No. 120655

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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I.

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II.

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NATURE OF THE CASE

Richard Holman, petitioner-appellant, appeals from a judgment dismissing his petition for post-conviction relief.

An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUES PRESENTED FOR REVIEW

I.

Because life-without-parole is tantamount to a sentence of death-by-forfeiture, whether this Court should adopt the *Miller*-factors as the starting point for trial courts conducting *Miller* hearings in order to ensure consistency and avoid the imposition of natural life in an arbitrary or capricious manner.

II.

Whether Mr. Holman is entitled to a new sentencing hearing, where the trial court did not consider youth and its attendant circumstances as a mitigating factor.

STATUTE INVOLVED

Sentence of Imprisonment for Felony.

(a) A sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for murder, a term shall be not less than 20 years and not more than 40 years, or if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment[.]

Ill. Rev. Stat. 1978, ch. 38, ¶ 1005-8-1.

Murder – Death Penalties – Exceptions – Separate Hearings – Proof – Findings – Appellate Procedures – Reversals.

***

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

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3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection (a) of this Section regardless of whether the deaths occurred as the result

> of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts[.]

Ill. Rev. Stat. 1978, ch. 38, § 9-1.

STATEMENT OF FACTS

Mr. Holman was 17 years old when he was convicted of murder by accountability. (R.C1,63,68,103; R.623,624,639) Prior to sentencing, the trial court ordered a pre-sentence investigation report ("PSI"). The first page of that report mistakenly showed that Mr. Holman was born on August 20, 1960, which would have made him 18 years old at the time of the murder. (R.C97) The PSI further showed that Mr. Holman and his co-defendant had been previously convicted of murder in St. Clair County case numbers 79-CF-592 and 79-CF-720. (R.C100) In the first of those cases, Mr. Holman was sentenced to serve a 40-year term of imprisonment, and in the second, he was sentenced to serve a 35-year term of imprisonment, with the sentences to be served consecutively. (R.C100)

On October 9, 1975, a psychological evaluation from the St. Clair County Home for Children in East St. Louis, Illinois, revealed that Mr. Holman "scored consistently in the mildly retarded range." (R.C113). Mr. Holman was admitted to a children's home as an in-patient from September 15 to November 2, 1976, where he was evaluated by a psychiatrist and tested by a psychologist. (R.C113) The diagnosis was mild mental retardation. (R.C113) According to the report: "Psychological testing showed that he had a rather high need for approval 'which sets him up as prey for peers of higher intelligence who can influence him to do bad deeds.'" (R.C113) As a result, he "is easily led into doing 'bad deeds.'" (R.C113)

According to the PSI, in 1977 and 1978, a judge ordered Mr. Holman to be examined by a psychiatrist; that evaluation led to a six-month "hospitalization" at the Murray Children's Center in Centralia, Illinois. (R.C108) Prior to that

hospitalization, Mr. Holman had received a head injury from a fall from a two-story building in Rockford, Illinois (R.C109), and was seen by a psychiatrist in Rockford. (R.C108) That psychiatrist had tentatively diagnosed Mr. Holman's IQ as borderline or dull normal. (R.C109)

According to another report, Mr. Holman's verbal IQ was 73, borderline mentally retarded (R.C111) His performance IQ was 64, mildly retarded (R.C111) Further testing showed that there was "significant evidence" and a "high probability" of organic brain damage. (R.C111)

Sentencing

At the sentencing hearing in 1981, defense counsel called no witnesses, submitted no exhibits, and failed to correct the mistake regarding Mr. Holman's age in the PSI. (R.727) Neither defense counsel nor the State explicitly argued statutory factors in mitigation or aggravation.

At the hearing, the State argued that Mr. Holman should be sentenced to a term of natural life imprisonment, arguing that only an accident of birth kept him from the death penalty because Mr. Holman was "too young when these offenses were committed to have qualified." (R.736-37) Defense counsel did not ask for any specific term, but argued:

> Your Honor, the question is, as I see it before this Court, is whether this Court should assess natural life to this very young man. *** I would strongly reject the suggestion of the State that this Court has no other alternative. *** I think that this Court has sentencing alternatives, and the Court ought to consider those. *** The question before this Court is whether this Court should remove this individual from society forever, or whether he should be given an opportunity to again participate in society. *** In line with that, Your Honor, I would ask this Court for some other alternative than that requested by the State and to give this young man an opportunity.

(R.738-40)

In response to defense counsel, the State argued that "it's nice to say, well yeah, rehabilitate *** [but] [t]his young man has been given help at least from 1975 with his first involvement with the Court systems in the juvenile facilities." (R.741) The State also commented that it would like to give Mr. Holman a lethal dose of medicine but was precluded from doing so due to an "accident at birth." (R.741)

The court spoke briefly before imposing sentence:

> The Court is ready to pronounce sentence. In this sentence, the Court has considered the factors enumerated in the Criminal Code as factors in mitigation and factors in aggravation. The Court does not find any factors in mitigation. There are many factors in aggravation. The Court has considered the evidence presented at the trial in this cause. The Court has considered the presentence investigation. The Court has considered the evidence presented at this hearing today and the arguments of counsel. And the Court believes that this Defendant can not be rehabilitated and that it is important that society be protected from this Defendant.
>
> It is, therefore, the sentence of this Court, and you are hereby sentenced, Mr. Holman, to the Department of Corrections for the rest of your natural life. Mittimus is to issue.

(R.742)

Subsequent proceedings

Mr. Holman's conviction was affirmed on direct appeal, and he did not raise a sentencing issue. *People v. Holman*, 115 Ill. App. 3d 60 (5th Dist. 1983). Mr. Holman subsequently filed numerous collateral attacks alleging a variety of issues, all of which were ultimately dismissed by the trial court. (R.C168-70, 173-77,215,348,421; R.753)

On October 7, 2010, Mr. Holman filed a motion asking leave to file a successive

post-conviction petition. (R.C472) As "cause" for the late filing, Mr. Holman averred that the collateral consequence of the life-without-parole sentence in this case caused him to be mentally incapacitated, and as "prejudice," he alleged that he is serving a sentence that is void *ab initio*. In the post-conviction petition attached to his motion (R.C474), he alleged that his sentence is void *ab initio*. (R.C480) Following the trial court's dismissal for failure to show cause and the appellate court's affirmance of the dismissal, Mr. Holman filed a petition for leave to appeal, arguing that *Miller* should be applied to Mr. Holman's discretionary sentence. See Appendix A-4. This Court denied the petition for leave to appeal, but entered a supervisory order vacating the appellate court's decision and ordering it to reconsider the case in light of *People v. Davis*, 2014 IL 115595 (2014). See *People v. Holman*, 2012 IL App (5th) 100587-U; *People v. Holman*, 2016 IL App (5th) 100587-B, ¶¶ 33-34.

On remand pursuant to this Court's order to reconsider Mr. Holman's case in light of *Davis*, the appellate court applied *Miller* to Mr. Holman's discretionary life sentence before holding that he had received an adequate *Miller* hearing. *Holman*, 2016 IL App (5th) 100587-B at ¶¶ 1, 46 ("This appeal requires us to consider whether a natural-life sentence without the possibility of parole may be imposed on a defendant who was a minor at the time of the offense when the sentencing court had the discretion to impose a lesser sentence."). In reaching this holding, the appellate court recited the recent changes in juvenile law brought about by *Miller v. Alabama*, 567 U.S. –, 132 S.Ct. 2455 (2012), and noted that there were at least three different "conclusions" as to what constituted a *Miller* hearing.

Holman, 2016 IL App (5th) 100587-B at¶ 33. The appellate court briefly outlined the three theories on resentencing post-*Miller*, ranging from those courts that held that sentencing courts must consider the *Miller*-factors,[1] to courts that held a sentencing court need only consider "youth" without utilizing a specific set of factors. *Id.* at ¶ 34. The appellate court found that the last approach — which required nothing more from the sentencing court than it consider youth as a mitigating circumstance — was the approach most in line with *Montgomery,* 136 S. Ct. 718 (2016) and *Miller*. The appellate court then held that the sentencing hearing in the present case was sufficient, even where the trial court noted that there were no factors in mitigation. *Id.* at ¶ 42. The appellate court reasoned that even though the trial court found no factor existed in mitigation, it had necessarily considered "youth" because the trial court had reviewed the PSI, which contained information about Mr. Holman's youth, and because defense counsel had made an argument that Mr. Holman's youth should be considered. *Id.*

The appellate court noted that it was not possible to determine how much weight the trial court gave to Mr. Holman's status as a juvenile. *Id.* at ¶ 43. Citing *People v. Smith*, 214 Ill. App. 3d 327 (2d Dist. 1991), the appellate court concluded, however, that since the trial court knew that Mr. Holman was a juvenile, "we presume the court takes into account mitigating evidence that is before it." *Id.* In affirming the trial court's sentence, the appellate court stated: "The [trial] court expressly found that the defendant had no rehabilitative potential. In the face of all this aggravating evidence, this finding does not indicate, without more, that

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[1]See Infra p. 13

the court failed to consider the mitigating evidence before it." *Id.* at ¶ 46.

Mr. Holman subsequently filed a petition for leave to appeal, raising only two issues: what factors must be considered by the trial court in order for a sentencing hearing to be constitutional in light of *Miller* and whether Mr. Holman received an adequate sentencing hearing pursuant to *Miller*. This Court granted Mr. Holman's petition on September 28, 2016.

ARGUMENT

I.

Because life-without-parole is tantamount to a sentence of death-by-forfeiture, this Court should adopt the *Miller*-factors as the starting point for trial courts conducting *Miller* hearings in order to ensure consistency and avoid the imposition of natural life in an arbitrary or capricious manner.

Introduction

Following the United States Supreme Court's opinion in *Miller v. Alabama*, juveniles who were sentenced to life without parole are entitled to a new sentencing hearing that comports with the requirements in *Miller* that the sentencer take into account youth and its attendant circumstances.[2] *People v. Davis*, 2014 IL 115595, ¶¶ 40, 43 (holding that *Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455 (2012) is retroactive); see also *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016)

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[2]The sentences on appeal in *Miller* were both mandatory natural life sentences, so *Miller*'s holding is limited to sentences imposed as part of a mandatory sentencing scheme. *People v. Davis*, 2014 IL 115595, ¶ 43. However, this Court ordered the appellate court to consider Mr. Holman's discretionary sentence in light of *Davis*, and the appellate court, pursuant to this Court's supervisory order, applied *Miller* to Mr. Holman's discretionary life sentence. *Holman*, 2016 IL App (5th) 100587-B at ¶¶ 1, 46 ("This appeal requires us to consider whether a natural-life sentence without the possibility of parole may be imposed on a defendant who was a minor at the time of the offense when the sentencing court had the discretion to impose a lesser sentence.") The only issues on appeal are what factors the trial court must consider in order to adequately comply with *Miller*, and whether the trial court complied in the present case. See Appendix A-5.

(holding *Miller* was retroactive). As juveniles receive new sentencing hearings, the question becomes what does it mean to consider youth as constitutionally significant when imposing a potential life without parole sentence. *Montgomery*, 136 S.Ct. at 733, *citing Miller*, 567 U.S. __, 132 S.Ct. at 2464 ("[C]hildren are constitutionally different from adults for purposes of sentencing."). As courts grapple with offenses that occurred after January 1, 2016, the question is easier as they will be sentenced pursuant to legislation that requires the trial court to take into account a variety of factors. 730 ILCS 5/5-4.5-105 (eff. Jan. 1, 2016);[3] see also *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 62 (holding that the new legislative amendment is not retroactive).[4] But for those juveniles who are already sentenced to natural life, some of whom, like Mr. Holman, have been in prison for decades, what must the trial court consider before imposing a new sentence, especially where life without parole is still a possibility?

In determining proper procedures for hearings, it is easy to lose sight of the fact that life without the possibility of parole is the most serious punishment available in Illinois. Though death is not as immediate or as irrevocable as it was

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[3]The new legislation requires the trial court to take into account nine factors. 730 ILCS 5/5-4.5-105. Compared to the *Miller*-factors (see Infra p. 13), the statute specifically requires the court to consider the defendant's criminal history and whether the juvenile was subjected to outside peer pressure. *Id.* Though the last factor is not explicitly mentioned in the *Miller*-factors, whether the juvenile was subject to outside pressure is implicit.

[4]Though this Court granted a petition for leave to appeal in *Hunter* to determine whether the new legislation is retroactive to defendant's on direct appeal, the outcome of the decision will not affect juveniles like Mr. Holman who are collaterally attacking their sentence.

with the death penalty, life without parole is death nonetheless. And for a juvenile sentenced to life without the possibility of parole, the backdrop of death lingers for decades, as their entire adult life is spent incarcerated without the hope of ever being released. *Miller*, 567 U.S. at ___, 132 S.Ct. at 2466

Without more consistency and stability in sentencing juveniles to life without the possibility of parole, it is difficult for trial courts to accurately "distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Graham v. Florida*, 560 U.S. 48, 77 (2011), *citing Roper v. Simmons*, 543 U.S. 551, 599 (2005). The Supreme Court made it clear that any procedure that resulted in the imposition of the death penalty could not be undertaken in an "arbitrary or capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978) (exploring the type of mitigation evidence that should be considered by a jury prior to imposing the death penalty). Similarly, Illinois should ensure that before we sentence juveniles to life without parole, the sentence is not imposed in an arbitrary or capricious manner.

After all, juveniles are constitutionally different from adults for purposes of sentences. *Miller*, 567 U.S. at __, 132 S.Ct. at 2464; *Graham*, 560 U.S. at 68. Their culpability is diminished, as is the penological objectives behind harsh sentences. *Miller*, 567 U.S. at __, 132 S.Ct. at 2465; *Graham*, 560 U.S. at 74; *Roper*, 543 U.S. at 571. Even for youth who commit heinous crimes, the traits of youth that diminish culpability exist. *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718, 736-36 (2016); *Miller*, 567 U.S. at __, 132 S.Ct. at 2465. Although rare, some juveniles may prove irredeemably corrupt and may be subject to life in prison,

but even trained experts find it difficult to determine which youthful offenders might ultimately fit into this rare group of offenders. *Montgomery*, 577 U.S. at __, 136 S.Ct. at 733-34; *Miller*, 567 U.S. at __, 132 S.Ct. at 2469; *Graham*, 560 U.S. at 72-73; *Roper*, 543 U.S. at 573. Equally important is the likelihood that "the brutality or *** nature of the particular crime will overcome mitigating arguments based on youth when the objective immaturity, vulnerability, and lack of true depravity should require a lesser sentence." *State v. Sweet*, 879N.W.2d 811, 831 (Iowa 2016); see also *Graham*, 560 U.S. at 77-78; *Roper*, 543 U.S. at 573.

Of course, Mr. Holman was not eligible for the death penalty due to his age. And life without the possibility of parole is not the immediate, irrevocable death associated with the death penalty. But consider, Mr. Holman was 17 years old at the time of the offense, and to this point, he has been incarcerated for almost four decades.[5] Mr. Holman could very easily spend several more decades incarcerated before he dies behind bars. Though his sentence was not one of immediate death, it was certainly one of death by forfeiture, and as such, we should be convinced that his sentence was not imposed in an "arbitrary or capricious manner," and all of the mitigation evidence in his case — and cases like his — were properly considered.

Standard of Review

What factors must be considered by a trial court in order to ensure that

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[5]According to DOC's website, Mr. Holman has been in custody since September 5, 1979. see https://www.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx; see also *People v. Smith*, 2014 IL App (4th) 121118, ¶ 34 ("The appellate court may take judicial notice of the Illinois Department of Corrections (DOC) website because it is an official public record of DOC.").

a sentencing hearing is constitutional is a matter of law and reviewed *de novo*. *People v. Taylor*, 2015 IL 117267, ¶11 (whether a statute is constitutional is reviewed *de novo*); *People v. Sanders*, 238 Ill. App. 2d 391, 357 (2010) (Matters of law are reviewed *de novo*).

A. Trial courts should use the *Miller*-factors as a baseline for considering youth and its attendant circumstances in order to ensure that any imposition of life without the possibility of parole is not imposed in an arbitrary or capricious manner.

In *Miller*, the Supreme Court laid out several factors that a trial court could consider in weighing the mitigation associated with youth and its attendant circumstances:

> "(1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence ***;
>
> (2) the family and home environment that surrounded the offender;
>
> (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him;
>
> (4) the incompetencies associated with youth-for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys; and
>
> (5) the possibility of rehabilitation."[6]

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[6]Many states, including Illinois, have changed their laws through legislation or judicial opinion to reflect the factors *Miller* identified. Though individual states chose to individualize the factors, for the most part, little has changed beyond the structure. Therefore, for consistency, Mr. Holman will refer to them as the *Miller*-factors, unless substantive differences exist.

Holman, 2016 IL App (5th) 100587-B, ¶ 31 (2016) (internal quotations removed); see also *Aiken v. Byars*, 765 S.W.2d 572, 577 (S.C. 2014); *Miller*, 567 U.S. at __, 132 S.Ct. at 2468. Though not applicable to Mr. Holman, the legislature adopted similar guidelines for juveniles who commit an offense on or after January 1, 2016:

> (1) the person's age, impetuosity, and level of maturity at the time of the offense, including the ability to consider risks and consequences of behavior, and the presence of cognitive or developmental disability, or both, if any;
>
> (2) whether the person was subjected to outside pressure, including peer pressure, familial pressure, or negative influences;
>
> (3) the person's family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;
>
> (4) the person's potential for rehabilitation or evidence of rehabilitation, or both; family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;
>
> (5) the circumstances of the offense;
>
> (6) the person's degree of participation and specific role in the offense, including the level of planning by the defendant before the offense;
>
> (7) whether the person was able to meaningfully participate in his or her defense;
>
> (8) the person's prior juvenile or criminal history; and
>
> (9) any other information the court finds relevant and reliable, including an expression of remorse, if appropriate. However, if the person, on advice of counsel chooses not to make a statement, the court shall not consider a lack of an expression of remorse as an aggravating factor.

730 ILCS 5/5-4.5-105 (2016). In rejecting the *Miller*-factors, the appellate court in *Holman* stated that it did not believe the trial court was required to consider any predetermined factors in sentencing a juvenile to life without the possibility

of parole. *Holman*, 2016 IL App (5th) 100587-B at ¶¶ 34-35.

The real issue before the appellate court was what parameters must be established post-*Miller* to ensure the constitutionality of sentencing hearings that do not benefit from recent legislative action to adopt the *Miller*-factors. In rejecting the *Miller*-factors as a constitutional floor, the appellate court cited to a number of cases from other jurisdictions. Specifically, the appellate court identified three approaches by other states. *Id.* First, it identified states that had specifically adopted the *Miller*-factors. *Id.* at ¶ 33, *citing* to *State v. Riley*, 110 A.3d 1205, 1216 (Ct. 2015); *People v. Guiterrez*, 324 P.3d 245, 268-69 (Cal. 2014); and *Bear Cloud v. State*, 2013 WY 18, ¶ 42 (Wyo. 2013). The appellate court noted a second approach, which concluded "that as long as sentencing courts have the discretion to impose sentences other than natural life in prison without the possibility of parole, *Miller* is not violated." *Holman*, 2016 IL App (5th) 100587-B at ¶ 33, *citing* to *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014); and *Arrendondo v. State*, 406 S.W.3d 300, 307 (Tex. App. Ct. 2013). Finally, the appellate court found that a third approach had been adopted following *Miller*, which requires "courts to consider mitigating circumstances related to a juvenile defendant's youth [but not] consider any set list of factors." *Holman*, 2016 IL App (5th) 100587-B at ¶¶ 34-35, *citing State v. Ali*, 855 N.W.2d 235, 256-57 (Minn. 2014); *State v. Long*, 8 N.E.3d 890, ¶ 16 (Ohio 2014); and *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012).

The appellate court's categorization of these cases, however, is inherently flawed. In fact, the majority of states that have addressed the parameters of a *Miller* hearing for juveniles facing life without the possibility of parole have

determined that the *Miller*-factors should be the starting point for a trial court considering a sentence of life without parole for a juvenile.

To begin, the appellate court cited to *Foster* and *Arrendondo* for the proposition that a second "approach" exists. *Holman*, 2016 IL App (5th) 100587-B at ¶ 33. This so called second approach is illusory and misleading; neither *Foster* nor *Arrendondo* discuss the parameters of a *Miller* sentencing hearing, but instead, hold that *Miller* is inapplicable when dealing with discretionary natural life. *Foster*, 754 S.E.2d at 37; *Arrendondo*, 406 S.W.2d at 307.[7] Those cases have no bearing here, however, where the appellate court has already applied *Miller* to Mr. Holman's case per this Court's prior supervisory order.

The appellate court also cited to *Conley* in support of its holding that specific factors need not be considered so long as the trial court generally "consider[s] mitigating circumstances related to *** youth." *Id.* at ¶ 34. *Conley*, however, does nothing more than lend support to the idea that the *Miller*-factors provide a baseline for determining whether a sentencing hearing was constitutional in light of *Miller*. To be sure, *Conley* held that the sentencing court adequately satisfied *Miller* without

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[7]Though whether *Miller* should be applied to Mr. Holman is not the issue on appeal, many states, including at least one Illinois appellate court, have extended *Miller* to discretionary sentences, noting that nothing that *Roper*, *Graham*, and *Miller* say about youth and its attendant circumstances is limited to specific sentencing schemes, and thus, should be applied to both mandatory and discretionary schemes. see *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 23; *McKinley v. Butler*, 809 F. 3d 908, 911 (7th Cir. 2016); *Aiken*, 765 S.W.2d 572 (S.C. 2014); *Long*, 138 Ohio St.3d 478 (Ohio 2014); *Conley*, 972 N.E.2d 864 (Ind. 2012); *Sweet*, 879 N.W.2d at 832-33; *State v. Null*, 836 N.W.2d 41, 74 (Iowa 2013); *Riley*, 110 A.3d 1205, 1216 (Ct. 215); and *People v. Guiterrez*, 324 P.3d 245, 268-69 (Cal. 2014).

using the enunciated factors, but Indiana law already requires the equivalent of a death penalty hearing before a sentence of natural life can be imposed. *Conley*, 972 N.E.2d at 871 ("A sentence of life without parole (LWOP) is subject to the same statutory standards and requirements as the death penalty."). In addition to the State having to prove beyond a reasonable doubt at least one aggravating factor that triggers life-without-parole sentence, the trial court:

> (i) must identify each mitigating and aggravating circumstance found,
>
> (ii) must include the specific facts and reasons which lead the court to find the existence of each such circumstance,
>
> (iii) must articulate that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence,
>
> and (iv) must set forth the trial court's personal conclusion that the sentence is appropriate punishment for this offender and this crime.

Id. at 873. Illinois law, of course, has no such requirement. The Indiana sentencing statute, in fact, goes beyond what Mr. Holman asks this Court to do. It is ironic, therefore, that the appellate court relied on this particular case for the proposition that the *Miller*-factors need not be considered by the trial court. Not only did the trial court in *Conley* make a specific record attributing the weight given to each mitigating and aggravating factor, it also specifically considered youth. *Id.* at 876 (citations omitted) ("The [*Miller*] Court further wrote that they would require a sentencer to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. We hold that Judge Humphrey did just that in the present case."). Here, the trial court made no such detailed finding. (R.742)

The appellate court also cited *State v. Ali* for the idea that *Miller* does not

require trial courts to consider specific factors. *Holman*, 2016 IL App (5th) 100587-B at ¶ 34. However, the Supreme Court of Minnesota in *Ali* reached nearly the identical conclusion Mr. Holman is urging here. *Ali,* 855 N.W.2d at 256-57. The *Ali* court readily acknowledged the *Miller*-factors in its discussion of the parameters of any new hearings granted pursuant to *Miller*:

> The Miller Court suggested that mitigating circumstances might include, but are not limited to, the defendant's chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences....the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional....[and] 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.

Ali, 855 N.W.2d at 256-57. The Minnesota Supreme Court concluded that although these factors are not exclusive, they "establish a useful *starting point.*" *Id.* at 257 (emphasis added). In other words, the Minnesota Supreme Court not only embraced the *Miller*-factors, but urged trial courts to consider other, additional factors.

Minnesota is not alone in adopting the *Miller*-factors as the starting point for establishing parameters for a constitutional sentencing hearing. The South Carolina Supreme Court in adopting the *Miller*-factors recognized that it was "the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." *Aiken,* 765 S.W. 2d at 543. The *Aiken* Court recognized that "*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* As the *Aiken* Court noted, "[m]any of the attorneys mention age as nothing more than a

chronological fact in a vague plea for mercy. *Miller* holds the Constitution requires more." *Id.* at 543. As a result of this added component, the South Carolina Supreme Court chose to adopt the *Miller*-factors as a "framework" for juvenile sentencing hearings where natural life was a possibility. *Id.* at 544.

Connecticut has likewise adopted the *Miller*-factors, and it has joined other states that now require the trial court to make its finding on the record when sentencing a juvenile to life without parole. *Riley*, 110 A.3d at 1217 ("To conform to *Miller's* mandate and our rules of practice *** the record must reflect that the trial court has considered and given due mitigating weight to these factors in determining a proportionate punishment."). The Connecticut Supreme Court found it persuasive that a number of legislatures throughout the country have also adopted the *Miller*-factors and "*require* the sentencing court to consider those youth related factors that *Miller* identified as constitutionally relevant mitigation." *Id.* (emphasis in original), *citing* Mich. Comp. Laws § 769.25(6) (2014); Neb. Rev. Stat. § 28-105.02(2) (Supp. 2013); Wash. Rev. Code § 10.95.030(3)(b) (2014); W. VA. Code Ann. § 61-11-23(c) (2014); N.C. Gen. Stat. Ann. § 15-A-1340.19C(a) (2013); 18 Pa. Cons. Stat. Ann. § 1102.1(d)(7) (2014).

The California Supreme Court has also adopted the *Miller*-factors. *People v. Gutierrez*, 324 P.3d 245, 268-69 (2014) (holding that a trial court must consider five factors from *Miller* before sentencing a juvenile to life without the possibility of parole). The *Gutierrez* Court noted that "although courts elsewhere have enumerated or categorized these factors in different ways, *** the emerging body of post-*Miller* case law has uniformly held that a sentencing court must consider

the factors discussed above before imposing life without parole on a juvenile homicide offender." *Id.* at 269 (collecting cases).

The Wyoming Supreme Court has also adopted the *Miller*-factors, though it broke the list into seven sub-parts rather than the five seen in other cases. *Bear Cloud v. State*, 2013 WY 18, ¶ 42 (Wyo. 2013) (holding the Wyoming life-without-parole statute unconstitutional as applied to juveniles in light *Miller*). Much like Minnesota, the Wyoming Court noted that the list was not exhaustive but provided a starting point for trial courts. *Id.*

Other states have adopted the *Miller*-factors as well. The Iowa Supreme Court, before finding that any life-without-parole sentence was unconstitutional as applied to juveniles, adopted the *Miller*-factors as the baseline for trial courts to begin consideration of youth and its attendant circumstances. *Sweet*, 879 N.W.2d at 832-33; *State v. Null*, 836 N.W.2d 41, 74 (Iowa 2013); see also *Williams v. Virgin Islands*, 59 V.I. 1024, 1041-42 (V.I. 2013) (requiring trial courts to utilize the *Miller*-factors). Alabama has similarly mandated that trial courts follow the factors as set out in *Miller* as a baseline before sentencing a juvenile to life without the possibility of parole. *Alabama v. Henderson*, 144 So. 3d 1262, 1283-84 (2013)(mandating trial courts consider fourteen factors when sentencing juveniles). A similar factor test was adopted in Pennsylvania. *Commonwealth v. Knox*, 50 A.3d 732, 745 (Penn. 2012). Likewise, the Mississippi Supreme Court remanded juveniles for resentencing, and its order indicated that the trial court should consider "the *Miller* factors before determining sentence." *Parker v. State*, 119 So. 3d 987, 998 (Miss. 2013), *citing Miller,* 132 S.Ct. 2469 (identifying five factors); see also

People v. Carp, 828 N.W.2d 685, 720-21 (Mich. App. Ct. 2012) (recognizing the *Miller*-factors provide trial court direction on remand for resentencing), *reversed on other grounds pursuant to Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

Though Florida has not specifically adopted the *Miller*-factors, it has applied *Miller* to discretionary life sentences, and on remand, trial courts have been instructed to "expressly consider whether any of the numerous distinctive attributes of youth referenced in *Miller* apply in this case so as to diminish the penological justifications for imposing a life-without-parole sentence." *Daugherty v. State*, 96 So.3d 1076, 1080 (Fla. App. Ct. 2012) (internal quotations removed), *citing Miller*, 132 S.Ct. at 2459, 2469. Louisiana has similarly held that the *Miller*-factors should be considered by the trial court. *State v. Fletcher*, 112 So.3d 1031, 1036 (La. App. Ct. 2013). In *Fletcher*, the appellate court noted that the trial court considered some of the *Miller*-factors but not all, and on remand, the trial court should "conduct[] a more thorough review of the appropriate factors enunciated in *Miller*." *Id.* Further, the Louisiana trial court was required to do more than weigh the *Miller*-factors, it was also required to state its reasonings for the record. *Id.* see also *Williams*, 59 V.I. at 1042 (holding that "if the court does find this case warrants a sentence of life without parole, it should make findings discussing why the general rule does not apply....[that] go beyond a mere recitation of the nature of the crime).

Even in *State v. Long*, 8 N.E.3d 890 (Ohio 2014), where the Ohio Supreme Court rejected the proposition that the trial courts had to consider the *Miller*-factors, the Ohio Supreme court emphasized that the Ohio sentencing statute already

provided for trial courts to consider "certain factors that make the offense more or less serious and *** indicate whether the offender is more or less likely to commit future offenses." *Id.* at 483. In rejecting the factors, the *Long* Court noted that Long had submitted a sentencing memorandum that outlined a number of *Miller*-factors, including his vulnerability, impulsivity, and lack of self-discipline. *Id.* at 484-85. Ultimately, the *Long* court remanded the case for resentencing because the trial court did not "separately mention that Long was a juvenile when he committed the offense, [and] we cannot be sure how the trial court applied this factor." *Id.* at 487. So even in Ohio, where the *Miller*-factors have not been adopted as a baseline approach, the trial court is required to affirmatively consider youth as a mitigating factor on the record.

Youth is not just a chronological fact, as *Miller* and numerous courts have made clear. Nevertheless, the appellate court in *Holman* found it appropriate to reject the *Miller*-factors as even a baseline for determining whether the *Miller* requirements were fulfilled, noting that the Supreme Court did not require consideration of these factors in *Montgomery*. *Holman*, 2016 IL App (5th) 100587-B at ¶ 37. But while *Montgomery* did not require trial courts to use the *Miller*-factors, the Supreme Court reiterated that "*Miller* *** did more than require a sentence to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient

immaturity." 136 S.Ct. at 734.

The *Montgomery* Court noted that it was "careful to limit the scope of any attendant procedural requirements to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice system." *Id.* at 735, *citing Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)("We leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences."). In noting this limit, however, the Supreme Court was quick to emphasize that while "*Miller* does not impose a formal fact finding requirement [, this] does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.*

So without the factor test established in *Miller* or a statutory scheme similar to the one in Indiana, how do trial courts uniformly ensure that they comply with the mandates of *Miller*? Youth is not just a mere number — it has constitutional significance. *Aiken*, 765 S.W. 2d at 577. The *Aiken* court noted that without the guidance of the *Miller*-factors, many of the practicing attorneys were quick to "mention age as nothing more than a chronological number." *Id.* Trial courts, without more, may be quick to follow suit and fail to do more than provide the cursory reference to age. See *Long*, 8 N.E. 2d at 899 (finding that despite a detailed memo from defense counsel outlining many of the *Miller*-factors, the trial court failed to mention youth in sentencing).

Mr. Holman's case provides a perfect example of this conundrum — the belief that the mere mention of youth is synonymous with the constitutional significance of youth. The appellate court, following the trial court's statement

that there were *no factors in mitigation*, held that in light of the aggravating evidence before the trial court, the finding that Mr. Holman had no rehabilitative potential did not indicate, "without more, that the court failed to consider the mitigating evidence before it." *Holman*, 2016 IL App (5th) 100587-B at ¶ 46. At least part of the appellate court's reasoning rested on the idea that since the trial court knew how old Mr. Holman was at the time of the offense, the trial court should have known that youth could be considered in mitigation, and defense counsel mentioned youth. *Id.* at ¶¶ 42-46.

But knowledge of age, and the presumption that the trial court knew that age was a mitigating factor, is not enough to meet the requirements of *Miller*. Age must take into account all of the hallmarks of youth. It must consider how brain development affects impulse control and thought processes, an area of science that was woefully underdeveloped at the time Mr. Holman was sentenced. *Miller*, 132 S. Ct. at 2464-65, *quoting* Steinberg & Scott Less Guilty by Reason of Adolescence: Developmental Immaturity, diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003). *Miller* recognized that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* Moreover, these differences do not vanish simply because a juvenile is 17, rather than 15. See *Holman*, 2016 IL App (5th) 100587-B at ¶ 44 ("It is worth noting that the defendant turned 18 only five weeks after the murder. Thus, his age alone is less of a mitigating factor than it might be for a younger defendant."); see also *Sweet*, 879 N.W.2d at ¶ 838 ("The features of youth identified in *Roper* and *Graham* simply do not magically

disappear at the age seventeen — or eighteen for that matter."), *citing* Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 60 (2008).

The complexity of mastering the science behind juvenile brain development — no doubt a part of the constitutional consideration of youth per *Miller* — is complicated, even for experts. Yet juvenile sentencings have occurred in Illinois without the necessary aid of science. Mr. Holman is a perfect example. Though the science was unavailable in 1981, it certainly exists now. And even after the Supreme Court's clear mandates in both *Miller* and *Montgomery*, the appellate court was satisfied with Mr. Holman's sentencing hearing even though the trial court explicitly found no factors in mitigation. (R.742)

Science, of course, is not the only consideration inherent in the *Miller* factors. Trial courts should consider the home of the defendant, the circumstances that led to the offense, the juvenile's inability to help his attorney during trial or plea negotiations, and the possibility of rehabilitation. *Miller*, 567 U.S. at __, 132 S.Ct. at 2468. Of course, not all of these factors will apply to every juvenile. Perhaps some juveniles might have a stable home life, while others are able to successfully plea bargain and assist their attorneys. And certainly, additional factors in mitigation may exist beyond those contemplated by *Miller*. But it is difficult to deny that the *Miller*-factors as set out by the Supreme Court have two advantages. One, the factors set clear expectations for both the defense bar and the trial court when conducting sentencing hearings for juveniles facing potential life-without-parole sentences so that consistent results are obtained regardless of forum; and two, the *Miller*-factors ensure that sentencing hearings are consistently

constitutionally sound without the fear that youth was not properly considered, and thus, run the real risk of a necessary resentencing.

Without established factors, courts run the risk of sentencing juveniles to life without parole in an "arbitrary or capricious manner." *Gregg*, 428 U.S. at 187. The defense bar is left without an expectation of what it should present to the court, and for that matter, what resources are available to it. And the trial court is left without a clear expectation of which evidence is discretionary and which evidence is mandatory in order to satisfy *Miller*. Moreover, the adoption of the *Miller*-factors not only establishes expectations, it also provides consistency.

Is it fair for one juvenile, for example, to have the benefit of an attorney who presents and a trial court who considers brain development, the juvenile's inability to escape from his home life, his inability to maturely interact with adults in order to cooperate with police or prosecutors, and his rehabilitative potential, while another juvenile, only miles away, has a defense counsel who presents and a trial court that considers very little beyond the chronological age of the juvenile? Without a clear mandate that certain factors must be considered in order to elevate the consideration of age as a mere number to age as constitutionally significant, sentencing hearings for juveniles facing life without parole run the very real risk that attorneys and trial courts, and the appellate court for that matter, will not fully understand the mandates of *Miller* and *Montgomery* and potentially sentence a juvenile to die after decades in prison based on a process that occurs in an arbitrary and capricious manner.

Second, using the *Miller*-factors ensures that trial courts that sentence

juveniles to life without parole are adequately following the constitutional mandates of *Miller*. Consideration of the factors, to be colloquial, removes the guesswork of defending a juvenile at such a hearing and diminishes the potential for arguments on appeal over whether the sentencing hearings were adequate. In other words, if the trial court considers the *Miller*-factors, then all parties can be confident that a life-without-parole sentencing procedure was constitutionally sound.

Finally, adopting the *Miller*-factors will not be onerous on trial courts, the State, or the defense bar. These types of hearings only occur when juveniles are facing natural life sentences and only apply to juveniles who were sentenced to natural life for crimes that occurred prior to January 1, 2016. Moreover, the adoption of these factors should become familiar to the trial courts as future sentencing of juveniles will have to comply with legislative amendments that, for the most part, mirror the *Miller*-factors.

Life without the possibility of parole is the most serious sentence Illinois has. The sentence carries with it the surety that the offender will die in prison. Before the harshest sentence is handed down to some of our least culpable offenders, *Miller* requires that care should be taken to ensure that only the most incorrigible offender lives without the hope of leaving prison. The *Miller*-factors, though not exhaustive, provide guidance for the trial court, the defense bar, and the State. Consideration of these factors yield consistently more fair and reliable sentences and avoid the potential that natural life sentences are handed down in an arbitrary or capricious manner. Therefore, Mr. Holman respectfully requests this Court to adopt the *Miller*-factors as the standard for trial courts to follow when considering the imposition of life without the possibility of parole for juvenile offenders.

II.

Mr. Holman is entitled to a new sentencing hearing, where the trial court did not consider youth and its attendant circumstances as a mitigating factor.

Mr. Holman was 17 years old, borderline mentally retarded, suffering from brain damage, and was easily led astray by others. (R.C111,113) The record offers little information about his home life, the circumstances that led him to participate in the murder of Sepmeyer, or his ability to work with his attorneys, prosecutors, or the police. At sentencing, defense counsel presented no witnesses on behalf of his client, though he did mention Mr. Holman's youth in a general plea for mercy on behalf of his client. (R.737-39) The State, likewise, mentioned youth only as its reason for why Mr. Holman was not eligible for the death penalty. (R.736) Yet despite Mr. Holman's youth and intellectual disabilities, the trial court found that there were no factors in mitigation. None. This failure to recognize Mr. Holman's youth and attendant circumstances could certainly be understood given the sentencing hearing was held in 1981, more than three decades before *Miller*. What is more perplexing, however, is the appellate court's decision — post *Miller* and *Montgomery* — finding that this sentencing hearing comported with the mandates of *Miller*, despite the trial court's failure to mention youth altogether and its explicit statement that there were no factors in mitigation.

Although the circuit court in this case asserted that it had considered the mitigation factors contained in the mitigation statute (Ill. Rev. Stat., 1978, Ch. 38,

§ 1005-5-3.1) (R.C742), the factors listed in that statute are insufficient to support the constitutionality of a natural life sentence imposed against a juvenile. The circuit court did not conduct the type of hearing mandated by *People v. Davis*, 2014 IL 115595 (2014), and *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012). Therefore, Mr. Holman's case should be remanded for a sentencing hearing where the trial court considers youth and its attendant circumstances.

Standard of Review

Because constitutionality is a pure question of law, the standard of review is *de novo*. *People v. Jones*, 223 Ill. 2d 569, 596 (2006).

Analysis

The Eighth Amendment provides that cruel and unusual punishments shall not be inflicted. This provision "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). The Illinois Proportionate Penalties Section of our Bill of Rights has two provisions: 1) that all penalties shall be determined according to the seriousness of the offense; and 2) all penalties shall be determined with the objective of restoring the offender to useful citizenship. Ill. Const. art. I, § 11. The first clause of Section 11 is synonymous with the cruel and unusual punishment clause of the Eighth Amendment. *People v. Clemons*, 2012 IL 107821, ¶ 40. The second clause of Section 11, "which focuses on the objective of rehabilitation, went beyond the framers' understanding of the eighth amendment and is not synonymous with that provision." *Id.* In other words, the rehabilitation portion of the Proportionate Penalties guarantee offers greater protections than the Eighth Amendment. A sentence

of life without parole denies the possibility of rehabilitation.

Children are constitutionally different from adults. *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718, 736-37 (2016) ("[T]his Court has said in *Roper, Graham*, and *Miller* [that] children are constitutionally different from adults in their level of culpability."). Thus, a sentence of life without parole violates the Eighth Amendment's prohibition on cruel and unusual punishment if the trial court imposes that sentence without considering the defendant's youth and the attendant mitigating factors mandated by *Miller*.

For a sentencing hearing to be constitutionally sound, at the time of sentencing, the sentencer must follow a process set forth in *Miller*:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime — as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process — considering an offender's youth and attendant characteristics — before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments.

Miller, 132 S. Ct. at 2471; see Issue I.

Even if this Court chooses not to specifically apply the *Miller*-factors to Mr. Holman, he is entitled to a new sentencing hearing because the record fails to show that the trial court considered youth or any of its attendant circumstances. For perspective, at the time Mr. Holman was sentenced to life without parole, the trial court was required to consider the following factors in aggravation and mitigation:

> (1) the defendant's criminal conduct neither caused nor threatened serious physical harm to another;

> (2) the defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another;
>
> (3) the defendant acted under a strong provocation;
>
> (4) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (5) the defendant's criminal conduct was induced or facilitated by someone other than the defendant;
>
> (6) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;
>
> (7) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
>
> (8) the defendant's criminal conduct was the result of circumstances unlikely to recur;
>
> (9) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;
>
> (10) the defendant is particularly likely to comply with the terms of a period of probation;
>
> (11) the imprisonment of the defendant would entail excessive hardship to his dependents;
>
> (12) the imprisonment of the defendant would endanger his or her medical condition.

Ill. Rev. Stat., 1978, Ch. 38, § 1005-5-3.1(a).

None of these factors account for the constitutional differences between juveniles and adults. And what is worse, the trial court's own statement at the time of sentencing makes no mention of youth or its attendant circumstances:

> The Court is ready to pronounce sentence. In this sentence, the Court has considered the factors enumerated in the Criminal Code as factors in mitigation and factors in aggravation. The Court does not find any factors in mitigation. There are many factors in aggravation. The Court has considered the evidence presented at the trial in this

> cause. The Court has considered the presentence investigation. The Court has considered the evidence presented at this hearing today and the arguments of counsel. And the Court believes that this Defendant can not be rehabilitated and that it is important that society be protected from this Defendant.
>
> It is, therefore, the sentence of this Court, and you are hereby sentenced, Mr. Holman, to the Department of Corrections for the rest of your natural life. Mittimus is to issue.

(R.742) The trial court, in fact, found no factors in mitigation. Given what we know from *Miller*, *Graham*, and *Roper*, Mr. Holman had at least one significant factor in mitigation: his youth and all the circumstances that entailed.

In rejecting Mr. Holman's request for a new sentencing hearing that comports with *Miller*, the appellate court held that merely because there was some mention of youth in the PSI and by defense counsel, the trial court had considered youth:

> The court then went on to state that it considered the evidence in the PSI and the evidence presented at trial, as well as the arguments of counsel at the sentencing hearing. The evidence in the PSI included evidence related to the defendant's youth and the mitigating features of youth, and defense counsel argued that the court should consider the defendant's youth. Thus, we do not interpret the court's statement as an indication that the court overlooked this important evidence.

Holman, 2016 IL App (5th) 100587-B at ¶ 42. Critically, the constitutional significance of youth requires something more than mere knowledge of Mr. Holman's age. It requires that the trial court weigh youth and its attendant circumstances as mitigation due to Mr. Holman's lessened culpability and his rehabilitative potential.

Moreover, given the recent development of both case law and science, only the most prescient trial judge could have considered youth in light of what we now know about brain development and the lessened culpability of youth itself

in a way that comports with *Miller*. The trial court did not have the benefit of recent science or the Supreme Court's ready adoption of scientific knowledge within the framework of the Eighth Amendment. The appellate court presumed that the trial court had adequately considered youth and its attendant circumstances merely because it had knowledge of Mr. Holman's age. However, the more appropriate response is to consider the trial court's own words. The trial court considered arguments of counsel, it considered the PSI, and it still found *no factors in mitigation*. (R.742); see *Id.* at ¶ 43 ("Although it is not clear from the court's statements how much weight the court gave these mitigating factors, we presume that the court takes into account mitigating evidence that is before it.")

To understand the difference between the consideration of youth in 1981 and the consideration of youth post-*Graham* and *Miller*, this Court need not look beyond the PSI. According to the psychiatrist who examined Mr. Holman, he was "not severely impaired enough to be unable to differentiate right from wrong." *Id.* at ¶ 44. Ignoring for a moment the intellectual disability of Mr. Holman, *Miller* makes clear that the lessened culpability of youth is not just a matter of knowing right from wrong, it is a matter of impulse control and the maturity to understand long term consequences. see (R.111,113) (diagnosing Mr. Holman with organic brain damage and mild mental retardation); *Miller*, 132 S.Ct. at 2464, *citing Roper*, 543 U.S. at 569 ("[C]hildren have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking."). Moreover, one cannot assume that the lessened culpability is common sense, something a psychiatrist would have assumed in 1981. Instead, the understanding

of juvenile development based on scientific knowledge occurred decades after Mr. Holman was sentenced. *Miller*, 132 S.Ct. at 2464, *citing Roper*, 543 U.S. at 570 and Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)).

Also consider the probation officer's conclusion, which was contained in the PSI, that Mr. Holman could not be rehabilitated because he showed no remorse. *Holman*, 2016 IL App (5th) 100587-B at ¶ 45. The probation officer's conclusions were underscored by the appellate court, which noted that Mr. Holman's denial "that he was previously convicted of murder provided additional evidence of his lack of remorse." *Id.* First, *Miller* makes clear that it is the rare juvenile who has no rehabilitative potential, who is truly incorrigible. *Miller*, 132 S.Ct. at 2469 ("But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."). Moreover, *Miller* also iterates that because youth is transient and the brain continues to develop, it is even more difficult to determine whether a juvenile is truly irredeemable. *Id.* ("[W]e noted in *Roper* and *Graham* [the difficulty] of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."). Yet both the probation officer and the appellate court were willing to categorize Mr. Holman as irredeemable based on very limited comments made by a juvenile, who was mentally retarded and suffering

from organic brain damage. Essentially, they used his statements as aggravation and drew conclusions that run contrary to *Miller*.

Second, Mr. Holman's statements go to the heart of another one of *Miller*'s concerns — the inability of juveniles to interact with adults for the purposes of plea bargaining, trial, or even sentencing. *Id.* at 2468, *quoting Graham*, 560 U.S. 48, (2011) ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J.D.B. v. North Carolina*, 564 U.S. ——, ——, 131 S.Ct. 2394, 2400–2401 (2011) (discussing children's responses to interrogation). At the sentencing hearing, for example, Mr. Holman had not had the advantage of conferring with counsel prior to the hearing (R.727), and his statement did not actually suggest a lack of remorse. Rather, it actually underscored his confusion and inability to cope with the judicial system: "Your honor, [the prosecutor] made the statement that I was convicted of several — three counts of murder before. That I have been convicted as what they say as accessory of the murder, of knowing that this murder have taken place. I was never convicted of no murder. And that's my statement." (R.742) Murder by accountability according to the laws in Illinois is still murder, but Mr. Holman, even after multiple convictions, did not understand this principle. Given his intellectual disability and his lack of preparation to understand what he should say during a statement of allocution — never mind his age — this statement hardly represents the type of evidence needed to identify Mr. Holman as the rare, incorrigible juvenile deserving of life without parole, yet both his probation officer and the appellate court were all too willing to use that statement as an excuse to deem him irredeemable.

The appellate court also found the nature of Mr. Holman's crime to be a factor that weighed against him for purposes of resentencing. *Holman*, 2016 IL App (5th) 100587-B at ¶ 45. ("The sentencing court considered the circumstances of the crime and the evidence presented at trial. [citations] This evidence showed that the defendant actively participated in the robbery and murder of a defenseless 83-year-old woman."). Of course the trial court should consider the nature of the offense when fashioning a sentence, but the crime itself does not displace the mitigation of youth and its attendant circumstances. Consider that the crimes committed by the juveniles in *Miller* were "vicious," yet their lessened culpability as juveniles was still a strong factor in mitigation. *Miller*, 132 S.Ct. at 2469 ("No one can doubt that [Miller] and Smith committed a vicious murder.); *Sweet*, 879 N.W.2d at 831 (Equally important is the likelihood that "the brutality or *** nature of the particular crime will overcome mitigating arguments based on youth when the objective immaturity, vulnerability, and lack of true depravity should require a lesser sentence."). Youth, after all, is more than the chronological age; it encompasses much more. *Miller*, 132 S.Ct. at 2469 (explaining the violence and abuse suffered by both juveniles were inextricably linked to their youth, in that they were not able to escape their poor home life in the way that an adult might be able to do, and thus, a factor in mitigation).

The PSI also revealed that Mr. Holman was a follower, not a leader, another concern identified by *Miller*. He "had a rather high need for approval which set 'him up as prey for peers of higher intelligence who [could] influence him to do bad deeds'." (R.C113) He was "easily led into doing 'bad deeds'." (R.C113); *People*

v. Jackson, 145 Ill. 2d 43, 125 (1991)(Being a "follower" is a factor in mitigation); *People v. Gleckler*, 82 Ill. 2d 145, 171 (1980). Moreover, the State only proved that Mr. Holman was guilty of murder by accountability. *Miller*, 132 S. Ct. at 2468 (("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."). The State here was unable to show whether it was the co-defendant or Mr. Holman who fired the fatal shot, and the prosecutor admitted as much to the jury (R.624) when arguing guilt by accountability (R.623,624,639) and having the jury instructed on the theory of guilt by accountability. (R.C63,83) Where guilt is by accountability, a lower sense of moral culpability attaches. *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *People v. Leon Miller*, 202 Ill. 2d 328, 342-43 (2002); *People v. Brown*, 2012 IL App (1st) 091940, ¶ 68. Yet there is no indication from the record that this was considered by the trial court.

Finally, though the trial court understood that Mr. Holman was a juvenile, nothing about the sentencing hearing — or even the appellate court's interpretation of the hearing — suggests that this was seen as anything other than a neutral factor, rather than a constitutionally significant requirement per the Eighth Amendment. see (R.741, prosecutor arguing but for "an accident at birth," Mr. Holman would be subject to the death penalty); (R.738, defense counsel arguing "the question is, as I see it before this court, is whether this court should assess natural life to this very young man); *Holman*, 2016 IL App (5th) 100587-B at ¶ 44 ("It is worth noting that the defendant turned 18 only five weeks after the murder. Thus, his age alone is less of a mitigating factor than it might be for a younger

defendant."). Aside from defense counsel's brief prayer for mercy and the State's mention of Mr. Holman's accident of birth, the other evidence before the court included the PSI, which misidentified Mr. Holman's age, and the arrest warrant. *Holman*, 2016 IL App (5th) 100587-B at ¶ 43. But we know from *Miller* that something more than age is required, and the record must reflect that youth and its attendant circumstances were considered in a real way.

For comparison, in *Long*, 8 N.E.3d 890 (Ohio 2014), one of the few states to consider and reject the *Miller*-factors for discretionary sentencing, the trial court was presented with considerable information regarding the juvenile's youth and attendant circumstances. Like Mr. Holman, Long was 17 years old at the time of the offense, and he was sentenced pursuant to a discretionary sentencing scheme. *Id.* at 479. At the time of Long's sentencing hearing, defense counsel presented a brief that argued:

> Adolescents are more vulnerable, more impulsive, and less self-disciplined than adults, and are without the same capacity to control their conduct and to think in long-range terms. They are particularly impressionable and subject to peer pressure, and prone to experiment, risk-taking, and bravado. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity than adults to control their conduct. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure or family, school, and the social justice system, which share responsibility for the development of America's youth.

Id. at 484-85. The State, however, used Long's youth to argue the opposite of defense counsel. *Id.* at 485. The Ohio Supreme Court remanded for a new hearing, concluding that "Because the trial court did not separately mention that Long was a juvenile when committed the offense, we cannot be sure how the trial court applied this

factor." *Id.* at 487.

In remanding, the *Long* court noted that "For juveniles, like Long, a sentence of life without parole is the equivalent of a death penalty. As such, it is not to be imposed lightly, for as the juvenile matures into adulthood and may become more amenable to rehabilitation, the sentence completely forecloses that possibility." *Id.* at 487. Here, Mr. Holman did not have the minimal consideration of youth afforded to Long. He didn't have the benefit of modern science or a memo detailing his youth and attendant circumstances. Instead, defense counsel attempted a well-intentioned argument but presented no witnesses. The State portrayed Mr. Holman as someone who was lucky to have escaped the death penalty, and unlike the trial court in *Long* who was silent, the trial court in Mr. Holman found no factors in mitigation. It is easy, after more than three decades, to lose sight of the fact that Mr. Holman was once a 17-year-old boy when he was sentenced to die in prison. But as the *Long* court noted, before we sentence a juvenile to a lifetime in prison, we must ensure that the sentence was not imposed lightly as evidenced by the trial court's consideration of the factors in mitigation associated with youth and its attendant circumstances. Consideration of the factors of youth and the characteristics of the defendant is critical because, although *Miller* and *Davis* may still permit a sentencing judge to impose a natural life sentence on a juvenile where appropriate, both decisions emphasized that the sentence should be *rare* and highlighted the extreme difficulty of making that determination when a juvenile is standing before a judge:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."

Miller, 132 S. Ct. at 2469; see also *Davis*, 2014 IL 115595 at ¶ 21.

Here, the trial court's language speaks for itself. The trial court found no factors in mitigation, despite Mr. Holman's youth and the circumstances associated with that youth per *Miller*. To be constitutional, the natural life sentence in this case can not be sustained unless the court had considered Mr. Holman's youth as contemplated by *Miller*. However, the sentencing court — acting 31 years before *Miller* — considered none of the *Miller* factors. The sentence of natural life was imposed in violation of the Eighth Amendment prohibition against cruel and unusual punishment and in violation of the Illinois right to proportionate penalties. Therefore, Mr. Holman respectfully requests that this Court remand this case for a new sentencing hearing in light of *Miller*.[8]

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[8]Mr. Holman's appeal originated from the trial court's denial of his motion to file a successive post-conviction petition. (R.C472-74) Because the only issue being raised, whether the trial court complied with *Miller*, is a matter of law, Mr. Holman's case should be remanded directly for resentencing rather than for subsequent post-conviction proceedings. see *Davis*, 2014 IL 115595 at ¶¶ 10, 58 (affirming the appellate court's remand of defendant's successive post-conviction petition for resentencing, where the trial court had initially denied leave to file a successive post-conviction petition).

CONCLUSION

For the foregoing reasons, Richard Holman, petitioner-appellant, respectfully requests that this Court adopt the *Miller*-factors as a parameter for *Miller* hearings and remand Mr. Holman's case for a new sentencing hearing pursuant to *Miller*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Amanda R. Horner, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 42 pages.

/s/Amanda R. Horner
AMANDA R. HORNER
Assistant Deputy Defender

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2016 IL App (5th) 100587-B

NO. 5-10-0587

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 80-CF-5
	)	
RICHARD HOLMAN,	)	Honorable
	)	Charles V. Romani, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court, with opinion.
Presiding Justice Schwarm and Justice Moore concurred in the judgment and opinion.

OPINION

¶ 1 This appeal requires us to consider whether a natural-life sentence without the possibility of parole may be imposed on a defendant who was a minor at the time of the offense when the sentencing court had the discretion to impose a lesser sentence. The defendant, Richard Holman, was 17 years old when he committed the murder at issue in this case. In April 1981, a court sentenced him to natural life in prison. Since that time, courts have grappled with the question of the extent to which the eighth amendment's proscription against cruel and unusual punishment (U.S. Const., amend. VIII) limits the sentences that may be imposed for crimes committed by juveniles. In *Miller v. Alabama*,

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the United States Supreme Court held that a mandatory sentence of natural life in prison without the possibility of parole runs afoul of the eighth amendment when imposed for a crime committed when the defendant was a juvenile. *Miller v. Alabama*, 567 U.S. ___, ___, 132 S. Ct. 2455, 2469 (2012). In this case, the defendant filed a petition for leave to file a successive postconviction petition alleging that his natural-life sentence is unconstitutional. He appeals an order denying that petition, arguing that (1) the sentencing court did not take into account mitigating factors associated with his youth, as required by the Court in *Miller*; and (2) the holding of *Miller* should be expanded to encompass any natural-life sentence imposed for a crime committed while the defendant was a juvenile. We affirm.

¶ 2 On July 13, 1979, 83-year-old Esther Sepmeyer was found dead in her rural farmhouse. Mrs. Sepmeyer had been shot in the side of the head with her own rifle. Her home had been ransacked. The defendant's fingerprints were found on the cabinet where Mrs. Sepmeyer stored her rifle. The defendant and a codefendant, Girvies Davis, were arrested for the murder. Both gave statements to police. Girvies admitted that he loaded the rifle, but indicated that the defendant was the shooter. The defendant indicated that Girvies was the shooter. Although the defendant's fingerprints were the only prints found on the cabinet, the State acknowledged that it could not establish beyond a reasonable doubt which of the two defendants was the shooter. It should be noted that the defendant turned 18 on August 20, 1979, just five weeks after the murder.

¶ 3 A jury found the defendant guilty of first-degree murder in March 1981, and the matter proceeded to a sentencing hearing on April 24, 1981. The multiple-murder

sentencing statute in effect at the time provided that the court "*may* sentence the defendant to a term of natural life imprisonment" if the defendant has been convicted of murdering more than one person. (Emphasis added.) Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-8-1(a)(1); see also Ill. Rev. Stat. 1979, ch. 38, ¶¶ 1003-3-3(d), 1005-8-1(d) (providing that parole is not available to prisoners serving sentences of natural life). (We note that the statute was subsequently amended to make natural-life sentences mandatory for defendants convicted of more than one murder. See Ill. Rev. Stat. 1981, ch. 38, ¶ 1005-8-1. All of the Illinois cases we will discuss later in this opinion arose under the latter version of the statute.)

¶ 4 A presentence investigation report (PSI) indicated that the defendant had been convicted in two unrelated cases of two additional murders and one attempted murder. One of those cases involved the August 30, 1979, robbery of an auto parts store. The defendant and Girvies, his codefendant in this case, were both convicted of one count of murder and one count of attempted murder. The other case involved the May 11, 1979, murder of John Oertel, during a home invasion. In addition, the PSI indicated that the defendant had three delinquency adjudications between 1975 and 1978. Two delinquency adjudications were for burglaries; the third involved three counts of criminal damage to property.

¶ 5 The PSI included psychological evaluations of the defendant. Psychiatrist Dr. Syed Raza evaluated the defendant and diagnosed him with borderline or dull normal intelligence, anxiety, and depression. He stated, however, that these diagnoses were

tentative because he believed that neurological testing was necessary to exclude neurological issues resulting from a head injury.

¶ 6 Psychologist Cheryl Prost then performed a psychological evaluation. In her evaluation, Prost noted that there were indications of neurological impairment. She found that the defendant had a verbal IQ of 73 and a performance IQ of 64. These scores both fell within the borderline retarded range. Prost also pointed out that the defendant was admitted to the Warren G. Murray Children's Home for a period of six weeks in 1976 when he was 15 years old. Prost noted that, during that time, staff observed that the defendant tended to be a follower and that his low IQ made him susceptible to bad influences from more intelligent peers.

¶ 7 After reviewing Prost's evaluation, Dr. Raza provided an addendum to his evaluation. Dr. Raza noted that although the defendant's overall IQ was towards the lower end of the borderline mentally retarded range, his verbal IQ was high enough to give the defendant the ability to exercise judgment as to the difference between right and wrong. Dr. Raza concluded that the defendant was not "severely handicapped" in terms of his ability to differentiate right from wrong.

¶ 8 The PSI also contained a brief family history as well as the observations of the probation officer who prepared the report, Linda Schulze. In the family history section, Schulze noted that the defendant's father and stepfather both died while he was young. She further noted that the defendant reported to her that he had a close and loving relationship with his mother and siblings. Finally, Schulze noted that the defendant

showed no remorse for Mrs. Sepmeyer or for the victims of any of his prior crimes. Schulze thus concluded that the defendant had "no predilection for rehabilitation."

¶ 9 At the sentencing hearing, the State's Attorney highlighted the defendant's criminal history and emphasized the fact that the victim was 83 years old and posed no threat to the defendant. He argued that, given the defendant's history, a sentence of natural life in prison was necessary to protect the public from the defendant. In addition, he argued that such a sentence was necessary to deter others from "going out on similar killing sprees." Defense counsel argued that the question before the court was whether the court "should assess natural life to this very young man." Counsel asked the court to consider rehabilitation as a goal and argued that isolation in the prison system mitigates against that goal.

¶ 10 The court offered the defendant an opportunity to make a statement. The defendant expressed no remorse for his role in the death of Esther Sepmeyer. Instead, he took issue with the prosecutor's argument that he had been convicted of previous murders. He told the court, "I have been convicted as what they say as accessory of the murder, of knowing that this murder [may] have taken place. I was never convicted of no murder."

¶ 11 Before pronouncing sentence, the court stated that it had considered the statutory factors in aggravation and mitigation. The court found no statutory factors in mitigation and stated that there were "many factors in aggravation." The court then stated that it had considered the evidence presented at trial, the PSI, and the evidence and arguments presented at the sentencing hearing. The court concluded, stating, "And the court

believes that this Defendant cannot be rehabilitated and that it is important that society be protected from this Defendant." The court therefore sentenced the defendant to natural life in prison.

¶ 12 The defendant appealed his conviction, but did not challenge his sentence. This court affirmed the defendant's conviction on direct appeal. *People v. Holman*, 115 Ill. App. 3d 60, 66 (1983). Between 2001 and 2009, the defendant filed three petitions for leave to file postconviction petitions. He raised various challenges to his sentence, including claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and our supreme court's holding in *People v. Miller*, 202 Ill. 2d 328 (2002) (*Leon Miller*) (holding that a mandatory sentence of life in prison violates the eighth amendment if imposed for a murder committed by a juvenile convicted under a theory of accountability). Each petition was dismissed, and this court upheld those rulings on appeal.

¶ 13 On October 7, 2010, the defendant filed the petition for leave to file a successive postconviction petition that is at issue in this appeal. In his *pro se* petition, he argued that his sentence of natural life in prison violated the constitution. He did not cite the eighth amendment, and he could not cite *Miller v. Alabama*, which had not yet been decided. On November 10, 2010, the circuit court entered an order denying the defendant's petition for leave to file the postconviction petition. The court found that the defendant failed to allege facts to satisfy the cause-and-prejudice test. See 725 ILCS 5/122-1(f) (West 2010); *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002). The defendant appealed that ruling.

¶ 14 The United States Supreme Court issued its decision in *Miller* in June 2012, while this matter was pending on appeal. The defendant argued on appeal that his sentence was unconstitutional pursuant to *Miller*. On December 31, 2012, this court affirmed the trial court's order denying the defendant's petition. We acknowledged that the First District had held that *Miller* applied retroactively to cases on collateral review. *People v. Holman*, 2012 IL App (5th) 100587-U, ¶ 19 (citing *People v. Williams*, 2012 IL App (1st) 111145, ¶¶ 42-56; *People v. Morfin*, 2012 IL App (1st) 103568, ¶¶ 35-59). However, we found that the defendant forfeited this claim by failing to identify the eighth amendment as the basis for the constitutional claim in his petition. *Id.* ¶ 18. We further found that he failed to satisfy the "cause" portion of the cause-and-prejudice test because the petition did not raise any claims that could not have been raised in earlier proceedings. *Id.* ¶ 16. We thus concluded that the defendant's *Miller* argument was not properly before us. *Id.* ¶ 17. We then noted in *dicta* that *Miller* was not violated because the defendant here was "afforded a 'sentencing hearing where natural life imprisonment [was] not the only available sentence.' " *Id.* ¶ 19 (quoting *Morfin*, 2012 IL App (1st) 103568, ¶ 59).

¶ 15 Subsequently, Illinois courts, including this court, have relaxed the forfeiture rule further than this court was willing to do in the defendant's first appeal. In *People v. Luciano*, a defendant filed a postconviction petition raising several challenges to his conviction. *People v. Luciano*, 2013 IL App (2d) 110792, ¶ 38. He did not challenge the constitutionality of his sentence, however. *Id.* ¶ 46. The trial court dismissed his petition in July 2011, which was nearly a year before the Supreme Court issued its decision in *Miller*. *Id.* ¶ 39. The defendant argued on appeal that his sentence was unconstitutional

under *Miller*. *Id.* ¶ 43. The Second District rejected the State's contention that the defendant had forfeited this argument. *Id.* ¶¶ 46-47. The court explained that an unconstitutional sentence is void and may therefore be challenged at any time. *Id.* ¶ 48.

¶ 16 Similarly, in *People v. Johnson*, this court considered an appeal from a trial court order which denied a postconviction petition before the Supreme Court issued its opinion in *Miller*. *People v. Johnson*, 2013 IL App (5th) 110112, ¶ 8. On appeal, the defendant challenged his sentence on the basis of *Miller*, which was decided while the matter was pending on appeal. *Id.* In rejecting the State's forfeiture argument, we first noted that the petition in that case alleged that the defendant's sentence was unconstitutional because it did not " 'reflect *** his ability to be rehabilitated' " and because it was " 'cruel.' " *Id.* ¶ 13. We then stated, "We also note that *Miller v. Alabama* has only been recently decided and to ignore it and its applicability in the instant case would constitute a serious injustice." *Id.*

¶ 17 Most importantly, our decision not to address the merits of the defendant's *Miller* claim was further undermined by the Illinois Supreme Court in *People v. Davis*, 2014 IL 115595, *cert. denied*, 574 U.S. ___, 135 S. Ct. 710 (2014). There, the supreme court addressed the applicability of the cause-and-prejudice test and reached the merits of a *Miller* claim raised in a situation procedurally similar to the case before us. The defendant in *Davis* filed a petition for leave to file a successive postconviction petition. The petition, filed before *Miller* was decided, challenged the defendant's natural-life sentence under the eighth amendment. This argument was based on *Graham v. Florida*, 560 U.S. 48 (2010). *Davis*, 2014 IL 115595, ¶ 9. On appeal, he also argued that the

sentence was unconstitutional pursuant to *Miller*. *Id.* ¶ 10. The appellate court applied *Miller* retroactively (*id.*), and the State appealed that ruling to the Illinois Supreme Court (*id.* ¶¶ 11, 22). The supreme court held that *Miller* announced a new substantive rule of constitutional law to be applied retroactively. *Id.* ¶¶ 34-40; see also *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S. Ct. 718, 735 (2016); *Johnson*, 2013 IL App (5th) 110112, ¶ 22.

¶ 18 Significantly for purposes of this appeal, the *Davis* court went on to consider the relevance of *Miller* in applying the cause-and-prejudice test. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) contemplates that a defendant will file only one petition. *Davis*, 2014 IL 115595, ¶ 14 (citing *Pitsonbarger*, 205 Ill. 2d at 456). With limited exceptions not relevant here, a defendant will not be granted leave to file a successive petition unless he can establish both cause and prejudice for his failure to raise his claims in an earlier petition. *Id.* To establish "cause," a defendant must allege that an "objective factor external to the defense" prevented counsel from raising the claim earlier. *Id.* "Prejudice" means an asserted constitutional error so serious that the resulting conviction or sentence violates due process. *Id.* The *Davis* court explained that "*Miller*'s new substantive rule constitutes 'cause' because it was not available earlier to counsel [citation], and [it] constitutes prejudice because it retroactively applies to [the] defendant's sentencing hearing." *Id.* ¶ 42. The supreme court subsequently directed this court to vacate our previous decision in this case and directed us to consider whether, in light of its holding in *Davis*, a different result was warranted. *People v. Holman*, No. 115597 (Ill. Jan. 28, 2015) (supervisory order).

¶ 19 Upon reconsideration, we find that it is appropriate to address the merits of the defendant's *Miller* claim. Our previous finding that the defendant failed to meet the cause-and-prejudice test is contrary to the supreme court's ruling on that issue in *Davis*. In addition, in light of *Johnson* and *Luciano*, we believe it is appropriate to relax the forfeiture rule and consider the defendant's arguments even though the eighth amendment was not raised in the defendant's *pro se* petition. We now turn to those arguments.

¶ 20 The defendant argues that his sentence of natural life in prison violates the eighth amendment under the Supreme Court's holding in *Miller*. Constitutionality of sentencing schemes is a question of law. Our review, therefore, is *de novo*. *People v. Jones*, 223 Ill. 2d 569, 596 (2006).

¶ 21 The eighth amendment provides that " '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' " *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting U.S. Const., amend. VIII). This prohibition applies not only to forms of punishment that are "inherently barbaric," but also to sentences that are "disproportionate to the crime." *Id.* at 59. The Supreme Court has repeatedly emphasized that the requirement of proportionate sentencing is central to the protection afforded by the eighth amendment. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2463; *Graham*, 560 U.S. at 59. This means that sentences must be proportionate to both the offender and to the offense. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2463 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))).

¶ 22 *Miller* was one of a series of United States Supreme Court cases involving the proportionality of sentences imposed for serious crimes committed by juveniles. *Id.* at ___, 132 S. Ct. at 2464-65 (discussing *Graham* and *Roper*). These cases, like other eighth amendment cases, required the Court to consider both the nature of the offense and the characteristics of the offender. *Graham*, 560 U.S. at 60.

¶ 23 In considering the characteristics of young offenders, the Court explained that juveniles "are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at ___, 132 S. Ct. at 2464. One key distinction is that a juvenile's character is less fully formed and less permanently fixed than that of an adult. Thus, the actions of a juvenile offender are less likely than those of an adult to be the result of irreparable depravity. *Id.* (quoting *Roper*, 543 U.S. at 570). This fact makes the possibility of rehabilitation a particularly appropriate consideration. *Id.* at ___, 132 S. Ct. at 2468. Another important difference between juveniles and adults is that juveniles are more susceptible to negative outside influences, including peer pressure and familial pressure. *Id.* at ___, 132 S. Ct. at 2464 (quoting *Roper*, 543 U.S. at 569). The Court pointed out that a juvenile "cannot usually extricate himself" from a "brutal or dysfunctional" home environment. *Id.* at ___, 132 S. Ct. at 2468. A third critical distinction identified by the Supreme Court is the fact that juveniles are less mature, less responsible, more impulsive, and more likely to take risks than their adult counterparts. *Id.* at ___, 132 S. Ct. at 2464 (quoting *Roper*, 543 U.S. at 569). The Court explained in *Miller* that because of these features, juvenile defendants have both "diminished culpability and [a] heightened capacity for change." *Id.* at ___ , 132 S. Ct. at 2469.

¶ 24 In assessing the nature of the offense, the Court has drawn "a line 'between homicide and other serious violent offenses.' " *Graham*, 560 U.S. at 69 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). This is because the "Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Id.*

¶ 25 Finally, in considering whether a sentence itself is excessive or disproportionate, the Court has generally treated the death penalty differently from prison sentences. In death penalty cases, the Court has held that the eighth amendment requires "certain categorical restrictions." *Id.* at 59. By contrast, cases involving challenges to the proportionality of prison terms have instead required the Court to consider whether the length of the sentence is "grossly disproportionate" in light of all the circumstances of the particular case. *Id.* at 59-60. Such cases have not generally involved categorical restrictions. See *id.* at 61 (noting that a "categorical challenge to a term[ ]of[ ]years" was a question the Court had not previously considered). However, the Court has recognized that natural life without the possibility of parole is " 'the second most severe penalty permitted by law' " (*id.* at 69 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring, joined by O'Connor and Souter, JJ.))), and that such sentences "share some characteristics with death sentences" (*id.*). In *Graham* and *Miller*, the Court also recognized that a sentence of natural life without the possibility of parole is a harsher sentence when imposed on a juvenile than it is when it is imposed on an adult offender. This is because the juvenile will spend a longer time in prison as a result of this sentence

than will an adult offender. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2466; *Graham*, 560 U.S. at 70.

¶ 26 Applying these principles in *Graham*, the Supreme Court held the eighth amendment requires a categorical ban on sentences of natural life without the possibility of parole for crimes other than homicide that are committed by juveniles. *Graham*, 560 U.S. at 82. The Court took care to distinguish between homicide and other felonies. *Id.* at 69. The Court explained that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* This holding was therefore limited to nonhomicide cases. *Id.* at 82.

¶ 27 Two years later in *Miller*, the Court considered a challenge to mandatory sentences of natural life in prison imposed for murders committed by juveniles. That case involved appeals by two 14-year-old defendants convicted of murder. Each defendant was sentenced to life in prison without the possibility of parole pursuant to state laws that did not give sentencing courts the discretion to impose any other sentence. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2460. In determining that these sentences were not sanctioned under the eighth amendment, the Court reaffirmed that "*Graham*'s flat ban on life without parole applied only to nonhomicide crimes." *Id.* at ___, 132 S. Ct. at 2465. However, the Court explained:

> "But none of what [the *Graham* Court] said about children–about their distinctive (and transitory) mental traits and environmental vulnerabilities–is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning

implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.*

¶ 28 The Court then explained at length how mandatory sentencing schemes fail to take these features of youth into account. The Court explained:

> "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features–among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him–and from which he cannot usually extricate himself–no matter how brutal or dysfunctional. It neglects 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. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth–for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at ___, 132 S. Ct. at 2468.

In addition, the Court explained that mandatory sentencing schemes are flawed because they do not allow sentencing courts to differentiate between a 17-year-old defendant and a 14-year-old or between a shooter and an accomplice. *Id.* at ___, 132 S. Ct. at 2467-68.

¶ 29 In light of these considerations, the Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for

juvenile offenders." *Id.* at ___, 132 S. Ct. at 2469. The Court stated that this holding would not "foreclose a sentencer's ability" to impose such a sentence in homicide cases. *Id.* The Court noted, however, that "given all [the Court has] said *** about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* The Court further stated that its holding requires sentencing courts "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

¶ 30 The defendant acknowledges that the sentencing court in this case had the discretion to impose a sentence other than natural life. He argues, however, that his sentence runs afoul of *Miller* for two reasons. First, he argues that the court did not consider certain factors he contends the *Miller* Court required sentencing courts to consider. Second, he argues that, assuming *Miller* did not mandate consideration of set factors, there is no indication in the record that the sentencing court gave any weight to his status as a juvenile. We will consider these arguments in turn.

¶ 31 The defendant first argues that his sentence does not comport with the requirements of *Miller* because the sentencing court did not hold a "*Miller*-type" hearing at which it considered what he refers to as the *Miller* factors. In support of this contention, the defendant cites a South Carolina decision which identified the *Miller* factors as:

> "(1) the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate the risks and

> consequence'; (2) the 'family and home environment' that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the 'incompetencies associated with youth–for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys'; and (5) the 'possibility of rehabilitation.' " *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2468).

The defendant points out that the statutory factors in mitigation considered by the sentencing court in this case did not include any of these factors. See Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-5-3.1. As such, he contends, his sentence must be vacated and this cause must be remanded for a new sentencing hearing that fully complies with what he sees as the requirements of *Miller*.

¶ 32 In response, the State acknowledges that the *Miller* Court mandated consideration of the mitigating characteristics of youth. The State, however, contends that although the Court provided an illustrative list of some of those characteristics, it did not mandate consideration of any specific factors. We agree with the State.

¶ 33 We first note that the state courts that have addressed the question of how to apply *Miller* in the context of discretionary natural-life sentences have reached differing conclusions. See *State v. Riley*, 110 A.3d 1205, 1214 n.5 (Conn. 2015) (noting that "there is no clear consensus"). Some courts have found that *Miller* requires consideration of set factors associated with youth, as the South Carolina Supreme Court found in *Aiken*.

See, *e.g.*, *Riley*, 110 A.3d at 1216; *People v. Gutierrez*, 324 P.3d 245, 268-69 (Cal. 2014) (describing five factors courts must consider before sentencing juvenile defendants to life in prison without parole); *Bear Cloud v. State*, 2013 WY 18, ¶ 42, 294 P.3d 36 (Wyo. 2013) (setting forth seven factors courts must consider in sentencing juveniles to life in prison without parole (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2467-68)). Other courts have concluded that as long as sentencing courts have the discretion to impose sentences other than natural life in prison without the possibility of parole, *Miller* is not violated. See, *e.g.*, *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014); *Arredondo v. State*, 406 S.W.3d 300, 307 (Tex. App. 2013).

¶ 34 Still other courts have found that although the *Miller* Court did require sentencing courts to consider mitigating circumstances related to a juvenile defendant's youth, it did not require courts to consider any set list of factors. See, *e.g.*, *State v. Ali*, 855 N.W.2d 235, 256-57 (Minn. 2014) (explaining that sentencing courts must consider "any mitigating circumstances," including those discussed by the *Miller* Court); *State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 16 (finding that the factors adopted by the Wyoming Supreme Court in *Bear Cloud* "may prove helpful" to courts sentencing juvenile defendants, but refusing to require sentencing courts to make explicit findings with respect to any enumerated factors); *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (holding that the sentencing court in that case complied with the requirements of *Miller* by taking into account how juveniles are different from adults " 'and how those differences counsel against irrevocably sentencing them to a lifetime in prison' " (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469)).

¶ 35 We believe that this third approach is most consistent with the Court's analysis in *Miller*. We acknowledge that the factors enumerated by the South Carolina Supreme Court in *Aiken* track the language of *Miller*. Compare *Miller*, 567 U.S. at ___, 132 S. Ct. at 2468, with *Aiken*, 765 S.E.2d at 577. However, the *Miller* Court made these statements in the context of explaining "the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders." *Miller*, 567 U.S. at ___, 132 S. Ct. at 2467. The Court explained that such sentencing schemes, "by their nature, *preclude* a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." (Emphasis added.) *Id.* The Court went on to describe various characteristics and circumstances that mandatory sentencing schemes "preclude" and "prevent" sentencing courts from considering. *Id.* at ___, 132 S. Ct. at 2468. In announcing its holding, however, the Court stated only that "a judge or jury must have the opportunity to consider mitigating circumstances" (*id.* at ___, 132 S. Ct. at 2475), and that its holding would "require [sentencers] to take into account how children are different, and how those differences counsel against" imposing a sentence of life without parole (*id.* at ___, 132 S. Ct. at 2469).

¶ 36 Our conclusion that *Miller* did not require sentencing courts to consider an enumerated set of factors is strengthened by the Court's recent decision in *Montgomery v. Louisiana*. That decision gave the Court an opportunity to clarify its holding in *Miller*. At issue in *Montgomery* was whether *Miller* should be applied retroactively. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 725. In reaching the conclusion that *Miller* does apply retroactively, the Court first determined whether *Miller* announced "a new

substantive rule that, under the Constitution, must be retroactive." *Id.* at ___, 136 S. Ct. at 732. In making this determination, the Court explained that its holding in *Miller* "did more than require a sentencer to consider a juvenile offender's youth." *Id.* at ___, 136 S. Ct. at 734. Rather, the Court explained, "*Miller* determined that sentencing a child to life without parole is excessive for all but ' "the rare juvenile offender whose crime reflects irreparable corruption." ' " *Id.* (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573)). As such, the Court stated, its holding in *Miller* "rendered life without parole an unconstitutional penalty for" juvenile offenders whose crimes do not reflect irreparable corruption. *Id.*

¶ 37 The *Montgomery* Court acknowledged that the holding of *Miller* "has a procedural component." *Id.* The Court explained that this procedural component–a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors"–is necessary to effectuate *Miller*'s substantive holding by enabling sentencing courts "to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at ___, 136 S. Ct. at 735. The Court then discussed "the degree of procedure *Miller* mandated in order to implement its substantive guarantee." *Id.* The Court noted that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id.* The Court explained that it did not require such a finding because in announcing new substantive rules of constitutional law, the Court "is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.*

¶ 38 We acknowledge that the *Montgomery* Court's statements regarding the procedure mandated by *Miller* were *dicta*. The defendant in *Montgomery* was sentenced pursuant to a mandatory sentencing scheme. *Id.* at ___, 136 S. Ct. at 726. Thus, the Court was not called upon to consider whether the procedure followed by the sentencing court was adequate to comport with the requirement of *Miller*. Nevertheless, these statements provide useful guidance in interpreting *Miller*. The *Montgomery* Court's statements regarding its intention to limit the scope of any procedural requirement lead us to conclude that the Court did not intend to require sentencing courts to make findings related to specific enumerated factors.

¶ 39 We reiterate that the *Montgomery* Court stated that the purpose of *Miller*'s procedural component is to separate those rare juvenile defendants who are incorrigible–and may therefore be sentenced to life in prison without parole–from those juvenile defendants whose crimes reflect their transient immaturity–who may not receive such a sentence. *Id.* at ___, 136 S. Ct. at 734. For the reasons that follow, we find that the procedure followed here was adequate to serve this purpose and, as such, sufficient to comply with the requirements of *Miller*.

¶ 40 As we noted earlier, the defendant's argument to the contrary focuses on the fact that the statutory factors in mitigation did not include the defendant's age or any of the mitigating circumstances associated with youth that were discussed in *Miller*. See Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-5-3.1(a). However, it is important to emphasize that pursuant to case law, sentencing courts in Illinois were not limited to consideration of the statutory factors in mitigation. As our supreme court explained in 1977, a few years

before the defendant in this case was sentenced, "A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977) (citing *People v. Bolyard*, 61 Ill. 2d 583, 589 (1975)). The court further explained that this "judgment depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, *social environment*, habits, *and age*." (Emphases added.) *Id.* (citing *People v. Dukett*, 56 Ill. 2d 432, 452 (1974)). It is also worth noting that Illinois law has long recognized a " 'marked distinction' " between juveniles and adults. *Leon Miller*, 202 Ill. 2d at 341-42 (quoting *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 423 (1894)). As such, existing law required the sentencing court to look beyond the statutory factors in mitigation and consider any mitigating circumstances, including the defendant's age and social environment. The court thus had the opportunity to consider all the mitigating circumstances related to the defendant's youth, as required in *Miller*. See *Miller*, 567 U.S. at ___, 132 S. Ct. at 2475.

¶ 41 *Miller*, however, requires not only that the sentencing court have the opportunity to consider these mitigating circumstances; it also requires that the court actually do so. See *id.* at ___, 132 S. Ct. at 2469. As the Supreme Court explained in *Montgomery*, this is necessary so that the sentencing court can determine whether the juvenile defendant is so irredeemably corrupt that a life sentence without the possibility of parole is constitutionally permissible. See *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734.

¶ 42 This brings us to the defendant's second argument. He argues that the sentencing court did not, in fact, consider the mitigating circumstances of his youth. In support of

this contention, he points to the court's statement at the hearing that it found "no mitigating factors." We believe this argument misconstrues the court's statement. As we discussed earlier, the court stated that it had considered the statutory factors in aggravation and mitigation and found no mitigating factors. The court then went on to state that it considered the evidence in the PSI and the evidence presented at trial, as well as the arguments of counsel at the sentencing hearing. The evidence in the PSI included evidence related to the defendant's youth and the mitigating features of youth, and defense counsel argued that the court should consider the defendant's youth. Thus, we do not interpret the court's statement as an indication that the court overlooked this important evidence.

¶ 43 As we discussed earlier, the PSI revealed that the defendant had a low IQ and was susceptible to being influenced by more intelligent peers. In addition, the court was aware of the defendant's age. (We note that on the first page of the PSI, the defendant's date of birth is mistakenly listed as August 20, 1960, instead of August 20, 1961. However, his birth date is accurately reflected elsewhere in the PSI and also on the warrant for the defendant's arrest. Moreover, the prosecutor stated at the sentencing hearing that the defendant was ineligible for the death penalty only due to "an accident of birth." Thus, the court was aware that the defendant was a juvenile at the time he committed the offense.) Although it is not clear from the court's statements how much weight the court gave these mitigating factors, we presume that the court takes into account mitigating evidence that is before it. *People v. Smith*, 214 Ill. App. 3d 327, 339 (1991).

¶ 44 In this case, there was also ample aggravating evidence. The psychiatrist who evaluated the defendant concluded that the defendant was not severely impaired enough to be unable to differentiate right from wrong. It is also worth noting that the defendant turned 18 only five weeks after the murder. Thus, his age alone is less of a mitigating factor than it might be for a much younger defendant. See *Miller*, 567 U.S. at ___ n.8, 132 S. Ct. at 2469 n.8 (noting that the holding of *Miller* would require sentencing courts to consider differences among juvenile defendants, enabling courts to distinguish between, for example, the 14-year-old defendants in *Miller* and 17-year-olds who commit "the most heinous murders" (internal quotation marks omitted)).

¶ 45 The sentencing court considered the circumstances of the crime and the evidence presented at trial. See *id.* at ___, 132 S. Ct. at 2468 (noting that the circumstances of the offense are a relevant consideration). This evidence showed that the defendant actively participated in the robbery and murder of a defenseless 83-year-old woman. See *Leon Miller*, 202 Ill. 2d at 341. Moreover, the probation officer who prepared the report found that the defendant's lack of remorse demonstrated that he had no potential to be rehabilitated. The defendant's own statement at the hearing denying that he was previously convicted of murder provided additional evidence of his lack of remorse. In addition, the PSI included the defendant's criminal record, which included three murder convictions over the course of three months as well as three juvenile delinquency adjudications, two of which were for serious felonies.

¶ 46 Defense counsel urged the court to consider the defendant's youth and fashion a sentence that offered him a chance for rehabilitation. The court expressly found that the

defendant had no rehabilitative potential. In the face of all this aggravating evidence, this finding does not indicate, without more, that the court failed to consider the mitigating evidence before it. Moreover, this is precisely the determination *Miller* requires sentencing courts to make. See *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735; *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469. We conclude that the sentencing hearing in this case comported with the requirements of *Miller*.

¶ 47 Alternatively, the defendant argues that the holding of *Miller* should be extended to require a categorical bar against even discretionary sentences of natural life in prison without the possibility of parole for crimes committed by juveniles. Before addressing the merits of this contention, we must first address the State's argument that this question is not properly before us.

¶ 48 The State argues that consideration of this question exceeds the scope of the supreme court's mandate. See *People v. Abraham*, 324 Ill. App. 3d 26, 30 (2001) (citing *People v. Craig*, 313 Ill. App. 3d 104, 106 (2000), and *People v. Bosley*, 233 Ill. App. 3d 132, 137 (1992)). We disagree. The supreme court directed us to reconsider our previous decision in light of its holding in *Davis* and "to determine if a different result is warranted." *People v. Holman*, No. 115597 (Ill. Jan. 28, 2015) (supervisory order). As discussed previously, in light of *Davis*, we found it appropriate to consider the defendant's constitutional challenge on its merits. Consideration of the defendant's challenge on its merits necessarily includes consideration of all of his related arguments. See *People v. Harris*, 388 Ill. App. 3d 1007, 1013 (2009) (rejecting a claim that the trial court exceeded the appellate court mandate by considering issues raised in amended

pleadings filed after remand); *Abraham*, 324 Ill. App. 3d at 31 (explaining that "the obvious implication of [a] remand order" is for the case to "continue in an ordinary manner"). We will therefore address the defendant's argument.

¶ 49 In support of his argument, the defendant points out that the *Miller* Court explicitly declined to decide whether the eighth amendment requires a categorical bar on sentences of life without parole for any juvenile defendant. The defendants there argued that such a categorical bar was constitutionally required, at least for defendants 14 or younger. The Court found it unnecessary to consider this alternative argument. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469. Likewise, although the *Davis* court stated that the "special status" of juvenile defendants recognized in *Graham* and *Miller* did not preclude a sentence of natural life without parole for all juveniles who actively participate in multiple murders, the court did not consider this question in the context of an argument for the extension of *Miller*. *Davis*, 2014 IL 115595, ¶ 45. Thus, the defendant is correct in asserting that the issue remains an open question. However, we are not persuaded by his contention that we must now expand the Court's holding.

¶ 50 We reach this conclusion for two reasons. First, as we have discussed, both *Montgomery* and *Miller* explicitly state that, in rare instances, a sentence of natural life in prison without the possibility of parole will be appropriate for juvenile defendants. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734 (noting that "life without parole could be a proportionate sentence" for the rare juvenile defendant "whose crimes reflect irreparable corruption"); *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469 (stating that its

holding does not foreclose sentencing courts from determining that such a sentence is appropriate).

¶ 51 Second, Illinois courts that have remanded cases for resentencing pursuant to *Miller*–including this court and our supreme court–have consistently indicated that a natural-life sentence might still be appropriate on remand so long as the court has the discretion to consider other sentences. See *Davis*, 2014 IL 115595, ¶ 43; *Johnson*, 2013 IL App (5th) 110112, ¶ 24; *Luciano*, 2013 IL App (2d) 110792, ¶ 63; *Morfin*, 2012 IL App (1st) 103568, ¶ 59. We decline to depart from this interpretation. (We note that in *Montgomery*, the Supreme Court held that states could remedy *Miller* violations by allowing defendants serving life sentences for murders committed as juveniles to apply for parole, thereby making remand for new sentencing hearings unnecessary. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736. This does not alter our conclusion.)

¶ 52 The defendant argues, however, that the holding of *Miller* should be extended because, as he correctly asserts, eighth amendment jurisprudence evolves to reflect changing social mores and "evolving standards of decency" (internal quotation marks omitted) (*Graham*, 560 U.S. at 58; *Leon Miller*, 202 Ill. 2d at 339). We are not persuaded. The Supreme Court issued its decision in *Miller* less than four years ago. Its decision in *Montgomery*, which reaffirmed its reasoning in *Miller*, was issued just weeks ago. The defendant does not explain how societal standards of decency have evolved in this short time to require this court to embrace a more expansive view of what constitutes cruel and unusual punishment than the one adopted by the Supreme Court in these very recent cases.

¶ 53 For the foregoing reasons, we affirm the order of the trial court denying the defendant's petition for leave to file a successive postconviction petition.

¶ 54 Affirmed.

2016 IL App (5th) 100587-B

NO. 5-10-0587

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD HOLMAN, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Madison County. No. 80-CF-5 Honorable Charles V. Romani, Jr., Judge, presiding.

Opinion Filed: March 3, 2016

Justices: Honorable Melissa A. Chapman, J.

Honorable S. Gene Schwarm, P.J., and Honorable James R. Moore, J., Concur

Attorneys for Appellant Michael J. Pelletier, State Appellate Defender, Ellen J. Curry, Deputy Defender, Robert S. Burke, Assistant Appellate Defender, Office of the State Appellate Defender, Fifth Judicial District, 909 Water Tower Circle, Mt. Vernon, IL 62864

Attorneys for Appellee Hon. Thomas D. Gibbons, State's Attorney, Madison County Courthouse, 157 N. Main Street, Suite 402, Edwardsville, IL 62025, Patrick Delfino, Director, Stephen E. Norris, Deputy Director, Whitney E. Atkins, Staff Attorney, Office of the State's Attorneys Appellate Prosecutor, 730 East Illinois Highway 15, Suite 2, P.O. Box 2249, Mt. Vernon, IL 62864

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs. Case No. 80-CF-5

RICHARD Holman, IDOC #N-06132
Defendant-Appellant.

NOTICE OF APPEAL

An appeal is taken from the prder or judgment s described below:

1) Appeal is taken to the Illinois Appellate Court, Fifth District.

2) Name of appellant and address to which notices shall be sent:

RICHARD HOLMAN, IDOC #N-06132
PONTIAC CORRECTIONAL CENTER
700 W. Lincoln Street
P.O.Box 99
Pontiac, Illinois 61764

3) Name and address of appellant's requested attorney on appeal is:

STATE APPELLATE DEFENDER
Fifth Judicial District
117 North Tenth Street-Suite 300
Mt.Vernon, Illinois 62864

4) Date of order: November 9,2010

5) Offenses of which convicted: First Degree Murder

6) Sentences: Natural Life on April 24,1981

7) Nature of orders and judgments appealed from: Denial of Motion for Leave To File A Successive Post-Conviction Petition, and Petition For Post-Conviction Relief, order enterd on November 9,2010.

8) Pro Se Defendant-Appellant request a copy of transcripts of the proceedings/order denying motion for leave to file successive

post-conviction petition on November 9,2010.

Date: November 29,2010

Respectfully submitted,

RICHARD HOLMAN,IDOC #N-06132
Pontiac Correctional Center
700 W. Lincoln Street
P.O.Box 99
Pontiac,Illinois 61764

C00499

IN THE THIRD JUDICIAL CIRCUIT COURT 120655

12/05/2016 [illegible]

MADISON COUNTY, ILLINOIS

People of the State of Illinois,
Plaintiff/Petitioner

Vs. No. 80-CF-5

RICHARD HOLMAN, IDOC #N-06132
Defendant/Respondent

PROOF/CERTIFICATE OF SERVICE

TO: Clerk of the Circuit Court-Criminal Cts Bldg
509 Ramey Street
Edwardsville, Illinois 62025

TO: State's Attorney of Madison County
Administration Building
157 N. Main Street
Edwardsville, Illinois 62025

PLEASE TAKE NOTICE that on November ~~29~~ 30, 2010, I placed the attached or enclosed documents in the institutional mail [Proof/Certificate of Service, Notice of Appeal] at Pontiac Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service: The Original and three(3) copies to the Clerk, and One(1) copy of the same to the State's Attorney of Madison County, Illinois.

DATED: November 29, 2010 /s/ Richard Holman

Subscribed and sworn to before me this 30th day of Nov. 2010

Notary Public

OFFICIAL SEAL
MARK SPENCER
Notary Public - State of Illinois
My Commission Expires

C00500

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RICHARD HOLMAN, Petitioner-Appellant.	Petition for Leave to Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-10-0587. There heard on Appeal from the Circuit Court of Madison County, Illinois, No. 80-CF-5. Honorable Charles V. Romani, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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A-4

IN THE

SUPREME COURT OF ILLINOIS

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

PETITION FOR LEAVE TO APPEAL

PRAYER FOR LEAVE TO APPEAL

Richard Holman, petitioner-appellant, hereby petitions this Court for leave to appeal, pursuant to Supreme Court Rules 315 and 612, from the judgment of the Appellate Court, affirming his sentence of natural life imprisonment.

STATUTE INVOLVED

Sentence of Imprisonment for Felony.

(a) A sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for murder, a term shall be not less than 20 years and not more than 40 years, or if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment[.]

Ill. Rev. Stat. 1978, ch. 38, par. 1005-8-1.

Murder – Death Penalties – Exceptions – Separate Hearings – Proof – Findings – Appellate Procedures – Reversals.

***

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

***

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection

(a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts[.]

Ill. Rev. Stat. 1978, ch. 38, § 9-1.

PROCEEDINGS BELOW

The Appellate Court affirmed Richard Holman's sentence on December 31, 2012. No petition for rehearing was filed. A copy of the Appellate Court's judgment is appended to this petition.

COMPELLING REASONS FOR GRANTING REVIEW

The Supreme Court of the United States, in *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012), held that the statute authorizing the mandatory imposition of a natural life sentence against a juvenile defendant convicted of homicide is unconstitutional and void under the Eighth Amendment (U.S. Const., Amend. VIII). Following the reasoning of *Miller*, the same rule applies to statutes authorizing the discretionary imposition of a natural life sentence against a juvenile defendant convicted of homicide. Under the holdings of the Appellate Court in *People v. Morfin*, 2012 IL App (1st) 103568, *leave to appeal pending*, and *People v. Williams*, 2012 IL App (1st) 111145, the rule of *Miller* applies retroactively. The Appellate Court in the instant case erred in finding that the constitutional prohibition against cruel and unusual punishment (*see also* Ill. Const. Art. I, §11) did not work to invalidate the statute under which the defendant was sentenced, and make void the sentence of life imprisonment without parole.

STATEMENT OF FACTS

The defendant, Richard Holman, was born August 20, 1961. (R.C 103) He and a co-defendant, Girvies Davis, were charged with the murder of Esther Sepmeyer on July 13, 1979.[1] (R.C1) Mr. Holman told the police that Davis shot Sepmeyer (R.494-95), and Davis told the police that Mr. Holman shot Sepmeyer. (R.540) Davis and Mr. Holman were charged with intentional or knowing first-degree murder for shooting Sepmeyer, felony murder by causing Sepmeyer's death during a burglary, and felony murder by shooting Sepmeyer during a burglary. (R.C1)

At the jury trial, the State had the jury instructed as to intentional murder and felony murder (R.C51, 54, 55), and also as to accountability (R.C83). In closing argument, the State argued that Mr. Holman was guilty either for causing Sepmeyer's death during a felony (R.622-23), or for being accountable for her death (R.623-24). During rebuttal, the State argued both theories. (R.639) The jury was provided general verdict forms only, finding Mr. Holman guilty. (R.C67, 89)

At sentencing on April 24, 1981, the State presented evidence that Mr. Holman had been convicted of the May 12, 1979, murder of John Oertel[2]

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[1]Girvies Davis received a sentence to be put to death (large manila envelope in the record on appeal), and was executed on May 17, 1995, for the murder of Charles Biebel.

[2]Oertel's name is sometimes spelled "Ortel" in the record on appeal, but his death certificate (People's Exhibit # 103, contained in the large manila envelope in the record) gives his name as "Oertel". The indictment charging Davis and Mr. Holman with his murder spells his name as "Oertel." The official

(R.733) and the August 30, 1979 (People's Exhibit 112 contained in the large manila envelope in the record on appeal) murder of Frank Cash. (R731)[3] The State asked for a sentence of life without parole pursuant to "Chapter 38, Section 1005-81" [sic]. (R.734) Without giving its reasons therefore, the court sentenced Mr. Holman to serve a sentence of natural life. (R.742; C115) A life sentence was available if the defendant actually killed the person during a forcible felony (Ill. Rev. Stat., 1978, Ch. 38, §9-1(b)(6)), but later the court clarified that a discretionary life sentence was available only because Mr. Holman had already been convicted of two murders. (R.752-53)

The instant appeal arose after Mr. Holman filed a "*Pro Se* Motion for Leave to File a Successive Post-Conviction Petition." (R.C472-73) An allegation in the post-conviction petition he attached to his motion was that his sentence was void *ab initio* because the sentencing statute from the time of his sentencing was unconstitutional. (R.C480) The statutes being attacked by Mr. Holman were the version of the sentencing statutes (Ill. Rev. Stat. 1980, ch. 38, § 1005-8-1(a)(1) and Ill. Rev. Stat. 1978, ch. 38, § 9-1(b)) in effect at the time of his sentencing, but not in effect at the time of the crime. Those statutes made the imposition of a life sentence mandatory where the defendant was convicted of murdering two or more persons. On November 9, 2010, the circuit court denied leave to file the post-conviction petition. (R.C493-94)

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spelling is used here.

[3]The record page numbers skip from R.731 to R.733. However, internal pagination and grammatical spelling show that the skip in the number was a scrivener's error.

In the Appellate Court, Mr. Holman argued that it was the 1978 statute (which allowed discretionary sentences of natural life) which was unconstitutional and void. The basis of this argument was that the 1978 statute allowed for the imprisonment of juveniles for life, without ever providing a parole hearing.

ARGUMENT

In *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012), the Supreme Court of the United States explained that a statute is unconstitutional if it does not account for the youth of a juvenile defendant when sentencing that defendant to a lifetime of imprisonment without a system of parole hearings. The reason why such a statute violates the constitutional prescription against cruel and unusual punishment (U.S. Const., Amend. VIII; Ill. Const. Art. I, §11) is because the statute does not provide a method by which a youthful offender can ever show that he should be allowed to leave prison. The importance of *Miller* to the instant case is enhanced based upon the Supreme Court's reliance in that case upon two earlier cases – *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. ___, 130 S.Ct. 2011 (2010). *Roper* bans the discretionary imposition of capital punishment for juveniles. *Graham* bans the discretionary imposition of natural life sentences for juveniles in nonhomicide cases. Under the reasoning of those cases, the discretionary imposition of a sentence of life without parole for a juvenile in a homicide case is likewise unconstitutional.

In *Roper*, the Supreme Court held that discretionary capital punishment for juveniles in homicide cases is unconstitutional. *Roper*, 543 U.S. 551, 573-74 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.") In *Graham*, the Supreme Court held that discretionary (and, by implication,

mandatory) sentences of life without parole for juveniles in nonhomicide cases is unconstitutional. *Graham*, 560 U.S. ___, 130 S.Ct. 2011, 2034 ("this Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.") In *Miller*, the Supreme Court held that mandatory sentences of life without parole for juveniles in homicide cases is unconstitutional. *Miller*, 132 S.Ct. 2455, 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.") This left unanswered the question of whether discretionary life without parole was constitutional in juvenile homicide cases.

In *Miller*, the Supreme Court relied upon the *Roper* and *Graham* emphasis on the "distinctive attributes of youth" in diminishing the justification behind imposing the harshest sentences on juvenile offenders, who commit terrible crimes. *Miller*, 132 S.Ct. 2455, 2458. The reason behind that emphasis is because the heart of the "punishment as retribution" rationale relates to an offender's blameworthiness, and a juvenile is generally less blameworthy than an adult. *Miller*, 132 S.Ct. 2455, 2465 (relying upon *Graham*, 130 S.Ct. 2011, 2028; and *Roper*, 543 U.S. 551, 571). The rationale of "punishment as deterrence" also does not work in the context of juveniles because "'the same characteristics that render juveniles less culpable than adults suggest ... that juveniles will be less susceptible to deterrence'", and thus less likely to contemplate potential punishment. *Miller*, 132 S.Ct. 2455, 2465, *quoting Graham*, 130 S.Ct. 2011, 2028, *quoting Roper*, 543 U.S. 551, 571. Deciding that

a juvenile offender forever will be a danger to society requires making a judgment that he is incorrigible, but incorrigibility is inconsistent with youth. *Miller*, 132 S.Ct. 2455, 2465, *citing Graham*, 130 S.Ct. 2011, 2029, *quoting Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968). Finally, rehabilitation cannot justify a sentence of life without parole because that sentence "'forswears altogether the rehabilitative ideal.'" *Miller*, 132 S.Ct. 2455, 2465, *quoting Graham*, 130 S.Ct. 2011, 2030. The view that a juvenile cannot be rehabilitated reflects "'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." *Miller*, 132 S.Ct. 2455, 2465, *quoting Graham*, 130 S.Ct. 2011, 2030.

In summarizing the viewpoint expressed in *Graham*, the *Miller* court stated, "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile". *Miller* 132 S.Ct. 2455, 2465. At its most fundamental level,

> *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate.

Miller, 132 S.Ct. 2455, 2465-66. Relying further upon *Graham*, the Supreme Court stated, "'An offender's age,' we made clear in *Graham*, 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" *Miller*, 132 S.Ct.

2455, 2466, *quoting Graham*, 130 S.Ct. 2011, 2031.

Life without parole shares characteristics of death sentences unshared by any other sentence – imprisoning an offender until his death alters his life by an irrevocable forfeiture. *Miller*, 132 S.Ct. 2455, 2466, *citing Graham*, 130 S.Ct. 2011, 2027. "And this lengthiest possible incarceration is an 'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" *Miller*, 132 S.Ct. 2455, 2466, *quoting Graham*, 130 S.Ct. 2011, 2028. Because having no chance at parole makes a natural-life akin to the death penalty, the Supreme Court of the United States treats that punishment similarly to the death penalty. *Miller*, 132 S.Ct. 2455, 2466.

> "[Y]outh is more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). It is a time of immaturity, irresponsibility, "impetuousness[,] and recklessness."*Johnson v. Texas*, 509 U.S. 350, 368 (1993). It is a moment and "condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings*, 455 U.S. 104, 115. And its "signature qualities" are all "transient." *Johnson*, 509 U.S. 350, 368."

Miller, 132 S.Ct. 2455, 2467. Relying on *Graham*, 130 S.Ct. 2011, 2030, *Miller* concluded that a "'State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 132 S.Ct. 2455, 2469, *quoting Graham*, 130 S.Ct. 2011, 2030.

"By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of

disproportionate punishment." *Miller*, 132 S.Ct. 2455, 2469. The Supreme Court did not declare all juvenile sentences of life without parole to be unconstitutional, but it did require that a sentencing scheme allow for how juveniles are different, and how " those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S.Ct. 2455, 2469.

The sentencing scheme in Illinois immediately prior to the crime in this case did allow for eventual parole hearings for a 17-year old convicted of homicide. Ill. Rev. Stat., 1977, Ch. 38, §1003-3-3(a)(2). Under *Miller* and *Graham*, a discretionary juvenile sentence of life without parole pursuant to that statute might be found to be constitutional if the sentence held out the hope that the offender could one day gain his release from imprisonment. But Mr. Holman does not have that hope under the sentencing scheme in effect at the time of the crime (Ill. Rev. Stat., 1978, Ch. 38, §1005-8-1).

A sentencing scheme such as the one in this case (allowing discretionary life without parole) has already been found to be unconstitutional under *Miller*. *See Daugherty v. State*, 96 So.3d 1076, (Fla. App. 4th Dist. 2012), *leave to appeal dismissed*, (Fla., # SC12-2410, unpublished order issued on December 7, 2012).

No parole means no hope. It is unconstitutional to sentence a juvenile to a life without hope, to imprisonment with never a parole hearing. Because the sentencing law in effect on July 13, 1979, allowed for the imposition of a life without parole sentence upon a juvenile homicide defendant, that law is unconstitutional.

If the statute under which a defendant is sentenced is unconstitutional,

then the sentence imposed is void. *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004); *People v. Jardon*, 393 Ill. App. 3d 725, 740 (1st Dist. 2009). In *Thompson*, the defendant filed a post-conviction petition, which did not challenge his sentence, and which was dismissed summarily by the circuit court. In the Appellate Court, the defendant did not challenge the sentence. In this Court, for the first time, the defendant raised the issue that the statute under which he was sentenced was unconstitutional. In addressing whether a reviewing court could entertain the defendant's issue, this Court stated:

> A void order may be attacked at any time or in any court, either directly or collaterally. An argument that an order or judgment is void is not subject to waiver. Defendant's argument that the extended-term portion of his sentence is void does not depend for its viability on his postconviction petition. In fact, courts have an independent duty to vacate void orders and may sua sponte declare an order void.

Thompson, 209 Ill. 2d 19, 27.

A statute is void *ab initio* under a new constitutional rule if the new rule renders the statute facially unconstitutional. *Lucien v. Briley*, 213 Ill. 2d 340, 344 (2004). A statute is facially unconstitutional if there are no circumstances in which it could be validly applied. *Briley*, 213 Ill. 2d 340, 344. The rule of *Miller*, that a mandatory sentence of life without parole for juveniles is unconstitutional, is a new rule. *People v. Williams*, 2012 IL App (1st) 111145, ¶ 47; *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 56, *leave to appeal pending*. The sentencing scheme in the instant case – on its face – prohibits parole hearings for juveniles serving sentences of natural life. Ill. Rev. Stat. 1978, ch. 38, par. 1003-3-3(d), and Ill. Rev. Stat. 1978, ch. 38, par. 1003-3-4(a). It is the

denial of the right to a parole hearing that makes the statutory scheme in this case unconstitutional, and under that scheme – on its face – no juvenile homicide defendant can become eligible for a parole hearing. Thus, the sentencing scheme is void *ab initio*.

The Appellate Court, in *Morfin*, and *Williams*, held that the holding of *Miller* applies retroactively. *Morfin*, 2012 IL App (1st) 103568, ¶ 56; *Williams*, 2012 IL App (1st) 111145, ¶ 52. Likewise, the legal underpinning of *Miller* – that juveniles may not be sentenced to a life where they can never prove to a parole board that they are worthy of release – should be applied retroactively to this case.

There was no jurisdiction to sentence Mr. Holman under an unconstitutional statute. The judgment order sending Mr. Holman to prison was a void order, and that order may be challenged in this appeal.

CONCLUSION

Richard Holman, petitioner-appellant, respectfully requests that this Court grant leave to appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Robert S. Burke, certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 315(d). The length of this petition, excluding pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters to be appended to the petition under Rule 315(c) is 16 pages.

/s/Robert S. Burke
ROBERT S. BURKE
Assistant Appellate Defender

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601;

Mr. Stephen Norris, Deputy Director, State's Attorneys Appellate Prosecutor, 730 E. Illinois Hwy 15, Ste. #2, P.O. Box 2249, Mt. Vernon, Illinois 62864;

Mr. Richard Holman, Register No. N06132, Pontiac Correctional Center, 700 West Lincoln St., P.O. Box 99, Pontiac, IL 61764.

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 February 4, 2013. On that same date, we mailed three copies to the Attorney General of Illinois, three copies to the State's Attorneys Appellate Prosecutor and one copy to the Petitioner in envelopes deposited in a U.S. mail box in Mt. Vernon, Illinois, with proper postage prepaid. The original and nine copies of the Petition will be sent to the Clerk upon receipt of the electronically submitted filed stamped petition.

/s/Robert S. Burke
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APPENDIX

Richard Holman, Petitioner

Appellate Court Decision

***** Electronically Filed *****

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Supreme Court Clerk

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2012 IL App (5th) 100587-U

NO. 5-10-0587

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD HOLMAN, Defendant-Appellant.	Appeal from the Circuit Court of Madison County. No. 80-CF-5 Honorable Charles V. Romani, Jr., Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Presiding Justice Spomer and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied the defendant leave to file a third petition for postconviction relief.

¶ 2 The defendant, Richard Holman, appeals from the trial court's order denying him leave to file a successive petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 In July 1979, 83-year-old Esther Sepmeyer resided in a rural Madison County farmhouse with her grandson, Rodney.

"When [Rodney] returned from work on July 13[,] he found his grandmother lying up against her bed with a bullet wound on the right side of her face. The bedroom and kitchen were in disarray. A new Remington semi-automatic .22 caliber rifle had been

taken from its case and a television, stereo turntable, lawn mower[,] and radio were missing." *People v. Holman*, 115 Ill. App. 3d 60, 62 (1983).

Esther was pronounced dead at the scene, and an ensuing homicide investigation led to the arrest of the defendant and Girvies Davis, both of whom made incriminating statements when questioned by the police. Notably, Esther was killed five weeks before the defendant's eighteenth birthday.

¶ 5 In March 1981, a Madison County jury found the defendant guilty of first-degree murder (Ill. Rev. Stat. 1979, ch. 38, ¶ 9-1). At trial, the State's evidence established, *inter alia*, that the defendant's fingerprints had been found on a metal cabinet where the stolen rifle had been stored and that the missing radio and lawnmower had been discovered in Davis's home. The jury also heard that when asked about Esther's murder, the defendant had stated that Davis had shot her, while Davis had claimed that the defendant had done so. The jury was ultimately instructed as to the law of accountability (Ill. Rev. Stat. 1979, ch. 38, ¶ 5-2) and returned a general verdict of guilty.

¶ 6 In April 1981, the cause proceeded to a sentencing hearing, where the State presented evidence that the defendant had two prior convictions for first-degree murder in St. Clair County, *i.e.*, case number 79-CF-592, in which he was tried and convicted of murdering John Ortel, and case number 79-CF-720, in which he was tried and convicted of murdering Frank Cash. Referencing the defendant's prior convictions and arguing that the defendant had consistently demonstrated that he "deserve[d] to be removed from society for the rest of his life," the State subsequently asked the trial court to sentence the defendant to natural life in prison. See Ill. Rev. Stat. 1979, ch. 38, ¶¶ 9-1(b)(3), 1005-8-1(a)(1) (giving the trial court the discretion to impose a natural-life sentence where "the defendant has been convicted of murdering two or more individuals"). The State also commented on the senseless nature of Esther's death. Noting that the defendant was a "very young man," defense counsel urged

the trial court to consider "some other alternative than that requested by the State" and thereby give the defendant a future "opportunity to again participate in society." Thereafter, expressing its agreement with the State's position regarding the defendant's dangerousness and rehabilitative potential, the court sentenced him to natural life.

¶ 7 In April 2001, arguing that his natural-life sentence was imposed in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant filed a petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 to 122-8 (West 2000)). In September 2001, the trial court entered a written order dismissing the petition. The defendant subsequently appealed, but for reasons not apparent from the record, the appeal was later dismissed. *People v. Holman*, No. 5-01-0783 (2002).

¶ 8 In December 2001, arguing that the statute under which he had been sentenced had been enacted in violation of the single-subject clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 8(d)), the defendant filed a second petition for postconviction relief pursuant to the Act. In May 2002, the trial court entered a written order dismissing the petition. The defendant subsequently appealed, but again, for reasons not apparent from the record, the appeal was later dismissed. *People v. Holman*, No. 5-02-0370 (2002).

¶ 9 In August 2009, arguing that his natural-life sentence was void, the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In November 2009, the trial court entered a written order dismissing the petition. The defendant subsequently appealed, and in November 2011, we affirmed the trial court's judgment. *People v. Holman*, No. 5-09-0678 (2011) (unpublished order under Supreme Court Rule 23).

¶ 10 In October 2010, the defendant filed a third petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 to 122-7 (West 2010)) and a motion for leave to file the petition. In his third postconviction petition, the defendant alleged that the statute under

which he had been sentenced was unconstitutional, that the procedure by which he had been sentenced was unconstitutional, and that he was "actually innocent" of the "invalid aggravating factors" upon which his sentence had been based. Notably, the defendant did not claim that his natural-life sentence violated the eighth amendment's prohibition of "cruel and unusual punishments." U.S. Const., amend. VIII.

¶ 11 In November 2010, the trial court entered a written order denying the defendant's motion for leave to file his third petition for postconviction relief. Finding that the constitutional claims set forth in the third petition could have been raised in the defendant's prior petitions, the trial court concluded that the defendant had failed to satisfy the "cause" prong of the Act's cause-and-prejudice test. The court further noted that the defendant's purported claim of "actual innocence" was that he was not "eligible for the sentence [he] received." The present appeal followed.

¶ 12 DISCUSSION

¶ 13 The Act sets forth a procedural mechanism through which a defendant can assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court independently assesses a defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can move to dismiss his petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2010). If a defendant's petition is not dismissed at the second stage, it proceeds to the third

stage for an evidentiary hearing. *Edwards*, 197 Ill. 2d at 245.

¶ 14 The Act generally limits a defendant to one postconviction petition. *People v. Holman*, 191 Ill. 2d 204, 210 (2000). "Successive postconviction petitions are disfavored under the Act[,] and a defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court." *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010). Moreover, "until such time as leave is granted, a successive petition, though received or accepted by the circuit clerk, will not be considered 'filed' for purposes of further proceedings under the Act." *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010).

¶ 15 To obtain leave of court to file a successive petition for postconviction relief, a petitioner must either demonstrate "actual innocence" or satisfy the cause-and-prejudice test codified in section 122-1(f) of the Act. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-24. For purposes of the cause-and-prejudice test, "a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings," and "a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010). Both elements of the cause-and-prejudice test must be met "in order for the petitioner to prevail." *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). To demonstrate "actual innocence," a defendant must produce new and reliable evidence that "raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The denial of a motion for leave to file a successive postconviction petition is reviewed *de novo*. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 16 Here, when finding that the defendant failed to satisfy the "cause" component of the

cause-and-prejudice test, the trial court rightly concluded that nothing impeded the defendant's ability to raise the constitutional claims set forth in his third postconviction petition in either of his prior petitions. In fact, the arguments set forth in the defendant's third petition are similar to those advanced in his first and second petitions. The trial court also rightly concluded that the defendant's so-called actual-innocence claim was not an actual-innocence claim at all. The trial court thus properly denied the defendant's motion for leave to file his third petition for postconviction relief.

¶ 17 On appeal, citing *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"), *Graham v. Florida*, __U.S.__, __, 130 S. Ct. 2011, 2030 (2010) (holding that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole"), and *Miller v. Alabama*, __U.S.__, __, 132 S. Ct. 2455, 2469 (2012) (holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders"), the defendant argues that because he was 17 when Esther was murdered, his natural-life sentence is unconstitutional and void. This argument is not properly before us, however, and even if it were, we would reject it.

¶ 18 First of all, as the State correctly observes, the defendant raises his eighth amendment claim for the first time on appeal, and he "never confronts the salient issue of whether he actually met the cause-and-prejudice test." "[A]s a general rule[,] arguments raised for the first time on appeal are deemed waived" (*People v. Williams*, 267 Ill. App. 3d 82, 91 (1994)), and under general principles of procedural default, a defendant forfeits appellate review of any issue not raised in his petition for postconviction relief (*People v. Pendleton*, 223 Ill. 2d 458, 475 (2006)). Waiver aside, the defendant's argument also confuses a "void" sentence with a "voidable" one. See *People v. Ramirez*, 361 Ill. App. 3d 450, 454 (2005) (noting that

because the defendant's conviction and sentence were "not void, but merely voidable," he could not "challenge them at any time in any proceeding as he could a void judgment"). Lastly, under the circumstances, the defendant's reliance on *Roper*, *Graham*, and *Miller* is misplaced.

¶ 19 As previously indicated, *Roper* prohibits the imposition of the death penalty on a juvenile offender, but this is not a death penalty case. Under *Simmons*, a juvenile cannot be given a life sentence for a nonhomicide offense, but here, the defendant committed first-degree murder. Under *Miller*, a sentencing scheme is unconstitutional if it requires the imposition of a life sentence on a juvenile convicted of murder, and we recognize that the First District Appellate Court has held that *Miller* applies retroactively to cases on collateral review. *People v. Williams*, 2012 IL App (1st) 111145, ¶¶ 42-56; *People v. Morfin*, 2012 IL App (1st) 103568, ¶¶ 35-59. As stated by the First District, however, the *Miller* Court "refused to declare categorically that a minor cannot receive life imprisonment without parole for a homicide offense," and *Miller* only requires that a juvenile found guilty of murder be afforded a "sentencing hearing where natural life imprisonment is not the only available sentence." *Morfin*, 2012 IL App (1st) 103568, ¶¶ 38, 59.

¶ 20 Here, pursuant to the statutory scheme under which the defendant was sentenced, the trial court had the discretion to impose a natural-life sentence, but a natural-life sentence was not mandatory. See Ill. Rev. Stat. 1979, ch. 38, ¶ 9-1(b)(3), 1005-8-1(a)(1) (providing that where "the defendant has been convicted of murdering two or more individuals," the trial court "may sentence the defendant to a term of natural life imprisonment"). The defendant was thus afforded a sentencing hearing where his age was addressed and "a sentence other than natural life imprisonment" was "available for consideration." *Morfin*, 2012 IL App (1st) 103568, ¶ 56. The defendant's claim that his sentence was imposed in violation of *Miller* is accordingly without merit. *Cf. Williams*, 2012 IL App (1st) 111145, ¶¶ 32, 46-47, 54

(finding a 1996 statutory provision requiring the imposition of a natural-life sentence for 17-year-old defendant convicted of "murdering an individual under 12 years of age" unconstitutional in light of *Miller*); *Morfin*, 2012 IL App (1st) 103568, ¶¶ 11, 33, 56, 58-59 (finding a 2010 statutory provision requiring the imposition of a natural-life sentence for 17-year-old defendant convicted of "murdering more than one victim" unconstitutional in light of *Miller*).

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the trial court's judgment denying the defendant leave to file a third petition for postconviction relief is hereby affirmed.

¶ 23 Affirmed.

120655

IN THE

SUPREME COURT OF ILLINOIS

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

PETITION FOR LEAVE TO APPEAL

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IN THE

SUPREME COURT OF ILLINOIS

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

PETITION FOR LEAVE TO APPEAL

PRAYER FOR LEAVE TO APPEAL

Richard Holman, petitioner-appellant, hereby petitions this Court for leave to appeal, pursuant to Supreme Court Rules 315 and 612, from the judgment of the Appellate Court, Fifth Judicial District, affirming his conviction for first degree murder and his sentence of Natural life in the Department of Corrections imprisonment.

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PROCEEDINGS BELOW

On October 7, 2010, Mr. Holman filed a motion asking leave to file a successive post-conviction petition. (R.C472) As "cause" for the late filing, Mr. Holman averred that the collateral consequence of the life-without-parole sentence in this case caused him to be mentally incapacitated, and as "prejudice," he alleged that he is serving a sentence that is void *ab initio*. In the post-conviction petition attached to his motion (R.C474), he alleged that his sentence is void *ab initio*. (R.C480) The circuit court found that Mr. Holman had not shown "cause" for the late filing, and denied the motion seeking leave to file the post-conviction petition. (R.C493) The instant appeal followed.

In this appeal, the appellate court affirmed the judgment of the trial court. *People v. Holman*, 2012 IL App (5th) 100587-U. This Court then denied leave to appeal, but exercised its supervisory authority by directing the appellate court to vacate its December 31, 2012, judgment in this case, and "to reconsider its judgment in light of *People v. Davis*, 2014 IL 115595 (03/20/14), to determine if a different result is warranted."[1]

Following supplemental briefing, the appellate court affirmed Mr. Holman's conviction on March 3, 2016. No petition for rehearing was filed. A copy of the appellate court's judgment is appended to this petition.

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[1]Mr. Holman received a discretionary natural life sentence rather than a mandatory natural life sentence. (R.C348) This Court required the appellate court to reconsider the issue in light of *Davis*. During supplemental briefing, the State argued that *Miller* was inapplicable because it only applied to mandatory sentences. (State's brief at 3) The appellate court, without addressing this issue and in following the mandate of this Court, considered the case in light of *Davis* without expressly ruling on the issue of whether *Miller* applies to discretionary sentences.

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COMPELLING REASONS FOR GRANTING REVIEW

1. Following the Supreme Court's decision in *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S. Ct. 718, 735 (2016), and this Court's decision in *People v. Davis*, 2014 IL 115595 (2014), holding that *Miller v. Alabama*, 567 U.S. ___, ___, 132 S. Ct. 2455, 2469 (2012), was retroactive, defendants who were juveniles at the time they committed the convicted offense are requesting new sentencing hearings through a variety of legal mechanisms. As the trial courts and the appellate court sort through these claims, they must determine whether the juvenile received a hearing that comports with *Miller*. The *Miller* Court held that youth and its attendant circumstances must be considered by the trial court in sentencing a juvenile, but guidance is needed as courts continue to grapple with whether – and to what extent – a sentencing court must utilize the *Miller*-factors in determining whether a prior sentencing hearing is sufficient in light of *Miller*. *People v. Holman*, 2016 IL App (5th) 100587-B, ¶¶ 33-34; see also *People v. Nieto*, 2016 IL App (1st) 121604, ¶¶ 55-56(applying *Miller* to discretionary *de facto* life sentences to determine that the trial court did not properly "apply principles of law and science that had not yet been adopted by the court").

Even aside from the factors themselves, how do courts determine whether youth was actually considered by the trial court, especially in cases that took place decades ago? Is mere conjecture based on inferences drawn from decades old records sufficient, or is something more required based on *Miller*?

120655

In order to resolve this issue, the Illinois Appellate Court, at least up to this point, has had to rely on law from other jurisdictions, though the status of the law coming from outside Illinois is much like a legal buffet, with each state offering a different option. *Holman*, 2016 IL App (5th) 100587-B at ¶¶ 33-34. From a practical standpoint, what this means is that this Court ordered the appellate court to reconsider an issue based on Illinois law, and in order to properly do so, the appellate court had to look to law outside of Illinois to find guidance. Thus, guidance is needed from this Court in order to resolve the issue of what factors must be considered and to what extent the trial court must consider youth in order for a sentencing hearing to be constitutional in light of *Miller*.

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STATEMENT OF FACTS

Mr. Holman was convicted of murder via accountability. (R.C1, 63, 68; R.623,624,639) Mr. Holman was 17 years old at the time of the offense. (R.C103)

Prior to sentencing, the trial court ordered a pre-sentence investigation report ("PSI). The first page of that report mistakenly showed that Mr. Holman was born on August 20, 1960, which would have made him 18 years old at the time of the murder. (R.C97) The PSI further showed that Mr. Holman and his co-defendant had been found guilty of murder in St. Clair County case 79-CF-592 and in St. Clair County case 79-CF-720. (R.C100) In the first of those cases, Mr. Holman was sentenced to serve a 40-year term of imprisonment, and in the second, he was sentenced to serve a 35-year term of imprisonment, with the sentences to be served consecutively. (R.C100)

According to the PSI, in 1977 and 1978, a judge ordered Mr. Holman to be examined by a psychiatrist; that evaluation led to a six-month "hospitalization" at the Murray Children's Center in Centralia, Illinois. (R.C108) Prior to that hospitalization, Mr. Holman had received a head injury from a fall from a two-story building in Rockford, Illinois (R.C109), and was seen by a psychiatrist in Rockford. (R.C108) That psychiatrist had tentatively diagnosed Mr. Holman's IQ as borderline or dull normal. (R.C109)

An October 9, 1975, psychological evaluation from the St. Clair County Home for Children in East St. Louis, Illinois, revealed that Mr. Holman "scored consistently in the mildly retarded range." (R.C113). Mr. Holman was admitted

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to a children's home as an in-patient from September 15 to November 2, 1976, where he was evaluated by a psychiatrist and tested by a psychologist. (R.C113) The diagnosis was mild mental retardation. (R.C113) According to the report: "Psychological testing showed that he had a rather high need for approval 'which sets him up as prey for peers of higher intelligence who can influence him to do bad deeds'." (R.C113) As a result, he "is easily led into doing 'bad deeds'." (R.C113)

According to another report, Mr. Holman's verbal IQ is 73, borderline mentally retarded (R.C111) His performance IQ is 64, mildly retarded (R.C111) Further testing showed that there was "significant evidence" and a "high probability" of organic brain damage. (R.C111)

Sentencing

At the sentencing hearing, defense counsel called no witnesses, submitted no exhibits, and failed to correct the mistake regarding Mr. Holman's age in the PSI. (R.727)

At the hearing, the State argued that Mr. Holman should be sentenced to a term of natural life imprisonment. (R.737) Defense counsel did not ask for any specific term, saying:

> Your Honor, the question is, as I see it before this Court, is whether this Court should assess natural life to this very young man. *** I would strongly reject the suggestion of the State that this Court has no other alternative. *** I think that this Court has sentencing alternatives, and the Court ought to consider those. *** The question before this Court is whether this Court should remove this individual from society forever, or whether he should be given an opportunity to again participate in society. *** In line with that, Your Honor, I would ask this Court for some other

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> alternative than that requested by the State and to give this young man an opportunity.

(R.738-40)

> The court spoke briefly before imposing sentence:
>
> The Court is ready to pronounce sentence. In this sentence, the Court has considered the factors enumerated in the Criminal Code as factors in mitigation and factors in aggravation. The Court does not find any factors in mitigation. There are many factors in aggravation. The Court has considered the evidence presented at the trial in this cause. The Court has considered the presentence investigation. The Court has considered the evidence presented at this hearing today and the arguments of counsel. And the Court believes that this Defendant can not be rehabilitated and that it is important that society be protected from this Defendant.
> It is, therefore, the sentence of this Court, and you are hereby sentenced, Mr. Holman, to the Department of Corrections for the rest of your natural life. Mittimus is to issue.

(R.742)

Subsequent proceedings

Mr. Holman's conviction was affirmed on direct appeal, and he did not raise a sentencing issue. *People v. Holman*, 115 Ill. App. 3d 60 (5th Dist. 1983). Mr. Holman subsequently filed numerous collateral attacks alleging a variety of issues, all of which were ultimately dismissed by the trial court. (R.C168-70, 173-77, 215, 348, 421; R.753)

On October 7, 2010, Mr. Holman filed a motion asking leave to file a successive post-conviction petition. (R.C472) As "cause" for the late filing Mr. Holman averred that the collateral consequence of the life-without-parole sentence in this case caused him to be mentally incapacitated, and as "prejudice" he alleged that he is serving a sentence that is void *ab initio*. In the post-

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conviction petition attached to his motion (R.C474), he alleged that his sentence is void *ab initio*. (R.C480) Following the trial court dismissal for failure to show cause, and the appellate court's affirmance of the dismissal, this Court entered a supervisory order vacating the appellate court and ordering it to reconsider the case in light of *People v. Davis*, 2014 IL 115595 (03/20/14). See *People v. Holman*, 2012 IL App (5th) 100587-U; *People v. Holman*, 2016 IL App (5th) 100587-B, ¶¶ 33-34.

On remand, the appellate court, after reciting the recent changes in juvenile law brought about by *Miller*, noted that there were at least three different "conclusions" as to what constituted a *Miller* hearing. *Holman,* 2016 IL App (5th) 100587-B at¶ 33. The appellate court briefly outlined the three theories on resentencing post-*Miller*, ranging from those courts that held that sentencing courts must consider the *Miller*-factors[2] to courts that held a sentencing court need only consider "youth" without the so called *Miller*-factors. *Id.* at ¶ 34. The appellate court found that the last approach – which required nothing more from the sentencing court than it consider youth as a mitigating circumstance – was the approach most in line with *Montgomery* and *Miller*. The appellate court then held that the sentencing hearing in the present case was sufficient even where the trial court noted that there were no factors in mitigation. *Id.* at ¶ 42. The appellate court reasoned that even though the trial court found no factor existed in mitigation, it necessarily considered "youth"

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[2]See Supra 11.

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because the trial court reviewed the PSI, which contained information about Mr. Holman's youth, and because defense counsel made an argument that Mr. Holman's youth should be considered. *Id.*

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ARGUMENT

Given that *Miller* sentencing issues will occur, often in cases where sentencing hearings took place decades before, this Court should establish criteria to determine whether prior sentencing hearings comported with *Miller*.

Generally, rigidity does not serve the law well because the facts of each case require fluidity in determining a just result. But as certainty is also the cornerstone of good jurisprudence, courts need objective criteria for determining whether a sentencing hearing complied with the Eighth Amendment. This is especially true given that judges faced with the task of determining whether prior sentencing hearings complied with *Miller* must act as something of a legal time traveler, determining whether judges who sentenced juveniles years ago – or in this case, decades ago – complied with law and with science that was not known at the time.

Here, Mr. Holman was sentenced on April 24, 1981 (R.741), more than thirty years ago. Both this Court in *Davis* and the United States Supreme Court in *Montgomery* held that *Miller* is retroactive. From a practical standpoint, the sentencing court was required to consider youth and its attendant circumstances as mitigating factors in order for Mr. Holman's sentence to be constitutional, even though *Miller* did not make this the law of the land for another three decades.

Miller, *Davis*, and *Montgomery* were fairly devoid of guidance on how

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reviewing courts should determine whether prior sentencing hearings passed constitutional muster, so the ensuing results have been anything but consistent.

In reaching its decision in the present case, the appellate court relied on numerous cases from other jurisdictions. *Holman*, 2016 IL App (5th) 100587-B at ¶¶ 31-34. Specifically, Mr. Holman pointed to *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014), a case decided by the South Carolina Supreme Court. *Holman*, 2016 IL App (5th) 100587-B at ¶31. The *Aiken* court held *Miller* established a specific framework for the sentencing court to follow in order to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Aiken*, 765 S.E.2d at 577 (quoting *Miller*, 132 S.Ct. at 2469). The *Aiken* court held that:

> a [sentencing] hearing must include: (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence"; (2) the "family and home environment" that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the "incompetencies associated with youth – for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and (5) the "possibility of rehabilitation."

Id. (quoting *Miller*, 132 S.Ct. at 2468); see also *Holman*, 2016 IL App (5th) 100587-B at ¶ 33 (gathering cases describing multiple factors a sentencing court must consider in order to comply with *Miller*); see also *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 49 (applying *Miller* to *de facto* life sentences where "the record affirmatively shows that the trial court failed to comprehend and apply such factors.")

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On the other end of the spectrum, other courts from outside Illinois have found that the sentencing court need not consider youth at all if the trial court has discretion to sentence a juvenile to a term other than natural life. *Id.* A third approach – and the one the appellate court adopted, at least in theory – requires only that the sentencing court consider "mitigating circumstances related to a juvenile defendant's youth, [but does] not require courts to consider any set list of factors." *Id.* at ¶ 34 (gathering cases).

While the appellate court is correct that *Miller* did not explicitly require sentencing courts to consider a set of factors, the Supreme Court did require that courts "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S.Ct. at 2469. To do this, sentencing courts, at a minimum, must do more than mention the juvenile's age or review the most basic information pertaining to the juvenile's life history.

Here, the appellate court "adopted" the third approach, which required the sentencing court to "consider mitigating circumstances related to a juvenile defendant's youth." *Holman*, 2016 IL App (5th) 100587-B at ¶ 35. In Mr. Holman's case, the sentencing court not only did not mention any considerations that might be liberally construed to comport with the *Miller*-factors, the trial court failed to discuss even the most basic factors of youth – such as Mr. Holman's age when he committed the crime. Most telling, perhaps, was the trial court's statement at sentencing that he found *no factors in mitigation* (R.742), yet *Miller* tells us that at least one crucial factor in

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mitigation was necessarily present – Mr. Holman's age.

Certainly, the *Miller* decision allows for courts to make a finding of incorrigibility for a few juveniles, but, at a bare minimum, this finding must be made in the face of the juvenile's mitigating age. *Montgomery*, 136 S.Ct. at 734; *Nieto*, 2016 IL App (1st) 121604, at ¶ 47 (noting that a juvenile must now be given an opportunity to "demonstrate that he belongs to the large population of juveniles not subject to natural life"). Here, one cannot reach the harshest available sentence for minors – natural life – without first considering the mitigation of youth. Yet the trial court found that no mitigation was present.

The appellate court's approach seems to be that so long as the words "youth" or "juvenile" appear somewhere in the record, then a *Miller* hearing took place. Here, the appellate court noted that "the court *** had the opportunity to consider all the mitigating circumstances related to the defendant's youth." *Holman*, 2016 (5th) 100587-B at ¶ 40. Yet the issue is not one of opportunity, but one of actuality. Certainly, a forward thinking judge decades ago could have considered youth as a mitigating factor sufficiently to satisfy *Miller*. But the record here indicates that the trial court found no factors in mitigation, and did not mention Mr. Holman's youth.

The appellate court now wants to find this procedure constitutional by pointing to a PSI and defense counsel's mere mention of youth. But the words "youth" or "juvenile" should not be some panacea for all *Miller* issues. Sure, the trial court in this case reviewed information about Mr. Holman's childhood via the PSI and heard a very short argument by defense counsel. But the majority

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of pre-sentence investigation reports include information about a defendant's childhood. This, by itself, is nothing more than a recitation of history; and logic dictates that every defendant, regardless of his or her age at the time the offense was committed, had a childhood. Likewise, defense counsel's short argument regarding youth cannot replace the sentencing court's actual consideration of youth as a mitigating circumstance. Finally, the appellate court noted that the court carefully considered a variety of facts, including the defendant's statement, the nature of the crime, and the PSI prepared by the probation officer. *Holman*, 2016 IL App (5th) 100587-B at ¶ 45. Yet this undercuts the appellate court's theory that the trial court considered the attendant circumstances of youth. The trial court listed numerous factors it considered. According to the appellate court's logic, the sentencing court inexplicably failed to mention its consideration of youth or Mr. Holman's juvenile status despite carefully noting other considerations and explicitly finding no factors in mitigation.

No, the *Miller* decision mandates something more than a recitation of childhood history in the PSI or defense counsel's reference to the defendant's youth. The *Miller* court requires something more than conjecture based on inferences drawn from what the reviewing court hoped the sentencing court considered. The *Miller* court requires *real,* substantive consideration of the attendant circumstances of youth. In an attempt to fit Mr. Holman's case within the most convenient framework offered by another State's jurisprudence, the appellate court has now created a fourth type of review for *Miller* claims, one that finds sentences of natural life for juvenile offenders are constitutionally

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sound so long as the trial court had before it some indication that the defendant was a juvenile at the time of the offense, even if it was buried in the PSI and the trial court specifically found no factors in mitigation,

Miller requires more. It requires real consideration of the brain development and characteristics of children and teenagers. And unfortunately, the issue of juvenile sentencing is not one that will simply fade. Even as the system slowly works its way through the older cases rising up via *Montgomery* and *Davis*, juveniles continue to be sentenced. And sentencing hearings, where trial courts hand out discretionary natural life sentences, will continue. Without specific guidance as to what exactly these courts must consider to comply with *Miller*, sentencing and reviewing courts will continue to decide *Miller* issues on an *ad hoc*, inconsistent basis as they grapple with how much consideration of youth is enough.

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CONCLUSION

Richard Holman, petitioner-appellant, respectfully requests that this Court grant leave to appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Amanda R. Horner, certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 315(d). The length of this petition, excluding pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters to be appended to the petition under Rule 315(c) is 16 pages.

/s/Amanda R. Horner
AMANDA R. HORNER
Assistant Deputy Defender

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APPENDIX

Richard Holman, Petitioner

Appellate Court Decision

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2016 IL App (5th) 100587-B

NO. 5-10-0587

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 80-CF-5
	)	
RICHARD HOLMAN,	)	Honorable
	)	Charles V. Romani, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court, with opinion.
Presiding Justice Schwarm and Justice Moore concurred in the judgment and opinion.

OPINION

¶ 1 This appeal requires us to consider whether a natural-life sentence without the possibility of parole may be imposed on a defendant who was a minor at the time of the offense when the sentencing court had the discretion to impose a lesser sentence. The defendant, Richard Holman, was 17 years old when he committed the murder at issue in this case. In April 1981, a court sentenced him to natural life in prison. Since that time, courts have grappled with the question of the extent to which the eighth amendment's proscription against cruel and unusual punishment (U.S. Const., amend. VIII) limits the sentences that may be imposed for crimes committed by juveniles. In *Miller v. Alabama*,

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the United States Supreme Court held that a mandatory sentence of natural life in prison without the possibility of parole runs afoul of the eighth amendment when imposed for a crime committed when the defendant was a juvenile. *Miller v. Alabama*, 567 U.S. ___, ___, 132 S. Ct. 2455, 2469 (2012). In this case, the defendant filed a petition for leave to file a successive postconviction petition alleging that his natural-life sentence is unconstitutional. He appeals an order denying that petition, arguing that (1) the sentencing court did not take into account mitigating factors associated with his youth, as required by the Court in *Miller*; and (2) the holding of *Miller* should be expanded to encompass any natural-life sentence imposed for a crime committed while the defendant was a juvenile. We affirm.

¶ 2 On July 13, 1979, 83-year-old Esther Sepmeyer was found dead in her rural farmhouse. Mrs. Sepmeyer had been shot in the side of the head with her own rifle. Her home had been ransacked. The defendant's fingerprints were found on the cabinet where Mrs. Sepmeyer stored her rifle. The defendant and a codefendant, Girvies Davis, were arrested for the murder. Both gave statements to police. Girvies admitted that he loaded the rifle, but indicated that the defendant was the shooter. The defendant indicated that Girvies was the shooter. Although the defendant's fingerprints were the only prints found on the cabinet, the State acknowledged that it could not establish beyond a reasonable doubt which of the two defendants was the shooter. It should be noted that the defendant turned 18 on August 20, 1979, just five weeks after the murder.

¶ 3 A jury found the defendant guilty of first-degree murder in March 1981, and the matter proceeded to a sentencing hearing on April 24, 1981. The multiple-murder

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sentencing statute in effect at the time provided that the court "*may* sentence the defendant to a term of natural life imprisonment" if the defendant has been convicted of murdering more than one person. (Emphasis added.) Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-8-1(a)(1); see also Ill. Rev. Stat. 1979, ch. 38, ¶¶ 1003-3-3(d), 1005-8-1(d) (providing that parole is not available to prisoners serving sentences of natural life). (We note that the statute was subsequently amended to make natural-life sentences mandatory for defendants convicted of more than one murder. See Ill. Rev. Stat. 1981, ch. 38, ¶ 1005-8-1. All of the Illinois cases we will discuss later in this opinion arose under the latter version of the statute.)

¶ 4 A presentence investigation report (PSI) indicated that the defendant had been convicted in two unrelated cases of two additional murders and one attempted murder. One of those cases involved the August 30, 1979, robbery of an auto parts store. The defendant and Girvies, his codefendant in this case, were both convicted of one count of murder and one count of attempted murder. The other case involved the May 11, 1979, murder of John Oertel, during a home invasion. In addition, the PSI indicated that the defendant had three delinquency adjudications between 1975 and 1978. Two delinquency adjudications were for burglaries; the third involved three counts of criminal damage to property.

¶ 5 The PSI included psychological evaluations of the defendant. Psychiatrist Dr. Syed Raza evaluated the defendant and diagnosed him with borderline or dull normal intelligence, anxiety, and depression. He stated, however, that these diagnoses were

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tentative because he believed that neurological testing was necessary to exclude neurological issues resulting from a head injury.

¶ 6 Psychologist Cheryl Prost then performed a psychological evaluation. In her evaluation, Prost noted that there were indications of neurological impairment. She found that the defendant had a verbal IQ of 73 and a performance IQ of 64. These scores both fell within the borderline retarded range. Prost also pointed out that the defendant was admitted to the Warren G. Murray Children's Home for a period of six weeks in 1976 when he was 15 years old. Prost noted that, during that time, staff observed that the defendant tended to be a follower and that his low IQ made him susceptible to bad influences from more intelligent peers.

¶ 7 After reviewing Prost's evaluation, Dr. Raza provided an addendum to his evaluation. Dr. Raza noted that although the defendant's overall IQ was towards the lower end of the borderline mentally retarded range, his verbal IQ was high enough to give the defendant the ability to exercise judgment as to the difference between right and wrong. Dr. Raza concluded that the defendant was not "severely handicapped" in terms of his ability to differentiate right from wrong.

¶ 8 The PSI also contained a brief family history as well as the observations of the probation officer who prepared the report, Linda Schulze. In the family history section, Schulze noted that the defendant's father and stepfather both died while he was young. She further noted that the defendant reported to her that he had a close and loving relationship with his mother and siblings. Finally, Schulze noted that the defendant

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showed no remorse for Mrs. Sepmeyer or for the victims of any of his prior crimes. Schulze thus concluded that the defendant had "no predilection for rehabilitation."

¶ 9 At the sentencing hearing, the State's Attorney highlighted the defendant's criminal history and emphasized the fact that the victim was 83 years old and posed no threat to the defendant. He argued that, given the defendant's history, a sentence of natural life in prison was necessary to protect the public from the defendant. In addition, he argued that such a sentence was necessary to deter others from "going out on similar killing sprees." Defense counsel argued that the question before the court was whether the court "should assess natural life to this very young man." Counsel asked the court to consider rehabilitation as a goal and argued that isolation in the prison system mitigates against that goal.

¶ 10 The court offered the defendant an opportunity to make a statement. The defendant expressed no remorse for his role in the death of Esther Sepmeyer. Instead, he took issue with the prosecutor's argument that he had been convicted of previous murders. He told the court, "I have been convicted as what they say as accessory of the murder, of knowing that this murder [may] have taken place. I was never convicted of no murder."

¶ 11 Before pronouncing sentence, the court stated that it had considered the statutory factors in aggravation and mitigation. The court found no statutory factors in mitigation and stated that there were "many factors in aggravation." The court then stated that it had considered the evidence presented at trial, the PSI, and the evidence and arguments presented at the sentencing hearing. The court concluded, stating, "And the court

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believes that this Defendant cannot be rehabilitated and that it is important that society be protected from this Defendant." The court therefore sentenced the defendant to natural life in prison.

¶ 12 The defendant appealed his conviction, but did not challenge his sentence. This court affirmed the defendant's conviction on direct appeal. *People v. Holman*, 115 Ill. App. 3d 60, 66 (1983). Between 2001 and 2009, the defendant filed three petitions for leave to file postconviction petitions. He raised various challenges to his sentence, including claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and our supreme court's holding in *People v. Miller*, 202 Ill. 2d 328 (2002) (*Leon Miller*) (holding that a mandatory sentence of life in prison violates the eighth amendment if imposed for a murder committed by a juvenile convicted under a theory of accountability). Each petition was dismissed, and this court upheld those rulings on appeal.

¶ 13 On October 7, 2010, the defendant filed the petition for leave to file a successive postconviction petition that is at issue in this appeal. In his *pro se* petition, he argued that his sentence of natural life in prison violated the constitution. He did not cite the eighth amendment, and he could not cite *Miller v. Alabama*, which had not yet been decided. On November 10, 2010, the circuit court entered an order denying the defendant's petition for leave to file the postconviction petition. The court found that the defendant failed to allege facts to satisfy the cause-and-prejudice test. See 725 ILCS 5/122-1(f) (West 2010); *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002). The defendant appealed that ruling.

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¶ 14 The United States Supreme Court issued its decision in *Miller* in June 2012, while this matter was pending on appeal. The defendant argued on appeal that his sentence was unconstitutional pursuant to *Miller*. On December 31, 2012, this court affirmed the trial court's order denying the defendant's petition. We acknowledged that the First District had held that *Miller* applied retroactively to cases on collateral review. *People v. Holman*, 2012 IL App (5th) 100587-U, ¶ 19 (citing *People v. Williams*, 2012 IL App (1st) 111145, ¶¶ 42-56; *People v. Morfin*, 2012 IL App (1st) 103568, ¶¶ 35-59). However, we found that the defendant forfeited this claim by failing to identify the eighth amendment as the basis for the constitutional claim in his petition. *Id.* ¶ 18. We further found that he failed to satisfy the "cause" portion of the cause-and-prejudice test because the petition did not raise any claims that could not have been raised in earlier proceedings. *Id.* ¶ 16. We thus concluded that the defendant's *Miller* argument was not properly before us. *Id.* ¶ 17. We then noted in *dicta* that *Miller* was not violated because the defendant here was "afforded a 'sentencing hearing where natural life imprisonment [was] not the only available sentence.' " *Id.* ¶ 19 (quoting *Morfin*, 2012 IL App (1st) 103568, ¶ 59).

¶ 15 Subsequently, Illinois courts, including this court, have relaxed the forfeiture rule further than this court was willing to do in the defendant's first appeal. In *People v. Luciano*, a defendant filed a postconviction petition raising several challenges to his conviction. *People v. Luciano*, 2013 IL App (2d) 110792, ¶ 38. He did not challenge the constitutionality of his sentence, however. *Id.* ¶ 46. The trial court dismissed his petition in July 2011, which was nearly a year before the Supreme Court issued its decision in *Miller*. *Id.* ¶ 39. The defendant argued on appeal that his sentence was unconstitutional

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under *Miller*. *Id.* ¶ 43. The Second District rejected the State's contention that the defendant had forfeited this argument. *Id.* ¶¶ 46-47. The court explained that an unconstitutional sentence is void and may therefore be challenged at any time. *Id.* ¶ 48.

¶ 16 Similarly, in *People v. Johnson*, this court considered an appeal from a trial court order which denied a postconviction petition before the Supreme Court issued its opinion in *Miller*. *People v. Johnson*, 2013 IL App (5th) 110112, ¶ 8. On appeal, the defendant challenged his sentence on the basis of *Miller*, which was decided while the matter was pending on appeal. *Id.* In rejecting the State's forfeiture argument, we first noted that the petition in that case alleged that the defendant's sentence was unconstitutional because it did not " 'reflect *** his ability to be rehabilitated' " and because it was " 'cruel.' " *Id.* ¶ 13. We then stated, "We also note that *Miller v. Alabama* has only been recently decided and to ignore it and its applicability in the instant case would constitute a serious injustice." *Id.*

¶ 17 Most importantly, our decision not to address the merits of the defendant's *Miller* claim was further undermined by the Illinois Supreme Court in *People v. Davis*, 2014 IL 115595, *cert. denied*, 574 U.S. ___, 135 S. Ct. 710 (2014). There, the supreme court addressed the applicability of the cause-and-prejudice test and reached the merits of a *Miller* claim raised in a situation procedurally similar to the case before us. The defendant in *Davis* filed a petition for leave to file a successive postconviction petition. The petition, filed before *Miller* was decided, challenged the defendant's natural-life sentence under the eighth amendment. This argument was based on *Graham v. Florida*, 560 U.S. 48 (2010). *Davis*, 2014 IL 115595, ¶ 9. On appeal, he also argued that the

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sentence was unconstitutional pursuant to *Miller*. *Id.* ¶ 10. The appellate court applied *Miller* retroactively (*id.*), and the State appealed that ruling to the Illinois Supreme Court (*id.* ¶¶ 11, 22). The supreme court held that *Miller* announced a new substantive rule of constitutional law to be applied retroactively. *Id.* ¶¶ 34-40; see also *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S. Ct. 718, 735 (2016); *Johnson*, 2013 IL App (5th) 110112, ¶ 22.

¶ 18 Significantly for purposes of this appeal, the *Davis* court went on to consider the relevance of *Miller* in applying the cause-and-prejudice test. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) contemplates that a defendant will file only one petition. *Davis*, 2014 IL 115595, ¶ 14 (citing *Pitsonbarger*, 205 Ill. 2d at 456). With limited exceptions not relevant here, a defendant will not be granted leave to file a successive petition unless he can establish both cause and prejudice for his failure to raise his claims in an earlier petition. *Id.* To establish "cause," a defendant must allege that an "objective factor external to the defense" prevented counsel from raising the claim earlier. *Id.* "Prejudice" means an asserted constitutional error so serious that the resulting conviction or sentence violates due process. *Id.* The *Davis* court explained that "*Miller*'s new substantive rule constitutes 'cause' because it was not available earlier to counsel [citation], and [it] constitutes prejudice because it retroactively applies to [the] defendant's sentencing hearing." *Id.* ¶ 42. The supreme court subsequently directed this court to vacate our previous decision in this case and directed us to consider whether, in light of its holding in *Davis*, a different result was warranted. *People v. Holman*, No. 115597 (Ill. Jan. 28, 2015) (supervisory order).

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¶ 19 Upon reconsideration, we find that it is appropriate to address the merits of the defendant's *Miller* claim. Our previous finding that the defendant failed to meet the cause-and-prejudice test is contrary to the supreme court's ruling on that issue in *Davis*. In addition, in light of *Johnson* and *Luciano*, we believe it is appropriate to relax the forfeiture rule and consider the defendant's arguments even though the eighth amendment was not raised in the defendant's *pro se* petition. We now turn to those arguments.

¶ 20 The defendant argues that his sentence of natural life in prison violates the eighth amendment under the Supreme Court's holding in *Miller*. Constitutionality of sentencing schemes is a question of law. Our review, therefore, is *de novo*. *People v. Jones*, 223 Ill. 2d 569, 596 (2006).

¶ 21 The eighth amendment provides that " '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' " *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting U.S. Const., amend. VIII). This prohibition applies not only to forms of punishment that are "inherently barbaric," but also to sentences that are "disproportionate to the crime." *Id.* at 59. The Supreme Court has repeatedly emphasized that the requirement of proportionate sentencing is central to the protection afforded by the eighth amendment. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2463; *Graham*, 560 U.S. at 59. This means that sentences must be proportionate to both the offender and to the offense. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2463 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))).

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¶ 22 *Miller* was one of a series of United States Supreme Court cases involving the proportionality of sentences imposed for serious crimes committed by juveniles. *Id.* at ___, 132 S. Ct. at 2464-65 (discussing *Graham* and *Roper*). These cases, like other eighth amendment cases, required the Court to consider both the nature of the offense and the characteristics of the offender. *Graham*, 560 U.S. at 60.

¶ 23 In considering the characteristics of young offenders, the Court explained that juveniles "are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at ___, 132 S. Ct. at 2464. One key distinction is that a juvenile's character is less fully formed and less permanently fixed than that of an adult. Thus, the actions of a juvenile offender are less likely than those of an adult to be the result of irreparable depravity. *Id.* (quoting *Roper*, 543 U.S. at 570). This fact makes the possibility of rehabilitation a particularly appropriate consideration. *Id.* at ___, 132 S. Ct. at 2468. Another important difference between juveniles and adults is that juveniles are more susceptible to negative outside influences, including peer pressure and familial pressure. *Id.* at ___, 132 S. Ct. at 2464 (quoting *Roper*, 543 U.S. at 569). The Court pointed out that a juvenile "cannot usually extricate himself" from a "brutal or dysfunctional" home environment. *Id.* at ___, 132 S. Ct. at 2468. A third critical distinction identified by the Supreme Court is the fact that juveniles are less mature, less responsible, more impulsive, and more likely to take risks than their adult counterparts. *Id.* at ___, 132 S. Ct. at 2464 (quoting *Roper*, 543 U.S. at 569). The Court explained in *Miller* that because of these features, juvenile defendants have both "diminished culpability and [a] heightened capacity for change." *Id.* at ___ , 132 S. Ct. at 2469.

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¶ 24 In assessing the nature of the offense, the Court has drawn "a line 'between homicide and other serious violent offenses.' " *Graham*, 560 U.S. at 69 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). This is because the "Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Id.*

¶ 25 Finally, in considering whether a sentence itself is excessive or disproportionate, the Court has generally treated the death penalty differently from prison sentences. In death penalty cases, the Court has held that the eighth amendment requires "certain categorical restrictions." *Id.* at 59. By contrast, cases involving challenges to the proportionality of prison terms have instead required the Court to consider whether the length of the sentence is "grossly disproportionate" in light of all the circumstances of the particular case. *Id.* at 59-60. Such cases have not generally involved categorical restrictions. See *id.* at 61 (noting that a "categorical challenge to a term[ ]of[ ]years" was a question the Court had not previously considered). However, the Court has recognized that natural life without the possibility of parole is " 'the second most severe penalty permitted by law' " (*id.* at 69 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring, joined by O'Connor and Souter, JJ.))), and that such sentences "share some characteristics with death sentences" (*id.*). In *Graham* and *Miller*, the Court also recognized that a sentence of natural life without the possibility of parole is a harsher sentence when imposed on a juvenile than it is when it is imposed on an adult offender. This is because the juvenile will spend a longer time in prison as a result of this sentence

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than will an adult offender. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2466; *Graham*, 560 U.S. at 70.

¶ 26 Applying these principles in *Graham*, the Supreme Court held the eighth amendment requires a categorical ban on sentences of natural life without the possibility of parole for crimes other than homicide that are committed by juveniles. *Graham*, 560 U.S. at 82. The Court took care to distinguish between homicide and other felonies. *Id.* at 69. The Court explained that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* This holding was therefore limited to nonhomicide cases. *Id.* at 82.

¶ 27 Two years later in *Miller*, the Court considered a challenge to mandatory sentences of natural life in prison imposed for murders committed by juveniles. That case involved appeals by two 14-year-old defendants convicted of murder. Each defendant was sentenced to life in prison without the possibility of parole pursuant to state laws that did not give sentencing courts the discretion to impose any other sentence. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2460. In determining that these sentences were not sanctioned under the eighth amendment, the Court reaffirmed that "*Graham*'s flat ban on life without parole applied only to nonhomicide crimes." *Id.* at ___, 132 S. Ct. at 2465. However, the Court explained:

> "But none of what [the *Graham* Court] said about children–about their distinctive (and transitory) mental traits and environmental vulnerabilities–is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning

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implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.*

¶ 28 The Court then explained at length how mandatory sentencing schemes fail to take these features of youth into account. The Court explained:

> "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features–among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him–and from which he cannot usually extricate himself–no matter how brutal or dysfunctional. It neglects 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. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth–for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at ___, 132 S. Ct. at 2468.

In addition, the Court explained that mandatory sentencing schemes are flawed because they do not allow sentencing courts to differentiate between a 17-year-old defendant and a 14-year-old or between a shooter and an accomplice. *Id.* at ___, 132 S. Ct. at 2467-68.

¶ 29 In light of these considerations, the Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for

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juvenile offenders." *Id.* at ___, 132 S. Ct. at 2469. The Court stated that this holding would not "foreclose a sentencer's ability" to impose such a sentence in homicide cases. *Id.* The Court noted, however, that "given all [the Court has] said *** about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* The Court further stated that its holding requires sentencing courts "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

¶ 30 The defendant acknowledges that the sentencing court in this case had the discretion to impose a sentence other than natural life. He argues, however, that his sentence runs afoul of *Miller* for two reasons. First, he argues that the court did not consider certain factors he contends the *Miller* Court required sentencing courts to consider. Second, he argues that, assuming *Miller* did not mandate consideration of set factors, there is no indication in the record that the sentencing court gave any weight to his status as a juvenile. We will consider these arguments in turn.

¶ 31 The defendant first argues that his sentence does not comport with the requirements of *Miller* because the sentencing court did not hold a "*Miller*-type" hearing at which it considered what he refers to as the *Miller* factors. In support of this contention, the defendant cites a South Carolina decision which identified the *Miller* factors as:

> "(1) the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate the risks and

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> consequence'; (2) the 'family and home environment' that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the 'incompetencies associated with youth–for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys'; and (5) the 'possibility of rehabilitation.' " *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2468).

The defendant points out that the statutory factors in mitigation considered by the sentencing court in this case did not include any of these factors. See Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-5-3.1. As such, he contends, his sentence must be vacated and this cause must be remanded for a new sentencing hearing that fully complies with what he sees as the requirements of *Miller*.

¶ 32 In response, the State acknowledges that the *Miller* Court mandated consideration of the mitigating characteristics of youth. The State, however, contends that although the Court provided an illustrative list of some of those characteristics, it did not mandate consideration of any specific factors. We agree with the State.

¶ 33 We first note that the state courts that have addressed the question of how to apply *Miller* in the context of discretionary natural-life sentences have reached differing conclusions. See *State v. Riley*, 110 A.3d 1205, 1214 n.5 (Conn. 2015) (noting that "there is no clear consensus"). Some courts have found that *Miller* requires consideration of set factors associated with youth, as the South Carolina Supreme Court found in *Aiken*.

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See, *e.g.*, *Riley*, 110 A.3d at 1216; *People v. Gutierrez*, 324 P.3d 245, 268-69 (Cal. 2014) (describing five factors courts must consider before sentencing juvenile defendants to life in prison without parole); *Bear Cloud v. State*, 2013 WY 18, ¶ 42, 294 P.3d 36 (Wyo. 2013) (setting forth seven factors courts must consider in sentencing juveniles to life in prison without parole (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2467-68)). Other courts have concluded that as long as sentencing courts have the discretion to impose sentences other than natural life in prison without the possibility of parole, *Miller* is not violated. See, *e.g.*, *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014); *Arredondo v. State*, 406 S.W.3d 300, 307 (Tex. App. 2013).

¶ 34 Still other courts have found that although the *Miller* Court did require sentencing courts to consider mitigating circumstances related to a juvenile defendant's youth, it did not require courts to consider any set list of factors. See, *e.g.*, *State v. Ali*, 855 N.W.2d 235, 256-57 (Minn. 2014) (explaining that sentencing courts must consider "any mitigating circumstances," including those discussed by the *Miller* Court); *State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 16 (finding that the factors adopted by the Wyoming Supreme Court in *Bear Cloud* "may prove helpful" to courts sentencing juvenile defendants, but refusing to require sentencing courts to make explicit findings with respect to any enumerated factors); *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (holding that the sentencing court in that case complied with the requirements of *Miller* by taking into account how juveniles are different from adults " 'and how those differences counsel against irrevocably sentencing them to a lifetime in prison' " (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469)).

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¶ 35 We believe that this third approach is most consistent with the Court's analysis in *Miller*. We acknowledge that the factors enumerated by the South Carolina Supreme Court in *Aiken* track the language of *Miller*. Compare *Miller*, 567 U.S. at ___, 132 S. Ct. at 2468, with *Aiken*, 765 S.E.2d at 577. However, the *Miller* Court made these statements in the context of explaining "the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders." *Miller*, 567 U.S. at ___, 132 S. Ct. at 2467. The Court explained that such sentencing schemes, "by their nature, *preclude* a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." (Emphasis added.) *Id.* The Court went on to describe various characteristics and circumstances that mandatory sentencing schemes "preclude" and "prevent" sentencing courts from considering. *Id.* at ___, 132 S. Ct. at 2468. In announcing its holding, however, the Court stated only that "a judge or jury must have the opportunity to consider mitigating circumstances" (*id.* at ___, 132 S. Ct. at 2475), and that its holding would "require [sentencers] to take into account how children are different, and how those differences counsel against" imposing a sentence of life without parole (*id.* at ___, 132 S. Ct. at 2469).

¶ 36 Our conclusion that *Miller* did not require sentencing courts to consider an enumerated set of factors is strengthened by the Court's recent decision in *Montgomery v. Louisiana*. That decision gave the Court an opportunity to clarify its holding in *Miller*. At issue in *Montgomery* was whether *Miller* should be applied retroactively. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 725. In reaching the conclusion that *Miller* does apply retroactively, the Court first determined whether *Miller* announced "a new

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substantive rule that, under the Constitution, must be retroactive." *Id.* at ___, 136 S. Ct. at 732. In making this determination, the Court explained that its holding in *Miller* "did more than require a sentencer to consider a juvenile offender's youth." *Id.* at ___, 136 S. Ct. at 734. Rather, the Court explained, "*Miller* determined that sentencing a child to life without parole is excessive for all but ' "the rare juvenile offender whose crime reflects irreparable corruption." ' " *Id.* (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573)). As such, the Court stated, its holding in *Miller* "rendered life without parole an unconstitutional penalty for" juvenile offenders whose crimes do not reflect irreparable corruption. *Id.*

¶ 37 The *Montgomery* Court acknowledged that the holding of *Miller* "has a procedural component." *Id.* The Court explained that this procedural component–a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors"–is necessary to effectuate *Miller*'s substantive holding by enabling sentencing courts "to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at ___, 136 S. Ct. at 735. The Court then discussed "the degree of procedure *Miller* mandated in order to implement its substantive guarantee." *Id.* The Court noted that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id.* The Court explained that it did not require such a finding because in announcing new substantive rules of constitutional law, the Court "is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.*

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¶ 38 We acknowledge that the *Montgomery* Court's statements regarding the procedure mandated by *Miller* were *dicta*. The defendant in *Montgomery* was sentenced pursuant to a mandatory sentencing scheme. *Id.* at ___, 136 S. Ct. at 726. Thus, the Court was not called upon to consider whether the procedure followed by the sentencing court was adequate to comport with the requirement of *Miller*. Nevertheless, these statements provide useful guidance in interpreting *Miller*. The *Montgomery* Court's statements regarding its intention to limit the scope of any procedural requirement lead us to conclude that the Court did not intend to require sentencing courts to make findings related to specific enumerated factors.

¶ 39 We reiterate that the *Montgomery* Court stated that the purpose of *Miller*'s procedural component is to separate those rare juvenile defendants who are incorrigible–and may therefore be sentenced to life in prison without parole–from those juvenile defendants whose crimes reflect their transient immaturity–who may not receive such a sentence. *Id.* at ___, 136 S. Ct. at 734. For the reasons that follow, we find that the procedure followed here was adequate to serve this purpose and, as such, sufficient to comply with the requirements of *Miller*.

¶ 40 As we noted earlier, the defendant's argument to the contrary focuses on the fact that the statutory factors in mitigation did not include the defendant's age or any of the mitigating circumstances associated with youth that were discussed in *Miller*. See Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-5-3.1(a). However, it is important to emphasize that pursuant to case law, sentencing courts in Illinois were not limited to consideration of the statutory factors in mitigation. As our supreme court explained in 1977, a few years

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before the defendant in this case was sentenced, "A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977) (citing *People v. Bolyard*, 61 Ill. 2d 583, 589 (1975)). The court further explained that this "judgment depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, *social environment*, habits, *and age*." (Emphases added.) *Id.* (citing *People v. Dukett*, 56 Ill. 2d 432, 452 (1974)). It is also worth noting that Illinois law has long recognized a " 'marked distinction' " between juveniles and adults. *Leon Miller*, 202 Ill. 2d at 341-42 (quoting *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 423 (1894)). As such, existing law required the sentencing court to look beyond the statutory factors in mitigation and consider any mitigating circumstances, including the defendant's age and social environment. The court thus had the opportunity to consider all the mitigating circumstances related to the defendant's youth, as required in *Miller*. See *Miller*, 567 U.S. at ___, 132 S. Ct. at 2475.

¶ 41 *Miller*, however, requires not only that the sentencing court have the opportunity to consider these mitigating circumstances; it also requires that the court actually do so. See *id.* at ___, 132 S. Ct. at 2469. As the Supreme Court explained in *Montgomery*, this is necessary so that the sentencing court can determine whether the juvenile defendant is so irredeemably corrupt that a life sentence without the possibility of parole is constitutionally permissible. See *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734.

¶ 42 This brings us to the defendant's second argument. He argues that the sentencing court did not, in fact, consider the mitigating circumstances of his youth. In support of

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this contention, he points to the court's statement at the hearing that it found "no mitigating factors." We believe this argument misconstrues the court's statement. As we discussed earlier, the court stated that it had considered the statutory factors in aggravation and mitigation and found no mitigating factors. The court then went on to state that it considered the evidence in the PSI and the evidence presented at trial, as well as the arguments of counsel at the sentencing hearing. The evidence in the PSI included evidence related to the defendant's youth and the mitigating features of youth, and defense counsel argued that the court should consider the defendant's youth. Thus, we do not interpret the court's statement as an indication that the court overlooked this important evidence.

¶ 43 As we discussed earlier, the PSI revealed that the defendant had a low IQ and was susceptible to being influenced by more intelligent peers. In addition, the court was aware of the defendant's age. (We note that on the first page of the PSI, the defendant's date of birth is mistakenly listed as August 20, 1960, instead of August 20, 1961. However, his birth date is accurately reflected elsewhere in the PSI and also on the warrant for the defendant's arrest. Moreover, the prosecutor stated at the sentencing hearing that the defendant was ineligible for the death penalty only due to "an accident of birth." Thus, the court was aware that the defendant was a juvenile at the time he committed the offense.) Although it is not clear from the court's statements how much weight the court gave these mitigating factors, we presume that the court takes into account mitigating evidence that is before it. *People v. Smith*, 214 Ill. App. 3d 327, 339 (1991).

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¶ 44 In this case, there was also ample aggravating evidence. The psychiatrist who evaluated the defendant concluded that the defendant was not severely impaired enough to be unable to differentiate right from wrong. It is also worth noting that the defendant turned 18 only five weeks after the murder. Thus, his age alone is less of a mitigating factor than it might be for a much younger defendant. See *Miller*, 567 U.S. at ___ n.8, 132 S. Ct. at 2469 n.8 (noting that the holding of *Miller* would require sentencing courts to consider differences among juvenile defendants, enabling courts to distinguish between, for example, the 14-year-old defendants in *Miller* and 17-year-olds who commit "the most heinous murders" (internal quotation marks omitted)).

¶ 45 The sentencing court considered the circumstances of the crime and the evidence presented at trial. See *id.* at ___, 132 S. Ct. at 2468 (noting that the circumstances of the offense are a relevant consideration). This evidence showed that the defendant actively participated in the robbery and murder of a defenseless 83-year-old woman. See *Leon Miller*, 202 Ill. 2d at 341. Moreover, the probation officer who prepared the report found that the defendant's lack of remorse demonstrated that he had no potential to be rehabilitated. The defendant's own statement at the hearing denying that he was previously convicted of murder provided additional evidence of his lack of remorse. In addition, the PSI included the defendant's criminal record, which included three murder convictions over the course of three months as well as three juvenile delinquency adjudications, two of which were for serious felonies.

¶ 46 Defense counsel urged the court to consider the defendant's youth and fashion a sentence that offered him a chance for rehabilitation. The court expressly found that the

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defendant had no rehabilitative potential. In the face of all this aggravating evidence, this finding does not indicate, without more, that the court failed to consider the mitigating evidence before it. Moreover, this is precisely the determination *Miller* requires sentencing courts to make. See *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735; *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469. We conclude that the sentencing hearing in this case comported with the requirements of *Miller*.

¶ 47 Alternatively, the defendant argues that the holding of *Miller* should be extended to require a categorical bar against even discretionary sentences of natural life in prison without the possibility of parole for crimes committed by juveniles. Before addressing the merits of this contention, we must first address the State's argument that this question is not properly before us.

¶ 48 The State argues that consideration of this question exceeds the scope of the supreme court's mandate. See *People v. Abraham*, 324 Ill. App. 3d 26, 30 (2001) (citing *People v. Craig*, 313 Ill. App. 3d 104, 106 (2000), and *People v. Bosley*, 233 Ill. App. 3d 132, 137 (1992)). We disagree. The supreme court directed us to reconsider our previous decision in light of its holding in *Davis* and "to determine if a different result is warranted." *People v. Holman*, No. 115597 (Ill. Jan. 28, 2015) (supervisory order). As discussed previously, in light of *Davis*, we found it appropriate to consider the defendant's constitutional challenge on its merits. Consideration of the defendant's challenge on its merits necessarily includes consideration of all of his related arguments. See *People v. Harris*, 388 Ill. App. 3d 1007, 1013 (2009) (rejecting a claim that the trial court exceeded the appellate court mandate by considering issues raised in amended

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pleadings filed after remand); *Abraham*, 324 Ill. App. 3d at 31 (explaining that "the obvious implication of [a] remand order" is for the case to "continue in an ordinary manner"). We will therefore address the defendant's argument.

¶ 49 In support of his argument, the defendant points out that the *Miller* Court explicitly declined to decide whether the eighth amendment requires a categorical bar on sentences of life without parole for any juvenile defendant. The defendants there argued that such a categorical bar was constitutionally required, at least for defendants 14 or younger. The Court found it unnecessary to consider this alternative argument. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469. Likewise, although the *Davis* court stated that the "special status" of juvenile defendants recognized in *Graham* and *Miller* did not preclude a sentence of natural life without parole for all juveniles who actively participate in multiple murders, the court did not consider this question in the context of an argument for the extension of *Miller*. *Davis*, 2014 IL 115595, ¶ 45. Thus, the defendant is correct in asserting that the issue remains an open question. However, we are not persuaded by his contention that we must now expand the Court's holding.

¶ 50 We reach this conclusion for two reasons. First, as we have discussed, both *Montgomery* and *Miller* explicitly state that, in rare instances, a sentence of natural life in prison without the possibility of parole will be appropriate for juvenile defendants. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734 (noting that "life without parole could be a proportionate sentence" for the rare juvenile defendant "whose crimes reflect irreparable corruption"); *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469 (stating that its

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holding does not foreclose sentencing courts from determining that such a sentence is appropriate).

¶ 51 Second, Illinois courts that have remanded cases for resentencing pursuant to *Miller*–including this court and our supreme court–have consistently indicated that a natural-life sentence might still be appropriate on remand so long as the court has the discretion to consider other sentences. See *Davis*, 2014 IL 115595, ¶ 43; *Johnson*, 2013 IL App (5th) 110112, ¶ 24; *Luciano*, 2013 IL App (2d) 110792, ¶ 63; *Morfin*, 2012 IL App (1st) 103568, ¶ 59. We decline to depart from this interpretation. (We note that in *Montgomery*, the Supreme Court held that states could remedy *Miller* violations by allowing defendants serving life sentences for murders committed as juveniles to apply for parole, thereby making remand for new sentencing hearings unnecessary. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736. This does not alter our conclusion.)

¶ 52 The defendant argues, however, that the holding of *Miller* should be extended because, as he correctly asserts, eighth amendment jurisprudence evolves to reflect changing social mores and "evolving standards of decency" (internal quotation marks omitted) (*Graham*, 560 U.S. at 58; *Leon Miller*, 202 Ill. 2d at 339). We are not persuaded. The Supreme Court issued its decision in *Miller* less than four years ago. Its decision in *Montgomery*, which reaffirmed its reasoning in *Miller*, was issued just weeks ago. The defendant does not explain how societal standards of decency have evolved in this short time to require this court to embrace a more expansive view of what constitutes cruel and unusual punishment than the one adopted by the Supreme Court in these very recent cases.

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¶ 53 For the foregoing reasons, we affirm the order of the trial court denying the defendant's petition for leave to file a successive postconviction petition.

¶ 54 Affirmed.

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2016 IL App (5th) 100587-B

NO. 5-10-0587

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD HOLMAN, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Madison County. No. 80-CF-5 Honorable Charles V. Romani, Jr., Judge, presiding.

Opinion Filed: March 3, 2016

Justices: Honorable Melissa A. Chapman, J.

Honorable S. Gene Schwarm, P.J., and
Honorable James R. Moore, J.,
Concur

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IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

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Mr. Richard Holman, Register No. N06132, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764

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 6, 2016. On that same date, we mailed three copies to the Attorney General of Illinois, mailing three copies to opposing counsel and mailed one copy to the petitioner in an envelope deposited in a U.S. mail box in Mt. Vernon, Illinois, with proper postage prepaid. The original and twelve copies of the Petition for Leave to Appeal will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

/s/Amanda R. Horner
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IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

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Mr. Richard Holman, Register No. N06132, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764

Under the penalties provided in law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that an electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on December 6, 2016. On that same date, we mailed three copies to the Attorney General of Illinois, mailed three copies to opposing counsel and mailed one copy to Madison State's Attorney Office and one copy to the petitioner-appellant in envelopes deposited in a U.S. mail box in Mt. Vernon, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

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