevelopmental model of early life adversity).

104 McLaughlin, *supra* note 103.

105 Katie McLaughlin et al, *Mechanisms Linking Childhood Trauma Exposure and Psychopathology: A Transdiagnostic Model of Risk and Resilience*, 18 BMC Med. 1 (2020).

106 Matthew Peverill et al, *Atypical Prefrontal–Amygdala Circuitry Following Childhood Exposure to Abuse: Links with Adolescent Psychopathology*, 24 Child Maltreatment 411 (2019).

107 Natalie Brito & Kimberly Noble, *Socioeconomic Status and Structural Brain Development*, 8 Frontiers in Neuroscience 276 (2014).

108 Kimberly Noble et al, *Family Income, Parental Education and Brain Structure in Children and Adolescents*, 18 Nat. Neurosci. 773 (2015).

109 Emily Merz et al, *Socioeconomic Inequality and the Developing Brain: Spotlight on Language and Executive Function*, 13 Child Development Persp. 15 (2019).

It is critical to note that these changes in the brain may actually serve *adaptive* purposes which help adolescents function in their current environment.¹¹⁰ Therefore, certain changes may be beneficial for adapting to a low-resource environment, but these same changes may pose challenges when individuals are placed in different contexts or are faced with new circumstances.¹¹¹ It is also important to appreciate there are many complexities surrounding the relationships between brain development and socioeconomic status. For example, external factors such as nutrition, exposure to toxins, safety, and even the frequency of verbal conversations in the home may contribute to these effects.¹¹² This means that many of the conditions affecting brain development that arise from poverty may be transient or remediable.

When early life adversity leads to psychological trauma, it has profound effects on brain and behavioral development. However, there is considerable individual variability.¹¹³ A new frontier of research is investigating what factors foster childhood resilience in the face of adversity. For example, there is evidence that capacities for emotion regulation can buffer the effects of adversity. Individuals with a history of maltreatment who exhibit better emotion regulation skills, and who exhibit enhanced activity in the frontoparietal regions of the brain, are less likely to report symptoms of depression.¹¹⁴

The social environment can also confer resilience in youth. The presence of supportive caretakers/mentors and an emotionally warm and supportive family context can buffer the effects of stress and adversity in youth.¹¹⁵ The research on resilience, while in its infancy, offers potential targets for intervention to support the healthy development of children and adolescents exposed to adversity.

Impact of Adversity on Late Adolescent Behavioral and Health Outcomes

Trauma is a potential consequence of adversity,¹¹⁶ and there are many definitions of trauma. For example, one definition of trauma includes events that pose a “significant threat (physical, emotional, or psychological) to the safety of the victim or loved ones/friends and are overwhelming and shocking.”¹¹⁷ The Diagnostic and Statistical Manual of Mental Disorders provides the following threshold definition of trauma as Criteria A of post-traumatic stress disorder: “The person was exposed to: death, threatened death, actual or threatened serious injury, or actual

¹¹⁰ *Roper v. Simmons*, *supra* note 97.

¹¹¹ *Id.*

¹¹² Brito, *supra* note 107.

¹¹³ Emily Cohodes et al, *Influences of Early-Life Stress on Frontolimbic Circuitry: Harnessing a Dimensional Approach to Elucidate the Effects of Heterogeneity in Stress Exposure*, 63 *Developmental Psychobiology* 153 (2020).

¹¹⁴ Alexandra Rodman et al, *Neurobiological Markers of Resilience to Depression Following Childhood Maltreatment: The Role of Neural Circuits Supporting the Cognitive Control of Emotion*, 86 *Biological Psych.* 464 (2019).

¹¹⁵ Adriana Leak & Jennifer Silvers, *Neurobiological Markers of Resilience to Early Life Adversity During Adolescence*, 6 *Biological Psych. Cog. Neurosci. & Neuroimaging* 238, 238–247 (2020).

¹¹⁶ Valery Krupnik, *Trauma or adversity?* 25 *Traumatology* 256, 256–261 (2019).

¹¹⁷ Am. Psychl. Ass'n, *Clinical Practice Guideline for Treatment of Posttraumatic Stress Disorder (PTSD) in Adults*, February 24, 2017 <https://www.apa.org/ptsd-guideline/ptsd.pdf> (last visited December 20, 2021).

or threatened sexual violence, in the following way(s): direct exposure; witnessing the trauma; learning that a relative or close friend was exposed to trauma; indirect exposure to aversive details of the trauma, usually in the course of professional duties (e.g., first responders such as police or medics).¹¹⁸ As we've learned over the past several decades, adverse events that can overwhelm the individual and become psychologically traumatic events are not confined to clearly catastrophic contexts like war or natural disaster but can and do occur in everyday settings including schools, families, and communities.¹¹⁹

The Adverse Childhood Experiences Study (ACES) was a landmark study of over 17,000 individuals with health insurance through their employers and showed how adverse (e.g., potentially traumatic) events early in life have profound long-term deleterious effects on the physical and mental health of adults. The ACES study was limited to ten categories of trauma. These included caretaker maltreatment as a child, parental substance abuse or serious psychiatric illness, family violence, and parental incarceration.

However, other difficult childhood adversities such as exposure to community violence are associated with increased risk of emotional and behavioral dysregulation, learning difficulties, conduct problems, court involvement (child protection, status offender, delinquency, early criminal justice involvement), and future violence.¹²⁰ Even among this relatively well educated and employed population, exposure to childhood adversity was linked to increased risk of poor life outcomes including earlier onset of risk-taking behaviors, substance misuse, psychiatric diagnoses, smoking, earlier onset of medical conditions and earlier death, and sexual practices resulting in early or unintended pregnancy.¹²¹ This study clearly demonstrated that the greater the number of childhood exposures, the greater the risks of negative life outcomes.

118 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders 5* (2013); Trent et al, *The Impact of Racism on Child and Adolescent Health*, 144 *Pediatrics* 2144 e20191765 (2019).

119 Jeong-Kyun Choi et al, *Neighborhood Disadvantage, Childhood Adversity, Bullying Victimization, and Adolescent Depression: A Multiple Mediation Analysis*, 279 *J. Affective Disorders* 554, 554–562 (2021).

120 Kristen McCabe et al, *The Relation Between Violence Exposure and Conduct Problems Among Adolescents: A Prospective Study*, 75 *Am. J. Orthopsychiatry* 575, 575–584 (2005); Suzanne Estrada et al, *Individual And Environmental Correlates of Childhood Maltreatment and Exposure to Community Violence: Utilizing a Latent Profile and a Multilevel Meta-Analytic Approach*, 51 *Psychol. Med.* 1 (2021).

121 See, e.g., Robert Anda et al, *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 *Eur. Archives Psych. & Clinical Neurosci* 174 (2011); Centers for Disease Control and Prevention, *About the CDC-Kaiser ACE study: Homepage*. <https://www.cdc.gov/violenceprevention/aces/about.html> (last visited December 20, 2021).

Social Determinants of Late Adolescent Wellbeing

Compared to earlier generations, late adolescents today face more challenges when removing themselves from difficult home environments.¹²² While late adolescents who come from resource-rich families are often able to remove themselves from the family environment by pursuing a college education and living away from home, disadvantaged late adolescents (ages 18–21) are more likely to have fewer options when deciding where and with whom to reside. This can be disadvantageous when the home environment is high conflict or inattentive, criminogenic, dangerous, or otherwise toxic.

Like nearly all children in mid-adolescence who have limited choice about where and with whom they live, disadvantaged late adolescents may have no other option but to remain in a dysfunctional family environment¹²³ or in a turbulent neighborhood. Multilayered environmental stressors, including poverty, lack of access to resources and education, and unstable housing all contribute to a lack of agency. These factors work to substantially diminish or preclude an adolescent's ability to "extricate" oneself from a negative home or community situation. Each of the factors identified above has significant consequences for behavior, brain development, and future life outcomes.¹²⁴

Racism, a social determinant¹²⁵ of poverty and health/educational inequality, also influences how youth of color are treated by the criminal justice system and society at large. For example, research indicates that beginning at age 10, youth who are Black are more likely to be mistakenly viewed as being older.¹²⁶ This can have significant implications for interactions with law enforcement and subsequent treatment by the court. Studies indicate that discrimination and racism also contribute to negative mental health for late adolescents,¹²⁷ including increased symptoms of anxiety and depression¹²⁸ and increased alcohol use.¹²⁹

122 Jeffrey Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through Early Twenties*. 55 *Am. Psych.* 69, 69–480 (2000); Jeffrey Arnett, *Does Emerging Adulthood Theory Apply Across Social Classes? National Data on a Persistent Question*. 4 *Emerging Adulthood* 227, 227–35 (2020); Seth Schwartz, *Turning Point for a Turning Point: Advancing Emerging Adulthood Theory and Research*, 4 *Emerging Adulthood* 307, 307–17 (2016); James Côté, *The Dangerous Myth of Emerging Adulthood: An Evidence-Based Critique of a Flawed Developmental Theory*, 18 *Applied Developmental Sci.* 177, 177–88 (2014); Sara Sandberg-Thoma et al, *Exiting and Returning to the Parental Home for Boomerang Kids*, 77 *J. Marriage & Family* 806 (2015); Lei, Lei & Scott J. South, *Racial and Ethnic Differences in Leaving and Returning to the Parental Home: The Role of Life Course Transitions, Socioeconomic Resources, and Family Connectivity*, 34 *Demographic Rsch.* 109, 109–42 (2016).

123 Alison De Marco & Stephanie Berzin, *The Influence of Family Economic Status on Home-Leaving Patterns During Emerging Adulthood*. 89 *Families in Society* 208, 208–218 (2008).

124 Despite the challenges faced by disadvantaged adolescents, most young people are resilient and largely overcome adversity as they mature into early young adulthood, particularly if they are in environments or relationships that buffer them from long-term impact of adversities and foster resilience.

125 Social determinants may be highly contextual such as whether or not a youth resides in an area heavily surveyed by law enforcement or in a school system where school resource officers more commonly respond to students in crisis with arrest as opposed to de-escalation.

126 Phillip Goff et al, *The Essence of Innocence: Consequences of Dehumanizing Black Children*. 106 *J. Personality & Soc. Psych.* 526 (2014).

127 Donte Bernard et al, *Making The "C-ACE" for a Culturally-Informed Adverse Childhood Experiences Framework to Understand the Pervasive Mental Health Impact of Racism on Black Youth*. 14 *J. Child & Adolescent Trauma* 233, 233–247 (2020).

128 Regina Miranda et al, *Perceived Discrimination, Ruminative Subtypes, and Risk for Depressive Symptoms in Emerging Adulthood*. 19 *Cultural Diversity & Ethnic Minority Psych.* 395 (2013).

129 Noelle Hurd et al, *Does Perceived Racial Discrimination Predict Changes in Psychological Distress and Substance Use Over Time? An Examination Among Black Emerging Adults*. 50 *Developmental Psych.* 1910 (2014).

Further, discrimination has implications for physical health outcomes. A study of Black adolescents found that individuals who experienced higher levels of discrimination between the ages of 16–18, had higher levels of stress hormones¹³⁰ (e.g. cortisol, epinephrine, and norepinephrine), higher blood pressure, more inflammation, and higher body mass index by the age of 20.¹³¹ Structural racism compounds difficulties for Black and Latino adolescents who are more likely to lack equal access to high quality education, employment (especially higher income jobs), safe housing, credit, and good health care.¹³²

Specifically, Black children are less likely to be given the benefit of the doubt with regards to perceptions or judgments about their innocence and are more likely to be viewed as adults while White children are more often granted the presumption or privilege of innocence and are viewed as less culpable. In one study, perceptions of innocence for Black children ages 10–13 were equal to those for non-Black children ages 14–17 while perceptions of innocence for Black children ages 14–17 equaled those for non-Black adults ages 18–21. In another study, Black felony suspects were perceived as being 4.5 or more years older than their actual age.¹³³ A similar disparity was also found in a study of police officers, where officers tended to overestimate the ages of Black and Latino children but not overestimate the ages of White children.¹³⁴

Racial bias also influences the perception of threat.¹³⁵ In a study examining threat detection, researchers found that study participants were worse at correctly perceiving threat and neutral cues in Black faces as compared to White faces.¹³⁶ In a study of prospective teachers, Black children were incorrectly perceived as angry more often than White children.¹³⁷ This is consistent with other research which found that, while young age in general may moderate general threat associations, race-based threat associations persist throughout the lifespan, even when the individual is a young Black child.¹³⁸ Overall, these disparities together with research consistently finding disproportionate rates of arrest and incarceration of Black and Latino youth indicate that these youth do not receive the same community responses or protections as White children from the severity of juvenile and young adult consequences for misconduct.

130 Cortisol is a “stress hormone” that regulates the body’s metabolic and immune responses, and high levels enhance alertness during stress. Epinephrine is a hormone that cues up the sympathetic nervous system by increasing heart rate and respiration rate during stress. Norepinephrine is released during times of stress, and its release stimulates action, arousal, and alertness.

131 Gene Brody et al, *Perceived Discrimination Among African American Adolescents and Allostatic Load: A Longitudinal Analysis With Buffering Effects*. 85 Child Development 989, 989–1002 (2014).

132 David Williams et al, *Racism and Health: Evidence and Needed Research*. 40 Ann. Rev. Pub. Health 105, 105–125 (2019).

133 Goff, *supra* note 126.

134 *Id.*

135 Jason Okonofua et al, *A Vicious Cycle: A Social-Psychological Account of Extreme Racial Disparities in School Discipline*. 11 Persp. Psych. Sci. 381, 381–398 (2016); Jason Okonofua & Jennifer Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*. 26 Psych. Sci. 617, 617–624 (2015); Jennifer Eberhardt, *Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do* (2020). Jennifer Eberhardt et al, *Seeing Black: Race, Crime, and Visual Processing*. 87 J. Personality & Soc. Psych 876, 876–893 (2004).

136 Glasgow, S., Imbriano, G., Jin, J., & Mohanty, A, *Is Threat Detection Black and White? Race Effects in Threat-Related Perceptual Decision-Making*. 20 Emotion 1495 (2020).

137 Amy Halberstadt et al, *Racialized Emotion Recognition Accuracy and Anger Bias of Children’s Faces*. 8 Emotion (2020).

138 Andrew Todd et al, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?* 27 Psych. Sci. 384, 384–393 (2016).

Late Adolescent Sensitivity to Peer Influence

In addition to environmental influences, social influences in general and specifically peer involvements are more powerful for adolescents than adults. This has significant implications for adolescent decision-making, impulse control, and risk-taking behavior. In general, late adolescents are more likely to take risks in the presence of peers than when they are alone or when an adult is watching.¹³⁹ This is why many crimes committed by adolescents involve peers.

Why are adolescents more likely to engage in criminal behavior in the presence of peers?¹⁴⁰ Peer involvement results in greater risk-taking behavior and is associated with changes in brain responses during adolescence.¹⁴¹ For example, middle and late adolescents elicit more brain activity in reward centers when receiving monetary incentives if a peer is present, compared to when they are alone. Specifically, peer presence enhances responses in a brain region that is important for motivation and reward processing (striatum). However, peer presence does not modulate neural responses to reward in adults ages 25–35.¹⁴² This effect of peer presence on reward-related activity in the brain relates to enhanced risk-taking behavior. During a risk-taking task, adolescents ages 14–19 showed more activity in the striatum while peers were present than when they were alone, and this boost in brain activity was related to increased risk-taking behavior.¹⁴³

Sensitivity to peer influence has direct consequences for real world behavior. Peer presence and social influence can contribute to risk of substance misuse during late adolescence. For example, when in a bar-like setting, late adolescents are more likely to imitate the drinking habits of their peers even without direct pressure to do so.¹⁴⁴ Similar effects have been reported for cigarette smoking—merely observing a peer smoke increased the chances that an individual would also smoke more than if they were explicitly asked to smoke.¹⁴⁵ This demonstrates that mere peer presence can result in imitative behavior which can be adaptive when modeling positive behavior or decision-making or maladaptive when involving health risks or poor decision-making.

139 Karol Silva et al, *Adolescents in Peer Groups Make More Prudent Decisions When a Slightly Older Adult is Present*, 27 *Psych. Sci.* 322 (2016); Raymond Bingham et al, *Peer Passenger Norms and Pressure: Experimental Effects on Simulated Driving Among Teenage Males*, 41 *Transportation Res. Part F, Traffic Psych & Behaviour* 124, 124–137 (2016).

140 F. E. Zimring, *American youth violence*. (Oxford University Press on Demand 2020).

141 Albert, *supra* note 15.

142 Ashley Smith et al, *Age Differences in the Impact of Peers on Adolescents' and Adults' Neural Response to Reward*, 11 *Developmental Cognitive Neurosci.* 75 (2015).

143 Jason Chien et al, *Peers Increase Adolescent Risk-Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 *Developmental Sci.* F1 (2011).

144 Sander Bot et al, *Sociometric Status and Social Drinking: Observations of Modelling and Persuasion in Young Adult Peer Groups*, 35 *J. Abnormal Child Psych.* 929, 929–941 (2007).

145 Zeena Harahe & Wilma Vollebergh, *The Impact of Active and Passive Peer Influence on Young Adult Smoking: An Experimental Study*, 121 *J. Drug & Alcohol Dependence* 220, 220–223 (2012).

Studies of decisions made during simulated driving exercises demonstrate that late adolescents and young adults take more risks when driving with peers.¹⁴⁶ The presence of peers at one point while driving persists in increasing risk-taking even when a participant later drives alone.¹⁴⁷ This sensitivity to peer influence is more pronounced in late adolescents than in adults. In a study of individuals ages 18–22, research participants were significantly more likely to engage in risk-taking when a peer was present, even if the participant was told the peer was unknown to them and observing from another room.¹⁴⁸ In another study, 18-year-olds were more likely to increase speeding behavior based on peer influence and peer pressure than individuals in their late twenties.¹⁴⁹ Digital communication can also influence risk-taking among late adolescents. Late adolescents were more likely to make risky decisions when exchanging brief, text-like communications with a peer than when alone or when a peer was passively observing them.¹⁵⁰

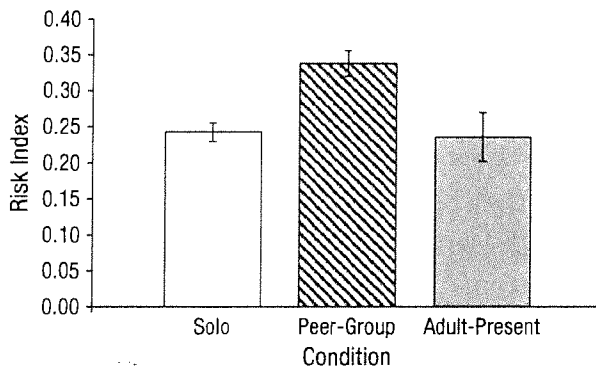


Figure 4: Silva et al 2016. Risk-taking behavior when the emerging adult was alone (Solo), with four age 18–22 peers (Peer-Group), or with 3 18–22 peers and one young adult 25–30 (Adult-Present).

The specific composition of peer groups also influences risk-taking behavior. Notably, the presence of adults can reduce risky decision-making for late adolescents.¹⁵¹ In a study testing late adolescent males ages 18–22, participants completed a set of risk-taking tasks either alone, in the presence of four 18–22 year old peers, or in the presence of three 18–22 year old peers and

¹⁴⁶ Bruce Simons-Morton et al, *The Observed Effects Of Teenage Passengers on the Risky Driving Behavior of Teenage Drivers*, 37 *Accident Analysis & Prevention* 973 (2005); Rui Pei et al, *Neural processes during adolescent risky decision-making are associated with conformity to peer influence*, 44 *Developmental Cognitive Neuroscience* 100794 (2020); Bingham, *supra* note 139; Christopher Cascio et al, *Buffering Social Influence: Neural Correlates of Response Inhibition Predict Driving Safety in the Presence of a Peer*, 27 *J. Cognitive Neurosci*, 83, 83–95 (2015). Marie Claude Ouiment et al, *The Effect of Male Teenage Passengers on Male Teenage Drivers: Findings From a Driving Simulator Study*, 58 *Accident Analysis & Prevention* 132, 132–139 (2013).

¹⁴⁷ J. L. Shepherd et al, *Susceptible to Social Influence: Risky "Driving" in Response to Peer Pressure* 1, 41 *J. Applied Soc. Psych.* 773 (2011).

¹⁴⁸ Alexander Weigard et al, *Effects of Anonymous Peer Observation on Adolescents' Preference for Immediate Rewards*, 17 *Developmental Sci.* 71 (2014).

¹⁴⁹ Mette Møller & Sonja Haustein, *Peer Influence on Speeding Behaviour Among Male Drivers Aged 18 and 28*, 64 *Accident Analysis & Prevention* 92 (2014).

¹⁵⁰ R. Ross MacLean et al, *Digital Peer Interactions Affect Risk-Taking in Young Adults*, 24 *J. Rsch. Adolescence* 772, 772–780 (2014).

¹⁵¹ Silva, *supra* note 139.

one adult between ages 25–30. When only similarly aged peers were present, late adolescents exhibited more risk-taking behavior than when they were alone or when an older adult was present (Figure 7). Specifically, when peers were present, individuals made riskier decisions on a delay discounting task, meaning they were less likely to delay gratification.

While peer influence can promote maladaptive risk-taking behaviors, the presence and influence of peers can also reduce risk-taking or serve a prosocial function. For example, when presented with risky economic decisions, adolescents are just as likely to conform to peers whether they make risky or safe decisions.¹⁵² Moreover, late adolescents as compared to early adolescents are more prosocial (sharing, giving) towards their friends than with less familiar peers.¹⁵³

Notably, both health-risk behaviors (such as substance misuse) and prosocial behaviors (such as giving to or helping a peer) peak in late adolescence.¹⁵⁴ Together these findings demonstrate that peer influence can have both positive and negative impacts on decision-making.

Summary

Late adolescents are more influenced by their environment and by peers than are adults. Adolescents facing difficult circumstances in their home and community face challenges to their emotional and physical wellbeing, which can influence behaviors such as decision-making and self-control. These factors can lead to involvement with the criminal justice system. Despite these challenges, the vast majority of individuals over time will be successful and demonstrate resilience as they grow and mature (please see Section II at page 18 for additional discussion on resilience). This is most likely to be the case for late adolescents who are given positive social supports and have access to adequate resources (social, community, housing, health, educational, leisure, vocational).

152 Barbara Braams et al, *Developmental Patterns of Change in the Influence of Safe and Risky Peer Choices on Risky Decision-Making*, *Developmental Sci.* e12717 (2018).

153 Berna Guroğlu et al, *Sharing and Giving Across Adolescence: An Experimental Study Examining the Development of Prosocial Behavior*, 5 *Frontiers Psych.* 291 (2014).

154 Neeltje Blankenstein et al, *Behavioral and Neural Pathways Supporting the Development of Prosocial and Risk-Taking Behavior Across Adolescence*, 91 *Child Development* e665-e681 (2020).

Section III: Miller Factor 4

Understanding Legal Proceedings

Fourth Miller factor: “the incompetencies associated with youth” including an “inability to deal with police officers or prosecutors (including on a plea agreement)” and “incapacity to assist his own attorneys.”

The decision of whether to invoke *Miranda* rights is often critical to the trajectory of a criminal case.¹⁵⁵ In 2019, law enforcement conducted more than 10 million arrests.¹⁵⁶ Many of these arrested individuals were subject to police interrogation. Decades of research suggests that many children and adolescents do not fully comprehend their *Miranda* rights or the implications of waiving *Miranda* rights.¹⁵⁷ For those in the age range of 18–21, the “temporal discounting” discussed in the previous sections may lead late adolescents to waive their rights in the heat of the moment, without fully appreciating the resulting consequences.¹⁵⁸ For example, despite future ramifications, a late adolescent may elect to waive their right to counsel and then provide or agree with information or statements consistent with an officer’s expectations during interrogation in an attempt to end the interrogation.

Research indicates that like early/middle adolescents, late adolescents are more easily swayed by adult influence and coercion than their adult counterparts.¹⁵⁹ This vulnerability has unique implications for late adolescents’ ability to effectively navigate interactions with law enforcement, including decisions about whether to assert *Miranda* rights and whether to disclose information or make a statement during police interrogation. Both susceptibility to adult influence and developmentally-based future discounting has implications for how late adolescents interface with the legal system, including judgments during plea bargaining and the extent to which they are able to meaningfully assist their defense attorneys. Additionally, due to racial profiling and cultural stereotypes that promote inaccurate perceptions of Black criminality, late adolescents who are Black are more likely to have had negative experiences with law enforcement and expect to be treated unfairly during interrogation, which can alter the decisions they make during interrogation.¹⁶⁰

¹⁵⁵ *Miranda* rights are 5th Amendment rights that attach when a person is taken into police custody and during custodial interrogation, including the right to remain silent and the right to an attorney.

¹⁵⁶ Federal Bureau of Investigation, *FBI Releases: 2019 Crime Statistics* (2020) <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-crime-statistics>, FBI (last visited Sep. 28, 2020) [<https://perma.cc/V76M-QNZ6>].

¹⁵⁷ See Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134, 1166 (1980).

¹⁵⁸ Late adolescents with cognitive or learning impairments are at heightened risk of misunderstanding *Miranda* rights. A review of over 350 juvenile *Miranda* warnings across the United States found over half of *Miranda* warnings required an eighth grade reading level or above. Richard Rodgers et al, *Juvenile Miranda Warnings: Perfunctory Rituals or Procedural Safeguards?* 39 Crim. Just. & Behavior 229, 229–249 (2012).

¹⁵⁹ Cleary, *supra* note 16.

¹⁶⁰ Cynthia Najdowski et al, *Stereotype Threat and Racial Differences in Citizens’ Experiences of Police Encounters*, 39 L. & Human Behavior 463 (2015).

Neurocognitive Processes Underlying Late Adolescent Decision-making

Future Oriented Decision-Making

Compared to adults, late adolescents are more likely to prioritize immediate outcomes over long-term consequences.¹⁶¹ Overvaluing immediate consequences has direct implications for waiving *Miranda* rights, making plea decisions, and susceptibility to falsely confessing.¹⁶² As discussed in Section I (page 10), neuroscientists and psychologists have studied how future-oriented decision-making changes with age. Researchers measured a form of future-oriented decision-making, referred to as temporal discounting, by asking individuals to decide between accepting a smaller reward sooner or waiting longer to receive a larger reward (e.g., \$5 today or \$25 in four weeks). The ability to delay gratification and prioritize later outcomes continues to develop during adolescence and through young adulthood.¹⁶³

Age-related changes in temporal discounting have been linked to the development of the prefrontal cortex,¹⁶⁴ a brain region that is important for thinking abstractly and making decisions about future outcomes. Future-oriented decision-making is associated with enhanced communication between the prefrontal cortex and subcortical regions that are responsive to rewards. Importantly, these connections continue to strengthen during late adolescence,¹⁶⁵ which can account for why late adolescents prioritize immediate outcomes and make more impulsive decisions.¹⁶⁶

Because of this preference for immediate reward, adolescents may be more likely to comply with an authority figure with the goal of escaping an uncomfortable situation as quickly as possible. These differences in adolescent future orientation have implications for police interrogations.¹⁶⁷ For example, because adolescents may perceive the ability to go home as an immediate reward, adolescents may face increased pressure to make both true and false confessions,¹⁶⁸ including situations in which officers assure the youth or young adult that they will be permitted to go home if they will “just tell the truth” or “help us understand your involvement” in an alleged offense.

161 Grace Icenogle et al, *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 L. & Human Behavior 69 (2019).

162 Scientist Action and Advocacy Network, *Scientific Support for a Developmentally Informed Approach to Miranda Rights* (May 2, 2018) <https://scaan.net/docs/20180607-MirandaReport.pdf> (last visited December 20, 2021).

163 Eveline Crone & Nikolaus Steinbeis, *Neural perspectives on cognitive control development during childhood and adolescence*, 21 Trends in Cognitive Sci. 205, 205–215 (2017); Christopher Holmes et al, *Peer Influence, Frontostriatal Connectivity, and Delay Discounting in African American Emerging Adults*, 14 Brain Imaging & Behavior 155, 155–163 (2020).

164 Laurence Steinberg & Jason Chein, *Multiple Accounts of Adolescent Impulsivity*, 112 Proc. Nat. Acad. Sci. 8807, 8807–8808 (2015).

165 Michelle Achterberg et al, *Frontostriatal White Matter Integrity Predicts Development of Delay of Gratification: A Longitudinal Study*, 36 J. Neurosci. 1954, 1954–1961 (2016).

166 Bos, *supra* note 82.

167 Cleary, *supra* note 16.

168 Lindsay Malloy et al, *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 L. & Human Behavior 181 (2014).

Decision-making Under Stress

A large body of research has demonstrated that acute stress impairs decision-making.¹⁶⁹ For example, evidence across multiple studies has shown that future-oriented decision-making is significantly impaired during highly stressful situations, and this effect is heightened in late adolescents and young adults.¹⁷⁰ The effect of stress on decision-making is especially pronounced when individuals are faced with social stressors, and when they are required to make decisions about uncertain outcomes.¹⁷¹ For example, an adolescent or young adult defendant's capacities for considering likely future outcomes may be compromised in situations where police insist "that you talk with us right now and we'll put in a good word for you with the prosecutor" or they are informed that "the plea deal needs to be done right now" or the offer will be withdrawn and harsh sentencing recommendations will be offered to the court if the defendant is later convicted after a trial.

Interactions with law enforcement and authorities induce heightened stress and arousal in youth.¹⁷² Research has demonstrated that adolescents experience heightened physiological stress responses when speaking in front of authorities or when being evaluated by adults.¹⁷³ When feeling stressed, both middle and late adolescents are more likely to make risky decisions.¹⁷⁴ A study evaluated risky decision-making and self-control performance when adolescents ages 14–21 were experiencing low and high stress life events. Results indicated that when adolescents were highly stressed, they made more risky decisions when they were presented with choices about uncertain financial outcomes. This suggests that when stressed, adolescents are more likely to pursue immediately rewarding outcomes without factoring in the potential costs of their actions and less likely to weigh the consequences of their decisions. This research again demonstrates the vulnerability of adolescents when making substantive decisions during arrest, interrogation, or high-stress moments throughout subsequent legal proceedings.

Stress influences activity in the prefrontal cortex,¹⁷⁵ and stress can alter communication between the prefrontal cortex and subcortical regions that are responsive to emotional and salient information.¹⁷⁶ A recent study testing adolescents and young adults found that the extent of structural connectivity between the prefrontal cortex and the striatum, a region

169 Anthony Porcelli & Mauricio Delgado, *Stress and Decision-Making: Effects on Valuation, Learning, and Risk-Taking*, 14 *Current Opinion Behavioral Sci.* 33–39 (2017).

170 Sherece Fields et al, *The Relationship Between Stress and Delay Discounting: A Meta-Analytic Review*, 25 *Behavioural Pharmacology* 434, 434–444 (2014).

171 Oriel FeldmanHall et al, *The Effects of Social Context and Acute Stress on Decision-Making Under Uncertainty*, 26 *Psych. Sci.* 1918, 1918–1926 (2015).

172 Cleary, *supra* note 16.

173 Jessica Seddon et al, *Meta-Analysis of the Effectiveness of the Trier Social Stress Test in Eliciting Physiological Stress Responses in Children and Adolescents*, 116 *Psychoneuroendocrinology* 104582 (2020).

174 Adriana Galván & Kristine McGlennen, *Daily Stress Increases Risky Decision-Making in Adolescents: A Preliminary Study*, 54 *Developmental Psychobiology* 433, 433–440 (2012).

175 Reinoud Kaldeqaj et al, *Frontal Control Over Automatic Emotional Action Tendencies Predicts Acute Stress Responsivity*, 4 *Biological Psych.: Cognitive Neurosci. & Neuroimaging* 975, 975–983 (2019).

176 J. Van Oort et al, *How the Brain Connects in Response to Acute Stress: A Review at the Human Brain Systems Level*, 83 *Neurosci. & Biobehavioral Rev.* 281, 281–297 (2017).

responsive to rewards, was associated with risky decision-making during stressful conditions.¹⁷⁷ Individuals with weaker connectivity were more likely to make risky decisions during highly stressful situations. Because these connections continue to develop during adolescence and into young adulthood, the late adolescent brain may be especially vulnerable to the effects of acute stress.¹⁷⁸

Development of the prefrontal cortex can also influence how late adolescents respond in vigilant states when they are anticipating potential threats.¹⁷⁹ When faced with acute threats, late adolescents (ages 18–21) respond more impulsively than young adults (ages 22–25). This enhanced impulsivity is associated with decreased recruitment of the prefrontal cortex. Notably, late adolescents' brain responses look more like those of middle adolescents (ages 13–17) than those of young adults (ages 22–25). Together, these findings demonstrate that adolescent decision-making and impulsivity may be more vulnerable to psychosocial stress than young adults, which can have implications for how late adolescents proceed when faced with interrogation. This includes impulsively confessing during an interrogation or providing information in the heat of the moment that an adult would be less likely to disclose.

Interrogation also uniquely impacts the physiological and biological arousal of late adolescents when confronted with coercive interrogation techniques. For example, the condition of *actual* innocence produced “immediate and fundamental” differences in suspects when examining systolic and diastolic blood pressure and various respiratory measures.¹⁸⁰ This translated to a significantly lower level of physiological arousal. Researchers hypothesized that this lower level of arousal contributed to the failure of innocent suspects to perceive the potential dangers of continuing to participate in an interrogation.

This, in turn, increased the likelihood that innocent participants would waive their *Miranda* rights because they naively believed that they would be able to convince police of their innocence. This physiological under-arousal and failure to assert their *Miranda* rights contributed to prolonged interrogation and increased the risk of false confession. For late adolescents, interrogation of both suspects who are innocent and who are guilty prompt different but powerful physiological responses which increase likelihood of false confession. Innocent subjects often fail to appreciate the jeopardy they are in and continue interrogation in the misguided belief that they can convince the interrogators of their innocence. Guilty subjects may fail to assert *Miranda* rights due to a stress-driven desire to promptly get out of an acutely anxiety-provoking encounter by appearing cooperative and perhaps acknowledging aspects of the allegations in an effort to mollify the interrogators.

177 Jessica Uy & Adriana Galván, *Individual Differences in Accumbocortical Tract Integrity Relate to Risky Decisions Under Stress in Adolescents and Adults*, 45 *Developmental Cognitive Neuroscience* 100859 (2020).

178 Tottenham, *supra* note 94.

179 Cohen, *supra* note 12.

180 Max Guyll et al, *Innocence and Resisting Confession During Interrogation: Effects on Physiologic Arousal*, 37 *L. & Human Behavior* 366–75 (2013).

181 *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

Decision-making in Legal Contexts

The United States Supreme Court acknowledged age-related susceptibility to adult influence within the context of *Miranda* rights and in the landmark case *J.D.B. v. North Carolina*.¹⁸¹ At the time of the interrogation, 13-year-old special education student J.D.B. was suspected of two break-ins. Without being provided with his *Miranda* warnings, J.D.B. was questioned by a uniformed police officer at school behind closed doors. While J.D.B. initially denied involvement in the burglaries, J.D.B. confessed after the officer encouraged him to tell the truth and threatened him with the possibility of juvenile detention. It was only then that the officer informed the student that he could refuse to answer questions or leave. Over the course of 30 to 45-minutes, J.D.B. verbally and in writing provided details of the crimes.

In remanding the case to state court, Justice Sotomayor observed:

“It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the *Miranda* custody analysis.”¹⁸²

In broadening the “in custody” test to include a consideration of the suspect’s age, the majority reasoned that children and adults experience their surroundings differently and that certain settings are inherently more coercive to youth. This was a significant shift in the *Miranda* custody analysis. Post-*J.D.B.*, a child’s age can be an important factor in determining whether a juvenile suspect was “in custody” and thus entitled to *Miranda* protections. However, despite the developmental similarities between late adolescents and middle adolescents, thus far, state appellate courts and the United States Supreme Court have declined to extend *J.D.B.*’s consideration of age to late adolescents.^{183, 184}

¹⁸² *Id.* at 264–65.

¹⁸³ See, e.g., *United States v. Eaton*, No. CR1801795TUCJGZBGM, 2019 WL 2135878, at *7 (D. Ariz. May 16, 2019) (“Defendant points to his age as a factor noting that ‘a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.’ Mr. Eaton was twenty-one (21) at the time of the incident, and although a young adult he was not a child. In fact, Mr. Eaton is a father. The Court finds that Mr. Eaton’s age is not a factor invalidating his consent.”) (citations omitted); *People v. McCullough*, No. 311083, 2013 WL 195607, at *5 (Mich. Ct. App. 2013); *United States v. Hunter*, 912 F. Supp. 2d 388, 399 (E.D. Va. 2012); *State v. Wentzel*, No. A15–1495, 2016 WL 3884417, at *2 (Minn. Ct. App 2016).

¹⁸⁴ Some courts have determined that both youth and race must be taken into account in determining reasonableness under the 4th Amendment seizure principles. See, e.g., *Commonwealth v. Tykorie Evelyn*, 485 Mass. 691, 152 N.W.3d 108 (Mass. 2020). (“Going forward, however, the age of a juvenile suspect, if known to the officer or if objectively apparent to a reasonable officer, will be part of the totality of the circumstances relevant to whether the juvenile was seized under art. 14 of the Massachusetts Declaration of Rights....With respect to the defendant’s arguments on race, we have examined the continued relevance of our reasoning in *Commonwealth v. Warren*, 475 Mass. 530, 540 (2016), on the question of reasonable suspicion. In that case, we concluded that an innocent African-American man in an urban area might flee from police for fear of racial profiling, and therefore the weight of the inference properly given to flight should be less when the individual is African-American. See *id.* We conclude that this reasoning remains pertinent to the reasonable suspicion analysis and should be extended to other types of nervous or evasive behavior in addition to flight.”)

False Confessions

As indicated previously, late adolescents are less equipped to appreciate long-term consequences and make complicated decisions when in emotionally-driven contexts where they are given very limited time to decide on a course of action.¹⁸⁵ These deficits are exacerbated in high stress situations. Arguably, few experiences are more stressful than interrogation by armed uniformed police officers. Research has established a connection between coercive techniques, such as feigned eyewitnesses and promises of leniency, and false confessions.¹⁸⁶ According to the National Registry of Exonerations, the false confession rates for adolescents are three times higher than the rates for adults.¹⁸⁷

Many of the developmental factors discussed in earlier sections also contribute to increased risk of false confessions in late adolescents. Due to the impact of peer influence and heightened allegiance to peers, as discussed in Section II (page 18), late adolescents may be more likely to be hesitant to expose a peer's behavior even if the disclosure mitigates the extent of their own involvement in the crime or exonerates them. They may even take responsibility for acts they did not commit out of misplaced loyalty to a peer.

There are two main causes of false confessions. The first category emanates from coercive interrogation techniques including coercive questions, comments, and conduct. The second category includes mental states where the defendant's mental status creates vulnerabilities to suggestibility or disruptions of deliberative decision-making due to mental illness, cognitive impairment, or substance use.¹⁸⁸

False Self-Incrimination

In 1996, the first experimental study on false confessions was conducted using late adolescent college students who were instructed not to hit the ALT key on a computer keyboard.¹⁸⁹ In this study, after being accused of having hit the ALT key, nearly 70% agreed to sign a confession falsely admitting they had hit the ALT key while typing. Approximately 39% were led to believe they had actually pressed the key and nearly 10% offered corroborating facts and details. Notably, in a test condition where participants were instructed to type at a more rapid speed and where confederate witnesses were present to support the accusation, 100% of

185 Casey, *supra* note 12; Willoughby, *supra* note 52; Bernd Figner et al, *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk-Taking in the Columbia Card Task*, 35 J. Exp. Psych: Learning, Memory & Cognition 709 (2009); Erik de Water, et al, *Distinct age-related differences in temporal discounting and risk-taking in adolescents and young adults*, 85 Child Development 1881, 1881–1897 (2014).

186 See, e.g., Melissa Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481, 482 (2005).

187 Samuel Gross & Rob Warden, *Exonerations in the United States, 1989 through 2012*, Rep. from Nat'l Reg. Exonerations (U. Mich./Nw U. L. Center on Wrongful Convictions), 2012; see generally Barry Field, *Kids, Cops, and Confessions: Inside the Interrogation Room* (2012).

188 There are significant ethical barriers to conducting comparison research studies of coerced false confessions, as inducing harm to research subjects is prohibited and inhibits the research replication of strong-arm tactics. As researchers over the years have attempted to move away from theoretical study and replicate the psychological pressure of the interrogation room while avoiding harm to research subjects, they have developed alternative ways to study coercion.

189 Saul Kassin & Katherine Keichel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol. Sci. 125, 125 (1996).

participants gave a false confession. This experiment, and subsequent studies, demonstrated that when late adolescent populations are confronted with false incriminating evidence, a common technique used by police, individuals may falsely confess to actions and may even come to believe they had acted in ways they did not.

This pattern of false confessions was observed again when researchers conducted a study of late adolescents that created an environment more analogous to police interrogation. Social scientists orchestrated a “cheating” experiment where 330 undergraduate students were assigned to complete individual and joint problem-solving activities with a confederate who posed as a participant.¹⁹⁰ Each undergraduate student was then told they had identical wrong answers on a problem and that a professor had been made aware of the situation and was upset about the sharing of answers and so was weighing appropriate consequences. Research subjects were then interrogated and given a statement to sign that indicated they had cheated. They were also told that if they did not sign the statement, the professor would be called into the laboratory to address the situation with the implication being this would make things worse for the student.

Without interrogation, confession rates were 46% for guilty participants and 6% for innocent participants. The use of two interrogation techniques—promises of leniency (“Things could probably be settled pretty quickly”) and minimization (“I’m sure you didn’t realize what a big deal it was”)—elevated the confession rate to 87% for guilty participants and 43% for innocent participants. The high rate of confessions by innocent participants offered leniency demonstrated that people without mental illness or cognitive impairment, and particularly those in the late adolescent age range, can be led to confess when they believe that asserting their innocence could lead to a potentially worse outcome.

False Memory and Peer Influence

Late adolescents are also more vulnerable to false memory formation than adults. Researchers compared youth ages 16–23 with adults ages 29–58 using a classic false memory task.¹⁹¹ Compared to adults ages 29–58, youth ages 16–23 were more likely to report recalling that they saw a word that had just been implied but never actually shown to them previously. This study suggests that late adolescents and young adults are more likely to form false memories than adults. Similar research showed that the tendency to report false memories increases during adolescence from ages 11 to 21.¹⁹² This body of research indicates that late adolescents are more prone to false memory formation. This also has implications for statements made by late adolescents during interrogation, particularly when inaccurate information is intentionally or inadvertently introduced or implied during interrogation.

190 Melissa Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481, 482 (2005).

191 L. Meusel et al, *Youth Are More Vulnerable to False Memories Than Middle-Aged Adults Due to Liberal Response Bias*, 21 J. Can. Acad. Child & Adolescent Psych. 289 (2012).

192 Katherine McGuire, Kamala London & Daniel Wright, *Developmental Trends in False Memory Across Adolescence and Young Adulthood: A Comparison of DRM and Memory Conformity Paradigms*, 29 Applied Cognitive Psych. 334, 334–344 (2015).

Adolescent memory is also susceptible to peer influence. When late adolescents are given information attributed to a friend, they are more likely to be influenced by the friend's statement.¹⁹³ In one research study, the impact of social influence was consistent from ages 11 to 21. This demonstrates that late adolescents are just as susceptible to peer influence as early to middle adolescents.

During interrogation, adolescents are also more likely to selectively share information to protect their friends. This tendency is especially strong in late adolescence and can have implications for false confessions. Middle and late adolescents are more prone to prosocial risk-taking than young adults, but they are also more likely to take a risk to benefit a peer because they underweight the personal risks at stake.¹⁹⁴ For example, middle and late adolescents (ages 16–21) are more likely to engage in high-cost prosocial behaviors to defend friends and family members compared to strangers.¹⁹⁵ Further, research on late adolescence has demonstrated that friendship closeness can predict the willingness of an individual to take the blame for a friend's offense.¹⁹⁶ This means that late adolescents are willing to compromise their own reputations and perhaps even their liberty to benefit their close friends despite negative personal consequences.

Contextual Influences and Individual Differences

Lastly, an additional consideration is that late adolescents held in jail pending trial are more likely to face a difficult environmental context, which could lead them to be at increased risk of falsely confessing to a crime as a means of being released from jail. Incarceration challenges for this population include increased exposure to potentially traumatizing adversities including rape and physical assault.¹⁹⁷ This population is also more likely to be held in solitary confinement, which is uniquely emotionally stressful for late adolescents due to this population's heightened need for social interaction.¹⁹⁸ This may lead to individuals within this age group (more so than adults) confessing to crimes or accepting plea bargains when they otherwise would maintain their innocence.

193 Katherine McGuire, Kamala London & Daniel B. Wright, *Peer Influence on Event Reports Among Adolescents and Young Adults*, 19 Memory 674, 674–683 (2011).

194 Kathy Do et al, *But Is Helping You Worth The Risk? Defining Prosocial Risk-Taking in Adolescence*, 25 Developmental Cognitive Neurosci. 260, 260–271 (2017).

195 Laura Padilla-Walker et al, *Longitudinal Change in High-Cost Prosocial Behaviors of Defending and Including During the Transition to Adulthood*, 47 J. Youth & Adolescence 1853, 1853–1865 (2018).

196 Willard, J., & Burger, C. (2018). *Willingness to Falsely Take Blame Among Friends: Closeness, Reporting Wrongdoing, and Identity*, 39 Deviant Behavior 981 (2018).

197 Listwan, S. J., Daigle, L. E., Hartman, J. L., & Guastaferro, W. P. (2014). *Poly-victimization Risk in Prison: The Influence of Individual And Institutional Factors*, 29 J. Interpersonal Violence 2458 (2014).

198 See, e.g., J. Lee, *Lonely Too Long: Redefining and Reforming Juvenile Solitary Confinement*, 85 Fordham L. Rev. 845 (2016).

Overall, developmental neuroscience, social science, and behavioral health research over recent decades has established that late adolescents as a group can make sound decisions when in circumstances supporting calm reflection with opportunities to communicate with others about the decisions to be made. However, when they are exposed to certain coercive and/or emotionally charged circumstances where they feel pressured to make specific statements or acknowledgements, feel as though they have limited options, and are under time pressures to decide or take action, late adolescents are vulnerable to making decisions that undermine their exercise of fundamental Constitutional protections.¹⁹⁹

199 See, e.g., Field, *supra* note 188.

Section IV: Miller Factor 5

Greater Potential for Rehabilitation

Fifth Miller factor: The greater potential for rehabilitation of youth, the limits of risk assessment, and the high likelihood of desistance from misconduct with maturation

Adolescent Brains Are Poised for Learning

Late adolescents exhibit enhanced neural sensitivity to rewards, as compared to children and adults,²⁰⁰ which enhances the vulnerabilities for risk-taking described above, but also creates a window of opportunity for prosocial learning and adaptation.²⁰¹ A longitudinal learning study tested individuals ages 8–25 and found that increased activity in a key reward region in the brain (striatum) that receives inputs from dopamine centers supports learning improvements during late adolescence.²⁰² Developmental changes in the dopamine system increase plasticity in the brain. “Plasticity” is the term describing the brain’s ability to change and adapt in response to experience. The prolonged period of plasticity during adolescence through young adulthood is also a time during which youth are neurologically primed to learn from experience.^{203,204}

During late adolescence, connections between the striatum and prefrontal cortex strengthen. These developing connections support goal-directed behavior,²⁰⁵ and stronger connections between the prefrontal cortex and the striatum are associated with adaptive learning strategies. Relative to children and early-middle adolescents, late adolescents ages 18–22 are more likely to update and refine their decision-making strategies after receiving rewards for “successful” decisions. This change in learning strategy is associated with enhanced connectivity between

200 Barbara Braams et al, *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development, and Risk-Taking Behavior*, 35 J. Neurosci 7226, 7226–7238 (2015).

201 Samantha DePasque & Adriana Galván, *Frontostriatal Development and Probabilistic Reinforcement Learning During Adolescence*, 143 Neurobiology Learning & Memory 1 (2017); Juliet Davidow et al, *An Upside to Reward Sensitivity: The Hippocampus Supports Enhanced Reinforcement Learning in Adolescence*, 92 Neuron 93 (2016).

202 Sander Peters & Eveline Crone, *Increased Striatal Activity in Adolescence Benefits Learning*, 8 Nature Communications 1 (2017).

203 Surjeet Mastwal et al, *Phasic Dopamine Neuron Activity Elicits Unique Mesofrontal Plasticity in Adolescence*, 34 J. Neuroscience 9484 (2014).

204 Vishnu Murty, Finnegan Calabro & Beatriz Luna, *The Role of Experience in Adolescent Cognitive Development: Integration of Executive, Memory, and Mesolimbic Systems*, 70 Neurosci. & Biobehavioral Rev. 46 (2016).

205 Catherine Insel et al, *Development of Corticostriatal Connectivity Constrains Goal-Directed Behavior During Adolescence*, 8 Nature Comm. 1 (2017); Juliet Davidow, Catherine Insel & Leah Somerville, *Adolescent Development of Value-Guided Goal Pursuit*, 22 Trends Cognitive Sci. 725 (2018).

the striatum and prefrontal cortex.²⁰⁶ When learning from feedback, research indicates that late adolescents are more responsive to positive feedback (including both material rewards and social rewards such as praise and recognition) than to punishments.²⁰⁷

The neuroscience and behavioral research indicate that late adolescents are particularly well suited to learning from experience given the right circumstances and contexts. Further, positive reinforcement may be especially beneficial for adolescent learning, as late adolescents are more responsive to learning from reward than punishment. This has direct consequences for intervention and rehabilitation, as the research demonstrates that late adolescents are more likely to learn from the outcomes of their experiences to change their behavior²⁰⁸ unless their capacities for social and other learning are compromised by psychiatric, developmental, or cognitive challenges. This, of course, has direct bearing for how to best promote positive behavioral change in youths.

Middle and Late Adolescent Behavior Patterns and Emerging Personality Features Are More Malleable Than Those of Adults

As noted by the United States Supreme Court in *Roper, Graham, and Miller*, the frequency of criminal offending increases in late adolescence and then tapers off in early adulthood.²⁰⁹ Most late adolescents who are chronically involved in the criminal justice system and/or commit violent acts are likely to self-desist from or “age out” of crime as they enter into adulthood, with or without punitive intervention.²¹⁰ As discussed in Section I (page 10), middle and late adolescence is a time where individuals are predisposed to impulsive decision-making, preferring immediate over delayed rewards (future discounting), and peer influence.

In 2019, there were more than 10 million crimes committed in the United States. Individuals ages 18–20 accounted for 8% of all offenses and 8.76% of all violent offenses.²¹¹ In a criminal trajectory study, which included individuals who were classified as persistent and serious

206 Wouter van den Bos et al, *Striatum–Medial Prefrontal Cortex Connectivity Predicts Developmental Changes In Reinforcement Learning*, 22 *Cerebral Cortex* 1247 (2012).

207 Dorothea Hämmerer et al, *Life Span Differences In Electrophysiological Correlates Of Monitoring Gains And Losses During Probabilistic Reinforcement Learning*, 23 *J. Cognitive Neuroscience* 579 (2011); Katherine Luking et al, *Do Losses Loom Larger for Children than Adults?* 16 *Emotion* 338 (2016); Catherine Insel & Leah Somerville, *Asymmetric Neural Tracking of Gain and Loss Magnitude During Adolescence*, 13 *Soc Cognitive & Affective Neurosci.* 785 (2018).

208 Arielle Baskin-Sommers et al, *Towards Targeted Interventions: Examining the Science Behind Interventions for Youth Who Offend*. 5 *Ann. Rev. Criminology* (forthcoming 2022).

209 Natsuaki Misaki, Xiaojia Ge & Ernst Wenk, *Continuity and Changes in the Developmental Trajectories of Criminal Career: Examining the Roles of Timing of First Arrest and High School Graduation*, 37 *J. Youth & Adolescence* 431, (2008).

210 Terrie Moffitt, *Male Antisocial Behaviour in Adolescence and Beyond*, 2 *Nature Human Behaviour* 177 (2018); Georg Kessler, *Delinquency in Emerging Adulthood: Insights into Trajectories of Young Adults in a German Sample and Implications for Measuring Continuity of Offending*. 6 *J. Developmental & Life-Course Criminology* 424, 424–447 (2020); Maryann Davis et al, *Reducing Recidivism and Symptoms in Emerging Adults with Serious Mental Health Conditions and Justice System Involvement*. 42 *J. Behavioral Health Services & Rsch.* 172, 172–190 (2015).

211 See Off. of Juvenile Justice and Delinquency Prevention, *Estimated number of arrests by offense and age group*, U.S. Dep’t Just. (2019), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1 [https://perma.cc/T6H7-3LWX].

delinquents, most individuals who committed serious crimes at 17 and 18 (including armed robbery and felony assault) did not continue to engage in antisocial behavior into adulthood, following court involvement.²¹²

Violent crime peaks at ages 17–19 and decreases in the early twenties.²¹³ While counterintuitive, a robust body of research indicates that committing a violent crime before age 20 is not a strong predictor of a persistent criminal trajectory.²¹⁴ While there are no research studies involving solely late adolescents, research indicates that early and middle adolescents who commit homicides have similar rates of desistance from misconduct to youth who commit other kinds of less serious offenses, and committing a homicide in adolescence is not itself a predictor of either future violent or non-violent recidivism.²¹⁵

This is in part, because—as discussed in Section I (page 10)—characteristics such as impulsivity, poor decision-making in “hot cognition” contexts and susceptibility to peer influence diminish as the brain continues to develop. However, while *most* late adolescents who commit crimes do not significantly penetrate the adult criminal justice system, pre-adolescent onset of criminal behavior is associated with a higher likelihood of persistent criminal offending behavior²¹⁶ and greater exposure to childhood adversities.²¹⁷ Versatility of criminal offending is also more likely among those who continue to commit more serious crimes into adulthood.²¹⁸ However, as previously noted, *most* chronic and repeat offenders in youth do not persist into adulthood.

Adolescence Gives Rise to Developmentally Expectable Changes in Behavior

Adolescence is characterized by evolving identity, fluctuating family and social relationships, changing motivations and goals, and maturing physical characteristics and cognitive abilities.²¹⁹ Adolescent brains continue to develop as they amass life experience. Brain development also responds to the characteristics of the specific physical and social environment within which the adolescent is maturing. Their decision-making, relationships, their ways of understanding the world they navigate, emotional regulation, and behaviors will necessarily change with age as

212 Edward Mulvey et al, *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 *Development & Psychopathology* 453 (2010).

213 See, e.g., Off. Juv. Just. Delinq. Prot., *Law Enforcement & Juvenile Crime: Arrests by Offense, Age, and Gender*, U.S. Dep't of Justice (Oct. 21, 2019), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1 [<https://perma.cc/T6H7-3LWX>]; Alex Piquero, et al, *Criminal Career Patterns, in From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention* 14 (Rolf Loeber & David P. Farrington eds., 2012).

214 See Piquero, *supra* note 215.

215 Elizebeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 *Behav. sci. & l.* 741 (2000); M. DeLisi, A.R. Piquero & S. M. Cardwell, *The unpredictability of murder: Juvenile homicide in the pathways to desistance study*, 14 *Youth Violence & Juv. Just.* 26 (2000).

216 Terrie Moffitt, *Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy*, 100 *Psychol. Rev.* 674 (1993).

217 Michael Baglivio et al, *The Relationship Between Adverse Childhood Experiences (ACE) and Juvenile Offending Trajectories in a Juvenile Offender Sample*, 43 *J. Crim. Just.* 229, 229–241 (2015).

218 Moffitt, *supra* note 218.

219 Casey, *supra* note 18.

each person transitions across adolescence and young adulthood. For example, development of the prefrontal cortex is accompanied by improvements in self-control and decision-making²²⁰ that are reflected in desistance of misconduct, diminished impulsivity and risk-taking, and long-term planning towards goals.

This is developmentally to be expected. It is currently not possible to reliably predict an individual adolescent's future developmental trajectory based upon current presentation and past history. This is partly because of the high rates of desistance from antisocial conduct as youth mature into young adulthood and partly because behavioral, emotional, and attitudinal changes are expected components of adolescent development.²²¹ It is also currently scientifically impossible to reliably predict how much or how quickly an individual will change with age based on their presumed brain development, history, or current behavioral profiles.²²²

While adolescents, as compared to adults, may exhibit increased impulsivity and riskier decision-making, these behaviors are ordinarily temporary and developmentally expected.²²³ In certain situations, enhanced risk-taking tendencies can be adaptive to promote learning and exploration.²²⁴ These changing behaviors help adolescents navigate the world as they seek to establish autonomy and self-efficacy in society, including risk-taking to achieve positive goals. However, this developmental brain-based behavioral profile also increases risk for problematic behaviors during adolescence.²²⁵ Risk-taking and impulsivity peak during childhood and adolescence and then decrease with age.²²⁶ This developmental trajectory is reflected in age-related changes in delinquent and criminal misconduct (primarily property, substance possession, and other non-violent misconduct), which surges from early through late adolescence and then declines during young adulthood.²²⁷

220 Catherine Insel et al, *Development of Corticostriatal Connectivity Constrains Goal-Directed Behavior During Adolescence*, 8 Nature Comm. 1 (2018); Davidow, *supra* note 207.

221 Brief of Amici Curiae Professional Organizations, Practitioners, and Academics in the Fields of Neuroscience, Neuropsychology, and Other Related Fields in Support of Petitioner, *Wardlow v. State of Texas*, 141 S. Ct. 190 (2020) (No. 19–8712), https://www.supremecourt.gov/DocketPDF/19/19–8712/145983/20200619160740671_19–8712%20-%20Wardlow%20v.%20Texas%20-%20Professional%20Organizations%20et%20al.%20cert.%20amicus.pdf; Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 Developmental Psychol. 1654, 1655 (2009).

222 Violence and Serious Theft: Development and Prediction from Childhood to Adulthood 333 (Rolf Loeber, David Farrington, Magda Stouthamer-Loeber & Helene Raskin White, eds., 2008).

223 Gail Rosenbaum & Catherine Hartley, *Developmental Perspectives on Risky and Impulsive Choice*, 374 Phil. Transactions Royal Soc'y 1766 (2019).

224 Duell, *supra* note 50.

225 Whitney Fosco et al, *The Development of Inhibitory Control in Adolescence and Prospective Relations with Delinquency*, 76 J. Adolescence 37 (2019).

226 Natasha Duell et al, *Age Patterns in Risk-Taking Across The World*, 47 J. Youth & Adolescence 1052 (2018).

227 David Farrington, Rolf Loeber & James Howell, *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 Crim. & Pub. Pol'y 729 (2012).

Personality Continues to Change Across the Lifespan

Research has long demonstrated that personality is not firmly established in adolescence. Indeed, the 20s are a time of significant evolution of many personality traits, including growth in conscientiousness, self-discipline, and emotional stability.²²⁸ Similarly, adolescence is characterized by continuous changes in personality as adolescents work to form a sense of identity.²²⁹ Personality traits are influenced by environmental and contextual factors such as changing social roles and relationships.²³⁰ Adolescents are uniquely attuned to their social world, and they are highly influenced by the perceptions and behaviors of their peers.²³¹

On average, as adolescents age, they exhibit decreases in neuroticism²³² and increases in agreeableness, conscientiousness, openness, and extraversion.²³³ Self-control and emotional stability also increase with age, with continued changes in the third and fourth decades of life.²³⁴ As with most developmental research, studies of personality rely upon group averages so research cannot reliably predict whether or how a particular individual's personality will change with age.

Converging research from psychological science simply does not support a view that most youth offenders are incorrigible.²³⁵ In fact, as described above, the science supports a view that (a) the significant majority of adolescent offenders will self-desist from misconduct with maturation, (b) that misconduct typically reflects the “transient immaturity” of youth, and (c) that it is not currently possible to reliably identify the “rare” juvenile who will fail at rehabilitation efforts over the course of a lifetime.

Research on personality and identity formation in late adolescents indicates that behavioral or temperamental traits change significantly through maturation. In other words, personality traits that once were believed to be fixed are actually subject to change over time. This is the case even for adolescents who display callous-unemotional traits and psychopathic traits, which

228 Cohen, *supra* note 12; Brent Roberts & Daniel Mroczek, *Personality Trait Change in Adulthood*, 17 *Current Directions Psych. Sci.* 31 (2008); Brent Roberts, Kate Walton, Wolfgang Viechtbauer, *Patterns of Mean-Level Change in Personality Traits Across the Life Course: A Meta-Analysis of Longitudinal Studies*, 132 *Psych. Bulletin* 1 (2006); Brent Roberts & Dustin Wood, *Personality Development in the Context of the Neo-Socioanalytic Model of Personality*, in *Handbook of Personality Development* 11–39 (2006).

229 Theo Klimstra, *Adolescent Personality Development and Identity Formation*, 7 *Child Development Perspectives* 80, 80–84 (2012).

230 Brent Roberts, Dustin Wood & Jennifer Smith, *Evaluating Five Factor Theory and Social Investment Perspectives on Personality Development*, 39 *J. Resch. Personality* 166, 166–184 (2005).

231 Sarah Blakemore & Jathryn Mills, *Is Adolescence a Sensitive Period for Sociocultural Processing?* 65 *Ann. Rev. Psych.* 187, 187–207 (2014); Leah Somerville, *Special Issue on the Teenage Brain: Sensitivity to Social Evaluation*, 22 *Current Directions Psych. Sci.* 121, 121–127; Braams, *supra* note 152; Lisa Knoll et al, *Social Influence on Risk Perception During Adolescence*, 26 *Psych. Sci.* 583, 583–592 (2015).

232 Neuroticism is a trait characterized by a tendency to experience intense negative emotions and emotional instability in response to various forms of stress.

233 Theo Klimstra et al, *Maturation of Personality in Adolescence*, 96 *J. Personality & Soc. Psych.* 898, 898–912 (2009).

234 Casey, *supra* note 12; Roberts BW, Mroczek D. 2008. *Personality Trait Change in Adulthood*. *Curr Dir Psychol Sci* 17: 31–35

235 Casey, *supra* note 12.

turn out not to be confidently predictive of life-course-persistent offending into adulthood.²³⁶ For example, in a longitudinal study of middle and late adolescents, ages 17–24, researchers found that previously identified psychopathic personality traits²³⁷ decreased over time in late adolescents until age 24.²³⁸

For late adolescents who engage in criminal behavior, relying upon approaches that build on buttressing individual strengths and resiliencies, at a time when the brain's plasticity facilitates new learning from experience, can promote positive growth and prevent further penetration into the criminal justice system.²³⁹ These approaches must be able to take into account the contributions to rehabilitation or continued criminality of the typically large number of social systems: family, peers, schools, their neighborhood and community, and public agencies.

Consistent interpersonal relationships with young and older adults and social engagement that supports positive prosocial relationships and activities are important for:

- fostering resilience and self-efficacy
- bolstering coping strategies and emotional self-regulation
- building on strengths
- improving prosocial competencies
- increasing a sense of personal responsibility
- establishing goals for the future
- providing opportunities for prosocial engagement and a sense of meaning, and
- establishing healthy and adaptive attitudes, values, and beliefs (norms)²⁴⁰ that are inconsistent with continuing criminal misconduct.

²³⁶ Jennifer Skeem et al, *Psychopathic Personality: Bridging the Gap Between Scientific Evidence and Public Policy*, 12 Psych. Sci. Pub. Interest, 95, 95–162 (2011); Matthew Harris et al, *Personality Stability from Age 14 to Age 77 Years*, 31 Psych. & Aging, 862 (2016).

²³⁷ Psychopathic personality traits include, for example, a lack of empathy, immoral behavior, and limited emotional responses.

²³⁸ Samuel Hawes et al, *Structural Coherence and Temporal Stability of Psychopathic Personality Features During Emerging Adulthood*, 123 J. Abnormal Psych. 623 (2014).

²³⁹ Anderson Moore, *Why Positive Youth Development Works*, Child Trends (2016) <https://www.childtrends.org/why-positive-youth-development-works> [<https://perma.cc/9CVX-JVSA>]; Family & Youth Services Bureau, *Positive Youth Development*, Admin. For Children & Families, <https://www.acf.hhs.gov/fysb/positive-youth-development>; [<https://perma.cc/NS47-DTVQ>] (last visited Dec 20, 2021); Arielle Baskin-Sommers, *Towards Targeted Interventions: Examining the Science Behind Interventions for Youth Who Offend*, 5 Ann. Rev. Crim. (forthcoming 2022).

²⁴⁰ Moore, *supra* note 241.

Conclusion and Recommendations

The United States Supreme Court cases of *Roper* (2005), *Graham* (2010), and *Miller* (2012) drew attention to adolescent and young adult brain and social development by clearly articulating a “children are different” Eighth Amendment jurisprudence. In *Montgomery* (2016), SCOTUS maintained this line of jurisprudence and clarified that *Miller* was to be applied by states retroactively as mandatory Life Without Parole juvenile sentences (JLWOP) are substantive violations of the Eighth Amendment.

The *Jones* (2021) decision held that sentencing courts are not required to articulate findings that a juvenile is “irreparably corrupt” or even required to make findings on the specific “*Miller* factors” previously outlined. However, the *Jones* opinion left undisturbed the position of the prior cases that even serious crimes committed by persons under age 18 reflect the “transient immaturity” of youth” but for “rare” cases. The challenges of reliably identifying these “rare” youth required barring execution for crimes committed as a minor (*Roper*) and presumably would render discretionary JLWOP sentencing “uncommon” (*Miller*). Even then, a sentenced youth must be provided at least one “meaningful opportunity” to demonstrate rehabilitation as an adult.

Between 2005–2021, states have responded through case law and legislative action to craft frameworks consistent with the SCOTUS line of cases. The variability of the state responses has resulted in a patchwork of “justice by geography” with disparate outcomes for similarly situated cases. However, it also affords an opportunity by clarifying that the focus has shifted from whether a sentencing court must make findings of “irreparable corruption” to a focus on the undisturbed acknowledgement of the “transient immaturity” of youth—even for those who have committed heinous crimes as minors. While *Jones* does not impose a federal Constitutional requirement on sentencing judges to make findings regarding “irreparable corruption” or the *Miller* factors, some states have already incorporated these steps in their state statutes and/or case law. Even where states have not incorporated these steps in their legal framework, there is nothing in *Jones* or state law that bars submitting evidence relevant to the “transient immaturity” of a youthful defendant or the *Miller* factors.

Moreover, the focus in this line of cases upon the dispositive “bright line” drawn at age 18 for imposing accountability through the adult criminal legal system has raised the question: Is there a reasonable basis found in brain science and developmental research (social, behavioral, criminology) for drawing this line at age 18? Put another way, is there a basis in science for drawing this life-altering line between mid-adolescence (ages 16–17) and late adolescence (ages 18–21)? The neuroscience and social-behavioral science summarized in this document indicates there is no solid basis in science for a line drawn at age 18 for criminal jurisdiction.

Indeed, drawing this line at age 18 will lead most late adolescents who offend (and most will *not* offend with serious crimes against persons) to penetrate the criminal justice system just before the time when the significant majority of middle and late adolescent youth will self-desist (the “age-crime curve” occurring at ages 19–20) even if they have been violent and persistent offenders when younger.

From a public policy perspective, this means that young offenders highly likely to desist with maturation—especially if provided with meaningful non-criminal opportunities—will instead accrue the collateral consequences of criminal justice involvement (e.g., criminal records, social labeling, forced affiliation with adult criminals if in prolonged detention or incarcerated). These collateral consequences over time actually *increase* risk of criminal recidivism among young offenders who with maturation are otherwise highly likely desist from continuing criminal misconduct.

From a criminal justice perspective, research indicates that continuing traditional supervision and sentencing practices inadvertently tend to increase recidivism, fail to foster diversion from unwarranted penetration into the criminal justice system, and continue the pattern of disproportionate entanglement of young persons of color. Parole practices focused primarily on “supervision”—rather than “engagement” and individualized case planning—will persist. Younger offenders will continue to be processed at least as harshly (and arguably more harshly) than adult offenders.

This is not to suggest that younger offenders (ages 18–21) should not be accountable for criminal conduct. Indeed, accountability for decisions and conduct is essential for positive development and maturation. Rather, it is to observe that the science exists to guide policy and individual case practice (for judges and probation officers, prosecutors and defense counsel, and others) towards *proportional* and *developmentally aligned* accountability for middle and late adolescent offenders. Our currently worrisome rates of recidivism among younger offenders can be lowered—thereby contributing to community safety—by adopting a developmentally-informed approach to young offenders.

At a policy level, our currently dismal criminal justice outcomes could be improved for this age cohort by designing and implementing evidence-based processes for diversion, preventing unwarranted penetration (including pre-trial detention and avoiding harsh sentencing), and resourcing developmentally specialized intervention for late adolescent offenders which supports prosocial activities (including non-criminal social networks, education, and jobs). Corrections policy may look to evidence-based models in the United States and elsewhere which improve recidivism outcomes by separating younger offenders from older adult offenders, placing them into their own units with developmentally aligned programming, and using

developmentally-trained correctional, educational, pre-vocational, and behavioral health staff to utilize less punitive approaches and support positive community re-entry, thus increasing the likelihood of avoiding future criminal involvement.²⁴¹

Judges can support local implementation of these kinds of policy measures while also informing themselves about the relevant brain and developmental science, considering science offered in briefs and expert testimony, encouraging processes (including plea agreements) which take the developmental status of younger offenders into account, and taking into account the inadvertent consequences of harsh sentencing or more punitive supervision practices. Judges may also look to emerging court-based models of deferred sentencing or innovative sentencing that may be adaptable to the local circumstances and resources of their jurisdiction.

Prosecutors can measure their success by metrics other than convictions and lengths of sentences imposed. For example, metrics can include cases successfully diverted from arraignment without subsequent recidivism, or cases where incarceration was precluded because of successful community-based and developmentally aligned services (e.g., education, vocation, prosocial interpersonal engagement, and behavioral health treatment) as part of initial diversion or subsequent plea bargaining.

Defense counsel can take a broader developmental view (taking into account biological, psychological, and social domains) of who the defendant is and what criminogenic needs must be addressed to lower recidivism risk. They can also learn how to create a complete trial record that includes successful and unsuccessful efforts to bring scientific and/or developmental information before the court in briefs, expert testimony, and oral argument. Appellate counsels are often disadvantaged by incomplete or unartful trial records and efforts are increasingly underway to train trial counsel on how to develop the best records possible.

241 Group-level research that yields “on average” data is a ready fit for guiding broad policy and program development and implementation. For example, policy and law can result in increased community safety if aligned with research finding that “on average” adolescents or youth adults diverted from unnecessary penetration into juvenile or criminal justice systems have lower recidivism rates than those who become entangled in these systems for relatively minor misconduct or misconduct that is likely to remit with maturation. The policy impact can be achieved without specifically assessing the likelihood that a given young person will desist, as the policy anticipates that a significant majority of young persons will desist from delinquent or criminal misconduct with maturation. This is similar to medical practice where decisions and practices are made for identified patient populations because they ordinarily work—such as prescribing antibiotics for certain kinds of infections although there may be some patients for whom the standard practice will not be as effective and alternatives may be considered.

Pre-trial and post-conviction probation staff can take a developmentally and trauma-informed approach to intake, recommendations made to the court, and supervision practices. These can include: (a) avoiding conditions of release/probation likely to result in violation but unlikely to contribute to public safety threat even if not fully complied with by the person under supervision; (b) advocating for conditions of release/probation that are likely to contribute to the person's stabilization and avoiding new arrests; (c) creating highly individualized supervision plans that are informed by the science of normal mid-late adolescent development, adversity/trauma, addictions, and mental health disorders; and (d) case planning that directly addresses each person's most significant criminogenic needs while building upon strengths and protective factors.

Behavioral health professionals likely to conduct forensic evaluations, provide forensic expert testimony, or provide clinical testimony about behavioral health needs/interventions for defendants can strive to be currently informed of relevant research domains. These include brain and developmental research about mid-late adolescents, the "age-crime curve," evidence-based assessment methods (clinical and forensic, including violence and recidivism risk), and evidence-based treatment and intervention approaches for younger offenders. Standard clinical training is ordinarily insufficient to provide proficiency in working with younger offenders, and, in any event, the continuing development of research in this area requires an ongoing process of professional development and learning.

Appendix: Introduction to Middle and Late Adolescent Brain Development

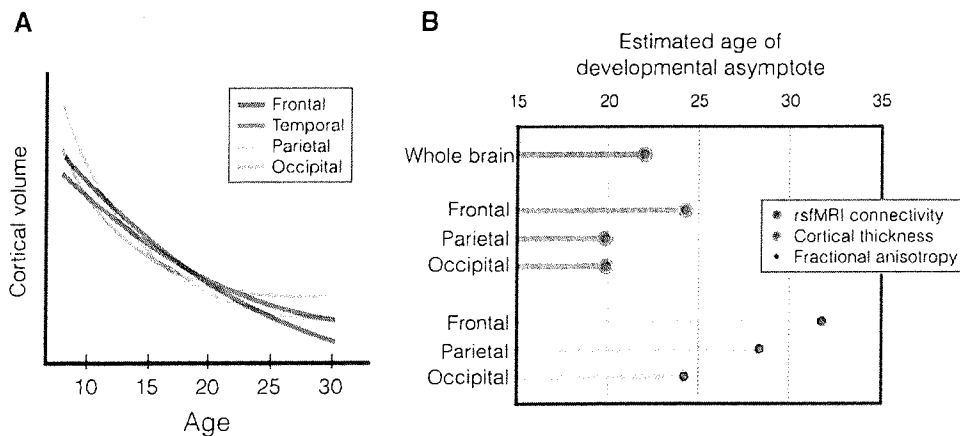


Figure 5: Somerville 2016. Age of developmental asymptote (plateau) for different brain measures. rsfMRI is a measure of whole brain connectivity; cortical thickness is a measure of grey matter development; fractional anisotropy is a measure of white matter development.

Brain development is a dynamic process that continues throughout the life course. Throughout early, middle, and late adolescence,²⁴² brain systems and the connections between them undergo a period of prolonged refinement.

Since *Miller* (2012), there have been a wealth of new research studies on adolescent brain development that have enhanced our understanding of how the brain matures and how this maturation impacts behavior. Scientists have begun using new approaches to measure brain development. Many newer studies include more individuals (large sample size), and some studies follow the same individuals over time (longitudinal research).²⁴³ With this type of data, researchers can model a “growth curve”²⁴⁴ of how the brain changes across development by averaging the brain changes of many individuals across different ages and time points. Researchers can measure the age at which the changes of different brain systems level off or plateau. Researchers can also estimate when a brain system reaches a point of stable

²⁴² Because brain development does not rigidly conform to chronological boundaries, there is some disagreement in the field as to how to precisely define the stages of adolescence and adulthood. For clarity, in this document, we define early adolescence as 10–15, middle adolescence as 16–17, late adolescence as 18–21, and young adulthood as 22–25. For discussion of changing age definitions, see Susan Sawyer et al, *The Age of Adolescence*. 2 *Lancet Child & Adolescent Health* 223, 223–228 (2018).

²⁴³ A longitudinal study is a study that tracks individuals over time.

²⁴⁴ A “growth curve” is a graphical depiction of change over time. A “growth curve” of brain development depicts changes in brain processes as a function of age.

development.²⁴⁵ It is important to note that different systems develop at different rates, and the brain never “stops developing,” as brain development continues throughout the lifespan. Additionally, development does not occur at the same rate in all areas of the brain. Rather, different brain systems follow different developmental trajectories and time windows.

Dynamic changes in brain development continue well beyond the age of 18 (Figure 1). This extended window of brain maturation is paralleled by prolonged social, emotional, and cognitive development during late adolescence.²⁴⁶ As a result, late adolescents (ages 18–21) as a group, exhibit unique brain and behavioral profiles that are distinct from both younger adolescents and young adults (ages 22–25).

Fundamentals of Late Adolescent Brain Development

Structural Development

Late adolescence is accompanied by continued development of brain structure. Multiple brain regions and the connections between them continue to mature during this period. The last region to structurally mature is the prefrontal cortex, which guides “executive functions” such as complex decision-making, self-control, and higher-order cognitions.²⁴⁷

²⁴⁵ Somerville, *supra* note 11.

²⁴⁶ Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 Ann. Rev. Developmental Psych. 21 (2019).

²⁴⁷ “Higher order cognitions” include abilities to consider situations from the perspective of another person, identify and assess the likelihood of future alternate outcomes of decisions made now, and systematic and evaluative problem-solving that is also sufficiently flexible to effectively apply past experiences to novel situations (creativity).

Grey Matter Development

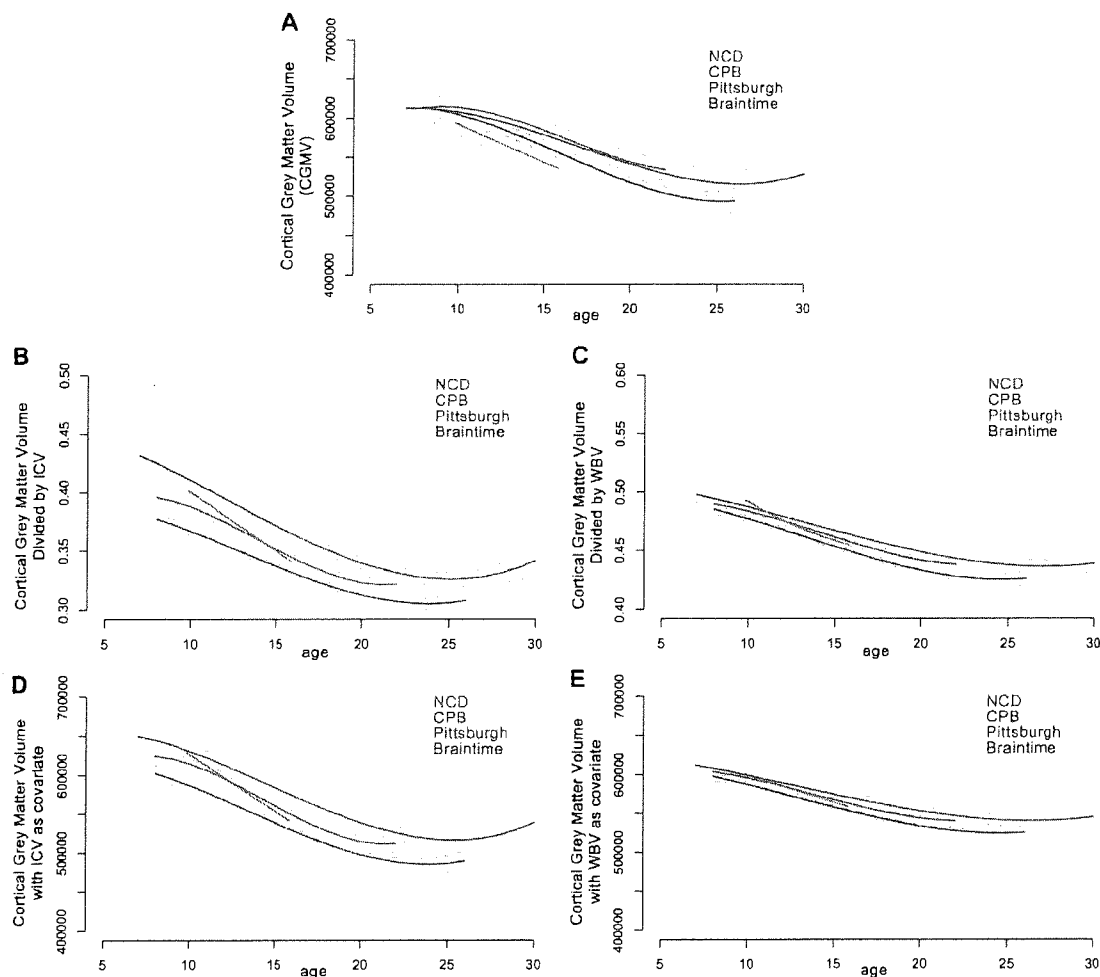


Figure 6: Mills et al 2016. Age models for cortical grey matter across four research sites. Each line represents a different research site. This study included 852 scans for 391 individuals age 8 to 30. Note that the upturn from age 25 to 30 is not statistically significant.

Grey matter is tissue in the brain that is responsible for information processing. Grey matter volume normatively thins during adolescence, and thinning persists through young adulthood.²⁴⁸ This decrease in grey matter results from a brain refinement process called synaptic pruning. Synaptic pruning is an experience-dependent process that weeds out underused synapses (connections between neurons). This developmental process sculpts a more efficient

248 Rhoshel Lenroot et al, *Sexual Dimorphism of Brain Developmental Trajectories During Childhood and Adolescence*, 36 *Neuroimage* 1065 (2007).

and specialized brain.^{249 250} Pruning during late adolescence is more pronounced in regions that support higher-level cognition, including the prefrontal cortex, which is among the last regions to mature. Prefrontal synaptic pruning persists well beyond adolescence and continues into young adulthood.²⁵¹

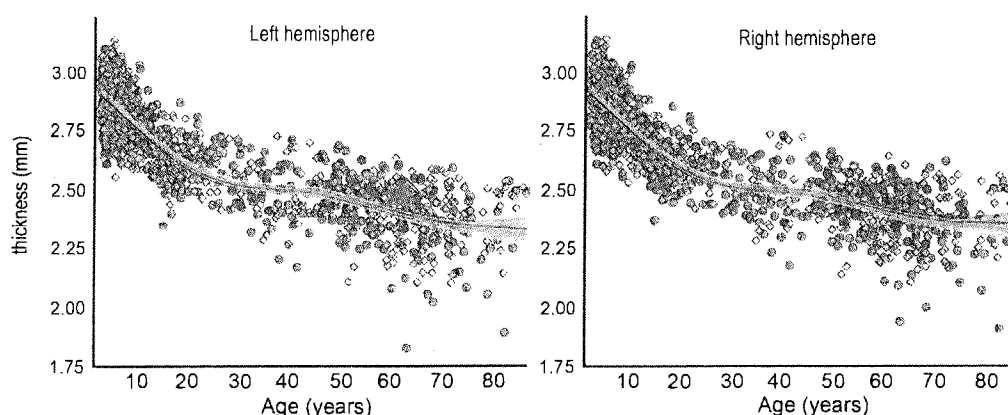


Figure 7: Fjell et al 2015. Global changes in cortical thickness. Longitudinal study testing 974 participants ages 4–89. Green is female, pink is male.

Converging evidence across multiple studies and institutions demonstrates that grey matter thinning continues throughout the twenties (Figure 2).²⁵² Research examining structural development across the lifespan found that cortical thinning begins to plateau between ages 25 and 30.²⁵³ The prefrontal cortex in particular shows dramatic thinning, with a 17% reduction in prefrontal grey matter volume between the ages of 6 and 26.²⁵⁴

249 Zdravko Petanjek et al, *Extraordinary Neoteny of Synaptic Spines in the Human Prefrontal Cortex*, 108 Proc. Nat'l Acad. Sci. Acad. Sci. 13281 (2011).

250 Budhachandra Khundrakpam et al, *Brain Connectivity in Normally Developing Children and Adolescents*, 134 Neuroimage 192 (2016).

251 Zdravko Petanjek et al, *Extraordinary Neoteny of Synaptic Spines in the Human Prefrontal Cortex*, 108 Proc. Nat'l Acad. Sci. 13281 (2011).

252 Kathryn Mills et al, *Structural Brain Development Between Childhood and Adulthood: Convergence Across Four Longitudinal Samples*, 141 Neuroimage 273 (2016); Christian Tamnes et al, *Development of the Cerebral Cortex Across Adolescence: A Multisample Study of Inter-Related Longitudinal Changes in Cortical Volume, Surface Area, and Thickness*, 37 J. Neuroscience 3402 (2017).

253 Hugo Schnack et al, *Changes in Thickness and Surface Area of The Human Cortex and Their Relationship with Intelligence*, 25 Cerebral Cortex 1608 (2015); Anders Fjell et al, *Development and Aging of Cortical Thickness Correspond to Genetic Organization Patterns*, 112 Proc. Nat'l Acad. Sci. 15462 (2015).

254 Kathryn Mills et al, *The Developmental Mismatch in Structural Brain Maturation During Adolescence*, 36 Developmental neuroscience 147 (2014).

White Matter Development

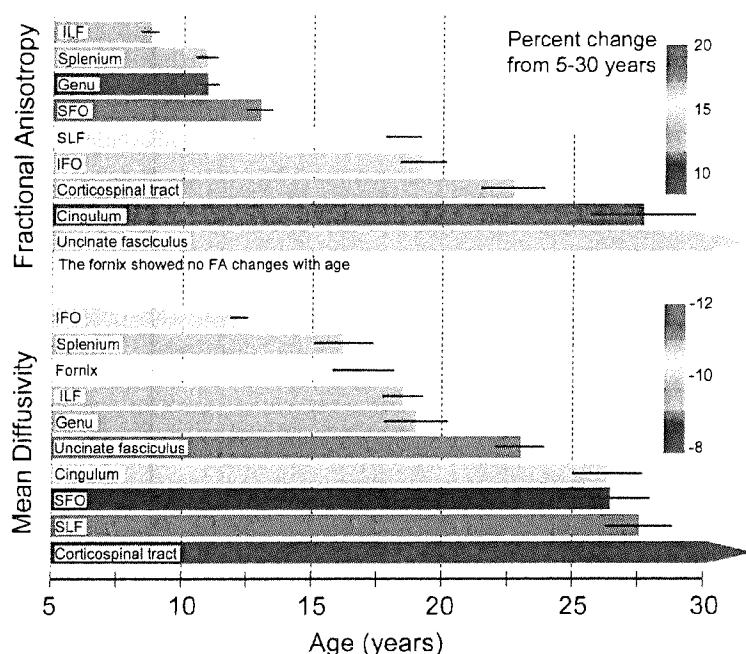


Figure 8: Lebel et al 2019. Plot showing white matter development from age 5 to 30 in different white matter tracts of the brain (colored bars). Decreases in mean diffusivity provide an approximation of strengthening white matter connections. The end of each bar represents the age at which the measure reaches 90% of its developmental plateau. IFO: inferior fronto-occipital fasciculus; ILF: inferior longitudinal fasciculus; SFO: superior fronto-occipital fasciculus; SLF: superior longitudinal fasciculus.

White matter is tissue that is composed of tracts, which are bundles of myelinated axons in the brain that can relay information between brain regions. White matter connections facilitate efficient communication across the brain. Developmental changes in white matter are thought to reflect myelination. Myelin is a substance that surrounds neuron axons and serves an insulating function for the brain's wiring, which facilitates more rapid communication between brain regions. The process of myelination increases the amount of myelin in the brain, which speeds up communication between different brain regions. During late adolescence, myelination strengthens communication between brain regions that are far apart from one another in the brain. During this period, myelination progresses in the prefrontal cortex, which strengthens connections that are important for reasoning, decision-making, and self-control.²⁵⁵

Longitudinal studies have demonstrated that the development of white matter continues throughout the twenties and into the thirties (Figure 4).²⁵⁶ Notably, connections between the prefrontal cortex and subcortical regions²⁵⁷ continue to develop past age 18. Maturation of

²⁵⁵ Daniel Miller et al, *Prolonged Myelination in Human Neocortical Evolution*, 109 Proc. Nat'l Acad. Sci. 16480 (2012).

²⁵⁶ Catherine Level, Sarah Treit & Christian Beaulieu, *A Review of Diffusion MRI of Typical White Matter Development from Early Childhood to Young Adulthood*, 32 NMR Biomedicine E3778 (2019).

²⁵⁷ Subcortical regions include the hippocampus, amygdala, and striatum. These regions are important for reward processing, processing of emotionally arousing and salient information, and learning and memory.

these white matter connections is associated with improved self-control.²⁵⁸ Connections between the prefrontal cortex and subcortical regions continue to develop through the twenties.²⁵⁹ This means that communication and integration within brain networks continue to refine through late adolescence and young adulthood to support higher-order cognition.

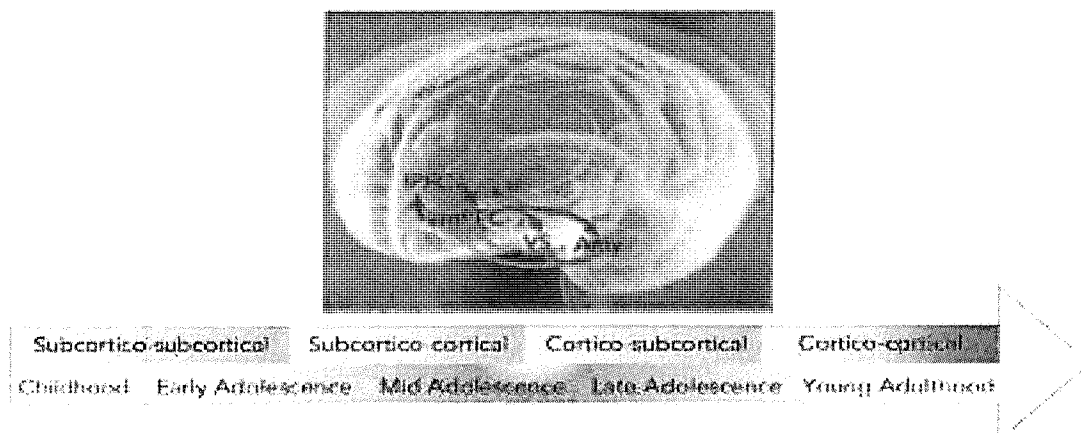


Figure 9: Casey 2020. Illustration of hierarchical development of brain circuitry. Amy is amygdala; VS is ventral striatum; vmPFC is ventromedial prefrontal cortex; IPFC is lateral prefrontal cortex.

Functional Development

While structural development reflects changes in the physical architecture of the brain, functional development reflects changes in the activity in brain regions and the communication between them in response to stimuli in the environment. In other words, functional development describes changes in how the brain's elements communicate with one another to produce cognitions and emotion. During adolescence, functional activity in brain regions and the functional connections between brain networks exhibit changes with age, which suggests that some regions and connections develop at different rates. This means that the development of distinct brain processes stabilizes at different ages (Figure 5).²⁶⁰ Therefore, the development of some regions and connections stabilizes earlier in adolescence, whereas others continue to mature well into the twenties and early thirties.^{261 262}

²⁵⁸ Daniel Simmonds et al, *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*, 92 *Neuroimage* 356 (2014).

²⁵⁹ *Id.*

²⁶⁰ Casey, *supra* note 42.

²⁶¹ B. J. Casey, Rebecca Jones & Leah Somerville, *Braking and Accelerating of the Adolescent Brain*, 21 *J. Rsch. on Adolescence* 21 (2011).

²⁶² Leah Somerville & B.J. Casey, *Developmental Neurobiology of Cognitive Control and Motivational Systems*, 20 *Current Op. Neurobiology* 236 (2010).

Subcortical regions have earlier structural development in adolescence than cortical regions.²⁶³ Subcortical regions include the striatum and amygdala, which are important for emotional and motivational processes like responding to rewards, emotionally salient information, and faces. In contrast, the prefrontal cortex, which guides self-control and complex decision-making, continues to mature throughout late adolescence. This extended window of prefrontal maturation supports the development of executive functioning, a set of mental processes that help with concentration, attention, cognitive flexibility, and self-control.²⁶⁴

The development of the prefrontal cortex, which guides self-control, exhibits a more protracted trajectory than the development of subcortical regions which are responsive to rewards and salient cues. As a result, late adolescents exhibit unique behavioral responses in reward-driven or emotionally heated situations. On the one hand, because the prefrontal cortex is more developed than it was during earlier periods in their lives, late adolescents have better cognitive control and decision-making skills than they did when they were younger. On the other hand, because the motivational and emotional systems in the brain are hyper-responsive during adolescence, middle and late adolescents as a group are more vulnerable than adults to lapses in self-control or impulsive decision-making—especially when in emotionally heated situations.²⁶⁵

Functional connectivity reveals which regions show synchronous activation. In other words, two regions are functionally connected if they show similar patterns of activity over time during a task or when at rest. Functional connectivity measures characteristics of the pathways the brain uses to communicate. The functional connections between brain regions continue to refine through late adolescence as connectivity patterns shift with age. Younger individuals exhibit more connections between regions that are closer together. However, during adolescence, connections strengthen among regions that are farther apart.²⁶⁶ This enhanced integration supports the development of executive functions²⁶⁷ which support complex reasoning and emotional regulation.

Emotional Influences on Cognition in the Late Adolescent Brain

Adolescents' cognitive abilities continue to strengthen as they age. However, adolescent self-control is more vulnerable to disruption than the self-control of adults. Specifically, adolescents are vulnerable to temporarily dampened self-control when in emotionally charged or high-stress situations. This occurs because the prefrontal cortex is still developing during adolescence, but subcortical systems in the brain are hyperresponsive to emotional information during this developmental period.

263 Kathryn Mills et al, *The Developmental Mismatch in Structural Brain Maturation During Adolescence*, 36 *Developmental Neurosci.* 147, 147–160 (2014).

264 Eveline Crone & Nikolaus Steinbeis, *Neural Perspectives on Cognitive Control Development During Childhood and Adolescence*, 21 *Trends Cognitive Sci.* 205 (2017); Adele Diamond, *Executive Functions*, 64 *Ann. Rev. Psych.* 135 (2013).

265 Casey, *supra* note 56. For a more detailed summary, see Section B (*infra*).

266 Damien Fair et al, *Functional Brain Networks Develop from a "Local to Distributed" Organization*, 5 *PLoS Computational Biology* e1000381 (2009); Nico Dosenbach et al, *Prediction of individual brain maturity using fMRI*, 329 *Science* 1358, 1358–1361 (2010).

267 Scott Marek et al, *The Contribution of Network Organization and Integration to the Development of Cognitive Control*, 13 *PLoS Biology* e1002328 (2015).

The prefrontal cortex and subcortical regions are connected to one another, and these connections strengthen during adolescence. The stronger connectivity between cortical and subcortical systems can account for the developmental differences in how people behave in emotional situations. Maturing connectivity between the prefrontal cortex and subcortical regions has been linked to improved cognitive performance in emotional scenarios.²⁶⁸ Due to the refinement of communication between cortical and subcortical brain systems, emotion regulation abilities improve with age.^{269 270} Connections within the prefrontal cortex also facilitate self-control and emotion regulation. These connections continue to develop through late adolescence and into young adulthood.²⁷¹

At the time of the *Miller* (2012) decision, most developmental research examining how emotionally heated situations influence behavioral and brain responses did so by comparing groups of individuals under age 18 to groups of individuals older than 18. However, research since 2012 has examined continuous changes in brain development throughout adolescence and beyond age 18 into late adolescence and young adulthood. This approach has revealed new insights about how the late adolescent brain responds to emotionally charged situations. Notably, this research shows that, when faced with certain emotional contexts, late adolescents exhibit situational disruptions in self-control. These suboptimal changes in behavior are related to differences in patterns of brain activity and connectivity. For example, these differences are reflected in the relative vulnerability of late adolescents to transient dampening of self-control when anticipating potential threats.^{272 273}

Relative to young adults (ages 22–25), late adolescents (ages 18–21) exhibit poorer self-control when anticipating a potential threat. Research found that during threat vigilance states, late adolescents exhibited patterns of brain activity more like the middle adolescent group (ages 13–17) than the young adult group (ages 22–25). Specifically, middle and late adolescents exhibited reduced connectivity between prefrontal regions and reduced activity in regions that guide successful self-control (lateral prefrontal cortex, the parietal cortex, and the dorsal anterior cingulate),

268 Somerville, *supra* note 65.

269 Dylan Gee et al, *A Developmental Shift from Positive to Negative Connectivity in Human Amygdala–Prefrontal Circuitry*, 33 *J. Neuroscience* 4584 (2013).

270 Aaron Heller et al, *Changes in Cortico-Subcortical and Subcortico-Subcortical Connectivity Impact Cognitive Control to Emotional Cues Across Development*, 11 *Soc. Cognitive & Affective Neuroscience* 1910 (2016).

271 Silvers, *supra* note 55.

272 Cohen, *supra* note 12.

273 One brain imaging study tested whether vulnerability to emotional scenarios persists through late adolescence by comparing brain activity and connectivity between middle adolescents (age 13–17), late adolescents (age 18–21), and young adults (age 22–25). Participants performed a self-control task with emotional cues during a neutral state, positive state, or a threat state. When in a positive or threat state, the participants were anticipating that something good (possibility of winning money) or bad (possibility of hearing an aversive sound) could happen at any point. Thus, the task compared behavioral and brain responses during reward and threat states to neutral states.

Related research has shown that the brain responses of late adolescents more closely resemble those of younger individuals rather than those of young adults for *both* negative and positive emotional states. When encountering both positive and negative vigilance states (such as anticipating potential rewards or threats), the brain responses of late adolescents (ages 18–21) look more similar to the brain responses of middle adolescents (ages 13–17) than those of young adults (ages 22–25).²⁷⁴

Researchers used brain measures to predict the age of an individual and examined how emotional states impacted these age predictions. The predicted “brain age” reveals how old someone’s brain behaves given their connectivity pattern, independent of the actual chronological age of the individual. When in neutral states, the predicted “brain age” of adolescents was comparable to their chronological age.

However, when faced with positive (potential to win a high reward) and negative (threat of a loud noise) vigilance states, adolescents’ brain connectivity patterns looked younger than their chronological age. This suggests that emotional states elicit temporary changes in patterns of activity and communication in the middle and late adolescent brain. Within the late adolescent group (ages 18–21), individuals who had “younger” patterns of brain connectivity during emotional states were more likely to self-report increased preferences for risk-taking. Therefore, late adolescents classified as having “younger” brain responses during emotional situations were deemed to be more at risk for engaging in real-world risky behavior.

Development of the Brain’s Learning and Reward Systems

Developmental changes in the dopamine system increase plasticity in the brain. Dopamine is a neurotransmitter that coordinates movement and is also involved in motivational learning and reward-driven behavior.²⁷⁵ Plasticity is the brain’s ability to change and adapt in response to experiences. The prolonged period of plasticity during adolescence can facilitate learning from experience.^{276 277}

274 M. D. Rudolph, et al., *At Risk Of Being Risky: The Relationship Between “Brain Age” Under Emotional States and Risk Preference*, 24 *Developmental Cognitive Neurosci* (2017). This brain imaging study examined the effects of emotional states on brain response patterns in a sample of participants ages 10 to 25. Using a self-control task with emotional cues, the researchers compared brain responses of middle adolescents, late adolescents, and young adults. During this study, participants were exposed to different vigilance states that varied in terms of whether something good or bad could happen at any moment. Participants encountered either a sustained neutral state where they anticipated nothing would happen, a positive state where they anticipated the possibility of winning a high reward, or a threat state where they anticipated the possibility of hearing an aversive sound. This research used a neuroimaging technique that measures whole brain connectivity patterns, which reveals how brain regions simultaneously activate and communicate with each other. This approach can measure how connectivity in the brain changes when individuals experience different emotional contexts.

275 Adriana Galvan, *Adolescent Development of the Reward System*, 4 *Frontiers Human Neuroscience* 6 (2010).

276 Surjeet Mastwal et al, *Phasic Dopamine Neuron Activity Elicits Unique Mesofrontal Plasticity in Adolescence*, 34 *J. Neuroscience* 9484 (2014).

277 Vishnu Murty, Finnegan Calabro & Breatiz Luna, *The Role of Experience in Adolescent Cognitive Development: Integration of Executive, Memory, and Mesolimbic Systems*, 70 *Neuroscience & Biobehavioral Rev.* 46 (2016).

During late adolescence, connections are strengthened between the striatum (a region within the dopamine system that is responsive to reward) and prefrontal cortex. Stronger connections between these regions promote the emergence of more adaptive learning strategies. Relative to children and younger adolescents, late adolescents (ages 18–21) are more likely to use positive feedback and less likely to use negative feedback to update and refine their decisions.²⁷⁸ In other words, adolescents are primed to learn from rewards. This change in learning strategy emerges because of enhanced connectivity between the striatum and prefrontal cortex.²⁷⁹ The changes in the learning system that occur during adolescence suggest that individuals in this developmental window may be more amenable to intervention and rehabilitation.²⁸⁰

During adolescence, the brain's reward system is hyper-responsive, which means that adolescents exhibit exaggerated responses in the brain's reward centers compared to both younger and older persons in response to the same rewarding stimulus. Studies in humans and animals have shown that enhanced reward sensitivity during adolescence is related in large part to changes in the dopamine system.

Researchers use brain imaging techniques to measure how the dopamine system changes during development.²⁸¹ This research reveals that dopamine concentration increases during adolescence and stabilizes during adulthood. Yet, the density of dopamine receptors continues to decrease from ages 18 to 30.²⁸² Therefore, refinement of the dopamine system persists beyond adolescence and continues throughout young adulthood and beyond.

This remodeling of the dopamine system has consequences for reward sensitivity and risk-seeking behavior.²⁸³ Adolescents, relative to children and adults, show exaggerated responses to reward in a key brain region in the dopamine system (striatum).²⁸⁴ The striatum is important for anticipating and responding to rewards, learning from feedback, and coordinating motivated actions. Longitudinal studies have demonstrated that reward-related activity in the striatum peaks between ages 15 and 17 and remains elevated in late adolescence.^{285 286}

278 Wouter van den Bos et al, *Striatum–Medial Prefrontal Cortex Connectivity Predicts Developmental Changes in Reinforcement Learning*, 22 *Cerebral Cortex* 1247 (2012).

279 *Id.*

280 See, e.g., David Yeager & Carol Dweck, *Mindsets that Promote Resilience: When Students Believe that Personal Characteristics Can Be Developed*, 47 *Educ. Psych.* 302 (2012).

281 Bart Larsen et al, *Maturation of the Human Striatal Dopamine System Revealed by PET and Quantitative MRI*, 11 *Nature Comm.* 1 (2020).

282 *Id.*

283 Tamara Fitzwater et al, *Motivational Systems in Adolescence: Possible Implications for Age Differences in Substance Abuse and Other Risk-Taking Behaviors*, 72 *Brain & Cognition* 114 (2010).

284 Merav Silverman, Kelly Jedd & Monica Luciana, *Neural Networks Involved in Adolescent Reward Processing: An Activation Likelihood Estimation Meta-Analysis of Functional Neuroimaging Studies*, 122 *Neuroimage* 427 (2015).

285 Braams, *supra* note 202.

286 Elisabeth Schreuders et al, *Contributions of Reward Sensitivity to Ventral Striatum Activity Across Adolescence and Early Adulthood*, 89 *Child Development* 797 (2018).

Adolescents show hyper-sensitivity in the striatum to a broad range of reward information. For example, adolescents, relative to adults, show more activity in the striatum when receiving positive feedback during learning,²⁸⁷ when tasting sweet liquid,²⁸⁸ when viewing smiling faces,²⁸⁹ and when receiving “likes” on social media.²⁹⁰

This enhanced sensitivity to reward can promote adaptive behaviors during adolescence, such as healthy exploration, novelty seeking, and feedback processing.²⁹¹ During adolescence, enhanced brain sensitivity to rewards creates a window of opportunity for learning.²⁹² For example, a longitudinal learning study tested individuals ages 8–25 and found that increased activity in the striatum supports learning improvements during middle and late adolescence.²⁹³ However, enhanced responses to reward in the brain have also been linked to increased sensation seeking and risk-taking behavior.^{294 295} Taken together, this research suggests that the adolescent brain is remarkably—and perhaps uniquely—attuned to what it identifies as rewarding cues in the environment. Enhanced brain responses to reward support the emergence of adaptive behaviors that promote learning and independence. Yet, this brain responsivity is also reflected in the adolescent propensity for maladaptive behaviors, impulsivity, and risky decision-making.

Social Influence Impacts Late Adolescent Brain Responses

Adolescents are hyper-attuned to their social worlds. In particular, the influence of peers is more powerful during this period than any other point in the lifespan.²⁹⁶ Adolescents are more likely to conform to the expectations and behaviors of peers, especially when seeking peer approval. This can be adaptive as it promotes social exploration and novelty-seeking.²⁹⁷ However, peer influence can also result in suboptimal self-control and decision-making. For example, adolescents typically make more cautious decisions when they are alone but riskier decisions when peers are present.²⁹⁸

287 Jessica Cohen et al, *A Unique Adolescent Response to Reward Prediction Errors*, 13 *Nature Neuroscience* 669 (2010).

288 Adriana Galván & Kristina McGlennen, *Enhanced Striatal Sensitivity to Aversive Reinforcement in Adolescents Versus Adults*, 25 *J. Cognitive Neuroscience* 284 (2013).

289 Somerville, *supra* note 65.

290 Lauren Sherman et al, *Peer Influence Via Instagram: Effects on Brain and Behavior in Adolescence and Young Adulthood*, 89 *Child Development* 37 (2018).

291 Juliet Davidow et al, *An Upside to Reward Sensitivity: The Hippocampus Supports Enhanced Reinforcement Learning in Adolescence*, 92 *Neuron* 93 (2016). (Citation: Davidow, *supra* note 203); Juliet Davidow, Catherine Insel & Leah Somerville, *Adolescent Development of Value-Guided Goal Pursuit*, 22 *Trends Cognitive Sci.* 725 (2018). (Citation: Davidow, *supra* note 207); Sabine Peters & Eveline Crone, *Increased Striatal Activity in Adolescence Benefits Learning*, 8 *Nature Communications* 1 (2017). (Citation: Sanders, *supra* note 204); Kate Nussenbaum & C. Hartley, *Reinforcement learning across development: What insights can we draw from a decade of research?* 40 *Developmental Cognitive Neurosci.* (2019).

292 Samantha DePasque & Adriana Galván, *Frontostriatal Development and Probabilistic Reinforcement Learning During Adolescence*, 143 *Neurobiology Learning & Memory* 1 (2017).

293 Peters, *supra* note 204.

294 Adriana Galvan et al, *Risk-Taking and the Adolescent Brain: Who Is at Risk?*, 10 *Developmental Sci.* F8 (2007).

295 Samuel Hawes et al, *Modulation of Reward-Related Neural Activation on Sensation Seeking Across Development*, 147 *Neuro Image* 763 (2017).

296 Eric Nelson et al, *The Social Re-Orientation of Adolescence: A Neuroscience Perspective on the Process and Its Relation to Psychopathology*, 35 *Psych. Med.* 163, 163–174 (2005).

Sensitivity to social influence uniquely impacts brain responses in adolescents, and the late adolescent brain is particularly sensitive to the presence of peers. This sensitivity is related to differences in brain responses in regions that are important for social and emotional processing.²⁹⁹ Social influence can modulate brain responses in reward regions like the striatum, and in regions in the prefrontal cortex that support social cognitive functions such as thinking about self and others. Research shows that the mere presence of a peer can elicit exaggerated activity in the brains of middle and late adolescents, although this effect is tempered in younger children.

For example, a study examined brain activity when individuals thought a peer was observing them.³⁰⁰ When a peer was watching, middle and late adolescents exhibited increased activity in a region within the prefrontal cortex that is important for social cognition and self-conscious awareness (medial prefrontal cortex). Middle and late adolescents also displayed increased connectivity between reward processing regions like the striatum and the medial prefrontal cortex. This suggests that the brains of middle and late adolescents are especially sensitive to social evaluation.

The presence of peers also modulates reward-related responses in the brain during middle and late adolescence, and this heightened reward response has direct implications for risk-taking behavior.³⁰¹ Neuroscience researchers found that when receiving rewarding outcomes, individuals ages 14–19 exhibited enhanced activity in reward-processing regions (including the striatum) when peers were present relative to when they were alone. However, peer presence did not modulate neural responses to reward in adults ages 25–35.³⁰² Peer modulation of reward-related activity in the brain has also been linked to enhanced risk-taking. For example, while completing a driving simulation task, adolescents ages 14–19 showed more activity in the striatum while in the presence of peers than when performing the task alone, and this difference was attributed to increased risk-taking behavior.³⁰³

297 Albert, *supra* note 15.

298 *Id.*

299 Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *Developmental Rev.* 78 (2008).

300 Leah Somerville et al, *The Medial Prefrontal Cortex and the Emergence of Self-Conscious Emotion in Adolescence*, 24 *Psych. Sci.* 1554 (2013).

301 Albert, *supra* note 15.

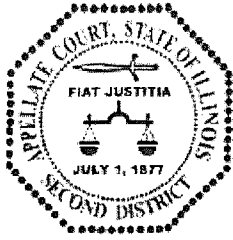
302 Ashley Smith, Laurence Steinberg, & Nicole Strang, *Age Differences in the Impact of Peers on Adolescents' and Adults' Neural Response to Reward*, 11 *Developmental Cognitive Neuroscience* 75 (2015).

303 Jason Chein et al, *Peers Increase Adolescent Risk-Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 *Developmental Sc.* F1 (2011).

Summary

Advances in contemporary psychology and neuroscience research provide converging evidence that adolescence is a period of dynamic brain development that persists beyond the age of 18. The vast majority of research has charted brain and behavioral development by averaging across groups of individuals and charting changes with age. However, moving forward, newer approaches in the field will allow scientists to quantify, and thus better understand, individual differences in brain and behavioral developmental trajectories.³⁰⁴ New innovations in research methods have allowed scientists to take new approaches to measure brain development, and ongoing initiatives with large-scale sample sizes and longitudinal data collection will reveal a more nuanced and complex picture of brain development.

304 Simmons, *supra* note 97; B.J. Casey et al, *The Adolescent Brain Cognitive Development (ABCD) Study: Imaging Acquisition Across 21 Sites*, 32 *Developmental Cog. Neurosci.* 43, 43–54 (2018), Leah Somerville et al, *The Lifespan Human Connectome Project In Development: A Large-Scale Study of Brain Connectivity Development in 5–21 Year Olds*, 183 *Neuroimage* 456, 456–468 (2018).



2-24-0284

No. 2-24-0284

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND JUDICIAL DISTRICT

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APPELLATE COURT 2ND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 16th Judicial Circuit,
Plaintiff-Appellant,	)	Kane County, Illinois.
	)	
vs.	)	No. 14 CF 76
	)	
DIMITRI GREEN-HOSEY,	)	Honorable
	)	Elizabeth Flood,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLANT

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NATURE OF THE CASE

After a jury trial, defendant was convicted of first-degree murder and armed robbery. He was age 18 when he committed the crimes. The jury found that the People proved that defendant personally discharged a firearm causing the victim's death. Consecutive sentencing was mandatory for the offenses. The mandatory minimum for the offenses was seventy-six years' imprisonment, and the trial court (Honorable D.J. Tegeler) imposed an aggregate sentence of 105 years' imprisonment. Defendant's convictions and sentences were affirmed on direct appeal. *People v. Green-Hosey*, 2019 IL App (2d) 170110-U, ¶ 3, as modified on denial of reh'g (Feb. 10, 2020).

Defendant filed a *pro se* post-conviction petition. The post-conviction court (Honorable Elizabeth Flood), moved the petition to the second stage of proceedings, and counsel was appointed for defendant. Defendant's petition was amended by appointed counsel. The People's motion to dismiss defendant's amended petition was denied. The matter proceeded to a third stage hearing regarding defendant's allegation that his sentence was unconstitutional as applied to him under the proportionate penalties clause of the Illinois Constitution. The instant appeal represents the People's appeal of the post-conviction court's order filed December 15, 2023, which granted defendant's amended post-conviction petition after third-stage proceedings, and ordered a new sentencing hearing. The People's motion to reconsider the order was filed on January 2, 2024, and denied on March 22, 2024. The People filed their timely notice of appeal on April 9, 2024, and their amended notice of appeal on April 18, 2024.

ISSUES PRESENTED FOR REVIEW

1. Whether the post-conviction court applied an incorrect standard at third-stage proceedings by accepting the underlying facts in Dr. Garbarino's report, testimony, and opinions as true and accurate when they were based on unconfirmed self-serving statements made by defendant, and Garbarino never met with or spoke to defendant, never conducted psychological testing of defendant, and never engaged in a "full-scale investigation," regarding defendant.

2. Whether the post-conviction court erred by finding that defendant, an adult offender, met his burden of proving a substantial constitutional violation under the proportionate penalties clause of the Illinois Constitution, as applied to him.

3. *Arguendo*, if the *Miller* factors applied to the adult defendant, whether the post-conviction court erred by determining that defendant's original sentencing hearing was not compliant with *Miller*-considerations.

JURISDICTIONAL STATEMENT

Pursuant to Supreme Court Rule 651(a), the People appeal the post-conviction court's order filed December 15, 2023, which granted defendant's amended post-conviction petition after third-stage proceedings, as well as the post-conviction court's subsequent order which denied the People's motion to reconsider. (C. 545-48, 568). The People's motion to reconsider was filed on January 2, 2024, and denied on March 22, 2024. (C. 552-58, 568). The People filed their timely notice of appeal on April 9, 2024, and their amended notice of appeal on April 18, 2024. (C. 573, 579). This appeal follows.

STATUTES INVOLVED

Ill. Const. 1970, art. I, § 11 provides, “All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”

730 ILCS 5/5-8-4(d)(1) provides, “Consecutive terms; mandatory. The court shall impose consecutive sentences in each of the following circumstances ***** One of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury.”

730 ILCS 5/5-8-1(a)(1)(d)(iii) provides, “if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.”

720 ILCS 5/18-2 provides in pertinent part:

(a) A person commits armed robbery when he or she violates Section 18-1;
and

(4) he or she, during the commission of the offense, personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person.

(b) Sentence.

A violation of subsection (a)(4) is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.

STATEMENT OF FACTS

After a jury trial, defendant was convicted of first degree murder and armed robbery of Arin Williams. *People v. Green-Hosey*, 2019 IL App (2d) 170110-U, ¶ 2. The jury found that defendant personally discharged a firearm and proximately caused Williams' death. *Id.* Defendant was 18-years-old at the time of the offenses. *Id.*

This Court described the facts of defendant's offenses in its Rule 23 order issued on defendant's direct appeal:

On January 13, 2014, defendant and his older brother, Jaquan (age 20), telephoned Ari¹ Williams (age 20), and arranged to purchase one ounce of marijuana for \$300. The three met at La Torta, a Mexican restaurant in Aurora and proceeded to a back hallway near a bathroom. Defendant shot and killed Williams. Witnesses testified that the brothers ran out of the restaurant, and Williams was found on the floor in the back hallway. He was taken to a hospital, where he was pronounced dead. The forensic pathologist testified that Williams died from a gunshot wound to the back of the head inflicted at close-range, *i.e.*, within 24-inches or less.

After running out of the restaurant, the brothers proceeded to the Fox River and defendant disposed of the weapon. They then returned to an apartment on Lake Street, where defendant washed himself with bleach (to remove gunpowder), shaved his head, and broke the phone they had used to arrange the meeting with Williams. Their sister, Jasmine, found them in her apartment, and they paid her to drive them to Joliet. In the car, defendant said, "Damn man, damn," and he called his mother and said, "I love you mommy, I love you. I fucked up mommy. I love you." The brothers proceeded to a motel in Cicero, where they spent the night. They were arrested the next day, trying to board a train. Jaquan was found in possession of the marijuana and \$373 cash. *Id.*, at ¶¶ 5-6.

Defendant's mandatory minimum sentence is 76 years' imprisonment based on the firearm enhancement pursuant to the jury's finding, and the fact that his offenses are statutorily required to run consecutively. *Id.*, at ¶¶ 2, 16-18. With truth-in-sentencing

¹ The victim's name is spelled Arin Williams in the record on appeal.

provisions, defendant would not be eligible for parole until after 71 years' imprisonment if he was sentenced to the mandatory minimum. *Id.*, at ¶ 47. Defendant was sentenced to 105 years' imprisonment by the Honorable D.J. Tegeler, and this Court affirmed defendant's convictions and sentence on direct appeal. *Id.*, at ¶ 3.

In its Rule 23 order, this Court rejected defendant's claims that his sentence was facially unconstitutional under the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 11):

[W]e cannot subscribe to a position that there is *no set of circumstances* where it is constitutional for an adult defendant who commits first-degree murder and armed robbery with a firearm to be sentenced to 71 years in prison. We presume that the legislature inherently considered rehabilitation when fashioning the sentencing range, and, therefore, a defendant who receives that minimum sentence has inherently had rehabilitative potential considered via receipt of the minimum sentence for each crime. We recognize the harsh reality that virtually every offender subject to this scheme will spend the remainder of his or her life in prison. However, we are not persuaded that this necessarily reflects a derogation of the legislature's constitutional duty to consider rehabilitative goals. Defendant's facial constitutional claim fails. *Id.*, at ¶ 55. (Emphasis in original).

On direct appeal, this Court also rejected defendant's claim that his sentence was an excessive abuse of the trial court's discretion:

[W]e cannot find an abuse of discretion here, where the court sentenced defendant within the applicable statutory range, was aware of all applicable enhancements, consecutive sentencing, and other similar parameters, and where it accounted for defendant's youth in imposing the minimum add-ons. *Id.*, at ¶ 69.

On direct appeal, defendant had argued that the sentencing provisions that cause his aggregate sentence to be a mandatory minimum of 76 year' imprisonment, including the firearm enhancement and the consecutive requirement, are unconstitutional *as applied* to

him, pursuant to the Illinois Constitution proportionate penalties clause, as an 18-year-old with rehabilitative potential and a limited criminal history. *Id.*, at ¶¶ 57-62. This Court agreed with the People, and determined that defendant's claim was premature because the record was not sufficiently developed at trial to consider his "as applied," argument:

[A]lthough [defendant] discusses studies on brain development in juveniles and young adults, and the trial court seemed aware of the research trends, it does not appear that these studies were, in fact, presented and examined at the trial court level for how they applied to this defendant. We note that the State did not respond substantively to defendant's arguments that, as applied to him, his sentence violates the rehabilitation clause. However, relying on [*People v. Harris*, 2018 IL 121932], it asserts that defendant's claim is premature and that the record is inadequately developed to address his as-applied claim. We agree. As such, we find defendant's as-applied claim premature. *Id.*, at ¶ 62.

On March 5, 2021, defendant filed a *pro se* post-conviction petition alleging that his sentence is unconstitutional under the Illinois Constitution proportionate penalties clause, as applied to him. (C. 339-77). His petition was advanced to the second-stage of proceedings and counsel was appointed. (C. 395). Counsel filed defendant's amended post-conviction petition, along with counsel's certificate pursuant to Illinois Supreme Court Rule 651(c) on June 17, 2022. (C. 406-412). Attached as an exhibit was a report prepared by Dr. James Garbarino. (E. 51-70). Garbarino indicated that he reviewed defendant's social history (including the Adverse Childhood Experiences [ACE] Scale). (E. 51). Defendant's responses to the ACE questions indicated that his score was ten. (E. 59). Garbarino's report stated, "these ten factors have proved to be powerful in accounting for differences in negative outcomes extending into adulthood *e.g.* accounting for 65% of the variation in suicide attempts, 55% of the variation in substance abuse, 45% of the variation in depression and

30% of the variation in Violent behavior.” (E. 58). Garbarino indicated that defendant’s self-reported score of ten was worse than .01% of the American population. (E. 58-59, 883

V4 (Ex. 29A)). The report stated:

Let me be clear on two important points. First, I am not offering any clinical diagnoses of Demitri, but rather providing an analysis of his development pathway from infancy to adolescence and emerging adulthood (to which the diagnoses offered by clinicians can contribute). Second, I am not excusing Demitri's behavior (but rather offering an explanation of how it arose from his life circumstances and experiences over the course of his 18 years before the crime for which he was sentenced to 105 years. (E. 51)(bolding in original).

Garbarino’s report concluded:

While Demitri has not completed the process of rehabilitation and positive transformation, he appears to be heading in the right direction, and therefore is not one of the rare "irreparably corrupt" individuals identified by the Supreme Court in *Miller v. Alabama*, for whom a life without possibility of parole is warranted. His current [*de facto*] life sentence (of 105 years) is thus developmentally inappropriate. I believe that a resentencing decision that permits his eventual release from prison is a wise, sound, reasonable, and "safe" decision, in keeping with the knowledge base of contemporary developmental science. (E. 68).

The People moved to dismiss defendant’s amended petition. (C. 414-42). After argument, the post-conviction court, the Honorable Elizabeth Flood, entered a written order denying the People’s motion to dismiss, and advancing defendant’s petition for a third-stage hearing on the sole issue of whether defendant’s sentence violates the Illinois Constitution proportionate penalties clause, as applied to him. (C. 499-501). The post-conviction court accepted Garbarino’s report as true for purposes of the second-stage proceedings. (C. 501). The post-conviction court also determined factually that defendant’s original sentencing

hearing had not been “*Miller*” compliant². (C. 501). The court determined that the trial court had not been able to consider the *Miller* factors of “immaturity, impetuosity, less capacity to consider future consequences, and related characteristics that impair juveniles’ ability to make decisions, and his potential for rehabilitation,” because the mandatory minimum of 76 years’ “required a *de facto* life sentence” for defendant. (C. 501).

The People filed their answer to defendant’s amended petition on April 10, 2023. (C. 506-09). The hearing on defendant’s amended petition was held on October 13, 2023. (R. 810-93).

At the third-stage hearing, Garbarino testified as an expert in developmental psychology. (R. 813-18). He has worked on over 300 murder cases, and of those, two were for the prosecution, and the remainder were for the defense. (R. 832). Defendant initiated contact with him by a letter written from the Stateville Correctional center. (R. 818). Garbarino believed defendant heard of him through word of mouth at the prison where Garbarino lectured and was working with other prisoners on their cases. (R. 818). Garbarino explained that the beginning of the report is applied generally to a category of individuals as follows:

The brain developmental research in developmental science provided the foundation for the amicus briefs in *Miller* versus Alabama and also *Roper* versus Simmons and *Graham* versus Florida, all the cases that dealt with special sentencing protections for juveniles.

And then, as the issue became extending those protections beyond age 18, there's research on the science, developmental science, on what that looks like and why that is and rationale for that. (R. 821-22).

² *Miller v. Alabama*, 567 U.S. 460 (2012).

Garbarino sent defendant a list of questions in the mail, which were the Adverse Childhood Experience (ACE), and a list of questions about his life experiences. (R. 822-24; E. 883 V4 (Ex. 29A)). Garbarino testified that he, “[t]old him that it was in everybody’s best interests, his and mine, that he be as honest as possible and he disclose everything I was asking about.” (R. 823). Then Garbarino wrote a first draft of the report and sent it to defendant to respond to some additional questions. (R. 823, 856). Garbarino could not recall if “it took two iterations of that or if one was sufficient to have what I felt was a complete report, which was dated April 15th of 2021.” (R. 823).

Garbarino explained the ACE questionnaire as follows:

It's become very widely used across the country. Because, one thing, it's relatively simple, transparent, and easy to administer. But, more importantly, it turns out this relatively simple 10 questions is incredibly predictive of life difficulties.

It began in the health field. And they found that the number of yes answers was commonly predictive of a wide range of health problems, cardiovascular problems, certain kinds of cancer, life expectancy. But also the finding was clear that it was very powerful in predicting substance abuse, suicidal behavior, depression, violent behavior. To give a kind of benchmark, it's generally recognized that smoking, quote, (sic) causes lung cancer. Smoking only accounts for about 14 or 15 percent of the variation whom actually gets lung cancer.

This simple list of 10 questions accounts for about 50 percent of the variation in substance abuse, depression, suicidal behavior, and so on. So, in a sense, it's three times more powerful in that connection than the connection between smoking and lung cancer where even courts have recognized is the causal link; despite the fact that 19 percent of people who get lung cancer never smoked, the connection is strong enough. And this is something that's three times more powerful.

And only 1/10th of 1 percent, one in a thousand people scored 8, 9, and 10.

So it helps individualize the understanding of how much adversity a person had knowing that that level of adversity is very powerful in predicting late-in-life difficulties. (R. 824-26).

Defendant answered “yes” to all of the ACE questions, and “it’s only about one in a thousand people reports that much adversity.” (R. 826-27). Garbarino stated, “[a]nd then for each yes answer, and there’s 10 in his case, he provided specific information of what that meant to him and what exactly happened to him.” (R. 828). Garbarino explained that defendant’s reported examples regarding his “yes,” answers were: being molested by a foster mother when he was removed from his home based on abuse and neglect; having a father who was incarcerated; having his parents separate; having a father who beat his mother; having a father who was a drug addict; having a mother with depression; having a mother who verbally degraded him; being beaten as a form of discipline; feeling a “sort of emotionally-bound household” where the only time he remembers ever being hugged by his mother was after he was incarcerated; and “there being no food in the household and no heat and other forms of physical neglect.” (R. 828-31).

Garbarino testified that he reached a conclusion as to defendant to a reasonable degree of psychological certainty as follows:

That his specific experience of adversity and trauma in the social environment in which he was growing up placed him at extremely high risk for delinquent violent behavior.

That – that the crime that he committed is – is – in a way makes sense, given his accumulation of adversity, his experiences of trauma, his – the morally corrupting affects of gang life and so on.

So I think that, coupled with the fact that at age 18 he is in this category that developmental research says have had difficulty making good decisions, executive function, as it's called, and managing emotions, affective – affective emotional issues, affective regulation issues.

So I think the conclusion was that the current status of science would say that, given his experience, he should be sentenced with respect to the juvenile protections. (R. 835).

Garbarino's report regarding defendant was admitted as defendant's exhibit 1. (R. 836-40; E. 51-67).

On cross-examination, Garbarino acknowledged that his opinion is that based on the science, *Miller* protections should be extended beyond juveniles. (R. 843). He testified:

Q. And it's your opinion that no individual between 18 and 25 should be considered eligible for life or [*de facto*] life sentence unless there's a realistic possibility for release?

A. Well, I wouldn't say that. Because there is a chapter in a book Miller's Children called Are There Exceptions that deals with individuals who are so damaged that it's unreasonable to expect that they could engage in rehabilitation. And that's what – I think that's the category the Supreme Court was referring to when they talked about the very rarest of cases and they irreparably come up. (R. 843-44).

He testified that of his 300 cases that he worked on, he would "guess" he found between three and five individuals "over the age of 18 who should not be released from prison or have the possibility of being released from prison." (R. 844). He asserted:

[T]hat's based on the science that says you can't presume brain maturation until about age 25, coupled with developmental science and neuroscience that says that the experience of adversity tends to slow down the process of maturation due to its effect on what's called white matter in the brain. (R. 845).

Garbarino also provided the following testimony through cross-examination:

Q. As a developmental psychologist, Dr. Garbarino, is it your opinion that a 20-year sentence for murder for an offender 18 to 25 years old is generally good enough?

A. Yes.

Q. And is it your belief that 20 years is good enough because it takes about 10 years for the brain to mature?

A. And then 10 years to use that mature brain in the process of rehabilitation transformation. That's my – that's my hypothesis.

Q. And that's how you come to the 20 years?

A. Yes. (R. 846).

Garbarino explained that he does not consider the seriousness of the offense as part of his the analysis, because, “[he’s] unaware of research that shows that the severity of the crime has much predictive power for predicting rehabilitation and transformation. So [his] focus is on – not so much on what did they do but why.” (R. 847). He was aware of the “discouraging” and “unfortunate,” facts that the U.S. Supreme Court, and the Illinois Supreme Court determined that courts did not need “to make a finding of permanent incorrigibility before sentencing an offender to natural life.” (R. 849-51). He did not know, and found “it hard to believe,” that defendant’s mandatory minimum sentence would be 76 years’ imprisonment, at any resentencing. (R. 851-52). Garbarino testified that he did not find a real difference between defendant’s current 105-year-sentence, and a 76-year-sentence:

I think both are clearly [*de facto*] life sentences.

And one would hope that 75 years would be judicially overruled at some point as a contradiction with the – certainly, the spirit, how things are moving in post-18 sentencing. (R. 852).

Garbarino was shown 27 reports by the prosecutor and verified they were examples of reports written by him, which followed his standard format. (R. 853-54). Those reports were admitted as People's Exhibits 1 through 27. (R. 873; E. 71-882). Defendant's family paid Garbarino \$3000 to write the report regarding defendant. (R. 854-55). Garbarino was not present when defendant answered the ACE or life history questions. (R. 856-57). People's Exhibit 29 A to L, the documents Garbarino relied upon when preparing his report, were admitted into evidence. (R. 873; E. 883-94). Exhibit 29I was a hand-written note stating defendant's medications and diagnosis, which was signed by someone named, "Ms. Sturghill." (R. 859-61; E. 891). It was not a medical record, Garbarino did not know her credentials or position, and he did not verify the information on it. (R. 860-61). Defendant provided him with the reading assessment taken while defendant was incarcerated, where defendant scored at grade 4 level in reading and grade 3 level in math. (R. 861; E. 892).

Garbarino did not obtain any school records regarding defendant from prior to defendant's incarceration. (R. 861-62). He did not obtain any of the DCFS reports regarding defendant. (R. 862). He did not speak to defendant's brother, to whom defendant claimed he had disclosed the sexual abuse. (R. 862). He also did not contact DCFS to alert them that one of their foster care providers was said to have abused a child under their care. (R. 862-63). He did not speak to any of defendant's family members about the home environment, "[he] was just analyzing the information that [he] was given." (R. 863). He read defendant's appeal order, and based on that, he was aware that defendant was convicted as the sole shooter, that the victim was described as unarmed, and that the crimes were drug-related, as opposed to gang related. (R. 863-64). He did not read any police reports or the PSI for

defendant, so he was unaware if any of the information defendant gave him was in conflict with the information given to the PSI investigator. (R. 864-65). As to the information he reviewed in preparing the report about defendant Garbarino stated:

I thought I stipulated I didn't talk to anyone beyond the information that [defendant] provided and the appeal and the prison records regarding his educational level and that report, that one-page note, about diagnosis and –

And the IDOC disciplinary history, the educational assessment from IDOC, and material that [defendant] provided. (R. 866).

Garbarino agreed that he assumed the truth of what defendant told him. (R. 866). He testified, "I'm just as an education witness trying to make sense of the information I have without engaging in a full-scale investigation." (R. 860). He did not request any neuropsychological testing of defendant, as "[t]hat was outside the scope of what we were doing here." (R. 861). Garbarino defined defendant's neighborhood as having "a war zone mentality," but he did not know where defendant lived and relied on defendant's report as to the character of the neighborhood. (R. 869-70). Garbarino was being paid by the defense to prepare and provide his testimony in this case. (R. 870-71).

After the parties presented their arguments, the post-conviction court took the matter under advisement. (R. 874-93). The post-conviction court entered its third-stage ruling, which was dated December 13, 2023, and file-stamped December 11, 2023. (C. 545-548).

The post-conviction court's order provided:

[T]he First District Appellate Court of Illinois has held that the Illinois Constitution prohibits a mandatory life sentence for a young adult offender who was 19 at the time of the offense, without consideration of the young adult's youth and attendant characteristics at sentencing. *People v. House*.

2019 IL App (1st) 110580-B. This includes juveniles who commit murder, without regard for whether the sentence was mandatory or discretionary. *People v. Ruiz*. 2020 IL App (1st) 163145. Therefore, this Court finds application of these cases alleviates the need for a separate showing that a sentence "shocks the moral sense of the community" if the defendant fulfills the other factors under *Ruiz*.

This Court next turns to the issue of witness credibility. At the hearing, the defendant presented Dr. Garbarino, who was qualified as an expert in the area of developmental psychology. He testified that he was familiar with the *Miller* factors as applied in juvenile sentencing cases. Dr. Garbarino administered a questionnaire to the defendant regarding his experience of Adverse Childhood Experiences ("ACE"), which have found to be predictive of life difficulties, including health issues, life expectancy, substance abuse, suicide, violence, and depression. Defendant answers indicated he had exposure to all 10 ACE factors, which occurs in only .01% of people. These factors include emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, parents being separated or divorced, witnessing domestic violence, having a household member suffer from a mental health issue, having a household member suffer from substance abuse, and having a household member be incarcerated. Dr. Garbarino testified that the defendant gave specific information for each factor, and how he had experienced it.

Based on his expertise, and review of the questionnaire and circumstances of the case, Dr. Garbarino opined that, to a reasonable degree of psychologic certainty, defendant's experience of adversity and trauma left him at high risk of delinquent and violent behavior, and at age 18, his executive functioning was not fully developed and he had difficulty managing emotions, such that his characteristics as a juvenile should have been considered at sentencing. On cross examination, Dr. Garbarino testified that generally neuroscience shows that the brain is not fully mature until age 25 or 26, and the ACE factors can slow this down. He was asked if he believes that no 18-25 year old should be considered for a life sentence, and he responded that there are exceptions if there is a finding the offender cannot be rehabilitated. He was questioned whether he verified the defendant's information, and he admitted he did not. (C. 547).

As to the People's argument that Garbarino relied solely on information self-reported by defendant, the court "note[ed] that not only was much of the information reported by the defendant consistent with the pre-sentence report, which this Court previously relied upon

for sentencing, but the information in those reports are not generally independently verified either.” (C. 548). The court found, “Dr. Garbarino's testimony to be credible, and his opinions to be well-founded on facts and based on his expertise.” (C. 548). The court then stated, “[t]herefore, this Court still finds that defendant has made a substantial showing that his individual characteristics require the application of *Miller*.” (C. 548). The court then incorporated its prior second-stage ruling as to why it found that defendant’s original sentencing hearing was not *Miller*-compliant. (C. 548).

The People’s motion to reconsider the post-conviction court’s order was filed on January 2, 2024, and defendant’s response was filed on February 9, 2024. (C. 552-58, 562-65). The court denied the People’s motion to reconsider on March 22, 2024. (C. 568). The People filed their notice of appeal on April 9, 2024, and their amended notice of appeal on April 18, 2024. (C. 573, 579).

STANDARDS OF REVIEW

At the third-stage of post-conviction proceedings, defendant bears the burden of making a substantial showing of a constitutional violation in the proceedings that led to his conviction or sentence. 725 ILCS 5/122-1(a)(1); *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). “When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved, [the reviewing court] will not reverse a circuit court’s decision unless it is manifestly erroneous ***** If no such determinations are necessary at third stage, *i.e.*, no new evidence is presented and the issues presented are pure questions of law, [the reviewing court will apply a *de novo* standard of review, unless the judge presiding over postconviction proceedings has some ‘special expertise or familiarity’ with the trial or sentencing of the defendant and that ‘familiarity’ has some bearing upon disposition of the postconviction petition.” *Id.* (Internal citations omitted).

ARGUMENT

I.

THE POST-CONVICTION COURT APPLIED AN INCORRECT LEGAL STANDARD BY ACCEPTING THE UNDERLYING FACTS IN GARBARINO’S REPORT, TESTIMONY, AND OPINIONS AS TRUE AND ACCURATE WHEN THEY WERE BASED SOLELY ON UNCONFIRMED, SELF-SERVING STATEMENTS OF DEFENDANT, AND GARBARINO NEVER CONDUCTED PSYCHOLOGICAL TESTING, AND NEVER ENGAGED IN A “FULL-SCALE INVESTIGATION” REGARDING DEFENDANT.

This Court should reverse the post-conviction court’s decision because the court erred when it failed to hold defendant to his burden of proving a substantial constitutional violation

as applied to him. The court abdicated its responsibility to determine credibility as to the underlying facts regarding defendant's individual characteristics.

In his amended post-conviction petition, defendant raised an as-applied, youth-based challenge to his sentence, relying on the principles articulated in *Miller* to claim that his 105-year-sentence violated the proportionate penalties clause of the Illinois Constitution. *Miller v. Alabama*, 567 U.S. 460 (2012); Ill. Const. 1970, art. I, § 11. He claimed that his individual characteristics require the application of *Miller* to him, an 18-year-old adult offender. (C. 407-11). His claim proceeded to a third-stage hearing, after which, the post-conviction court granted defendant's amended petition and ordered a new sentencing hearing. (C. 545-48). This was error.

At the third stage, a defendant has the burden to prove a substantial constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A "substantial showing" is a showing that is "real and weighty," as opposed to "illusory and trivial." *People v. Carballido*, 2015 IL App (2d) 140760, ¶ 65 (internal citation omitted). The "defendant no longer enjoys the presumption that the allegations in his petition and accompanying affidavits are true." *People v. Gacho*, 2016 IL App (1st) 133492, ¶ 13.

Here, the post-conviction court inexplicably and improperly equated defendant's burden at a third stage hearing on a proportionate penalties clause claim with what a court receives and considers from a defendant at a sentencing hearing where the defendant has no burden. (C. 548). At sentencing, a defendant has no burden and his reliance on unverified information to persuade the court to impose a lower sentence is done at the risk that the sentencing court may reject it. See *People v. Adkins*, 41 Ill. 2d 297, 300 (1968) (noting that

a trial court must exercise care to insure the accuracy of information considered at sentencing and to shield itself from what might be the prejudicial effect of improper materials).

Dr. Garbarino [Garbarino] was the sole witness defendant offered in support of his burden of proof at the third stage hearing. (R. 813-72). Garbarino never met with or spoke to, or psychologically tested defendant, and admitted he never engaged in a “full-scale investigation of defendant. Garbarino merely accepted defendant’s unverified, and unsworn assertions about his history as true. (R. 823, 861-66). The post-conviction court erred by wholesale adopting those “facts” at the third-stage, because at bottom, they are based on defendant’s credibility, which was not under oath or subject to cross-examination.

Defendant was required to prove that “from a developmental standpoint, [he] had the characteristics of a juvenile.” *People v. Garcia*, 2024 IL App (2d) 210488-B, ¶ 17, citing *People v. Howard*, 2021 IL App (2d) 190695, ¶ 40, and *People v. Mauricio*, 2021 IL App (2d) 190619. In *Howard*, this Court stated, “[d]efendant’s argument is not that his sentence for murder is so disproportionate to the offense as to violate the constitution. It is simply that his youth was not adequately considered, which is akin to an abuse-of-discretion argument, not a constitutional argument **** [T]he claim is not even cognizable in a postconviction petition [.]” *Howard*, 2021 IL App (2d) 190695, at ¶ 40.

Similarly, a proportionate penalties claim was not cognizable in *Mauricio* when Garbarino’s testimony, “particularly focused on defendant’s traumatic childhood experiences and how those experiences may have impacted defendant,” but “did not appear to establish that, from a developmental standpoint, the defendant had the characteristics of a juvenile.” *Garcia*, 2024 IL App (2d) 210488-B, at ¶ 17, citing *Mauricio*, 2021 IL App (2d) 190619, at

¶ 7. The People note that in *Mauricio*, Garbarino actually interviewed the defendant, something he did not do in the instant case. *Mauricio*, 2021 IL App (2d) 190619, at ¶ 7.

Here, the only evidence defendant, an adult offender, presented to show that “from a developmental standpoint, [he] had the characteristics of a juvenile,” was through Garbarino repeating the unverified information defendant provided to Garbarino. In that regard, the People note that appellate courts have criticized testimony from Garbarino on other occasions. See *People v. Parish*, 2023 IL App (1st) 200011-U³, ¶ 65; *People v. Croom*, 2022 IL App (4th) 210410-U⁴, ¶ 65.

Garbarino’s expert opinion simply was an age-based one, which is insufficient to support a proportionate penalties clause claim. The opinion was a repackaged version of defendant’s unsuccessful facial challenge that he pursued on appeal, as it had little to nothing to do with the individual characteristics of defendant. See *People v. Green-Hosey*, 2019 IL App (2d) 170110-U, ¶ 55. Notably, the post-conviction court received 27 reports authored by Garbarino for other offenders. (E. 71-882). The reports are nearly identical to each other and to the report Garbarino authored on behalf of defendant, demonstrating that Garbarino’s opinion was not unique to defendant’s specific circumstances, and was nothing more than an age-based conclusion he reaches for all offenders who paid him to author a report on their behalf.

³ Cited for persuasive purposes and attached as an appendix pursuant to Illinois Supreme Court Rule 23(e)(1). Il. S. Ct. Rule 23(e)(1).

⁴ Cited for persuasive purposes and attached as an appendix pursuant to Illinois Supreme Court Rule 23(e)(1). Il. S. Ct. Rule 23(e)(1).

There is no doubt that in Garbarino's opinion, a "20-year sentence for murder for an offender 18 to 25 years old is generally good enough." (R. 846). Although he opined that there might be "the rarest" of defendants between ages 18 to 25 that might be "so damaged to expect that they could engage in rehabilitation," in his 300 cases, he would "guess," there were only between three and five defendants for which that was his opinion. (R. 843-44). The primary flaw in Garbarino's overall opinion regarding defendant is that he failed to verify any of the information or conduct any psychological testing of defendant to see if defendant fell into that category. In any event, his opinion was based on the general category of individuals in the age range from 18 to 25, which as discussed in Argument II, *infra*, are not entitled to *Miller* protections that apply to juveniles, unless they prove that their own individual characteristics constitutionally demand that application. As such, to meet his burden of proof, it was incumbent upon defendant to present evidence that supported his claim, in which the witness looked at his specific characteristics, verified the information, conducted interviews of collateral sources, obtained records, and did psychological testing.

In sum, the post-conviction court acknowledged that the information upon which Garbarino relied was unverified, and not under oath, and merely assumed as true by Garbarino. (C. 547-48). Thus, it failed to make the only conclusion possible, which is that defendant failed to meet his burden of showing that he was more like a juvenile based upon his own specific and individual characteristics. The post-conviction court never determined defendant's credibility as to his specific and individual characteristics, which, as discussed in Argument II, *infra*, was the sole consideration needed for defendant's as applied challenge to succeed. *See People v. Harris*, 2018 IL 121932, ¶¶ 53, 56, 61. Because the court erred

in relying on facts that were assumed to be true at the third-stage, as opposed to requiring defendant to meet his burden of proving those facts, this Court should reverse the order granting defendant's petition and ordering a new sentencing hearing, and then affirm defendant's sentence, as he failed to meet his burden of proving his as applied constitutional challenge.

II.

THE POST-CONVICTION COURT ERRED BY FINDING THAT DEFENDANT, AN ADULT OFFENDER, MET HIS BURDEN OF PROVING A SUBSTANTIAL CONSTITUTIONAL VIOLATION UNDER THE PROPORTIONATE PENALTIES CLAUSE OF THE ILLINOIS CONSTITUTION, AS APPLIED TO HIM.

As discussed above, at the third stage, defendant had the burden of proving a substantial constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). As a young adult offender, defendant was not entitled to the presumption that the tenets of *Miller* apply to him pursuant to the proportionate penalties clause. Rather, to receive sentencing protections pursuant to *Miller* and its progeny, he was required to prove that his specific and individual characteristics require the application of *Miller*; See *People v. Harris*, 2018 IL 121932, ¶¶ 53, 56, 61; *People v. Thompson*, 2015 IL 118151, ¶ 37. To succeed on his as applied challenge, defendant needed to demonstrate that “from a developmental standpoint, [he] had the characteristics of a juvenile.” *People v. Garcia*, 2024 IL App (2d) 210488-B, ¶ 17, citing *People v. Howard*, 2021 IL App (2d) 190695, ¶ 40, and *People v. Mauricio*, 2021 IL App (2d) 190619. Specifically, he had to prove, “(1) at the time of the commission of the underlying offense, his [] own specific characteristics – those related to youth, level of maturity, and brain development – placed him [] in the same category as juvenile offenders described in *Miller* and (2) his [] sentencing was not *Miller* compliant, in that a life sentence was imposed without regard for the offender’s youth and its attendant characteristics.” *People v. Cortez*, 2021 IL App (4th) 190158, ¶ 47.

In other words, it was insufficient for defendant to merely present general allegations about young adult brains being akin to juvenile brains and then conclude that since he was

a young adult when he committed the crime, the *Miller* principles apply to him. Not only did defendant fail to meet his burden to show that his specific circumstances made him, an adult offender, developmentally more like a juvenile, the only effective relief defendant will receive from a new sentencing hearing is the retroactive application of a statute allowing parole review for offenders under age 21 that specifically does not apply retroactively. This Court should reverse the post-conviction court's order granting defendant's amended post-conviction petition.

A. The post-conviction court erred because it found defendant's sentence unconstitutional as applied under the Illinois Constitution's proportionate penalties clause, without finding that it was cruel, degrading, or so wholly disproportionate to his offenses that it shocked the conscience of the community.

The proportionate penalties clause states, "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. A statute violates the proportionate penalties clause if either the penalty is harsher than the penalty for a different offense containing identical elements or the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community. *People v. Hilliard*, 2023 IL 128186, ¶ 20. Defendant challenged his sentence under the latter standard. Although an as-applied proportionate penalties claim is available to a young adult offender, he still bears the burden of proving facts that show that his particular circumstances fall under *Miller*, and that a sentence imposed on him pursuant to the relevant statutes is so disproportionate to the offenses that it shocks the moral sense of the community. *People v.*

Thomas, 2022 IL App (1st) 200164, ¶ 52; *People v. Hickman*, 2023 IL App (4th) 220172-U⁵, ¶ 78; see also *Hilliard*, 2023 IL 128186, at ¶ 20.

Here, the trial court relied on *People v. House*, 2019 IL App (1st) 110580-B, and *People v. Ruiz*, 2020 IL App (1st) 163145, to dispense with the crux of a proportionate penalty clause claim, *i.e.*, whether the defendant's sentence shocks the moral sense of the community. (C. 547). That was error.

In *House*, the First District found that the imposition of a mandatory natural life sentence on the 19-year-old defendant was unconstitutional, as applied, under the Illinois Constitution because it shocked the moral sense of the community. *House*, 2019 IL App (1st) 110580-B. However, on appeal, in *People v. House*, 2021 IL 125124, the Illinois Supreme Court vacated the First District's decision, and remanded for new second-stage proceedings where defendant would be required to plead, and then ultimately prove through a third-stage evidentiary hearing "how the evolving science on juvenile maturity and brain development applied to his specific facts and circumstances," in order to demonstrate that his sentence was unconstitutional as applied to him. *People v. House*, 2021 IL 125124, ¶¶ 21-32.

In *Ruiz*, the First District determined that defendant's allegations, taken as true, as they must be at the initial stage of proceedings, were sufficient to entitle the 18-year-old defendant to file his successive post conviction in order to raise an as applied constitutional challenge under the Illinois Constitution. *Ruiz*, 2020 IL App (1st) 163145, at ¶¶ 34-59. However, in *Hilliard*, the Illinois Supreme Court noted that *Ruiz* merely stood for the

⁵ Cited for persuasive purposes and attached as an appendix pursuant to Illinois Supreme Court Rule 23(e)(1). Il. S. Ct. Rule 23(e)(1).

proposition that a young adult defendant could raise an as applied challenge under the Illinois Constitution, not that it was *per se* proven just by raising it. *Hilliard*, 2023 IL 128186, at ¶¶ 28-29.

In *Hilliard*, as discussed further, *infra*, the court affirmed the summary dismissal of the 18-year-old's post-conviction after determining that mandatory firearm enhancements for adult offenders did not shock the conscience of the community for purposes of an as applied constitutional challenge. *Hilliard*, 2023 IL 128186, at ¶¶ 20-40. The court held, "[w]hen defendant's allegations are considered in conjunction with the circumstances of the case, that defendant chose to fire multiple shots at [the victim] at close range with no demonstrated provocation in an attempt to kill him, the imposition of the mandatory 25-year firearm enhancement, which brought his total sentence to 40 years, is not even arguably 'cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.'" *Id.*, at ¶ 40.

Defendant's sentence does not shock the moral sense of the community. Defendant was convicted for shooting Arin Williams in the back of the head, killing him, after the completion of the armed robbery of one ounce of marijuana. *People v. Green-Hosey*, 2019 IL App (2d) 170110-U, ¶¶ 5-6. Defendant, alone, made the decision to bring a gun to the robbery, and alone, made the decision to shoot Arin in the back of the head. *Id.* Defendant was the sole shooter, and the principal actor. *Id.* Defendant received a discretionary sentence of 105 years' imprisonment: 35 years for the murder with an additional 25-year add-on for personally discharging a firearm that proximately caused Arin's death and a consecutive 20 years for armed robbery with an additional 25-year add-on for using a gun. (R. 769).

This discretionary sentence is also not “so wholly disproportionate that it shocks the moral sense of the community” where defendant was the person who unilaterally decided to bring a gun to steal one ounce of marijuana, and after his brother had successfully taken the marijuana, shot unarmed Arin, in the back of the head at close range. *Id.*, at ¶¶ 5-6, 10-11.

In *Wilson*, a case involving a juvenile offender, the Illinois Supreme Court expressly distinguished sentencing challenges raised under the eighth amendment from those raised under the Illinois proportionate penalties clause. *People v. Wilson*, 2023 IL 127666, ¶ 46. There, the Illinois Supreme Court agreed with the United States Supreme Court’s holding in *Jones v. Mississippi*, 593 U.S. 98 (2021), that unless a sentencing court expressly refuses to consider the defendant’s youth, as opposed to, for example, deeming the defendant’s youth to be outweighed by other factors or deeming the defendant’s youth to be an insufficient reason to support a lesser sentence under the facts of the case, a discretionary sentencing scheme, in itself, satisfies *Miller*’s requirement that sentencing courts account for youth and its attendant circumstances. *Wilson*, 2023 IL 127666, at ¶ 38.

Holman, required a finding of permanent incorrigibility before a juvenile defendant could be sentenced to life without parole. *People v. Holman*, 2017 IL 120655, ¶ 46, overruled by *Wilson*, 2023 IL 127666. In *Wilson*, the Illinois Supreme Court expressly recognized *Jones*’s holding that neither a finding of permanent incorrigibility nor an on-the-record sentencing explanation is constitutionally required before a *juvenile* may be sentenced to life without parole. *Wilson*, 2023 IL 127666, at ¶ 38. The supreme court in *Wilson* unequivocally held that *Holman* was overruled, and that no additional findings are

required so long as a discretionary sentencing scheme permits the sentencing court to consider youth and its attendant circumstances during sentencing:

[W]hen the Supreme Court adopts a particular framework for applying a federal constitutional provision, we are required to follow that framework, regardless of how other courts, including this one, may have approached the issue in other decisions.” *People v. Hood*, 2016 IL 118581, ¶ 22 [citation]. *Holman*’s holding that a juvenile offender’s discretionary life sentence does not comport with the eighth amendment unless the sentencing court first makes a finding of permanent incorrigibility after specifically addressing the “*Miller* factors” is directly at odds with the holding in *Jones*—specifically, that additional findings are not required, in that a discretionary sentencing scheme that allows a court to consider youth and its attendant characteristics is “constitutionally sufficient” (*Jones*, 593 U.S. at —, 141 S. Ct. at 1313). Accordingly, ***Holman* is overruled.** *Wilson*, 2023 IL 127666, at ¶ 42. (Emphasis added).

In any event, both *Wilson* and *Holman* are eighth amendment decisions concerning juvenile offenders. Thus, *Holman*, and now *Wilson*, do not provide the standard for evaluating whether a young adult offender’s sentence comports with the proportionate penalties provision. See *People v. Dorsey*, 2021 IL 123010, ¶ 74 (“A ruling on a specific flavor of constitutional claim may not justify a similar ruling brought pursuant to another constitutional provision.”). Rather, any properly raised proportionate penalties provision claim would be analyzed under Illinois’ longstanding standards for reviewing such claims. See, e.g., *People v. Rizzo*, 2016 IL 118599, ¶ 28 (“cruel or degrading standard” applies to challenge of mandatory sentences); *People v. Barrios*, 114 Ill. 2d 265, 277 (1986) (sentence within statutory limits comports with proportionate penalties provision unless “it is greatly at variance with the purpose and spirit of the law or manifestly” disproportionate “to the nature of the offense”). In this case, as argued in Argument III, *infra*, the trial court considered all relevant mitigating factors at sentencing. In fact, on direct appeal, this Court

rejected defendant's claim that his sentence was an excessive abuse of the trial court's discretion, in part because the trial court had accounted for defendant's youth when it imposed the minimum enhancements. On direct appeal, this Court determined that defendant's sentence was not an abuse of discretion, in part, because the trial court accounted for defendant's youth when it imposed the minimum enhancements. *Green-Hosey*, 2019 IL App (2d) 170110-U, at ¶ 69. As such, defendant's sentencing hearing was actually *Miller*-compliant, even though the People maintain that it was not required to be.

Further, the concept of a "*de facto*" life that applies to juveniles, does not apply to an adult offender such as defendant. In *People v. Buffer*, 2019 IL 122327, ¶¶ 27, 40, the court held that a sentence of 40 years or less would not qualify as a *de facto* life sentence for a juvenile defendant. However, *Buffer* does not apply to defendant, as an adult defendant. *Dorsey*, 2021 IL 123010, at ¶¶ 45-46. Indeed, the Illinois Supreme Court has expressly recognized that "[d]efendant's status as an adult also distinguishes this case from the appellate court cases that [rely] on finding mandatory firearm enhancements unconstitutional as applied under the proportionate penalties clause." *Hilliard*, 2023 IL 128186, at ¶ 35 (citing cases). What is clear from *Hilliard* is that the application of mandatory firearm sentencing enhancements to young adult offenders does not violate the proportionate penalties clause. *Id.* at ¶ 33 ("[a]s the State points out, *Leon Miller* is the only case in which this court has found a mandatory minimum penalty unconstitutionally disproportionate as applied to a

particular offender).⁶ In sum, no Illinois jurisprudence has held that a forty year sentence or greater constitutes a *de facto* life sentence with respect to *adult* offenders.

The legislative judgment here – mandating a minimum 76-year-sentence for a young adult who personally discharged a firearm that killed another person, after committing an armed robbery of the person, does not shock the moral sense of the community. In this case, defendant was 18-years-old and was the principal offender, not a passive accomplice influenced by peer pressure. Moreover, even assuming that young adults are not fully mature, defendant has not proven that he is an exceptional case where the punishment is so harsh that it grossly distorts the factual realities of his crimes and fails to accurately represent his personal culpability. *People v. Leon Miller*, 202 Ill. 2d 328, 341 (2002).

Notably, the post-conviction court did not even consider the seriousness of defendant's offense in its analysis. (C. 545-48). Garbarino also failed to consider the seriousness of defendant's offenses in his analysis. (R. 847).

Defendant's crimes exemplify why the General Assembly required a minimum 45-year sentence for adult offenders who kill people using a firearm. As the supreme court has explained, given "the significant danger posed when a firearm is involved," it is not shocking to our community's conscience to require an additional penalty when a first degree murder is "committed with a weapon that not only enhances the perpetrator's ability to kill the intended victim, but also increases the risk that grievous harm or death will be inflicted upon

⁶ The *Hilliard* court noted that *Leon Miller* involved a unique set of circumstances wherein the defendant "had moments to decide whether to help the accomplices and stood as a lookout during the subsequent shooting but did not touch a gun." *Id.* ¶ 34 (citing *People v. Leon Miller*, 202 Ill. 2d 328, 330-31, 341 (2002)).

bystanders.” *People v. Sharpe*, 216 Ill. 2d 481, 524-25 (2005), citing *People v. Morgan*, 203 Ill. 2d 470, 488-89 (2003), and *People v. Hill*, 199 Ill. 2d 440, 452-53 (2002).

The additional penalty was unanimously passed by the General Assembly to combat this “pervasive and enhanced danger,” protect society, deter others from using firearms to commit serious felonies, and penalize the illegal use of firearms. *Hill*, 199 Ill. 2d at 457-59; see *Sharpe*, 216 Ill. 2d at 524-25, 531-32. At the same time, by reserving application of the enhancements to “those who commit some of the most serious felonies,” the General Assembly determined that the seriousness of those offenses in particular warrants the additional penalty and outweighs the objective of rehabilitating that offender. *Sharpe*, 216 Ill. 2d at 525-26 (rejecting argument that “legislature did not take into account rehabilitative potential when making the[] enhancements applicable to first degree murder”). Accordingly, the General Assembly permissibly placed greater weight on the gravity of defendant’s offenses, harm he inflicted, and weapon he used, in fixing the minimum term at 76 years. See *People v. Coty*, 2020 IL 123972, ¶ 24 (“there is no indication in our constitution that the possibility of rehabilitating an offender was to be given greater weight and consideration than the seriousness of the offense in determining a proper penalty” (cleaned up)).

Moreover, the General Assembly has reaffirmed that defendant’s minimum 76-year sentence reflects our community’s moral sense. In 2015, the General Assembly passed a separate sentencing provision for “individuals *under the age of 18* at the time of the commission of an offense,” which applies *prospectively* to require courts to consider youth-related mitigating factors when sentencing juveniles and removes the mandatory firearm enhancements for that category of offenders. 730 ILCS 5/5-4.5-105 (eff. Jan. 1, 2016)

(capitalization omitted) (emphasis added). Thus, after considering *Miller* and its scientific research, the General Assembly made the considered and deliberate judgment that young adults who commit serious felonies with firearms, and specifically those like defendant who cause the death of another person by personally discharging a firearm, should still receive the mandatory 25-year firearm enhancement. See *People v. Thomas*, 2017 IL App (1st) 142557, ¶¶ 46-47.

In 2019, the General Assembly also enacted a scheme that prospectively provides parole review to certain individuals who were under age 21 at the time of their offenses. 730 ILCS 5/5-4.5-115(b) (2019) (for murder, parole eligibility after serving 20 years); see also *Id.* (eff. Jan. 1, 2024). Critically, the General Assembly chose not to apply either the juvenile sentencing scheme or the youthful offender parole scheme retroactively to offenders sentenced before either scheme's effective date, 730 ILCS 5/5-4.5-115(b); *People v. Hunter*, 2017 IL 121306, ¶ 52, thus demonstrating that each choice was one of policy and not a judgment that requiring a minimum 45-year sentence for either a juvenile or young adult offender in these circumstances is morally offensive, see *People v. Woods*, 2020 IL App (1st) 163031, ¶ 62 ("there is no indication the General Assembly found that application of mandatory firearm enhancements to juvenile defendants shocked our sense of moral decency" because the new provision is not retroactive and still allows application of the enhancements to juvenile defendants). The General Assembly's judgment, made after *Miller* and with consideration of scientific research, shows that our community is not shocked by the mandatory 76-year minimum for defendant's offenses.

Further, in *Hilliard*, the Illinois Supreme Court recently reinforced the distinction between juveniles and adults as the following passages make clear:

We agree with the State that the legislative changes do not support defendant's as-applied challenge. The legislature's determination of a particular punishment for a crime in and of itself is an expression of the general moral ideas of the people [citation omitted]. The legislature determined that courts should have the discretion to determine whether to impose the firearm enhancement on individuals who were juveniles when they committed their crimes (730 ILCS 5/5-4.5-105(b) (West 2022)), but the provision is not retroactive [citation omitted] More pertinent here, the legislature made a deliberate choice not to extend this discretion to sentences for individuals who were adults at the time of their offenses.

The distinction between a juvenile and adult remains significant. The 'Supreme Court has clearly and consistently drawn the line between juveniles and adults for the purpose of sentencing at the age of 18.

Notably, though the legislature also determined that certain defendants who were under 21 at the time of their crimes will be eligible for parole review after 10 years [for non-homicide offenses; 20 years for murder], the legislature chose not to make the provision retroactive, such that the provision does not apply to defendant. The legislature's decision not to broaden the statute's reach to *all* defendants under 21 shows that it was implementing the legislation as a policy change rather than a reflection that the previous statutory scheme was abhorrent to the community's moral sense. Accordingly, the legislative changes do not aid defendant's position. *Hilliard*, 2023 IL 128186, at ¶¶ 38-39.

At bottom, defendant's claim is that the General Assembly's recent enactments reflect a shift toward treating young adult offenders like juvenile offenders, so the proportionate penalties provision clearly requires that he be treated the same as a juvenile offender who commits the same crimes today. This Court should reject defendant's attempt to constitutionalize a matter that has always considered to be a policy judgment for the General Assembly. "Our constitution empowers the legislature to declare and define criminal

conduct and to determine the type and extent of punishment for it” because “[t]he legislature, as an institution, is more aware than the courts of the evils confronting our society and, therefore, is more capable of gauging the seriousness of various offenses.” *People v. Fuller*, 187 Ill. 2d 1, 19 (1999).

Thus, the General Assembly’s more recent enactments favoring discretionary sentences and parole for juvenile and young adult offenders do not mean that the minimum sentences imposed under the prior system, which the legislature continues to approve of and courts previously found proportionate, violate the proportionate penalties provision. To the contrary, “determining the age at which human beings should be held fully responsible for their criminal conduct is” for the General Assembly because it is “ultimately a matter of social policy that rests on the community’s moral sense.” *Harris*, 2018 IL 121932, at ¶ 77 (Burke, J., specially concurring); *see also House*, 2021 IL 125124, at ¶¶ 47-58 (Burke, C.J., concurring in part, dissenting in part); *Id.* at ¶¶ 61, 65-71 (Burke, J., concurring in part, dissenting in part); *Thomas*, 2017 IL App (1st) 142557, at ¶ 47.

In sum, a straightforward application of established proportionate penalties provision jurisprudence demonstrates that defendant’s as-applied claim lacks merit. His sentence is not so extreme as to grossly distort the factual reality of how defendant murdered Arin. His 105-year-sentence simply does not shock the moral sense of our community. To the contrary, defendant’s crime fits squarely within the serious conduct, degree of harm, and societal dangers the General Assembly sought to address when it enacted the mandatory firearm enhancements, consecutive sentencing, and truth-in-sentencing provisions.

B. The post-conviction court erred by granting relief that only amounts to *de facto* retroactive application of the parole statute, which does not apply to defendant.

Defendant was sentenced on November 4, 2016. (C. 260, 264). The post-conviction court's order is in error because it is an improper retroactive application of the statute allowing parole review for offenders under age 21. 730 ILCS 5/5-4.5-115(b) (“[a] person under 21 years of age at the time of the commission of first degree murder who is sentenced on or after June 1, 2019 (the effective date of Public Act 100-1182) shall be eligible for parole review by the Prisoner Review Board after serving 20 years or more of his or her sentence or sentences”). If defendant were re-sentenced today, the minimum available sentence remains 76 years’ imprisonment where the firearm add-on remains mandatory for offenders 18 years of age and older at the time of their offenses, the sentences would run consecutively, and defendant would have to serve the entire sentence for first degree murder. 730 ILCS 5/8-4(d)(1); 730 ILCS 5/5-8-1(a)(1)(d)(iii); 720 ILCS 5/18-2(b); 730 ILCS 5/3-6-3(a)(2)(i). There is no practical difference between a sentence of 76 years and one of 105 years, where defendant likely will not outlive either term. Garbarino conceded as much. (R. 852). The only change in law defendant would benefit from if granted a new sentencing hearing is the law which allows for the possibility of parole after serving twenty years of a murder sentence for those offenders who were under the age of twenty-one when they committed their crimes, but the legislature specifically provided that this change in law is to apply prospectively only. 730 ILCS 5/5-4.5-115(b).

In fact, this change does not support defendant’s as-applied challenge. In *People v. Hilliard*, 2023 IL 128186, the Illinois Supreme Court found that the legislature’s change

from mandatory to discretionary firearm enhancements for those under 18-years-old did not support the 18-year-old defendant's as-applied, proportionate penalties clause challenge to his sentence. The Court stated, "the legislature made a deliberate choice not to extend this discretion to sentences for individuals who were adults at the time of their offenses." *Hilliard*, 2023 IL 128186, ¶¶ 38-39.

The Supreme Court added:

[T]hough the legislature also determined that certain defendants who were under 21 at the time of their crimes will be eligible for parole review after 10 years, the legislature chose not to make the provision retroactive, such that the provision does not apply to defendant. The legislature's decision not to broaden the statute's reach to *all* defendants under 21 shows that it was implementing the legislation as a policy change rather than a reflection that the previous statutory scheme was abhorrent to the community's moral sense. Accordingly, the legislative changes do not aid defendant's position. *Id.* at ¶ 39; see also *People v. Mauricio*, 2021 IL App (2d) 190619, ¶¶ 27-28.

The trial court's order for a new sentencing hearing amounts to nothing more than the retroactive application of the parole statute in contravention of the clear legislative mandate that the parole statute is not retroactive. It is error for a court to grant a *de facto* retroactive application of a statute. See, generally, *People v. Perruquet*, 68 Ill. 2d 149, 153 (1977) (sentences within the statutory guidelines are reviewed for an abuse of discretion); *People v. Webster*, 2023 IL 128428, ¶ 28 ("a court of review is without authority to vacate and remand a defendant's criminal sentence absent a finding of error or a finding of an abuse of discretion by the trial judge"). To affirm the post-conviction court's order would override the legislature's express determination that the parole statute has only prospective application.

In sum, because defendant, did not prove that his sentence was unconstitutional under the Illinois Constitution's proportionate penalties clause, as applied to him, the post-conviction court's decision was erroneous, and merely allows defendant the benefit of a statute that is expressly inapplicable to him. This Court should reverse the order, and affirm defendant's sentence.

III.

ARGUENDO, IF THE *MILLER* FACTORS WERE APPLICABLE TO DEFENDANT, THE POST-CONVICTION COURT ERRED BY DETERMINING THAT DEFENDANT’S ORIGINAL SENTENCING HEARING WAS NOT COMPLIANT WITH *MILLER* CONSIDERATIONS.

After the second-stage proceedings, the post-conviction court determined that defendant’s original sentencing hearing had not been “*Miller*” compliant. (C. 501); *Miller v. Alabama*, 567 U.S. 460 (2012). Specifically, the court determined that the trial court had been unable to consider the *Miller* factors of “immaturity, impetuosity, less capacity to consider future consequences, and related characteristics that impair juveniles’ ability to make decisions, and his potential for rehabilitation,” because the mandatory minimum of 76 years’ “required a *de facto* life sentence” for defendant. (C. 501). After the third-stage proceedings, the court adopted its second-stage ruling as to this issue. The People maintain that even if the *Miller* factors apply to this defendant, contrary to the People’s arguments above, defendant’s sentencing hearing satisfied *Miller*-considerations. If defendant’s sentencing hearing was *Miller*-compliant, then that finding would resolve this appeal because he had to prove both prongs of *Cortez*, including that, his [] sentencing was not *Miller* compliant, in that a life sentence was imposed without regard for the offender's youth and its attendant characteristics.” *People v. Cortez*, 2021 IL App (4th) 190158, ¶ 47.

A review of the record reflects that defendant received a *Miller*-compliant sentencing hearing, at which the trial court considered his youth and its attendant characteristics. The People note that the Honorable D.J. Tegeler was the trial judge who imposed defendant’s sentence. (C. 707). Thus, the Honorable Elizabeth Flood, as the post-conviction court, did

not have any “special expertise or familiarity with the trial or sentencing of the defendant,” nor were there any credibility determinations, and this issue should be reviewed *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). This Court should find defendant’s sentencing was *Miller*-compliant.

Defendant shot unarmed Arin Williams in the back of the head, at close range (within 24 inches) in an armed robbery over one ounce of marijuana. *People v. Green-Hosey*, 2019 IL App (2d) 170110-U, ¶ 5. After shooting and killing Arin, defendant threw the gun into the river, washed his body with bleach to get rid of evidence that he committed the crime, cut his hair, and hid out at a hotel. *Id.* at ¶¶ 5-6.

At the sentencing hearing, the trial court possessed the PSI, which included information about defendant’s age, home life, educational background, criminal history, employment history, mental health, purported diagnosis with ADHD, and substance abuse history. (R. 727; CI. 4-13). The PSI included a statement from defendant wherein defendant stated that his brother and the State lied at trial, he wished he had told his side of the story about how this was a “drug deal gone wrong” and not a robbery, and that “[m]aybe if I had lied I might not have been found guilty.” (CI. 6, 12). Defendant also stated that he saw himself living a conventional life but contradicted himself by asserting that he “had to do what [he] had to do to survive. We all have choices to make.” (CI. 12). Defendant “reported he wished ‘[he] could go back and be there for [his] kids but these are the cards [he] was dealt.’” (CI. 12). Finally, the PSI included a risk assessment, which is used to determine who would be likely to re-offend. Defendant scored a 30, which fell within the 14-33 medium risk category. (CI. 12).

In aggravation, the People presented victim impact statements from two of Arin's sisters. (R. 729-40) Defendant did not present any evidence. (R. 740). In argument, the People discussed how each statutory mitigating factor did not apply in this case and also discussed the statutory aggravating factors. (R. 741-57). In anticipation that the defense would ask the court to "feel sorry" for defendant because the PSI indicated that defendant had a "hard life," the People asked the court to carefully review the PSI, as the PSI contained many contradictions which called into question the accuracy of defendant's self-reported information. (R. 751). While defendant reported that he was "kicked out of the house" when he was 14 because of his mother's boyfriend, he also reported having a great relationship with his mother, and that she had been supportive of him since his arrest, and that he called his mother after he shot Arin. (R. 751). Even if defendant was kicked out of the house at 14, he was not without support as he was the youngest of 25 siblings with whom he had great relationships, and he had a probation officer who recognized that defendant was a child in need when he recommended defendant for in-patient substance abuse treatment. (R. 752). Defendant rejected the offer for inpatient substance abuse treatment, despite purportedly being homeless. (R. 752). Defendant clearly had someone taking care of him because he had to be under the supervision of a parent or guardian while he had his prior case pending in juvenile court. (R. 752-53).

Additionally, defendant had not taken responsibility for shooting Arin in the head, in that defendant stated he felt wronged by the system and questioned whether he should have lied when he testified. (R. 753-54). The PSI painted a picture of a person who "feels sorry for himself," not recognizing his role as the shooter. (R. 747).

The People noted the contradiction of defendant reporting that he saw himself living a conventional life and claiming that he had to do things to survive. (R. 754). However, defendant's execution of Arin over one ounce of marijuana had nothing to do with survival, and defendant was not a "kid trying to survive" but was "a murderer who took what he wanted." (R. 755). Defendant's tattoos were discussed to illustrate "who the defendant actually [was]." (R. 755-56). Defendant's tattoos of the words "cold hearted" and "bud killer," as well as his tattoo that showed he was a "money hustler," were argued to give a clear picture that defendant was a "cold-hearted person wanting to hold onto the money he had, to the point he was willing to kill for some bud." (R. 755-56).

The People also focused on the seriousness of the offense. (R. 756-57). Defendant and his brother "set-up" the victim, with a plan to rob him. (R. 756). Defendant brought a gun to rob Arin of one ounce of marijuana, even though defendant and his brother had the money to pay for it, and that this occurred outside an occupied restaurant. (R. 756-57). The People concluded that defendant was not a person who deserved the minimum sentence. (R. 757).

In mitigation, the defense argued that the minimum sentence, 45 years for murder served at 100% and 35 years for armed robbery served at 85% would result in defendant's incarceration for 71 years. (R. 757-58). The defense stated that he planned on "filing a motion that 71 years at a minimum is cruel and unusual punishment." (R. 758).

Defendant spoke in allocution. (R. 761). Defendant apologized to Arin's family, stating he wished "it never happened," and that if he could go back to that day and change things, he would. (R. 761) Defendant told the court he was not asking for sympathy, and

added, “You know, when you pray for rain, sometimes you got to deal with the mud, And that’s all I would like to say.” (R. 761).

The trial court made many references to defendant’s age and the other factors referenced in *Miller* throughout its findings. It started by considering the factors in aggravation and mitigation. (R. 761). The court agreed with the People that none of the statutory factors in mitigation applied. (R. 761). The court accepted and commended defendant for his apology for the offense. (R. 761-62). The court then noted defendant’s history of prior delinquency and criminal activity. (R. 762). It considered that defendant had a battery case when he was juvenile, and that he did not abide by the terms of probation, so he spent 60 days in jail before probation was terminated. (R. 762). The court next found that the sentence was necessary to deter others from committing the same crime. (R. 763-68).

The court considered that defendant made decisions that he was not going to pay for the marijuana and that he was going to take the marijuana with the use of a gun. (R. 764-65). The court stated that defendant, in the court’s estimation, had at least three hours to realize that what he wanted to do was wrong, but at no point when walking into the restaurant to steal one ounce of marijuana “did he ever determine that he was going to change. And it’s that thought process that really concerns this Court.” (R. 765-67) The court pointed out that defendant had no respect for Arin or Arin’s property. (R. 765-66). The court commented that defendant had the opportunity to flee the scene after he took the marijuana but he “decided” to pull out the gun and shoot Arin from “two inches from the back of the head.” (R. 766). The court commented that, while situations may arise where bad things happen in seconds, “that’s not this case.” (R. 766). The court found that it takes a “unique mind to decide to that

I am going to put a gun on me, I am going to think about this, on how I'm going to accomplish this robbery, I am going to walk across a parking lot, I am going to walk into a restaurant, I am going to take this property, and I am going to make sure that this man never sees the light of day." (R. 766-67). The court stated that it was this thought process that bothered the court more than anything else, because "that process says I have no respect for anyone but my own personal feelings. And when you lose respect for everyone else's feelings but yourself, you no longer deserve the right to walk in free society because that is a thought process that might never change." (R. 767).

The court also noted that, if defendant had not brought a firearm to the robbery, he "quite frankly" would probably have been looking at between three and seven years' imprisonment. (R. 767). However, because he decided to take and use the firearm, the law required that the court add 25 years-to-life on each count, so that defendant was starting at 50 years' imprisonment. (R. 767). The court explicitly considered defendant's age, and stated that, due to defendant's age and lack of criminal history, the minimum add-on of 25 years for using the gun was appropriate. (R. 768-69). Thus, on the murder conviction, the court sentenced defendant to 35 years' imprisonment, plus 25 years for the add-on, for a total of 60 years, to be served at 100 percent. (R. 769). For the armed robbery conviction, the court sentenced defendant to 20 years' imprisonment, plus 25 years for the add-on, for a total of 45 years, to be served at 85 percent. (R. 769). It ordered that the sentences to be served consecutively (for a total of 105 years). (R. 769).

Defendant filed a motion to vacate sentence. (C. 268-71). Defendant argued, in part, that the court did not consider certain mitigating circumstances, such as his home life, prior

criminal background, the fact that defendant had allegedly been homeless since age 14, and the fact that he had purportedly received disability payments since age 6 for ADHD and mental issues. (C. 268-71). He further argued that his 105-year sentence violated the eighth amendment to the United States Constitution (U.S. Const. amend. VIII) and violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 11). Defendant argued that, while one goal of sentencing was punishment, another was rehabilitation, *i.e.*, restoring defendants to useful citizenship. (C. 268-71). He argued that his sentence reflected only punishment, and was cruel and unusual as to an 18-year-old offender. (C. 268-71).

The trial court denied the motion. It disagreed that it did not consider defendant's rehabilitative potential or the entire pre-sentence report. (R. 781). The court noted that, although it agreed that the aggregate 105-year sentence "does somewhat equal a [*de facto*] life sentence," "it gave a sentence for each crime that it felt was appropriate." (R. 785). The court explicitly acknowledged defendant's young age and attendant circumstances when it stated:

I looked at [defendant's] family life. I looked at his personal life, and it's not been a great personal life or family life; however, I did not have any evidence before me and I am using my common sense on this, I believe that at a young age everybody knows that it is absolutely improper, immoral, and a crime to take a gun, pull the trigger from about one foot, put a bullet in the back of somebody's head and kill them. (R.787).

The court then detailed the conscious and calculated decisions that defendant necessarily made when planning and committing these crimes. (R. 788). It then noted that defendant showed that he knew what he did was wrong when he ran, tried to disguise

himself, and tried to get away with “what [the court] consider[ed] an absolute execution of a human being.” (R. 788-89).

The trial court clearly considered defendant’s young age when imposing defendant’s sentence:

[If defendant had been] age 50 or 60, he most likely would have gotten the maximum sentence in this case, because there would be no [rehabilitative] potential in this case. In fact, [defendant] is a very young man, and I looked at his rehabilitative potential, and I sentenced him under the law [as to] what I thought was appropriate. I did not give him the maximum. Quite frankly, I could never give him the minimum on this case, nor would I give him the minimum based upon his actions of executing a human being. That is the most heinous offense that anyone could possibly commit. That young man never now has the chance to survive.

Therefore, the motion to reduce, reconsider, or vacate the sentence will be respectfully denied. I believe that this court did take into account the rehabilitative potentials of [defendant], and this Court was required also to add on the 25-year sentence, which if I read the law correctly, I believe it could have been 25 to life in some instances. I gave him the minimum. I did not extend that out.

I do agree had he been under 18, I would be allowed to consider those 25[-]year add-ons and not give them in this case. He is not. I will follow the law, and I believe the sentence I gave him of 20 years on the armed robbery and 35 years on the murder are appropriate in this case. They protect society. They rightfully do punish [defendant] for his actions of executing a human being, but they also do take into account his family life, his age, and his ability to possibly rehabilitate himself while in prison. (R.788-89); *Green-Hosey*, 2019 IL App (2d) 170110-U, at ¶ 27.

The court discussed that, “[defendant] is the one who executed the gentleman.” (R. 791). The court concluded by explaining how it arrived at its sentencing decision:

I am compelled by the law to sentence [defendant]. I did so [in] what I believe to be consistent with the law by taking into [account] not only the punishment factor but his rehabilitative potential in this case; and, therefore, the 105-year total sentence will remain, 20 years for the armed robbery, 35

years on the murder case with a 25-year add-on to each case for a total of 105 years. (R. 791-92).

This above described hearing was *Miller* compliant because the court considered defendant's chronological age at the time of the offenses. The court considered defendant's social, educational, and criminal background which addressed evidence of his particular immaturity, impetuosity, and ability to appreciate risks and consequences. The court considered defendant's family and home environment, including evidence that defendant had been purportedly kicked out of the home at age 14. The court considered defendant's failure to complete high school. The court considered defendant's diagnosis of ADHD. The court considered defendant's history of marijuana use. The court also considered the seriousness of the offense, the unnecessary and unprovoked nature of defendant's execution of Arin Williams, and how defendant was not pressured by anyone to commit the murder. The court found defendant's execution of Arin heinous. The court specifically stated he considered defendant's prospects for rehabilitation and concluded that he would "never give him the minimum on this case, nor would I give him the minimum based upon his actions of executing a human being. That is the most heinous offense that anyone could possibly commit." (R. 788).

At sentencing, defendant had the opportunity to present evidence to show that his criminal conduct was the product of immaturity. See *People v. Croft*, 2018 IL App (1st) 150043, ¶¶ 32-33 (the issue is not the particular sentence the trial court imposed but whether the defendant had the opportunity to present evidence regarding his youth and that the court considered his youth and its attendant characteristics in reaching its sentencing decision); see

also *People v. Chambers*, 2021 IL app (4th) 190151, ¶ 80 quoting *People v. Buffer*, 2019 IL 122327, ¶ 27 (“a defendant seeking relief under the *Miller* line of cases “must show that *** the sentencing court failed to consider youth and its attendant characteristics” a showing that, one might think, would entail more than observing that the court did not explicitly recite the *Miller* factors.”).

The People note that all that remains after *Wilson* is that, to be *Miller*-compliant, a sentencing court must have available a discretionary sentencing scheme and not refuse to consider defendant’s youth and its attendant circumstances. *People v. Wilson*, 2023 IL 127666, ¶ 38. The above review of defendant’s sentencing hearing shows these requirements were satisfied. Although, the People reiterate that because *Wilson* involved a juvenile defendant, its applicability to this 18-year-old defendant is of little instruction.

In sum, the record shows that the court engaged in *Miller*-related considerations before sentencing defendant, where the record establishes, without question, that the court considered defendant’s age, social history, educational history, criminal history, and rehabilitative potential in imposing a sentence that the court stated was appropriate for the heinous execution of Arin by defendant. This Court should find that defendant’s sentence was *Miller*-compliant and therefore reverse the post-conviction court’s order.

CONCLUSION

WHEREFORE, for the foregoing reasons, the People urge this Court to reverse the post-conviction court's order granting defendant's amended post-conviction petition, and ordering a new sentencing hearing. After doing so, this Court should affirm defendant's sentence.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 48 pages.

Respectfully submitted,

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IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) On Petition for Leave to Appeal
	) from the Appellate Court of
	) Illinois, Second Judicial District
Plaintiff-Petitioner,	) No. 2-24-0284
	)
v.	) There on Appeal from the Circuit
	) Court of the Sixteenth Judicial District,
	) Kane County, Illinois
DEMITRI GREEN-HOSEY,	) No. 14 CF 76
	)
	) The Honorable
Defendant-Respondent.	) Elizabeth K. Flood,
	) Judge Presiding.

PETITION FOR APPEAL AS A MATTER OF RIGHT OR,
ALTERNATIVELY, FOR LEAVE TO APPEAL

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SUPREME COURT CLERK

PRAYER FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rules 315, 317, 603, and 612(b), the People of the State of Illinois appeal to this Court as a matter of right, or alternatively, request leave to appeal the appellate court's judgment in *People v. Green-Hosey*, 2025 IL App (2d) 240284, which held that defendant's statutorily mandated aggregate sentence violates article I, section 11, of the Illinois Constitution (the proportionate penalties clause).

At age 18, defendant went to a restaurant and fatally shot, at close range, an unarmed 20-year-old in the back of the head. *Id.* ¶ 4. In August 2016, a jury found defendant guilty of first degree murder and armed robbery, and also found that, during both offenses, he personally discharged a firearm that proximately caused the victim's death. *Id.* ¶ 7. Defendant was 18 years old at the time of his offenses. *Id.* ¶ 4. The aggregate mandatory minimum sentence for the crimes was 76 years in prison, *i.e.*, *de facto* life in prison without the possibility of parole. *Id.* ¶ 7. Following a hearing, the circuit court sentenced defendant to an aggregate prison term of 105 years. *Id.* ¶¶ 5-7. The appellate court affirmed defendant's convictions and sentences. *Id.* ¶ 13.

In March 2021, defendant filed a postconviction petition, alleging that applying the mandatory *de facto* life without parole sentence to him violates the proportionate penalties clause. *Id.* ¶¶ 16-17. The circuit court advanced the petition to a third-stage evidentiary hearing, based on defendant's submission of an April 2021 report authored by James Garbarino, Ph.D., a developmental psychologist. *Id.* ¶¶ 17-18. In March 2023, Garbarino testified that he corresponded with defendant only by mail, never met defendant, and never spoke with him in person or by phone. *Id.* ¶¶ 25, 30. Rather, Garbarino sent defendant a questionnaire called the Adverse Childhood Experiences (ACE) Scale, which asked

defendant to provide “yes” or “no” answers to questions about his life and expand upon any “yes” answers. *Id.* Defendant answered “yes” to all 10 ACE questions and provided limited explanations. *Id.* ¶ 26. Garbarino assumed the truth of defendant’s responses and opined that defendant could not reach adult brain maturation until approximately age 25 or 26. *Id.* ¶ 28. He further “opined that a 20-year murder sentence for an offender 18 to 25 years old is ‘generally good enough’ because it takes 10 years for the brain to mature and then another 10 years to use that mature brain in the process of rehabilitation transformation.” *Id.* Garbarino did not consider the seriousness of an offender’s offenses as important to assessing the offender’s rehabilitative potential because his focus is solely on why the offender committed the crime. *Id.* And he acknowledged that of the more than 300 cases he had been involved in, he had opined only 3 to 5 times that an offender over age 18 should not have an opportunity for release or be released from prison. *Id.* ¶ 27. The People introduced 27 other reports authored by Garbarino, which followed the same format as the report in defendant’s case and reached the same conclusions. *Id.* ¶ 30.

The circuit court granted postconviction relief and ordered a new sentencing hearing. *Id.* ¶ 32. It held that defendant made a substantial showing that the Eighth Amendment holding in *Miller v. Alabama*, 567 U.S. 460 (2012) — barring mandatory life without parole for juvenile homicide offenders — applied to defendant under the proportionate penalties clause. *Green-Hosey*, 2025 IL App (2d) 240284, ¶¶ 32-34. The circuit court did not find, and determined that it did not need to find, that sentencing defendant to *de facto* life without parole for his crimes “shocked the moral sense of the community.” *Id.* The court further held that Garbarino’s opinion was sufficiently credible to overturn the mandatory aggregate sentence, even though it rested on the assumption that

defendant's unverified and untested statements were true and Garbarino had provided the same opinion in 27 other cases. *Id.* ¶ 33.

The appellate court affirmed the circuit court's judgment. *Id.* ¶ 1. The court agreed with the circuit court that defendant did not need to show that sentencing him to *de facto* life without parole shocks the moral sense of the community. *Id.* ¶¶ 59-61. It further held that defendant demonstrated that *Miller* applied to him because the presentence investigation report (PSI) corroborated the facts upon which Garbarino relied in forming his opinion. *Id.* ¶¶ 46-47.

The People appeal as a matter of right under Rules 317 and 612(b)(2) because the appellate court found defendant's statutorily mandated sentences unconstitutional. *See People v. Leon Miller*, 202 Ill. 2d 328, 334-35 (2002).

Alternatively, leave to appeal is warranted because the appellate court's judgment conflicts with this Court's precedent and other appellate court decisions. The appellate court held that it was sufficient for defendant to show that he was developmentally equivalent to a juvenile to establish a proportionate penalties violation. But this holding conflicts with longstanding precedent — which this Court has repeatedly reaffirmed since *Miller* — that the General Assembly's sentencing determination violates the proportionate penalties clause only if the defendant clearly shows that the mandatory sentence is “cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.” *People v. Williams*, 2024 IL 127304, ¶¶ 24-25 (cleaned up); *see also, e.g., People v. Hilliard*, 2023 IL 128186, ¶ 20. The appellate court's judgment also conflicts with other appellate court decisions, which hold that a defendant raising a *Miller*-based proportionate penalties claim must satisfy the cruel or degrading standard because the

proportionate penalties clause “is concerned with the outcome of the sentencing hearing, not with the procedure by which the outcome was reached.” *People v. Masters*, 2024 IL App (4th) 230370, ¶¶ 56-59, *PLA denied*, No. 131381 (Ill. Mar. 26, 2025); *see also People v. Haines*, 2021 IL App (4th) 190612, ¶ 36.¹

The Court should also grant leave to appeal to review the appellate court’s additional holding that defendant demonstrated that he was equivalent to a juvenile, despite his failure to offer any evidence to corroborate his factual assertions regarding his circumstances, upon which Garbarino relied in forming his opinion. For instance, defendant did not testify at the postconviction hearing or offer any letters or testimony from family members. And the appellate court improperly relied on defendant’s statements in the PSI to distinguish this case from *Masters* because defendant’s statements in the PSI were also unverified. Considering defendant’s heavy burden to show that his statutorily mandated sentences are *clearly* unconstitutional, and the lack of any corroboration for defendant’s self-serving statements, the evidence was insufficient to overturn the General Assembly’s sentencing judgment. Accordingly, the Court should grant leave to appeal to clarify that defendants may not rely solely on their self-serving, unverified statements at a third-stage postconviction hearing to satisfy their burden to clearly show a constitutional violation.

¹ Although the issue was not argued below, the appellate court also erred in analyzing defendant’s sentences in the aggregate, rather than individually, as the Court’s precedent requires. *See, e.g., People v. Carney*, 196 Ill. 2d 518, 529 (2000); *People v. Elliott*, 272 Ill. 592, 600 (1916). This issue is pending before the Court in *People v. Spencer*, No. 130015 (argued Mar. 11, 2025).

STATEMENT REGARDING JUDGMENT AND REHEARING

The Illinois Appellate Court issued its opinion on February 3, 2025. No petition for rehearing was filed. Upon the People's motion, this Court extended the time for filing this petition to April 24, 2025.

POINTS RELIED UPON FOR REVIEW

The People appeal as a matter of right under Rules 317 and 612(b)(2) because the appellate court found defendant's statutorily mandated aggregate sentence unconstitutional.

Alternatively, leave to appeal is warranted because the appellate court's opinion conflicts with this Court's precedent and other appellate court decisions.

STATEMENT OF FACTS

A jury found defendant guilty of first degree murder and armed robbery, and further found that during the offenses, he personally discharged a firearm that proximately caused a person's death. *Green-Hosey*, 2025 IL App (2d) 240284, ¶ 4. Defendant committed the offenses when he was 18 years old, and about six months after he completed probation for a juvenile offense. *Id.*; CI4, 6.

The trial evidence showed that defendant and his brother Jaquan, then 20 years old, called Ari Williams, who was also 20 years old, and arranged to buy an ounce of marijuana from Williams for \$300. *Green-Hosey*, 2025 IL App (2d) 240284, ¶ 4. The three met at a restaurant in Aurora and went to a back hallway. *Id.* There, defendant took the marijuana, pulled out his handgun, stated "[w]e ain't paying for anything," and fatally shot Williams in the back of the head at close range. *Id.* Defendant and Jaquan then fled and threw the gun in a river. *Id.* Defendant later washed himself with bleach, shaved his head, and broke

the phone they had used to arrange their meeting with Williams. *Id.* Defendant and Jaquan paid their sister to drive them to Joliet, and from there, they went to a motel in Cicero, where they spent the night. *Id.* Both men were arrested the next day while they were trying to board a train. *Id.*

The aggregate minimum sentence for defendant's crimes was 76 in prison: mandatory consecutive prison terms of 20 years for first degree murder plus a mandatory minimum firearm enhancement of 25 years, and 6 years for armed robbery plus a mandatory minimum firearm enhancement of 25 years. *Id.* ¶ 7. At the sentencing hearing, the circuit court considered the PSI, which included unverified information that defendant had provided about his background, his age, and his prior juvenile delinquency adjudication for battery. *Id.*; CI4-10. The court considered defendant's young age and lack of adult criminal history, along with the seriousness of his offenses, and sentenced defendant to a total of 60 years for first degree murder (35 years plus 25 years for the enhancement) to be served at 100%, and a consecutive sentence of 45 years for armed robbery (20 years plus 25 years for the enhancement) to be served at 85%. *Green-Hosey*, 2025 IL App (2d) 240284, ¶¶ 7-12.

On appeal, as relevant here, the appellate court rejected defendant's contentions that (1) the mandatory *de facto* life without parole sentence is facially unconstitutional under the proportionate penalties clause, and (2) the circuit court abused its discretion by failing to consider defendant's youth and mitigating circumstances. *Green-Hosey*, 2019 IL App (2d) 170110-U, ¶¶ 46-55, 64-72. The appellate court further held that defendant's claim that applying the mandatory *de facto* life sentence to him violated the proportionate penalties clause was premature because the scientific research upon which the claim relied

were never “presented and examined at the trial court level for how they applied to this defendant.” *Id.* ¶ 62.

Defendant filed a *pro se* postconviction petition in March 2021. *Id.* ¶ 16. The circuit court advanced the petition to the second stage and appointed counsel, who filed an amended postconviction petition alleging that applying the mandatory minimum aggregate sentence of *de facto* life without parole to defendant violates the proportionate penalties clause. *Id.* ¶ 17. In support, defendant submitted Garbarino’s April 2021 report. *Id.* In the report, Garbarino concluded that specific factors in defendant’s life likely caused defendant’s brain to be less developed than the brains of those in the general population who had not experienced similar life issues. *Id.*

In March 2023, the circuit court advanced the petition to the third stage, *id.* ¶ 18, and held an evidentiary hearing in October 2023, *id.* ¶ 21. Defendant presented one witness, Garbarino. *Id.* ¶ 22. Garbarino testified as an expert in developmental psychology. *Id.* ¶ 23. He explained that development in the brain’s frontal lobe, which controls impulses, planning, and management of emotions, is not fully developed for individuals under the age of 25. *Id.* ¶ 24. In addition, development of the brain’s white matter is sometimes impacted by an individual’s social conditions and experiences. *Id.* According to Garbarino, youths involved in violent crime thus have a “double whammy” experience because “they suffer from both the general limitations of unformed brains and the disadvantaged functioning that arises from their adverse childhood experiences.” *Id.*

Garbarino testified that defendant heard Garbarino’s name through other inmates in prison, and the two corresponded by mail but never met or spoke in person or by phone. *Id.* ¶¶ 25, 30. Garbarino sent defendant life-history questions and the ACE Scale, which

consists of 10 questions that ask for “yes” or “no” answers regarding an individual’s life experiences, and asked defendant to provide an explanation for any “yes” answers. *Id.*

¶ 25. According to Garbarino, the higher the score on the ACE Scale, the greater adversity the individual has experienced; 65% of people score a 0 or 1, while only 0.1% score an 8, 9, or 10. *Id.*

Defendant answered yes to every question, self-reporting: “(1) verbal degradation by his mother; (2) discipline through beatings; (3) molestation by a female foster parent; (4) emotional neglect (for example, he recalled his mother hugging him only once, which was after his incarceration); (5) physical neglect, including lack of food and heat in the house; (6) his parents’ separation; (7) his father’s physical abuse of his mother; (8) his father’s drug addiction; (9) his mother’s depression; and (10) the incarceration of a household member (specifically, his father).” *Id.* Based on this information, Garbarino opined “within a reasonable degree of psychological certainty” that defendant’s childhood experiences put him at “extremely high risk for delinquent violent behavior” and “the current status of science would say that, given [defendant’s] experience, he should be sentenced with respect to the juvenile protections[, and] defendant’s behavior at the time of the shooting reflected impulsiveness and limited consideration of consequences due to his immature brain development.” *Id.* Then, “based in part upon his review of defendant’s disciplinary records and academic progress from the Illinois Department of Corrections (DOC), Dr. Garbarino opined that defendant had begun making progress towards rehabilitation and positive transformation and did not appear to be one of the ‘rarest’ of young offenders incapable of significant improvement.” *Id.*

On cross-examination, Garbarino opined that defendant would not reach adult brain maturation until approximately the age of 25 or 26, because brain maturation cannot be presumed until around age 25 and adverse experiences tend to slow down the process of maturation due to their effects on white matter in the brain. *Id.* ¶ 28. Garbarino also “opined that a 20-year murder sentence for an offender 18 to 25 years old is ‘generally good enough’ because it takes 10 years for the brain to mature and then another 10 years to use that mature brain in the process of rehabilitation transformation.” *Id.* Garbarino did not consider the seriousness of defendant’s offenses as a factor for assessing rehabilitation potential because his focus was not “on what did they do but why.” *Id.*

Aside from defendant’s answers to the ACE Scale and life-history questions, Garbarino reviewed online newspaper articles about defendant’s case, the decision on direct appeal, defendant’s disciplinary record in DOC, “mental health medication paperwork,” an academic assessment, and a certificate of achievement for completing an anger management program. *Id.* ¶ 30. Garbarino did not request defendant’s prison medical records, lifetime psychiatric or medical records, or Department of Children and Family Services records. *Id.* He did not interview any third parties or request any neuropsychological testing of defendant. *Id.* He agreed that his report assumed the truth of what defendant had told him. *Id.* Garbarino viewed his role as that of “an analyst, . . . an education witness trying to make sense of the information that I have without engaging in a full-scale investigation.” *Id.*

Garbarino acknowledged that, in the 300 or more cases he had been involved in, he had possibly opined in only 3 to 5 cases that an individual over age 18 should not be released from prison or have an opportunity for release. *Id.* ¶ 27. The People introduced

27 of Garbarino's reports from other cases, which generally followed his standard format and reached the same conclusions. *Id.* ¶ 30. Defendant's family paid Garbarino \$3,000 to prepare the report, and defense counsel paid him for testifying and travel expenses. *Id.* Defendant rested, and the People did not present witnesses. *Id.* ¶ 31.

In December 2023, the circuit court granted defendant postconviction relief on his proportionate penalties claim and ordered a new sentencing hearing. *Id.* ¶ 32. The court found that defendant showed that he was sufficiently like a juvenile when he committed his offenses, so *Miller's* Eighth Amendment rule applied to him under the proportionate penalties clause. *Id.* The court held that defendant did not need to show that *de facto* life without parole is so wholly disproportionate to his offenses that the sentence shocks the moral sense of the community. *Id.* ¶ 32.

On appeal, the appellate court affirmed the circuit court's judgment, holding that the aggregate mandatory minimum sentence of *de facto* life without parole violates the proportionate penalties clause when applied to defendant. *Id.* ¶¶ 43, 56-62. The court agreed with the circuit court that to prevail on his proportionate penalties claim, defendant needed to show only that he was sufficiently like a juvenile that *Miller's* rule should apply to him and did not need to show that *de facto* life without parole is so wholly disproportionate to defendant's offenses as to shock the moral sense of the community. *Id.* ¶¶ 59-61. The appellate court further held that because "there was no obvious basis here to suggest that the information [upon which Garbarino relied] was incorrect simply because defendant provided it," and defendant's factual assertions were not inconsistent with the record or PSI, defendant satisfied his burden to show a constitutional violation. *Id.* ¶ 52.

ARGUMENT**I. The People May Appeal as a Matter of Right Under Supreme Court Rules 317 and 612(b)(2).**

Rule 317 provides for appeals as a matter of right from the appellate court to this Court “in cases in which a statute of the United States or of this state has been held invalid or in which a question under the Constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court.” Rule 612(b)(2) incorporates Rule 317 into criminal cases. Ill. S. Ct. R. 612(b). And this Court has held that Rules 317 and 612(b) provide the People a right to appeal when the appellate court finds a statutorily mandated sentence unconstitutional as applied to a particular defendant, as the appellate court did here. *See Leon Miller*, 202 Ill. 2d at 334-35. Thus, the People may appeal the appellate court’s decision as a matter of right.

II. Alternatively, This Court Should Grant Leave to Appeal Because the Appellate Court’s Decision Conflicts With This Court’s Precedent and Other Appellate Court Decisions.

Alternatively, leave to appeal is warranted because the appellate court’s judgment conflicts with this Court’s precedent and other appellate court decisions.

A. The appellate court’s holding as to the legal standard for defendant’s proportionate penalties claim conflicts with this Court’s precedent and other appellate court decisions.

This Court should grant leave to appeal because the appellate court’s holding that defendant established a proportionate penalties violation merely by showing that he was developmentally equivalent to a juvenile conflicts with the Court’s longstanding precedent. As the Court has repeatedly reaffirmed since *Miller*, the General Assembly’s sentencing determination violates the proportionate penalties clause only if the defendant clearly

shows that mandatory sentence is “cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.” *People v. Williams*, 2024 IL 127304, ¶¶ 24-25 (cleaned up); *see also, e.g., People v. White*, 2025 IL 129767, ¶ 40; *People v. Hilliard*, 2023 IL 128186, ¶ 20. Thus, even if defendant had satisfied his burden to demonstrate that he was equivalent to a juvenile when he committed his offenses — and he did not, as discussed below — he still needed to clearly show that *de facto* life without parole is a constitutionally disproportionate sentence for his serious offenses. Neither the appellate court nor the circuit court considered the seriousness of defendant’s offenses in finding a proportionate penalties violation. *Green-Hosey*, 2024 IL App (2d) 240284, ¶¶ 55-62; C545-48.

Moreover, the record here demonstrates that *de facto* life without parole is not so wholly disproportionate to defendant’s serious offenses as to shock the moral sense of the community. Defendant fatally shot Williams in the back of the head to steal an ounce of marijuana. *Green-Hosey*, 2019 IL App (2d) 170110-U, ¶¶ 5-6. Defendant acted alone when he decided to bring a gun to the prearranged sale and then to shoot Williams in the back of the head. *Id.* In short, defendant was the sole shooter and principal actor, and none of the facts or circumstances of the crime suggest that defendant’s acts resulted from impetuosity or peer pressure. *Id.* Thus, even assuming defendant’s brain was developmentally equivalent to that of a juvenile, life imprisonment is not clearly disproportionate to his murder and armed robbery of Williams. *See, e.g., People v. Davis*, 2014 IL 115595, ¶¶ 4, 8, 45 (upholding mandatory natural-life sentence for 14-year-old accomplice who had “carried a weapon to the crime scene, which he perhaps dropped,” and “entered the abode where [multiple] murders occurred”); *see generally id.* ¶ 45 (Our

Constitution “does not necessarily prohibit a sentence of natural life without parole where a juvenile offender actively participates in the planning of a crime that results in multiple murders.” (citing *Leon Miller*, 202 Ill. 2d at 341-42)).

The appellate court’s contrary holding rests on a misunderstanding of the proportionate penalties clause. “[T]here is no indication [in our Constitution] that the possibility of rehabilitating an offender was to be given greater weight and consideration than the seriousness of the offense in determining a proper penalty.” *Hilliard*, 2023 IL 128186, ¶ 40 (cleaned up). Thus, the proportionate penalties clause allows the General Assembly to consider the severity of an offense and determine that no set of mitigating circumstances could permit an appropriate punishment less than a mandatory minimum, *People v. Rizzo*, 2016 IL 118599, ¶ 39; *People v. Dunigan*, 165 Ill. 2d 235, 245 (1995), “even though such sentences, by definition, restrict the inquiry and function of the judiciary in imposing sentence,” *Dunigan*, 165 Ill. 2d at 245. For this reason, the Court has repeatedly “rejected claims that the legislature violates [the penalties provision] when it enacts statutes imposing mandatory minimum sentences,” *id.*, including statutes that require life imprisonment or lengthen sentences through application of mandatory firearm enhancements, *id.*; see, e.g., *Hilliard*, 2023 IL 128186, ¶ 40; *People v. Coty*, 2020 IL 123972, ¶¶ 43-44; *People v. Sharpe*, 216 Ill. 2d 481, 524-27 (2005); *People v. Huddleston*, 212 Ill. 2d 107, 129-45 (2004); *People v. Morgan*, 203 Ill. 2d 470, 487-89 (2003); *People v. Hill*, 199 Ill. 2d 440, 452-54 (2002); *People v. Taylor*, 102 Ill. 2d 201, 204-10 (1984).

As other appellate court decisions have correctly recognized, the proportionate penalties provision does not encompass a *Miller*-like rule requiring “a discretionary

sentencing procedure” before a mandatory sentence may be imposed. *Jones v. Mississippi*, 593 U.S. 98, 110 (2021); see *People v. Masters*, 2024 IL App (4th) 230370, ¶¶ 56-59, *PLA denied*, No. 131381 (Ill. Mar. 26, 2025); *People v. Haines*, 2021 IL App (4th) 190612, ¶ 36. “The proportionate penalties clause is concerned only with the result: the punishment, the sentence.” *Masters*, 2024 IL App (4th) 230370, ¶ 57. The clause “is indifferent to sentencing procedure” because whether the sentence is discretionary or mandatory, the clause is offended if the sentence “is ‘cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.’” *Id.* (quoting *Leon Miller*, 202 Ill. 2d at 338). Accordingly, “[a]lthough the procedure-centric holding of *Miller* is irrelevant to the outcome-centric analysis under the proportionate penalties clause, the evolving science on juvenile maturity and brain development that formed the basis of the *Miller* decision could be relevant to a proportionate penalties analysis.” *Id.* ¶ 58 (cleaned up). In short, considering the seriousness of the defendant’s offenses along with evidence of his youth and mentality, a defendant may be able to clearly demonstrate that his sentence is so wholly disproportionate to his offense as to shock the moral sense of the community. See *id.* ¶¶ 58-59. But, contrary to the appellate court’s holding, evidence that a defendant is developmentally equivalent to a juvenile is insufficient to clearly show a proportionate penalties violation; defendant must still show that the sentence is wholly disproportionate to the offense. As discussed above, defendant failed to make that showing. Leave to appeal is therefore warranted.

B. The appellate court's holding that defendant satisfied his burden to show that he was developmentally equivalent to a juvenile is inconsistent with the proportionate penalties standard.

The Court should also grant leave to appeal to review the appellate court's additional holding that defendant demonstrated that he was equivalent to a juvenile. Defendant offered no evidence to corroborate his factual assertions regarding his circumstances, upon which Garbarino relied in forming his opinion. For instance, defendant did not testify at the postconviction hearing or offer any letters or testimony from family members. Nor were his statements to the PSI officer verified such that they could be deemed reliable. Defendant carried the heavy burden to show that his statutorily mandated sentences are *clearly* unconstitutional, and defendant's uncorroborated, untested, unverified, and self-serving statements were insufficient to overturn the General Assembly's judgment.

At the third stage, a defendant has the burden to make a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A "substantial showing" is a showing that is "real and weighty," as opposed to "illusory and trivial." *People v. Carballido*, 2015 IL App (2d) 140760, ¶ 65. And the "defendant no longer enjoys the presumption that the allegations in his petition and accompanying affidavits are true." *People v. Gacho*, 2016 IL App (1st) 133492, ¶ 13.

Defendant's as-applied proportionate penalties claim rested on "his specific facts and circumstances" and "how the evolving science on juvenile maturity and brain development applies to [those] specific facts and circumstances." *People v. House*, 2021 IL 125124, ¶¶ 27-29. Garbarino opined about how the science applies to the facts and circumstances defendant *alleged*. But defendant provided no proof that those allegations

were true, *i.e.*, that he, in fact, has those “specific facts and circumstances.” *See id.* ¶ 28 (circuit court must “make . . . findings of fact on the defendant’s specific circumstances”). And such evidence is crucial to proving defendant’s claim; otherwise, any defendant could make the same assertions — *e.g.*, check the same boxes on the ACE Scale — and the result would be the same. In the absence of evidence as to defendant’s “specific facts and circumstances,” defendant failed to satisfy his heavy burden to show that the General Assembly’s judgment as to his sentence was clearly unconstitutional.

Indeed, without this proof, Garbarino’s opinion amounted to nothing more than a generalized opinion that defendants who allegedly have these characteristics and were 18 to 26 when they committed their offenses are developmentally equivalent to juveniles. But without evidence proving defendant’s facts and circumstances, Garbarino’s opinion was insufficient “to establish that the statut[ory] [sentencing scheme] is unconstitutional as it applies to the specific facts and circumstances of [defendant].” *Id.* ¶ 27 (cleaned up).

Moreover, Garbarino’s opinion was not unique to defendant and fatally flawed. The People introduced 27 other reports that Garbarino prepared for other offenders, which were virtually identical to each other and to the report Garbarino prepared for defendant. In fact, when Garbarino provided the same opinion in *Masters*, the circuit and appellate courts rejected it. 2024 IL App (4th) 230370, ¶¶ 74-112. There, unlike here, Garbarino interviewed the defendant by telephone and reviewed the PSI and police reports regarding the offense. *Id.* ¶¶ 39, 41. But as he did here, in *Masters*, Garbarino accepted as true the defendant’s unverified and unsworn written responses to the ACE Scale questions. *Id.* ¶¶ 74-88. The circuit and appellate courts then rejected Garbarino’s opinion as having an

“unsound basis.” *Id.* ¶ 87. The same should hold true here, as Garbarino rested his opinion on even less information than he did in *Masters*.

Accordingly, the Court should grant leave to appeal to clarify that defendants may not rely solely on their self-serving, unverified statements at a third-stage postconviction hearing to satisfy their burden to clearly show a constitutional violation.

CONCLUSION

The People of the State of Illinois respectfully request that this Court grant this petition for appeal as a matter of right or, alternatively, for leave to appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this petition for leave to appeal conforms to the requirements of Rules 315(c) and (d), 317, and 341(a) and (b). The length of this petition for leave to appeal, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the petition under Rule 315(c)(6), is 17 pages.

/s/ Stephanie Hoit Lee
STEPHANIE HOIT LEE, Staff Attorney
State's Attorneys Appellate Prosecutor

No. 131560

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Petition for Leave to Appeal
	)	from the Appellate Court of
	)	Illinois, Second Judicial District
Plaintiff-Petitioner,	)	No. 2-24-0284
	)	
v.	)	There on Appeal from the Circuit
	)	Court of the Sixteenth Judicial District,
	)	Kane County, Illinois
DEMITRI GREEN-HOSEY,	)	No. 14 CF 76
	)	
	)	The Honorable
Defendant-Respondent.	)	Elizabeth K. Flood,
	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

To: Christopher McCoy, Deputy Defender
Toni Lea Heniff, Assistant Appellate Defender
Office of the State Appellate Defender
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Under the penalties provided in 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. The undersigned certifies that an electronic copy of the Petition for Leave to Appeal in the above-entitled cause was submitted to the Clerk of the above Court for filing on April 23, 2025. On that same date, opposing counsel was electronically served at the email address shown above. Thirteen copies of the Petition for Leave to Appeal will be sent to the Clerk of the above Court upon receipt of the electronically submitted file-stamped petition.

/s/ Shari Lavick
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No. 131560

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of
	)	Illinois, No. 2-24-0284.
Plaintiff-Appellant,	)	
	)	There on appeal from the Circuit Court
-vs-	)	of the Sixteenth Judicial Circuit, Kane
	)	County, Illinois, No. 14 CF 76.
	)	
DIMITRI GREEN-HOSEY,	)	Honorable
	)	Elizabeth K. Flood,
Defendant-Appellee.	)	Judge Presiding.
	)	

NOTICE AND PROOF OF SERVICE

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Mr. Dimitri Green-Hosey, A/K/A Dimitri Green-Hosey, Register No. Y17618, Pinckneyville
 Correctional Center, 5835 State Route 154, Pinckneyville, IL 62274

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 June 3, 2026, the Brief and Argument for Defendant-Appellee 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 defendant-appellee in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Vinette Mistretta

LEGAL SECRETARY

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