No. 123010

IN THE
SUPREME COURT OF ILLINOIS

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

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

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TABLE OF CONTENTS

Points and Authorities

NATURE OF THE CASE

Petitioner Derrell Dorsey appeals the appellate court's judgment affirming the circuit court's denial of his motion for leave to file a successive postconviction petition. A12.[1] An issue is raised on the pleadings: whether petitioner's motion made a prima facie showing of cause and prejudice under 725 ILCS 5/122-1(f).

ISSUES PRESENTED

1. Whether the circuit court properly denied petitioner leave to raise an Eighth Amendment claim in a successive postconviction petition because he did not receive a sentence of *de facto* life without the possibility of parole.

2. Whether petitioner has failed to show the requisite cause and prejudice that would permit him to relitigate a claim under article I, section 11, of the

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[1] "RA__" refers to this brief's appendix. "Pet. Br. __" and "A__" refer to petitioner's brief and appendix. "PLA at __" refers to petitioner's petition for leave to appeal. "Pet. App. Ct. Br. __" and "Pet. App. Ct. Reply Br. __" refer to petitioner's appellate court briefs (No. 1-15-1124).

"C__" and "R.__" refer to the common law record and report of proceedings from the successive postconviction proceedings underlying this appeal (No. 1-15-1124). "TC__" and "TR.__" refer to the direct appeal (No. 1-98-3979) common law record and report of proceedings. "PC__" and "PCSupp.__" refer to the first postconviction appeal (No. 1-05-2480) common law record and supplemental common law record. "PJC__" and "PJR.__" refer to the first petition for relief from judgment appeal (No. 1-07-2307) common law record and report of proceedings. "PC2.C__" and "PC2R.__" refer to the second postconviction appeal (No. 1-11-0580) common law record and report of proceedings. "PJ2C__" and "PJ2R.__" refer to the second petition for relief from judgment appeal (No. 1-13-0875) common law record and report of proceedings.

1970 Illinois Constitution (the penalties provision) in a successive postconviction petition.

JURISDICTION

Jurisdiction lies under Rules 315 and 612. This Court allowed petitioner's petition for leave to appeal (PLA) on March 25, 2020.

STATEMENT OF FACTS

I. Trial and Sentencing

In March 1996, when he was 14 years old, petitioner kicked open a door to a take-out restaurant and repeatedly fired a gun at four customers who were waiting for their food. TR.D185-88, D233-45, E77-95. Petitioner killed 16-year-old Tyran Snow and severely injured 13-year-old Irene Williams and 16-year-old Calvin Simms; the fourth customer fled the restaurant through another door. TR.D151-57, D238-48, E69, E77-95, G42-43, G57, EE20.

The People filed a delinquency petition and asked the juvenile court for permission to prosecute petitioner in criminal court. TC31. After hearing evidence and "considering all the statutory as well as non-statutory factors," the juvenile court allowed petitioner's criminal prosecution. *Id.* In August 1996, a grand jury returned a multi-count indictment against petitioner, which included charges of first degree murder for Snow's death and attempted murder and aggravated battery with a firearm for the injuries to Williams and Simms. TC8-20.

Before trial, petitioner moved to suppress statements that he made to an assistant state's attorney following his arrest. TC58-60. He emphasized his youth, *id.*; TR.A59, B66-67, and the trial court heard testimony from those present for the interview, including a youth officer and petitioner's grandmother, TR.A25-40, A60-91, B6-62. The trial court found that petitioner had been "given his juvenile rights" and received *Miranda* warnings several times and denied the motion. TR.B73-74.

In August 1998, a jury convicted petitioner of first degree murder, attempted murder, and aggravated battery with a firearm. TC68-72; TR.F125. At the sentencing hearing, the trial court received a presentence investigation (PSI) report. TC132; TR.G3-4, G56. Neither party made any amendments to the report. TR.G3-4.

According to the PSI, petitioner had a "disrupted family unit": his parents were married but had a long history of substance abuse and separated frequently. TC135, 138. Until age 10, petitioner lived primarily with his mother while his father was in and out of prison; he spent his summers with his grandmother. TC135. After age 10, petitioner's grandmother was his primary caretaker. *Id.* Petitioner continued to have a good relationship with his sister. *Id.*

Petitioner reported that his childhood was "O.K. to a point" and "went down" in the seventh grade when he joined a gang. C135, 137. At age 13, petitioner was arrested for robbery, adjudicated a delinquent, and received

juvenile probation. TC134, 139; TR.G39-40. Petitioner violated his probation when he committed the present offenses. TC134.

While awaiting trial in the juvenile detention center, petitioner attained an eleventh-grade education with "very good grades." TC136. His teacher reported that he was "an 'excellent student motivated to learn.'" *Id.* Petitioner earned several certificates, including one in the behavior management program. *Id.* A pretrial behavior clinical examination reported that petitioner was fit to stand trial. *Id.*

The People presented testimony from 16-year-old Adrian Bowman, who resided with petitioner at the juvenile detention center. TR.G4-6. Bowman testified that two months earlier, petitioner hit him with a chair, and then three of petitioner's acquaintances jumped on Bowman and punched him in the head. TR.G5-6, G10-15. The attack was unprovoked, and Bowman received eight stitches in his lip. TR.G15-17. The People also presented victim impact testimony from Snow's family and letters from Williams and Simms. TR.G23-31.

In mitigation, petitioner submitted four letters, including two from supervisors at the juvenile detention center. TR.G31-32. Additionally, Sheila Teague, petitioner's aunt, testified that petitioner was not a "troublemaker," but "always a good kid" who respected and helped his family. TR.G33-36. Sheila asked the trial court not to sentence petitioner to prison for "all his life" and instead to provide him "hope one day to drive a car, since he haven't

[sic] been able to learn how to drive a car since his early incarceration; that he may . . . one day have children and he may one day just be able to go to the store and buy something on his own." TR.G36. Seana Teague, petitioner's cousin, similarly testified that petitioner was "a good boy" who "always had good grades in school." TR.G37-38.

The prosecutor asked for "a more severe sentence" based on the seriousness of petitioner's "unprovoked" offenses, including that his actions reflected a "total disregard for human life," caused death and severe bodily injury, threatened the safety of the restaurant owner and community, and were in furtherance of organized gang activity. TR.G41-50. The prosecutor argued that although petitioner was 14 years old and "of such a young age [that he] did not have much of an opportunity to establish any type of prior record of delinquency" before the offenses, he was on juvenile probation when he committed them; and rather than take that opportunity to "conform [his] actions to that of a law-abiding citizen," petitioner joined a gang, which led him to the commit the crimes underlying this appeal. TR.G40-42, 46. Citing petitioner's attack on Bowman, the prosecutor contended that petitioner's actions still showed a disregard for others. TR.G47-48. In conclusion, the prosecutor asked for a "substantial period of incarceration," TR.G49, and argued that "[a]lthough [petitioner] is of a tender age and it's a difficult thing to do, he's left the court with no [other] option," TR.G50.

Defense counsel asked the trial court to consider the transcripts from petitioner's juvenile transfer hearing and reports from social workers and psychologists who examined petitioner at the juvenile detention center, which were previously reviewed by the trial judge. TR.G50.[2] Counsel argued that petitioner was "barely a teen-ager" and "a young boy" whose choices reflected the intelligence and "lack of judgment of a 14-year-old," and resulted from society's failures and a "broken family" background, including an alcoholic mother and a "dad [who] was in jail many, many times" and was "involved with drugs and alcohol." TR.G51-53. As to his prior offense, counsel contended that petitioner "was not an experienced criminal," but an eighth grader who had stolen a bicycle. TR.G52. Counsel argued that petitioner was "doing well" and "modifying his behavior" in the juvenile detention center, a structured environment with an "organization paying attention to him." TR.G53-54. In conclusion, counsel asked the court to provide petitioner "with a future in our society again when he continues to grow, as he continues to learn, as he continues to modify his behavior and as he pursues successes that can be obtained in the institution so he can join us in society again." TR.G55.

In sentencing petitioner, the trial court stated that it had presided over the trial, was "very familiar" with the case, and had considered the nature

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[2] These records are not in the record on appeal before this Court. *See generally People v. Stewart*, 179 Ill. 2d 556, 565-66 (1997) (appellant is responsible for preserving and presenting sufficient record on appeal).

and character of the offenses, petitioner's character and history, the PSI, the evidence presented at the sentencing hearing, the parties' arguments in aggravation and mitigation, and the statutory aggravating and mitigating factors. TR.G55-56. The court found petitioner's "youth" to be mitigating, but noted that he had a prior delinquency adjudication and had not benefitted from juvenile probation. TR.G57.

In aggravation, the court found that petitioner's "attack" caused and threatened serious harm to not only the victims but also to other individuals in the restaurant. TR.G56. The court found that petitioner acted with "indiscriminate ruthlessness" and described his offenses:

> [Petitioner] simply kicked open that door, walked in and started indiscriminately shooting. And everybody dove for cover and three people were hit, one person wasn't. All those people could be dead today. It certainly wasn't as a result of lack of trying of [petitioner] that they are not.
>
> It was a very small space that those people were running around in trying to dodge those bullets.

TR.G57-58. The court emphasized that it was fortuitous that petitioner killed only one person and injured two others "[b]ecause from the nature of th[e] attack that he launched on that restaurant, that evening, it would be very possible that [petitioner] would be sitting here charged with four murders[] [a]nd facing a life sentence in prison." TR.G57. The court also found "particularly aggravating" that this was a "gang crime" that resulted in violence to innocent bystanders. TR.G58-59.

After merging the aggravated battery convictions into the attempted murder convictions, the trial court sentenced petitioner to consecutive prison terms of 40 years for first degree murder, and 18 years for each attempted murder, resulting in an aggregate 76-year term of imprisonment. TR.G60-61; TC159. Petitioner unsuccessfully argued in a motion to reconsider sentence that the trial court erred in allowing victim impact testimony and that the "nature and circumstances of the crime should have resulted in a period of incarceration less than the imposed sentence." TC167; TR.H3.

II. Direct Appeal

In September 2000, the appellate court affirmed petitioner's convictions and sentences. RA1-11. Petitioner had argued, in relevant part, that his sentence was excessive because the trial court failed to adequately consider his age and rehabilitative potential. RA15-16. The appellate court found that petitioner had waived this claim by omitting it from his post-sentencing motion. RA9.

The appellate court further found that, regardless of the waiver, "the trial court properly considered the factors relevant to [petitioner's] sentence." RA9. The trial court had "expressly stated" that it had reviewed and considered the statutory aggravating and mitigating factors, "[d]efense counsel mentioned [petitioner]'s age, and the trial court specifically affirmed that it was considering [petitioner]'s 'youth' as a mitigating factor." RA10-11. The court concluded that the trial court did not abuse its discretion in

imposing petitioner's sentence. RA11. Petitioner did not file a PLA. *See* PC2.C42.

III. Petitions for Relief from Judgment

In June 2001, petitioner filed a petition for relief from judgment under 725 ILCS 5/2-1401, *et seq*., alleging that his consecutive sentences violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). C10; PCSupp.10-11. The circuit court denied the petition, and petitioner did not appeal. C10; A16.

Petitioner filed a second § 2-1401 petition in March 2007, in which he asserted that because his indictments were based on a nonexistent statute, the trial court lacked jurisdiction to convict and sentence him. PJC30-32. The circuit court denied relief, PJR.E3, and the appellate court affirmed, PC2.C36-38.

In October 2012, petitioner filed a third § 2-1401 petition in which he again challenged his consecutive sentences. PJ2C28-31. The circuit court denied the petition, PJ2R.C2, the appellate court affirmed, C17-18; A17, and this Court denied petitioner's PLA, *see* Order, *People v. Dorsey*, No. 118178 (Ill. Nov. 26, 2014).

IV. Initial Postconviction Proceedings

Meanwhile, in March 2005, petitioner filed a pro se postconviction petition, which alleged, among other claims, that trial and appellate counsel were ineffective in several respects, PC19-90, the trial court improperly imposed consecutive sentences, PC91, and the statutes that required

consecutive sentences and permitted his transfer to criminal court violated *Apprendi*. PC92-99. The circuit court dismissed the petition, PC117-29; however, the appellate court reversed the first-stage dismissal, and remanded for further proceedings, after finding that the petition had stated the gist of an ineffective assistance of trial counsel claim, PC2.C24-31.

In November 2010, appointed counsel filed an amended postconviction petition, which alleged actual innocence and claims unrelated to petitioner's sentence. PC2.C45-154. The circuit court rejected petitioner's innocence claim and dismissed the petition as untimely. PC2.C185-95. The appellate court affirmed the judgment, C17, and this Court denied petitioner's PLA, *see* Order, *People v. Dorsey*, No. 115753 (Ill. May 29, 2013).

V. Successive Postconviction Proceedings

In December 2014, petitioner moved for leave to file a successive postconviction petition raising two claims: (1) his aggregate sentence violates the Eighth Amendment to the United States Constitution, C35-39; and (2) the trial court gave, and the prosecutor improperly called attention to, erroneous jury instructions, C40-44.

As relevant here, petitioner argued that he could establish cause and prejudice that would permit him to raise his Eighth Amendment claim in a successive postconviction petition because *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010), were decided after his initial postconviction proceedings, *Miller* applied retroactively under *People v.*

Davis, 2014 IL 115595, and his "lengthy sentence" was unconstitutional under those decisions. C36-37. In support, petitioner attached excerpts of testimony from his juvenile transfer hearing and certificates that he obtained in prison (after he was sentenced). C38-39, 101-20, 134-46.

The circuit court denied leave to file the successive petition. C151-57. It found that although petitioner "may be able to show cause" to raise a *Miller*-based claim in a successive petition, he did not show prejudice because "he was not sentenced to mandatory life without the possibility of parole in violation of the Supreme Court's holding in *Miller*." C154-55.

On appeal, petitioner argued that the circuit court erroneously denied leave to raise his Eighth Amendment claim in a successive postconviction petition because he had established cause and prejudice under *Miller*. Pet. App. Ct. Br. 10, 13-14. Petitioner claimed that "[h]is 76-year sentence at 50% is . . . a *de facto* life sentence," *id.* at 17, and "the mere availability of good conduct credit does not alleviate the severity of the sentence for purposes of the Eighth Amendment," Pet. App. Ct. Reply Br. 4.

In November 2017, the appellate court affirmed the circuit court's judgment. A12. It found that although petitioner had established cause based on *Miller*, A21-22, he failed to show prejudice because he did not receive a *de facto* life sentence, A28. In reaching that conclusion, the appellate court determined that sentence credit is relevant to the analysis:

> The great weight of authority on this issue indicates that a court looks, not only to the total sentence imposed, but to the

> availability and amount of sentence credit applicable to a given sentence before determining whether it actually amounts to a *de facto* life sentence without the possibility of parole. . . . We join that authority, and decline to look to [petitioner]'s total 76-year sentence in a vacuum, without consideration of his scheduled release date or the fact that he will likely receive the day-for-day credit for which he is eligible.

A24 (citations omitted).

Petitioner's PLA asked this Court "to provide guidance about how to determine whether a particular sentence constitutes a *de facto* life sentence" under *Miller*. PLA at 4, 11-14, 17.

STANDARD OF REVIEW

This Court reviews the denial of a motion for leave to file a successive postconviction petition *de novo*. *People v. Lusby*, 2020 IL 124046, ¶ 27.

ARGUMENT

I. Standards Governing Petitioner's Motion for Leave to File a Successive Postconviction Petition

The Post-Conviction Hearing Act (Act) allows a criminal defendant to assert in a petition 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). Because postconviction proceedings "are collateral to proceedings in a direct appeal," they "focus on constitutional claims that have not and could not have been previously adjudicated." *People v. Holman*, 2017 IL 120655, ¶ 25. For that reason, "issues that were raised and decided on

direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are forfeited." *Id.*

The Act "contemplates the filing of a single petition." *Lusby*, 2020 IL 124046, ¶ 27. "Consequently, a [petitioner] faces immense procedural default hurdles when bringing a successive postconviction petition. Because successive petitions impede the finality of criminal litigation, these hurdles are lowered only in very limited circumstances," *Davis*, 2014 IL 115595, ¶ 14, and a petitioner "must obtain leave of court to file a successive petition," *Lusby*, 2020 IL 124046, ¶ 27.

To obtain leave, the petitioner "must demonstrate cause for the failure to raise the claim in the initial petition and prejudice from that failure." *Id.* A petitioner "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." 725 ILCS 5/122-1(f). And a petitioner establishes "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." *Id.*

The petitioner must establish cause and prejudice as to each individual claim asserted in a successive petition and submit enough documentation to allow the trial court to make that determination. *People v. Smith*, 2014 IL 115946, ¶ 35. Under these standards, the circuit court must deny leave to file a successive postconviction petition "when it is clear, from a review of the

successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Id.*

II. The Circuit Court Properly Denied Petitioner Leave to Raise a Meritless Eighth Amendment Claim in a Successive Postconviction Petition.

Miller and *Davis* provide sufficient cause for petitioner's failure to raise his Eighth Amendment claim in his initial postconviction petition. *See Lusby*, 2020 IL 124046, ¶ 30. But petitioner cannot show prejudice because he did not receive a sentence of "lifetime imprisonment without the possibility of parole" and his claim therefore fails to satisfy a threshold legal criterion that would permit him to bring a *Miller* claim in a successive petition.

A. The Eighth Amendment does not prohibit a sentence that provides a juvenile offender some meaningful opportunity to demonstrate maturity and rehabilitation and obtain release before he spends more than 40 years in prison.

The Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 560 U.S. at 82. It also "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile [homicide] offenders." *Miller,* 567 U.S. at 479-80. Such mandatory statutes are constitutionally flawed because they "'remov[e] youth from the balance'" and "prohibit a trial

court from 'assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender.'" *Lusby*, 2020 IL 124046, ¶ 33. But *Miller* "did not foreclose the possibility of discretionary life sentences for juveniles. Instead, the Court mandated a 'certain process—considering an offender's youth and attendant characteristics' before a trial court may impose such a sentence." *Id.*

In rendering life without parole an unconstitutional penalty for most juvenile offenders, the Supreme Court was careful not to mandate a particular form of early release. *See, e.g.*, *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728-29 (2017) (per curiam); *see also Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 7 (1979) (a State has no duty to establish a parole system); Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, Nat'l Conference of State Legislatures, at 1, 4-9 (2015), *available at* http://www.ncsl.org/documents/cj/sentencing.pdf (describing various sentencing systems and release policies).[3] Instead, the Court held that the Eighth Amendment requires only that a State provide juvenile offenders "some realistic opportunity to obtain release before the end of [a life] term." *Graham*, 560 U.S. at 82. The Court left "'for the State, in the first instance, to explore the means and mechanisms for compliance' with eighth amendment mandates pertaining to juvenile sentencing." *People v. Buffer*, 2019 IL 122327, ¶ 40 (quoting *Graham*, 560 U.S. at 75).

[3] All websites cited in this brief were last visited on January 19, 2021.

Applying these principles, in *People v. Patterson*, this Court held that a juvenile nonhomicide offender's 36-year aggregate sentence was not "the most severe of all criminal penalties" and did not violate the Eighth Amendment. 2014 IL 115102, ¶ 110. The Court explained that "'[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime' but only to give those offenders 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id.* ¶ 108 (quoting *Graham*, 560 U.S. at 75). In upholding Patterson's sentence, this Court reasoned that he "was statutorily mandated to serve at least 85% of his total prison term, or 30 years, 7 months" and, "[a]lthough lengthy, that term [was] not comparable to either the death penalty, or the second most severe penalty permitted by law, life in prison without parole." *Id.* ¶ 108 (quotation marks and citations omitted).

Next, in *People v. Reyes*, this Court held that "sentencing a juvenile [homicide] offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole" violates the Eighth Amendment. 2016 IL 119271, ¶ 9. In assessing the constitutionality of Reyes's sentence, this Court again considered statutory good conduct credit: Reyes was 16 years old when he committed his offenses and received the mandatory minimum "sentence of 97 years, with the earliest opportunity for release after 89 years." *Id.* ¶¶ 2, 10. Because "the sentencing scheme mandated that [Reyes] remain in prison until at least the age of 105," he

"w[ould] most certainly not live long enough to ever become eligible for release," and his term-of-years sentence thus violated *Miller*. *Id.*

Finally, in *Buffer*, this Court emphasized that the legislature is responsible for making the fundamental choices about the purposes, objectives, and efficacy of any penal system, and "determine[d] when a juvenile defendant's prison term is long enough to be considered a *de facto* life sentence without parole" based on the General Assembly's post-*Miller* statutory enactments. *Buffer*, 2019 IL 122327, ¶¶ 29, 34, 40-42. After *Miller*, the General Assembly determined that a juvenile offender must remain in prison for a minimum of 40 years if convicted of certain first degree murders that warrant natural life in prison for an adult offender. *Id.* ¶¶ 36-39. The General Assembly required those juvenile offenders to serve the entirety of the 40-year term and provided no opportunity for good conduct credit to reduce the period of incarceration. 730 ILCS 5/3-6-3(a)(2)(i), 5-4.5-105(c), 5-8-1(a)(1)(c) (2016); *see also* 730 ILCS 5/5-4.5-115(b) (2019) (declining to extend parole eligibility to this category of juvenile offenders).

"Extrapolating from this legislative determination," the Court held that "a prison sentence of 40 years or less imposed on a juvenile offender provides 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" and is therefore *not* functionally equivalent to lifetime imprisonment without the possibility of parole for purposes of *Miller*. *Buffer*, 2019 IL 122327, ¶ 41. The Court held, however,

that a greater "prison term is long enough to be considered *de facto* life without parole." *Id.* ¶¶ 29, 40, 42. Buffer's 50-year sentence thus fell within *Miller*'s prohibition. *Id.* ¶ 42.

The foregoing principles establish that *Miller* does not apply to a sentence that provides a juvenile offender some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation before the offender spends more than 40 years in prison. *See id.* ¶ 41. Indeed, in giving *Miller* retroactive effect, the Supreme Court emphasized that the focus is not on the court-imposed sentence, but on whether the State provides an opportunity for release: States need not "relitigate sentences . . . in every case where a juvenile offender received mandatory life without parole" but instead "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). That is because "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* "Those prisoners who have shown an inability to reform will continue to serve life sentences." *Id.*

Accordingly, the Supreme Court has not "focus[ed] on the precise sentence meted out," or "require[d] the [S]tate to 'guarantee the offender eventual release.'" *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017)

(quoting *Graham*, 560 U.S. at 82). "Determining whether a sentence is cruel and unusual does not require [a court] to ignore reality." *Id.* at 320; *see, e.g.*, *Rummel v. Estelle*, 445 U.S. 263, 264, 267-68, 280-81 (1980) (although Rummel received sentence of "life in the penitentiary," a "proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life" due to Texas's "relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years"). Rather, the question is a practical one and asks whether the juvenile offender has received a punishment that in effect denies him "some meaningful opportunity to obtain release" before he serves a lifetime — *i.e.*, more than 40 years — in prison. *Buffer*, 2019 IL 122327, ¶ 41; *Reyes*, 2016 IL 119271, ¶¶ 9-10; *Patterson*, 2014 IL 115102, ¶ 108.

B. Petitioner has a meaningful opportunity to demonstrate rehabilitation and obtain release before he spends more than 40 years in prison.

The legislature provided petitioner "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" after he serves 38 years in prison, and thus he did not receive a sentence of *de facto* lifetime imprisonment without the possibility of parole.

Petitioner was sentenced under a statutory scheme that "controls the actual length of imprisonment" through statutory good conduct credit and

"allows prisoners to be released before their sentence is completed." Gregory W. O'Reilly, *Truth-in-Sentencing: Illinois Adds Yet Another Layer of Reform to Its Complicated Code of Corrections*, 27 Loy. U. Chi. L. J. 985, 987-1014 (1996), *available at* http://lawecommons.luc.edu/luclj/vol27/iss4/6 (describing early release mechanisms used throughout Illinois history). In this scheme, the judiciary imposes only the *maximum* period of incarceration for an offender. *See* 730 ILCS 5/3-3-3(c), 3-6-3(a)(2), 5-8-7(b) (1994); *see generally Johnson v. Franzen*, 77 Ill. 2d 513, 516-19 (1979); O'Reilly, *supra*, at 987, 989-93, 1009-12. The legislature determines how much of that sentence the person must serve, and has provided that "every person sentenced to imprisonment . . . *shall serve* the full term of a determinate sentence *less time credit for good behavior and shall then be released*" on mandatory supervised release. 730 ILCS 5/3-3-3(c) (1994) (emphasis added). Indeed, the statutory "Rules and Regulations for Early Release" *require* the person to receive "one day of good conduct credit for each day of service in prison," where each day of credit must "reduce by one day the inmate's period of incarceration set by the court." *Id.* § 3-6-3(a)(2); *see also id.* § 5-8-7(b) ("The offender shall be given credit on the determinate sentence . . . for time spent in custody as a result of the offense for which the sentence was imposed, at the rate specified in Section 3-6-3 of this Code.").[4] Thus, as this Court has held, the scheme

[4] The offender may further reduce the time that he spends in prison by earning credit, awarded at the discretion of the Director of the Illinois Department of Corrections (IDOC), for meritorious service. 730 ILCS 5/3-6-

mandates the application of day-for-day credit to determinate sentences. *Johnson*, 77 Ill. 2d at 518; *see also People v. Lindsey*, 199 Ill. 2d 460, 477 (2002) (describing scheme as a "system of mandatory 'good conduct credit'").

This day-for-day credit scheme is designed to encourage rehabilitation and enable an offender to be released after he serves half of the determinate sentence. The scheme is "very predictable, allowing a fairly accurate assessment of the offender's length of imprisonment at the time of sentencing." O'Reilly, *supra*, at 993. Prisoners know that they are "directly accountable for their successes or failures of self-control" and have "a direct stake in maintaining good order and discipline while incarcerated." Robert P. Shuwerk, *Illinois' Experience with Determinate Sentencing: A Critical*

3(a)(3) (1994). Recently, the General Assembly amended the scheme to require that IDOC award additional good conduct credit to offenders like petitioner who show that they "engaged full-time in" various prison programs and courses and/or earned educational degrees while in prison. *See* 730 ILCS 5/3-6-3(a)(3), (4), (4.1) (2020). Such additional credit might properly be considered in determining whether an offender received a *de facto* life sentence given the United States Supreme Court's emphasis on demonstrated maturity and rehabilitation. *See, e.g.*, *United States v. Mathurin*, 868 F.3d 921, 934-35 (11th Cir. 2017) (including credit that may be earned when calculating minimum prison time under *Miller*); *Starks v. Easterling*, 659 F. App'x 277, 281-82 (6th Cir. 2016) (White, J., concurring) (same). But because this Court did not include it in calculating Reyes's "earliest opportunity for release," *Reyes*, 2016 IL 119271, ¶¶ 2, 10 (including only credit to which offender is entitled, 730 ILCS 5/3-6-3(a)(1), (2), (2.1), (2.3)-(2.6), not credit that may be earned, 730 ILCS 5/3-6-3(a)(1.5), (a)(3) (2016)), the People do not consider it here, *see Barger v. Peters*, 163 Ill. 2d 357, 365-67 (1994) (Heiple, J., dissenting) (distinguishing day-for-day credit from earned educational credit).

Reappraisal Part I: Efforts to Structure the Exercise of Discretion in Bargaining for, Imposing, and Serving Criminal Sentences, 33 DePaul L. Rev. 631, 637 n.30 (1984), *available at* https://via.library.depaul.edu/law-review/vol33/iss4/1. In this way, the scheme provides "the incentive for prisoners serving long sentences to behave in order to gain early release." O'Reilly, *supra*, at 993; *see also People v. Kolzow*, 319 Ill. App. 3d 673, 679 (1st Dist. 2001) (statutory credit schemes provide prisoners incentives "'to conform their behavior to what society will accept'"); *Mathurin*, 868 F.3d at 935 ("good-time credits provide a potent rehabilitative incentive for juvenile offenders subject to lengthy sentences"). Thus, an offender sentenced under the day-for-day credit scheme who follows prison rules — and thereby demonstrates growth and rehabilitation — must be released after serving half of the judicially imposed maximum prison term. *See People ex rel. Colletti v. Pate*, 31 Ill. 2d 354, 357 (1964) ("It is established that a convict is unlawfully imprisoned after he has served his maximum sentence less good-time credit.").

For this reason, petitioner received a sentence that provides him a meaningful opportunity to obtain release after he serves 38 years in prison. So long as he abides by institutional rules, he is guaranteed release at that time. *See Barger*, 163 Ill. 2d at 365-67 (Heiple, J., dissenting) (day-for-day credit is "automatic," "guaranteed," and "annexed to the crime when committed"). Indeed, the legislature cannot, without violating the Ex Post

Facto Clause, eliminate or reduce petitioner's entitlement to the award of day-for-day credit because doing so would increase his punishment. *See Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 505-07 (1995); *Weaver v. Graham*, 450 U.S. 24, 30-36 (1981); *Barger*, 163 Ill. 2d at 362-63. Petitioner thus has a meaningful opportunity to demonstrate rehabilitation and obtain release before he serves more than 40 years in prison.

C. Petitioner provides no reasoned basis for disregarding statutory day-for-day credit.

Citing appellate court opinions that have reached a result different than the court below,[5] petitioner contends that whether a sentence is *de facto* life without parole depends solely on the judicially imposed sentence, and that statutory day-for-day good conduct credit is irrelevant because it "'is not guaranteed'"; the trial court lacks control over "'the manner in which a defendant's good conduct credit is earned or lost'"; and IDOC has "broad discretion" to award credit and "revoke credit at any time" for "minor infractions," "with little to no due process afforded." Pet. Br. 17-21. Petitioner's arguments answer the wrong question, misconstrue the credit scheme, and fail to explain why his opportunity for release materially differs

[5] The State has filed PLAs seeking review of the first of these opinions, *see People v. Peacock*, No. 125340 (Ill.), as well as subsequent decisions that have relied on them, *see People v. Daniel*, No. 126262 (Ill.); *People v. Ruddock*, No. 126404 (Ill.); *People v. Figueroa*, No. 126497 (Ill.); *People v. Morfin*, No. 126540 (Ill.); *People v. Hood*, No. 126546 (Ill.); *People v. Spaulding*, No. 126548 (Ill.); *People v. Anderson*, No. 126550 (Ill.); *People v. Quezada*, No. 126562 (Ill.); *People v. Hill*, No. 126581 (Ill.). *See also People v. Thornton*, 2020 IL App (1st) 170677 (rehearing petition pending).

from an opportunity for discretionary parole, which the Supreme Court held comports with the Eighth Amendment. *See Montgomery*, 136 S. Ct. at 736.

1. Statutory credit reduces the length of a prison term and must be considered when determining whether a juvenile offender has received a sentence of *de facto* life without parole.

Petitioner concedes that statutory good conduct credit is part of every sentence, yet asks this Court to disregard that credit and focus solely on the judicially imposed sentence because the time an offender must serve is irrelevant in the guilty plea context. Pet. Br. 17-18. But, as discussed in Part II.A, *Miller* applies only to sentences that do not provide a meaningful opportunity for release before a juvenile offender serves more than 40 years in prison. Thus, unlike the guilty plea context, *see* Pet. Br. 17-18, the length of time that the offender must spend in prison before he obtains an opportunity for release is the central question under *Miller*.

Moreover, as shown above, "[t]he sentence imposed is only part of the calculation for determining how long an offender spends in prison. Sentence credits, parole eligibility and automatic release policies also affect when an inmate is eligible and suitable for release." Lawrence, *supra*, at 9; *see also Weaver*, 450 U.S. at 31-32 (statutory credit "is one determinant of [an offender]'s prison term"). Whether a juvenile offender has a meaningful opportunity for release thus depends on the applicable statutory scheme, for if the legislature provided that opportunity before the offender serves more than 40 years in prison, the State has not "irrevocably sentence[d] [the

juvenile] to a lifetime in prison." *Miller*, 567 U.S. at 480; *see also Montgomery*, 136 S. Ct. at 736.

For that reason, *Buffer* does not render this Court's prior decisions in *Reyes* and *Patterson* irrelevant, as petitioner argues. *See* Pet. Br. 21-22. Under the scheme that *Buffer* considered, the 50-year sentence imposed by the trial court equaled the minimum time that the offender was required to spend in prison. 2019 IL 122327, ¶¶ 29, 34-41; *see also* 730 ILCS 5/3-6-3(a)(2)(i) (2016). But here, as in *Reyes*, petitioner's sentence is not the same as the number of years he needs to spend in prison before he is "eligible for release." 2019 IL 119271, ¶ 10; *see also Patterson*, 2014 IL 115102, ¶ 108. And, unlike in *Reyes*, the legislature provided petitioner "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" after he serves 38 years in prison. *See supra*, Part II.B. Petitioner thus did not receive a *de facto* life sentence.

2. Petitioner is entitled to day-for-day credit and no credit may be revoked arbitrarily or for minor infractions.

Petitioner's arguments misconstrue the day-for-day credit scheme. *See* Pet. Br. 18-20. As discussed in Part II.B., petitioner is *entitled* to sentence credit for each day that he serves in prison. The good conduct credit must be awarded and may be revoked only "for specific rule violations." 730 ILCS 5/3-6-3(c). Any decision to revoke such credit must comport with the Due Process Clause because the legislature "created a liberty interest in a shortened

sentence that result[s] from the good time credits." *Fillmore v. Taylor*, 2019 IL 122626, ¶ 39 (discussing *Wolff v. McDonnell*, 418 U.S. 539 (1974)). Due process requires that a prisoner receive "advance written notice of the disciplinary charges," an opportunity "to call witnesses and present documentary evidence in his defense," and a written statement by the disciplinary board "of the evidence relied on and the reasons for the disciplinary action." *Id.* ¶ 57. In addition, "to prevent arbitrary deprivations" of good conduct credit, the board's findings "must be supported by some evidence in the record." *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 447, 454-55 (1985).

Consistent with these requirements, "Illinois law establishes a multistep process before an inmate's good-conduct credits can be revoked." *Lucas v. Taylor*, 349 Ill. App. 3d 995, 1002 (4th Dist. 2004). The procedures comport with due process and thus protect against arbitrary revocation of awarded sentence credit. *Id.* at 1000, 1002; *see also* 730 ILCS 5/3-6-3(a), 3-8-7(e); *Rodriguez v. Ill. Prisoner Rev. Bd.*, 376 Ill. App. 3d 429, 435 (5th Dist. 2007). Specifically, the Illinois Administrative Code lists, defines, and categorizes all disciplinary offenses based on their seriousness. 20 Ill. Adm. Code 504.20, App'x A & Tbl. A. An IDOC employee who observes misconduct must prepare a written report that charges a prisoner with a disciplinary offense, but may issue a verbal reprimand for the least serious infractions.

Id. § 30. Upon service of the report on the prisoner, *id.* § 30(e), the matter proceeds to a reviewing officer for investigation, *id.* § 50.

After investigation, the reviewing officer may terminate proceedings (in which case the report is expunged), or amend, modify, or keep undisturbed the original charges. *Id.* If proceedings are not terminated, the officer must categorize the charged offenses as "major or minor based on the seriousness of the offens[es] and [enumerated] factors." *Id.* § 50(d)(3). The Adjustment Committee hears major offenses, and the Program Unit hears minor ones. *Id.* Prior to a hearing before the Adjustment Committee, *see Lucas*, 349 Ill. App. 3d at 1000-02 (summarizing hearing requirements), a hearing investigator reviews the report, investigates, corrects any errors, interviews witnesses, inspects evidence, and prepares an additional report for the Adjustment Committee as necessary, 20 Ill. Adm. Code 504.60(a). The hearing investigator must report to the Adjustment Committee "evidence of a convincing nature that the offender did not commit the offense." *Id.* § 60(a)(4).

The Code sets forth the available disciplinary actions that the Adjustment Committee or Program Unit may recommend, which include 10 sanctions other than revocation of statutory sentence credit. *Id.* § 80(*l*)(4); *Fillmore*, 2019 IL 122626, ¶ 46. Significantly, however, the Program Unit lacks authority to recommend revocation of sentence credit for minor offenses. 20 Ill. Adm. Code 504.100(i). The Code also fixes the maximum

possible sanctions for each offense. 20 Ill. Adm. Code 504 Tbl. A. For example, the maximum penalties available for an offender who "willfully disobey[s] any rule of the facility," are one month of loss or restriction of privileges, status downgrade, and/or revocation of statutory credit, *id.* App'x A (offense "404. Violation of Rules"); *id.* Tbl. A (offense 404), but again, credit may be revoked only if the conduct itself was serious enough to be classified as a major offense or accompanied by more serious misconduct, *id.* §§ 50(d)(3), 100(i).[6]

The Chief Administrative Officer and Director of IDOC must review all dispositions that recommend a revocation of sentence credit and, while those officials may reduce the recommended sanctions, they may not increase them. *Lucas*, 349 Ill. App. 3d at 1001; 20 Ill. Adm. Code 504.80(p)-(q). In addition, by statute, the Director may not revoke more than 30 days of credit within

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[6] Research studies suggest that prison officials are unlikely to revoke good time credit for minor offenses. *See, e.g.*, John Howard Association Staff, *"Location, Location, Location": How Where a Prisoner is Housed Influences the IDOC Disciplinary Process* (Summary Report 2020), at 21 (for least serious offenses, sentence credit revocation occurred in less than 1.6% of violations), and accompanying Thesis at 2, 30-31, 36 (finding that majority of disciplinary sanctions imposed upon Illinois prisoners are relatively minor sanctions in response to low-level offenses, and most common sanction for these offenses is verbal warning or loss or restriction of privileges), *available at* https://www.thejha.org/special-reports/location; Benjamin Steiner & Calli M. Cain, *Punishment Within Prison: An Examination of the Influences of Prison Officials' Decisions to Remove Sentencing Credits*, 51 Law & Soc'y Rev. 70, 87-89 (2017) (finding that, in one Midwestern state, "prison officials seldom respond[ed] to rule violations by removing good time" and were more likely to consider characteristics of rule violation and remove good time for more serious offenses than less serious offenses).

any 12-month period without review and approval of the Prisoner Review Board (PRB). 730 ILCS 5/3-3-2(a)(4), 3-6-3(c); *see also* 20 Ill. Adm. Code 107.150(c), 1610.170.

As for the PRB, it "provides an extra layer of procedural protection" beyond that required by the Due Process Clause. *Rodriguez*, 376 Ill. App. 3d at 437 (quotation marks omitted). In reviewing a recommendation for revocation of sentence credit, the PRB considers factors including whether revocation would be consistent with past practices and regulations. 20 Ill. Adm. Code 1610.170(b). The PRB may concur with, deny, or modify the recommended sanction, *id.* § 170(a), but it may not increase any sanction beyond that requested by the Director, *Lucas*, 349 Ill. App. 3d at 1001; 730 ILCS 5/3-6-3(c). The Code also provides a grievance procedure, including an appeal to an administrative review board, by which a prisoner may challenge any disciplinary action and obtain a reduction in any credit revocation. *See* 20 Ill. Adm. Code 504.800, *et seq.*; *Cebertowicz v. Baldwin*, 2017 IL App (4th) 160535, ¶¶ 22-27; *see also, e.g.*, *Toney v. Briley*, 351 Ill. App. 3d 295, 296-97 (3d Dist. 2004) (grievance process "provide[s] meaningful redress for prisoner concerns").

Moreover, after pursuing these administrative remedies, a prisoner may seek redress in state court for credits lost due to constitutionally infirm disciplinary proceedings. *Fillmore*, 2019 IL 122626, ¶ 67. And if the prisoner remains dissatisfied, he may renew the due process claim in a petition for a

writ of habeas corpus in the federal courts. *Donelson v. Pfister*, 811 F.3d 911, 915 (7th Cir. 2016). Finally, a prisoner may petition, every three months, for restoration of revoked credit; the Director may restore up to 30 days of credit at his discretion, and more than 30 days with PRB approval. 20 Ill. Adm. Code 107.160; 730 ILCS 5/3-3-2(b), 3-6-3(c).

In sum, petitioner must be awarded day-for-day credit, is entitled to keep it as long as it is not revoked because he commits a major disciplinary offense, is afforded procedures that protect against the arbitrary revocation of credit, and may enforce the constitutional protections through judicial review. That IDOC may determine — after adhering to the foregoing procedures that protect against the arbitrary revocation of credit — that petitioner's misconduct in prison warrants revocation of previously awarded credit does not alter the fact that the legislature provided him a meaningful opportunity to demonstrate rehabilitation and obtain release before he spends more than 40 years in prison.

As the Eleventh Circuit Court of Appeals explained when it considered good conduct credit in determining whether a juvenile offender had received *de facto* life without parole: "[I]t is totally within Defendant's own power to shorten the sentence imposed. *Graham* does not require that a sentence 'guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime.'" *Mathurin*, 868 F.3d at 935. Rather, the Eighth Amendment requires only "that the offender have a chance to show that he has earned the right to

be given a second chance at liberty." *Id.*; *see also Montgomery*, 136 S. Ct. at 736. Because petitioner's sentence provides him a meaningful chance to be released before he spends more than 40 years in prison, *Miller* does not apply to his sentence.

3. The day-for-day credit scheme provides an opportunity for release that is at least as certain as a chance for discretionary parole.

Petitioner argues that sentence credit should not be considered because it "creates no certainty that he will serve anything but the full 76-year sentence imposed by the trial court," and is "highly individualized in its application," and because the trial court lacks "'control over the manner in which [his] good conduct credit is earned or lost.'" Pet. Br. 17-18. But petitioner's argument overlooks that a life sentence that provides an opportunity for parole has these same characteristics, *Greenholtz*, 442 U.S. at 7-16, and satisfies the Eighth Amendment, *Montgomery*, 136 S. Ct. at 736.

There are "few certainties" in a discretionary parole system. *Greenholtz*, 442 U.S. at 8. A parole board's decision "involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." *Id.* "The behavior record of an inmate during confinement is critical in the sense that it reflects the degree to which the inmate is prepared to adjust to parole release." *Id.* at 15. But a board also "assess[es] whether, in light of the nature of the crime, the

inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice." *Id.* at 8; *see also, e.g.*, 730 ILCS 5/5-4.5.115(j). In addition, "there is no set of facts which, if shown, mandate a decision favorable to the individual." *Greenholtz*, 442 U.S. at 10; *see also Swarthout v. Cooke*, 562 U.S. 216, 222 (2011) (per curiam).

A discretionary parole system thus "provides no more than a mere hope that the benefit will be obtained[,] . . . a hope which is not protected by due process." *Greenholtz*, 442 U.S. at 11. All that a State must provide if it establishes such a system is "an opportunity to be heard" and "a statement of the reasons why parole was denied." *Swarthout*, 562 U.S. at 220. Moreover, because a person has no liberty interest in being released on parole, a board's decision to deny parole is generally unreviewable. *Id.* at 220-22; *see also Hill v. Walker*, 241 Ill. 2d 479, 485-88 (2011); *Hanrahan v. Williams*, 174 Ill. 2d 268, 274-76 (1996).

In sum, a discretionary parole scheme creates no certainty that an offender will serve anything but the full sentence imposed by a trial court. *Graham*, 560 U.S. at 74-75. Indeed, a trial court has no control over whether a defendant is ever released on parole, for the decision is ultimately one for the parole board. *See id.*; *Greenholtz*, 442 U.S. at 8-11. And the determination of who is released on parole is highly individualized and depends on myriad factors, including the offender's prison disciplinary record.

See, e.g., 730 ILCS 5/5-4.5-115(j); *Hanrahan*, 174 Ill. 2d at 274-76; *Greenholtz*, 442 U.S. at 15-18; Lawrence, *supra*, at 9.

Nevertheless, *Montgomery* held that "[e]xtending parole eligibility to juvenile offenders" satisfies the Eighth Amendment. 136 S. Ct. at 736. That is because eligibility for parole provides a juvenile offender the incentive "to achieve maturity of judgment and self-recognition of human worth and potential" and an opportunity to demonstrate that he is ready to "rejoin society." *Graham*, 560 U.S. at 78. In other words, the focus is on whether the State through its laws provided the juvenile an *opportunity* for release and when that "earliest opportunity" occurs, *Reyes*, 2016 IL 119271, ¶ 10, not on a factual determination of the offender's "projected release date" or "actual time served," as petitioner argues, Pet. Br. 25-26. Likewise, the trial court's intent at the time of sentencing, *see id.*, is irrelevant because, as *Montgomery* holds, a State may satisfy the Eighth Amendment by providing a juvenile offender an opportunity for release, even if the trial court sentenced the person to life without parole, 136 S. Ct. at 736.[7]

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[7] Petitioner infers that the trial court intended to effectively sentence him to life without parole because "[t]he law in effect at the time of sentencing required Dorsey to serve 100% of his 76-year sentence. 730 ILCS 5/3-6-3(a)(2)(i) (West 1996)." Pet. Br. 26. But the trial court was silent on this issue, *see, e.g.*, TC5, 159; TR.G55-62, and by the time that petitioner was sentenced, two appellate court districts had already invalidated this statute — known as the "Truth-in-Sentencing" law — as facially unconstitutional under Illinois's single subject rule. *See People v. Reedy*, 295 Ill. App. 3d 34 (2d Dist. 1998); *People v. Pitts*, 295 Ill. App. 3d 182 (4th Dist. 1998). This Court affirmed that determination, *People v. Reedy*, 186 Ill. 2d 1 (1999), and because the General Assembly did not reenact the Truth-in-Sentencing law

The day-for-day good conduct credit scheme gives no less hope or chance for early release than a discretionary parole scheme. And it provides a juvenile offender an incentive to "exhibit 'maturity and rehabilitation'" through good behavior in prison. *Mathurin*, 868 F.3d at 935-36; *see supra*, Part II.B. In fact, the day-for-day scheme creates a liberty interest in statutory credit and thus provides *greater* certainty and protection against arbitrariness than a discretionary parole system, in which an inmate can only hope that the board will determine that his behavior in prison shows rehabilitation and not deny parole based on the seriousness of his criminal offenses. The day-for-day scheme also provides more predictability, *see* O'Reilly, *supra*, at 993-94, because a prisoner's release depends solely on whether he can "'conform [his] behavior to what society will accept,'" *Kolzow*, 319 Ill. App. 3d at 679; *see also* Shuwerk, *supra*, at 637 n.30 (day-for-day credit scheme intended to "place[] control over imprisoned inmates' sentences in their own hands rather than leaving that determination to some outside authority").

Petitioner's contrary position would prohibit (or invalidate) every sentence imposed on a juvenile offender that is more than 40 years, regardless of the opportunity for release that the legislature provided through guaranteed statutory credit. For example, a minimum aggregate

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until after petitioner was sentenced, it does not apply to him, *People v. Gooden*, 189 Ill. 2d 209, 222-23 (2000).

41-year sentence imposed for multiple offenses on a juvenile homicide offender is unconstitutional under petitioner's position, despite the legislature's intent to provide the offender a release opportunity after he spends 20.5 years in prison (or six months more than the minimum sentence for first degree murder). But the Eighth Amendment requires no such result.

In sum, the day-for-day scheme provides an opportunity for early release based on demonstrated maturity and rehabilitation that is at least as meaningful and realistic as discretionary parole. Because petitioner has "some meaningful opportunity for release based on demonstrated maturity and rehabilitation" before he spends more than 40 years in prison, he has not received a *de facto* life without parole sentence and *Miller*'s sentencing procedures do not apply to him as a matter of law. The appellate court thus properly affirmed the circuit court's judgment denying petitioner leave to raise an Eighth Amendment claim in a successive postconviction petition.

III. This Court Should Deny Petitioner Leave to Raise an Illinois Constitutional Challenge to His Sentence in a Successive Postconviction Petition.

The question on appeal from the denial of leave to file a successive postconviction petition is whether the motion, petition, and supporting documentation are sufficient to establish cause and prejudice as to each claim asserted in the successive petition, *i.e.*, whether the asserted claims fail as a matter of law or whether the pleadings are sufficient to justify further proceedings under the Act. *Smith*, 2014 IL 115946, ¶ 35. Petitioner's motion

for leave to file a successive postconviction petition, his appellate court briefing, and his PLA in this Court argued only that he had shown cause and prejudice to assert an Eighth Amendment claim under *Miller* in a successive petition. *See supra*, pp. 10-12. As discussed in Part II, petitioner was not sentenced to *de facto* life without parole, so the circuit court properly denied him leave to raise a *Miller* claim in another postconviction petition.

In his opening brief before this Court, petitioner argues for the first time in support of his motion for leave to file that if this Court rejects his Eighth Amendment claim, he should be granted leave to assert a claim under the penalties provision in a successive postconviction petition. Pet. Br. 26-27. But petitioner has forfeited this request. *See People v. Robinson*, 223 Ill. 2d 165, 173-74 (2006) (claims "raised for the first time in defendant's [opening] brief to this [C]ourt . . . are forfeited"); *People v. Johnson*, 2018 IL App (1st) 153266, ¶ 27 (juvenile offender's challenge to sentence under penalties provision forfeited where not raised prior to appellate court reply brief).

Forfeiture aside, petitioner's claim is barred by the doctrine of *res judicata*, and thus he fails to show cause and prejudice to relitigate the claim in a successive postconviction petition. The penalties provision provides, in relevant part: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The provision "is directed to the judiciary in that it requires courts not to abuse discretion in imposing

sentences within the framework set by the legislature." *People v. Taylor*, 102 Ill. 2d 201, 206 (1984); *accord People v. Perruquet*, 68 Ill. 2d 149, 154-55 (1977). A sentence within statutory limits is deemed excessive and the result of an abuse of discretion only if "it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose," *i.e.*, when a sentence fails to reflect the seriousness of the offense or give adequate consideration to the defendant's rehabilitative potential. *People v. Heflin*, 71 Ill. 2d 525, 545 (1978) (citing *People v. Taylor*, 33 Ill. 2d 417 (1965), and Ill. Const. 1970, art. I, § 11); *accord People v. Murphy*, 72 Ill. 2d 421, 439 (1978).

When imposing a sentence within the statutory range, the trial court must "consider 'all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding.'" *People v. Fern*, 189 Ill. 2d 48, 55 (1999) (quoting *People v. Barrow*, 133 Ill. 2d 226, 281 (1989)). A sentencing judge thus considers myriad factors, including the defendant's age, personal history, and rehabilitative potential. *See id.* at 53; *accord People v. La Pointe*, 88 Ill. 2d 482, 493-99 (1981).

On direct appeal, petitioner recited the language of the penalties provision and argued that his sentence was excessive — *i.e.*, "a great departure from the fundamental law and its spirit and purpose" — because the trial court failed to adequately consider his age and rehabilitative

potential. RA15-16 (citing *Taylor*, 33 Ill. 2d at 417, and *Murphy*, 72 Ill. 2d at 421). The appellate court rejected the claim and petitioner did not seek review in this Court. *See supra*, pp. 8-9. Accordingly, the doctrine of *res judicata* bars petitioner's penalties provision claim, and he may not relitigate it in a successive postconviction petition. *See Davis*, 2014 IL 115595, ¶¶ 4-5, 42-45 (holding that Illinois law recognized "the special status of juvenile offenders" before *Miller*, and *res judicata* barred relitigation of juvenile offender's challenge to sentence under penalties provision, even though *Miller* was not decided until after the prior judgment).

Petitioner fails to establish the requisite cause and prejudice to overcome this prior adjudication and allow him to again raise a penalties provision claim in a successive petition. *See People v. Pitsonbarger*, 205 Ill. 2d 444, 463 (2002) (Act requires petitioner to establish cause and prejudice for "each individual claim" he seeks to assert). Contrary to petitioner's suggestion, Pet. Br. 27, 34, *Miller*'s announcement of a new substantive rule — and thus a new legal right — under the Eighth Amendment does not provide cause for a defendant to raise a claim under the Illinois Constitution's penalties provision. "A ruling on a specific flavor of constitutional claim may not justify a similar ruling brought pursuant to another constitutional provision." *Patterson*, 2014 IL 115102, ¶ 97 (citing *Davis*, 2014 IL 115595, ¶ 45). Although both the Eighth Amendment and the penalties provision apply "to direct actions by the government to inflict

punishment," *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006), once they apply, they afford different protections and are governed by distinct standards, *see Davis*, 2014 IL 115595, ¶¶ 42-45 (separately analyzing claims); *People v. Clemons*, 2012 IL 107821, ¶¶ 35-42 (explaining differences). Thus, petitioner cannot rely on *Miller* as "cause" to challenge his sentence under the penalties provision in a successive petition.

Petitioner also appears to rely on the scientific knowledge that *Miller* cited to support its holding. Pet. Br. 34. However, *Miller* is based primarily on the longstanding societal recognition that children are different from adults, not scientific research, *People v. Harris*, 2018 IL 121932, ¶ 60, and the constitutional significance of youth and rehabilitation was well established in Illinois law prior to *Miller, see Holman*, 2017 IL 120655, ¶ 44 ("We have long held that age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance.").

Thus, *Miller*'s unavailability at best "deprived [petitioner] of some helpful support for" his state law claim, which is insufficient to establish "cause." *People v. La Pointe*, 2018 IL App (2d) 160903, ¶ 59. As the Second District has observed, "[i]f the acquisition of new scientific knowledge to support an already viable claim were all that a [petitioner] needed to show in order to raise the claim years late, then the 'cause' requirement of section 122-1(f) would be a weak threshold indeed." *Id.*

Even if petitioner could show cause (and he cannot), he must still establish prejudice. Here, the sole question is whether the trial court abused its discretion and imposed a sentence that exceeds constitutional limits. *See Taylor*, 102 Ill. 2d at 205-06; *Murphy*, 72 Ill. 2d at 439. As the appellate court held on direct appeal, the trial court considered petitioner's youth and rehabilitative potential and properly exercised its discretion in determining the appropriate sentence for his multiple offenses. RA9-11. Thus, petitioner cannot establish prejudice.

Indeed, petitioner's youth was central to his pretrial motions, and, as defense counsel acknowledged at sentencing, the trial judge was familiar with the transfer hearing in juvenile court and the evidence that had been presented there about petitioner's background. *See supra*, pp. 2-7. Additionally, the PSI and letters submitted at the sentencing hearing included information about petitioner's family background and rehabilitative efforts before trial. *Id.* And petitioner's family asked the trial court to sentence petitioner to a term that provided him a hope for release. *Id.*

In arguing for a sentence that would allow petitioner to rejoin society, defense counsel emphasized petitioner's youth and rehabilitative potential, including that his choices reflected the intelligence and lack of judgment that attends youth and that his educational progress in the juvenile detention center demonstrated his capacity to learn and grow. *Id.* The prosecutor highlighted the seriousness of petitioner's offenses, including that he was the

lone shooter and his actions reflected a "total disregard for human life" and threatened the safety of the restaurant, its customers, and the community. *Id.* Ultimately, the trial court carefully weighed the myriad factors — indeed, it specifically identified petitioner's youth as mitigating — and properly exercised its discretion in concluding that a lengthy prison term was appropriate based on the seriousness of petitioner's crimes of first degree murder and two attempted murders. *See People v. Coleman*, 166 Ill. 2d 247, 261 (1995) (under penalties provision, a defendant's rehabilitative potential "is not entitled to greater weight than the seriousness of the offense"); *cf. Davis*, 2014 IL 115595, ¶ 45 (penalties provision "does not necessarily prohibit a sentence of natural life without parole where a juvenile offender actively participates in the planning of a crime that results in multiple murders"); *People v. Miller*, 202 Ill. 2d 328, 341-43 (2002) (same). As the appellate court held on direct appeal, petitioner's sentence passes constitutional muster under the penalties provision.

Petitioner's remaining contentions do not alter this conclusion. First, petitioner's rehabilitative efforts *after* he was sentenced, *see* Pet. Br. 32-33, are irrelevant to determining whether the trial court, at the time of sentencing, imposed a penalty within constitutional limits. *See La Pointe*, 2018 IL App (2d) 160903, ¶ 62; *see generally People v. Calhoun*, 46 Ill. 2d 60, 63-64 (1970) (Act limited to relief for constitutional errors that occurred in proceedings that resulted in a defendant's judgment of conviction, not to

matters occurring after conviction); *cf. Holman*, 2017 IL 120655, ¶ 47 ("good conduct while imprisoned cannot undercut" a trial court's finding of incorrigibility at time of sentencing). Second, as discussed in Part II, the trial court gave petitioner a sentence that provides him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, as required under the Eighth Amendment. But this Court has never held that the penalties provision bars natural-life sentences, let alone sentences of less than life, for all juvenile offenders such that the opportunity for release is relevant to his penalties provision claim, *see Davis*, 2014 IL 115595, ¶ 45, as petitioner argues, Pet. Br. 28-29, 33-34.

Third, that petitioner might be sentenced under a different statutory scheme if he were sentenced today, *see* Pet. Br. 31-32, does not make his sentence unconstitutional, particularly where the principles that govern his penalties provision claim have not changed. *See People v. Richardson*, 2015 IL 118255, ¶¶ 9-11 (Illinois Constitution does not "prevent[] statutes and statutory changes from having a beginning" or "prohibit reasonable distinctions between rights as of an earlier time and rights as they may be determined at a later time"); *Dorsey v. United States*, 567 U.S. 260, 280 (2012) (line-drawing efforts create disparities whenever Congress enacts a new law changing sentences); *see also Buffer*, 2019 IL 122327, ¶ 29 (line-drawing efforts always subject to objections). Finally, petitioner's arguments about his prison conditions, *see* Pet. Br. 29-31, do not state a claim under the

penalties provision or a claim for postconviction relief. *See Calhoun*, 46 Ill. 2d at 63-64 (Act provides no relief for constitutional errors occurring after judgment of conviction); *Kucinsky v. Pfister*, 2020 IL App (3d) 170719 (detailing procedures for complaints about prison conditions).

In sum, forfeiture aside, petitioner fails to satisfy the cause-and-prejudice test and this Court should deny him leave to challenge the constitutionality of his sentence in a successive postconviction petition.

CONCLUSION

This Court should affirm the judgment of the appellate court.

January 19, 2021

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 43 pages.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

APPENDIX

Table of Contents to the Appendix

FOURTH DIVISION
September 7, 2000

No. 1-98-3979

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 96 CR 21035
	)	
DERRELL DORSEY,	)	Honorable
	)	Stuart E. Palmer,
Defendant-Appellant.	)	Judge Presiding.

O R D E R

Following a jury trial, defendant Derrell Dorsey was found guilty of one count of first degree murder and two counts of attempted first degree murder.[1] He was sentenced to an aggregate prison term of 76 years: 40 years for first degree murder and 18 years for each count of attempted first degree murder. On appeal, defendant contends that the trial court erred by allowing gang-related testimony. Defendant also contends that the trial court improperly relied on evidence of his gang membership and failed to consider his age when imposing his sentence.

About 7 p.m. on March 11, 1996, Irene Williams, Calvin Sims,

[1]Defendant was also found guilty two counts of aggravated battery which merged with the two counts of attempted first degree murder.

Steven Thomas, and the victim Tyran Snow were at a take-out restaurant located at 79th and Ada Streets in Chicago. Williams and Sims testified that defendant kicked open the door to the restaurant and fired four shots towards them. The bullets hit Williams and Sims, and fatally injured the victim who died at the scene. At the hospital after the shooting, Williams told the police that defendant was the shooter. The following day Sims identified defendant in a photo array.

At trial, the victim's grandmother Bessie Snow testified that she did not know if the victim was a gang member. Snow also stated that she knew about gangs from living and working in the area. The Gangster Disciples (Disciples) street gang controlled the area where the shooting occurred and the Blackstones controlled the area south of 80th Street. Defendant's objection that this testimony was beyond the witness's "acumen" was overruled.

On cross-examination, Snow affirmed that "generations of boys" were members of the Disciples and Blackstones. She denied knowing whether several of the victim's friends were members of the Disciples. However, Snow was aware that these friends had nicknames and that gang members also used nicknames.

Williams testified that the Disciples and Blackstones were present in the area where the shooting occurred. The area controlled by the Disciples extended to 80th Street and the Blackstones controlled the area beyond. Williams knew defendant

was a member of the Blackstones because she had previously seen him making hand signs and wearing red and black clothing, colors associated with the gang.

Subsequently, defense counsel objected when the State asked Williams if she was aware of any other gangs who used the same signs. Outside the presence of the jury, defense counsel argued that the witness lacked sufficient information to respond and that he lacked notice that gang evidence would be involved in the trial. The trial court disagreed and found that defense counsel had notice of potential gang evidence because he questioned the jurors during the voir dire examination.

On cross-examination, Williams stated that she may have told a nurse that she was injured when "a rival gang walked in and started shooting." She did not know whether the victim was a member of the Disciples, but knew that he and Sims "hung out" with them. Williams stated that Thomas was a Disciples' member, lived in the Blackstones-controlled area, and had experienced problems with the Blackstones in the past.

After Williams' testimony, the trial court denied defense counsel's motion to strike Snow's testimony because it was hearsay and she was not an expert.

Sims then testified regarding his observations at the scene. On cross-examination, Sims stated that he did not know if defendant or the victim were gang members.

Chicago police officer Wardell Hardy testified that the

Disciples and Blackstones were rival gangs located in the area of the shooting. Over defense counsel's relevancy objection, Officer Hardy was permitted to testify regarding the gangs' alignments with other gangs, signs and colors, but not as to internal gang hierarchy.

On cross-examination, Officer Hardy affirmed that the Disciples and Blackstones were fighting at the time of the shooting. He also stated that Disciples' members wore blue, and that the victim was wearing blue pants and a blue and black jacket at the time of the shooting. Officer Hardy stated on redirect examination that the victim may have been perceived as a member of the Disciples because he was wearing blue.

Chicago police detective Mike McDermott testified regarding his investigation of the shooting and the territories claimed by the Disciples and Blackstones. Over defense counsel's objection that such testimony was cumulative, Detective McDermott testified that the Disciples and Blackstones were rivals and that there "was a lot of gang rivalry going on" at the time of the shooting.

During closing argument, the State said that defendant may have shot the victim because he was a Disciple member, wore blue clothing or the restaurant was located in Disciples' territory. The State also indicated that the police officers testified regarding gang problems in the area of the shooting.

Defense counsel argued that there were hundreds of gang members in the area of the shooting and that the jury had to

determine that defendant, specifically, was the shooter. He also reviewed Williams' statements to a nurse that she was at the restaurant with gang members and that a rival gang member came inside and started shooting.

In rebuttal, the State argued that defendant was a member of the Blackstones who went to Disciples' territory to shoot people inside the restaurant. The State further argued that Williams and Sims would not risk gang retaliation by lying about defendant being the shooter.

The trial court subsequently instructed the jury that "conduct other than that charged in the indictment" could only be considered to show defendant's motive. After the jury found him guilty, defendant filed a motion for a new trial contending, among other allegations, that the trial court erred by allowing Snow to testify about the identification and presence of gangs.

At sentencing and in addition to other evidence in mitigation, defendant presented the testimony of his aunt Sheila Teague who testified that he was a member of the Blackstones. In aggravation, the State indicated that defendant admitted in the presentence investigation report to being affiliated with the Blackstones. The State also argued that the gang evidence presented at trial showed the shooting was related to the rivalry between the Disciples and Blackstones.

Defense counsel argued in mitigation that defendant was 14 years old at the time of the shooting and that no evidence

connected the shooting to defendant's gang involvement.

After listening to the arguments, the trial court indicated that it had "reviewed and considered the statutory factors in aggravation and *** mitigation." The court mentioned that it "obviously recognized the youth of" defendant in mitigation. The trial court reiterated that defendant admitted to being a gang member in his presentence investigation report and that the evidence also established his membership. The trial court then stated that the "real inherent evil of gang crime" is that innocent bystanders get hurt. The trial court also stated that defendant's gang member friends were not with him in court and that "once [defendant] took that gun and went into the restaurant on [his] own and started firing, [he] was on [his] own [and defendant's friends were] not going to be there to help [him do the time in jail]." The trial court then imposed defendant's sentence.

Defendant first contends that the trial court erred by allowing Snow, Williams, Officer Hardy and Detective McDermott to testify regarding gang affiliations and warfare because such testimony was not relevant. However, to preserve an evidentiary issue for appeal, a defendant must object at trial and raise the issue in a written post-trial motion. People v. Enoch, 122 Ill. 2d 176, 186 (1988); People v. Maldonado, 240 Ill. App. 3d 470, 478 (1992). The basis for a contention on appeal must be the same as that relied upon at trial. People v. Williams, 262 Ill.

App. 3d 808, 820 (1994)(defendant waived objection to foundation of gang-related evidence where relevancy objection raised at trial).

The record shows that the only relevancy objection raised by defendant was to the gang-related testimony of Officer Hardy. No such objection was made during the testimony of Snow, Williams or Detective McDermott. In addition, defendant's motion for a new trial only objected to the testimony of Snow and failed to address the testimony of the other witnesses. Thus, defendant failed to raise his objections at trial and preserve them in his post-trial motion. Therefore, he has waived any contention that the gang-related testimony was not relevant.

Waiver aside, the gang-related evidence was relevant to the issue of defendant's motive for the shooting. "[T]o be admissible as evidence of motive, gang evidence must show both that the defendant is a member of a gang, and that gang activity is related to the crime charged." Williams, 262 Ill. App. 3d at 819, citing People v. Smith, 141 Ill. 2d 40, 58-60 (1990). The trial court's decision to admit such evidence will not be reversed absent an abuse of discretion. People v. Gonzalez, 142 Ill. 2d 481, 489-90 (1991).

Here, Williams testified that she had seen defendant wearing colors and making hand-signs associated with members of the Blackstones. Officer Hardy also indicated that the victim could have been perceived as a member of the Disciples because of the

color of the clothing he wore. Williams, Officer Hardy and Detective McDermott all testified that the two gangs were rivals. Snow, Williams and Officer Hardy further indicated that the restaurant where the shooting occurred was located near the border of the territories claimed by the Disciples and Blackstones. Additionally, both Officer Hardy and Detective McDermott stated that the two gangs were fighting at the time of the shooting. In summary, the testimony showed that defendant was likely the member of a gang that was fighting with a rival gang at the time of the shooting and whose colors the victim wore. The testimony of these witnesses was, therefore, related to defendant's motive for the shooting and the trial court did not abuse its discretion in admitting the evidence.

Even if the trial court did err in admitting the gang-related testimony, a new trial is not automatically required. People v. Easley, 148 Ill. 2d 281, 330 (1992). A defendant's conviction may nonetheless be upheld and the alleged error deemed harmless where "the competent evidence in the record establishes a defendant's guilt beyond a reasonable doubt and it can be concluded that a retrial without the erroneous evidence would produce the same result." People v. Negron, 297 Ill. App. 3d 519, 536 (1998). Since both Williams and Sims were able to positively identify defendant as the shooter, a new trial is not warranted in the instant case. See People v. Green, 298 Ill. App. 3d 1054, 1064 (1998) (identification by single witness

sufficient to sustain conviction where circumstances permit positive identification).

Defendant next contends that the trial court imposed an excessive sentence by relying on evidence of his gang membership and failing to consider his age. However, a defendant seeking to challenge his sentence must first file with the trial court a post-sentencing motion addressing the issues for review. 730 ILCS 5/5-8-1(c)(West 1998); People v. Reed, 177 Ill. 2d 389, 393 (1997). Defendant's failure to present this question in his post-sentencing motion results in waiver of this claim on appeal.

Regardless of defendant's waiver of this issue, the record indicates that the trial court properly considered the factors relevant to his sentence. Any evidence that is reliable and relevant is admissible during a sentencing hearing at the discretion of the trial court. People v. Patterson, 154 Ill. 2d 414, 475 (1992). Further, "[a]ny evidence regarding a defendant's character is relevant" and may include evidence of the defendant's gang affiliation. Patterson, 154 Ill. 2d at 476. All penalties are to be determined according to the particular circumstances of each case, and the nature and extent of the offenses involved. People v. Allan, 231 Ill. App. 3d 447, 458 (1992). Such sentencing determinations are entitled to great deference and weight (People v. Ellis, 187 Ill. App. 3d 295, 303 (1989)), and the trial court's decision will not be overturned absent an abuse of discretion (People v. Perruquet, 68 Ill. 2d

149, 154 (1977)).

The evidence presented by the State established that the gang rivalry between the Blackstones and the Disciples was a possible motive for the shooting. Testimony at the sentencing hearing also affirmed that defendant was a member of the Blackstones. Since the gang-related evidence was reliable and relevant, the trial court's consideration thereof was not an abuse of discretion.

However, defendant relies on the decision in People v. Gonzalez, 238 Ill. App. 3d 303, 333-34 (1992). When sentencing the defendant to the maximum term for murder, the trial court in Gonzalez relied on the circumstances of the crime as a "cold blooded shooting" involving street gang rivalry. Gonzalez, 238 Ill. App. 3d at 333-34. The appellate court found that the requisite statutory factors were not considered and vacated defendant's sentence. Gonzalez, 238 Ill. App. 3d at 334.

Unlike the trial court in Gonzalez, the record here indicates that the court's statements to defendant were merely a comment on the potential for gang-related violence to injure those not involved in such rivalries. The trial court also admonished defendant that, just as he acted alone as the shooter, so, too, would he be solely responsible for serving the sentence imposed despite his gang membership.

In addition, the trial court expressly stated that it had "reviewed and considered the statutory factors in aggravation and

*** mitigation." Defense counsel mentioned defendant's age, and the trial court specifically affirmed that it was considering defendant's "youth" as a mitigating factor. Thus, the trial court did not abuse its discretion in imposing defendant's sentence.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

BARTH, J., with HOFFMAN and SOUTH, J.J., concurring.

2000 WL 34247126 (Ill.App. 1 Dist.) (Appellate Brief)
Appellate Court of Illinois, First District.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,

v.

Derrell DORSEY, Defendant-Appellant.

No. 1-98-3979.
January 31, 2000.

Appeal from the Circuit Court of Cook County Criminal Division
96 CR 21035 Honorable Stuart Palmer Judge Presiding

Brief and Argument for Defendant-Appellant

Dennis J. Born, Robert L. Gevirtz, Law Firm of Gevirtz and Born, 181 N. Waukegan Rd. Suite 306, Northfield, Illinois 60093, (847) 501-3388.

***1** *POINTS AND AUTHORITIES*

Case

Note: Table of Contents page numbers missing in original document

2** ***NATURE OF THE ACTION

This action is brought pursuant to the Defendant's desire to appeal the verdict of guilty before the Honorable Stuart Palmer of the offenses of first-degree murder of Tyran Snow, attempt first-degree murder of Irene Williams, and attempt first-degree murder of Calvin Simms and subsequent sentencing by the Honorable Stuart Palmer to 40 years for the first-degree murder of Tyran Snow, 18 years for the attempt first-degree murder of Irene Williams, and 18 years for the attempt first-degree murder of Calvin Simms. All of these sentences to run consecutively.

ISSUES PRESENTED FOR REVIEW

1) Whether Trial Judge acted improperly in allowing various witnesses to testify to gang affiliation and gang warfare when such evidence was not relevant to the charges before the finder of fact.

2) Whether Trial Judge imposed an excessive sentence of 76 years, where Trial Court relied on defendant's gang membership to impose excessive sentences upon defendant in sentencing when the evidence introduced at trial indicated that mere "gang membership" played no part in the events.

3) Whether Trial Judge did not sufficiently consider defendant's age in imposing sentence.

JURISDICTION

Defendant appeals his conviction and sentence pursuant to Article VI, Section 6 of the Illinois Constitution (1970) and Illinois Supreme Court Rules 602 and 603.

*3 *STATEMENT OF FACTS*

On March 11, 1996 at approximately 7:00 p.m. Tyran Snow, Irene Williams, Calvin Simms, and Steven Thomas were in a neighborhood restaurant called Tai Chen's at 79th and Ada, Chicago, Illinois. Shortly after 7:00 p.m. Irene Williams testified that Derrell Dorsey kicked open the door to the waiting area for Tai Chen's restaurant (D-233) and shortly after the door was opened that Derrell Dorsey opened fire (D-238) with a silver gun. Irene Williams further testified that Derrell Dorsey fired twice towards Bishop (Steven Thomas) and that Derrell then fired a shot towards Calvin Simms and a shot towards her (D-241). Irene Williams then further testified that she was hit by one of the shots and subsequently she was taken to Christ Hospital and treated for two to three days. (D-247)

Irene Williams further testified that while being treated at Christ Hospital, she spoke to police officers from the Chicago Police Department and that she told those officers that it was Derrell Dorsey that shot her, Calvin Simms and Tyran Snow. (D-271-272). She also stated that she had known Derrell Dorsey from Cook School and from the neighborhood.

Calvin Simms testified further that at the time of the shooting he was present with Irene Williams, Tyran Snow and Steven Thomas in Tai Chen's waiting area when he heard the door kicked in (E-78) and that he then looked up and saw an individual he identified as Derrell Dorsey holding a gun in both hands and that Derrell aimed the gun a Tyran Snow when he fired the first shot (E82), ***4** at Steven Thomas when he fired the second shot (E-82) and at himself when the third shot was fired. Calvin further testified that a fourth shot was fired, but he did not see that shot (E-83). Calvin further testified that at no time did he hear anyone say anything while the shooting was going on inside the restaurant. (E-83).

Calvin Simms further testified that he was hit by one of the shots and that he attempted to run home but fainted and was carried to his home by some friends. (E-86). He then was taken to Christ Hospital by ambulance where he remained until March 15, 1999 when he was released to his home. (E-91) At his home he was shown a classroom photo of Cook School Eighth Grade and subsequently identified Derrell Dorsey as the person who fired the shots in Tai Chen's waiting area. (E-95).

Chicago Police officers Wadell Hardy, Mike McDermott and Anthony Powell were subsequently called and testified to there various roles in the investigation of the crime on March 11, 1996.

Officer Hardy testified to his response to the scene and the protection of the crime scene.(E-8-24).

Detective McDermott testified to his investigation and conversations with Calvin Simms and Irene Williams (EE-59-80).

Detective Anthony Powell testified to the arrest of Derrell Dorsey on May 1, 1996. (EE-122).

Four witnesses testified to gang related testimony. The first witness called in the trial was Bessie Snow. Bessie Snow testified that she had lived in the neighborhood of 78th and Ada ***5** for twenty years and that there were Gangster Disciples and Blackstones. (D-162, 165-168).

Irene Williams then testified to her knowledge of Gangster Disciples and Blackstones and whether or not each gang got along with each other. (D-250) Irene Williams also testified that Derrell Dorsey was a member of the Blackstones. (D-254).

Officer Wadell Hardy also testified that the area of 81st and Ada was an area associated with gang activity and the area of the shooting was Gangster Disciple territory. (E-34).

Detective Mike McDermott also testified that the area of 79th and Ada was the borderline between gangs (EE-82) and that on March 11, 1996 there was a lot of gang rivalry going on. (EE-83).

At the close of the above-mentioned testimony the jury returned a verdict of guilty as to the first-degree murder of Tyran Snow and verdicts of guilty of attempted first-degree murder of Calvin Simms and Irene Williams.

Sentencing was held on September 10, 1998 before the Honorable Stuart Palmer and after the trial court received evidence in aggravation from Adrian Bowman (G-4), Bessie Snow (G-23), Steven Howell (G-27) and the victim-impact statements of Irene Williams and Calvin Simms. (G-31). The trial court then received evidence in mitigation from the defendant by way of four letters (G-32) and the testimony of Shelia Teague and Seana Teague (G-36-37). Defendant then addressed the court prior to sentencing and stated that he was sorry and that may God bless the court (G-55).

The trial court then stated prior to sentencing that he had ***6** taken into consideration both aggravating and mitigating factors. The trail court further stated that when you have indiscriminate gang violence everybody gets hit.(G-59) Also that Dorsey acknowledged in his presentence investigation that he was a gang member and that all of his gang buddies may have been standing around patting each other on the back about what he was going to do in the restaurant. (G-60)

Whereupon the trial court sentenced defendant to 40 years for the murder of Tyran Snow, 18 years each for the attempt first-degree murders of Irene Williams and Calvin Simms. All sentences to run consecutively for a total of 76 years.

7** ***ARGUMENT

I.

TRIAL COURT ERRED IN ALLOWING WITNESSES TO TESTIFY TO GANG AFFILIATION AND GANG WARFARE

It has become increasingly frequent under Illinois case law, that reviewing courts have taken a close look at the admissability of gang affiliation where the admissability of such evidence does not bear any causal link to the charged offense. *People v. Maldonado,* 680 N.E.2d. 499, 181 Ill. Dec. 426.(1994). In the instant case the State introduced at the first opportunity the specter of gang affiliation through the testimony of Bessie Snow. (D-162). This testimony consisted of Bessie Snow stating to the jury that there were different gangs in the area, (D-165-168) with no attempt to link Derrell Dorsey with the gangs in the area, or any attempt to explain the circumstances of the shooting as being triggered by gang rivalry. This type of testimony continued when the State introduced to the jury the testimony of Detective Mike McDermott concerning the borderlines of different gangs and that gang rivalry was high on March 11, 1996. The State at no time introduced any evidence from either Detective Mike McDermott or Officer Wadell Hardy linking this rivalry to Derrell Dorsey or that it had anything to do with the circumstances of the shooting. (E-34). It is well settled that the State when they introduce gang affiliation and present expert testimony on

various gangs there must be some relevancy to the offense and that to introduce evidence of gang affiliation is error where the State seeks to introduce such evidence as motive and then fails to link the gang ***8** membership to the crime. *People v. Mason,* 653 N.E.2d. 1371, 210 Ill. Dec. 909 (1996). The trial court furthered erred when the trial court allowed the testimony of victim, Irene Williams, to testify as to her opinion as to Derrell Dorsey's gang affiliation (D-254) and that Gangster Disciples and Blackstones did not like one another. (D-250). The reviewing courts in Illinois have repeatedly allowed introduction of gang affiliation when the States' evidence produces common design by gang members to do an unlawful act and the act itself is carried out in a manner consistent with gang membership. *People v. Carson,* 606 N.E.2d. 363, 179 Ill. Dec. 537 (1992). On the other hand in the instant case the State presented evidence from four witnesses concerning gang affiliation, but both the occurrence witnesses, Irene Williams and Calvin Simms specifically testified that the shooting was carried out without any demonstration of gang affiliation or gang signs or statements.(E-81-82). The reviewing courts have stated that this type of evidence is error to introduce where it is not relevant for motive purposes. In the instant case the State sought to introduce this type of evidence only for motive, yet failed to present any competent testimony to link the gang affiliation with the crime committed.

Based upon the above-mentioned instances of introduction of gang affiliation without any linking to the instant crime this Honorable Court should reverse Derrell Dorsey's conviction and remand this cause for a new trial.

***9 II**

TRIAL COURT IMPOSED EXCESSIVE SENTENCE WHILE RELYING ON GANG MEMBERSHIP OF DEFENDANT

In the instant case the trial court heard both aggravation and mitigation testimony concerning the background of the defendant and his relationship with family members and friends. The trial court in his statement prior to sentencing defendant stated that he relied upon the presentence investigation to conclude that defendant was a gang member(G-58) and that this crime was the result of indiscriminate gang violence(G-59). The trial court in many of its rulings cautioned the state to tie up the admission of gang affiliation (D-251). The evidence introduced at the trial never tied up the crime with any gang affiliation, yet at sentencing the court stated that none of your gang members are going to do your time for you and that they are not going to help you (G-60). The reviewing courts have ruled that a new sentencing hearing should be conducted where the trial court referred to the offense as a typical "Chicago street gang murderous assault." *People v. Gonzalez,* 606 N.E.2d 304, 238 Ill App. 3d 303 (1992). In this sentencing hearing it is clear that the trial court imposed an excessive sentence based upon the gang membership acknowledged by defendant in the presentence investigation and never linked to the crimes for which the defendant was convicted. Based upon the trial court's reliance on gang membership as the basis for the excessive sentence, this Honorable Court should remand this cause for a new sentencing hearing.

***10 III**

TRIAL COURT ERRED IN NOT CONSIDERING DEFENDANT'S AGE IN IMPOSING EXCESSIVE SENTENCE

The reviewing courts have consistently stated that they will not disturb the sentence unless it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose. *People v. Taylor, 211* N.E.2d 673, 33 Ill. 2d 417 (1965).

The reviewing courts though have stated that an abuse of discretion would exist where the sentence fails to reflect the seriousness of the offense and give adequate consideration to the rehabilitative potential of the defendant. *People v. Murphy,* 381 N.E.2d 677, 72 Ill.2d 421 (1978). In this particular case the only mention that the trial court stated with regard to the defendant's age and rehabilitative potential was the statement by the court that "In mitigation, obviously I recognize the youth of Mr. Dorsey." (G-57). Each reviewing court must look closely in determining whether or not the trial court has imposed an excessive sentence without regard to the defendant before the court. In this case the trial court clearly only considered the defendants age in passing and

placed no weight to any rehabilitative potential of the 14-year old defendant before sentencing. It is therefore urged that this Honorable Court set aside the 76 year sentence as excessive and remand for a new sentencing hearing.

CONCLUSION

For the foregoing reasons, this Honorable Court should reverse ***11** Mr. Dorsey's conviction outright or should remand this cause for either a new trial or a new sentencing hearing.

End of Document

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 19, 2021, the **Brief and Appendix of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email addresses:

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