No. 124046

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- ASHANTI LUSBY Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0189. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 01 CF 664. Honorable David Carlson, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

DEBORAH NALL
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

E-FILED
7/18/2019 10:32 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES Page

I. Ashanti Lusby's *de facto* life sentence violates the Eighth Amendment because the record does not demonstrate that the circuit court properly considered the specific attendant circumstances of Lusby's youth in mitigation at sentencing as required by *Miller* and its progeny 13

People v. Lusby, 2018 IL App (3d) 150189 13

A. The appellate court correctly held that Lusby's sentence violates the Eighth Amendment under this Court's precedent 14

People v. Buffer, 2019 IL 122327 14

People v. Holman, 2017 IL 120655 14

Miller v. Alabama, 567 U.S. 460 (2012) 14

People v. Reyes, 2016 IL 119271 14

1. Lusby is currently serving a life sentence 15

People v. Buffer, 2019 IL 122327 15

2. The circuit court failed to properly consider Lusby's youth and its attendant circumstances as mitigation 15

People v. Lusby, 2018 IL App (3d) 150189 . . . . . *passim*

People v. Buffer, 2019 IL 122327 . . . . . *passim*

People v. Holman, 2017 IL 120655 . . . . . *passim*

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

United States v. Briones, 2019 WL 2943490 (9th Cir. 2019) 20

People v. Boose, 66 Ill. 2d 261 (1977). 21

Adams v. Alabama, 136 S. Ct. 1796 (2016) 22

People v. Brown, 2015 IL App (1st) 130048 22-23

Dana Goldstein, *Too Old to Commit Crime?*, N.Y. TIMES, 4SR (March 22, 2015) 23

People v. House, 2019 IL App (1st) 110580-B 23

Reforming Juvenile Justice: A Developmental Approach 24-25

People v. Nieto, 2016 IL App (1st) 121604. 24

Montgomery v. Alabama, 577 U.S. __, 136 S. Ct. 718 (2016) 24, 25

People v. Walker, 2018 IL App (3d) 140723-B. 25

People v. Johnson, 2018 IL App (1st) 153266 25

B. This Court should reject the State's effort to circumvent the appellate court's correct ruling by suggesting a narrowing of the application of the Eighth Amendment in a manner contrary to settled precedent. 27

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

People v. Buffer, 2019 IL 122327 . . . . . *passim*

Johnson v. Texas, 509 U.S. 350 (1993) 27

Graham v. Florida, 560 U.S. 48 (2010) 28, 31

Roper v. Simmons, 543 U.S. 551 (2005) 28, 31

People v. Holman, 2017 IL 120655 . . . . . *passim*

Montgomery v. Alabama, 577 U.S. __, 136 S. Ct. 718 (2016) 28, 31

United States v. Briones, 2019 WL 2943490 (9th Cir. 2019) 20

People v. Carter, 2015 IL 117709. . . . . 29, 37

People v. Thompson, 222 Ill. 2d 1 (2006). 29

People v. LaPointe, 88 Ill. 2d 482 (1981) 29

People v. Lusby, 2018 IL App (3d) 150189 30

People v. Aikens, 2016 IL App (1st) 133578 31

Danforth v. Minnesota, 552 US. 264 (2008) 31

American Trucking Associations, Inc. v. Smith, 496 U.S 167 (1987). 31

Atkins v. Virginia, 536 U.S. 304 (2002). 32

II. If this Court finds that Ashanti Lusby's *de facto* life is unconstitutional, it should remand for a new sentencing hearing 33

People v. Davis, 2014 IL 11595 33

A. *Buffer* definitively establishes that resentencing is the proper remedy when relief is granted for a postconviction *Miller* claim 33

People v. Buffer, 2019 IL 122327 . . . . . 33, 34

People v. Holman, 2017 IL 120655 . . . . . 34, 35

People v. Davis, 2014 IL 11595 . . . . . 34, 35

B. It would be a waste of judicial resources to remand for additional leave-to-file proceedings where Ashanti Lusby has raised a substantive argument that can be resolved based on the record. 35

Miller v. Alabama, 567 U.S. 460 (2012) 35

People v. Lusby, 2018 IL App (3d) 150189 35

People v. Munson, 2018 IL App (3d) 150544. 36

People v. Baller, 2018 IL App (3d) 160165 36

People v. Partida, 2018 IL App (3d) 160581 36-37

People v. Carter, 2015 IL 117709. 37

People v. Young, 2018 IL 122598. 37

ISSUES PRESENTED FOR REVIEW

I. Whether Ashanti Lusby's *de facto* life sentence violates the Eighth Amendment because the record does not demonstrate that the circuit court properly considered the specific attendant circumstances of Lusby's youth in mitigation at sentencing as required by *Miller* and its progeny.

II. Whether, if this Court finds that Ashanti Lusby's *de facto* life sentence is unconstitutional, it should remand for a new sentencing hearing.

STATEMENT OF FACTS

Ashanti Lusby was 16 years old in 1996, when a 27-year-old school teacher named Jennifer Happ was sexually assaulted and murdered in her Joliet home. Lusby was arrested several years later, after his former friend Dwayne Williams told police Lusby was involved in the crime and Lusby's DNA proved a match to semen found in Happ's body. A jury ultimately found Lusby guilty of 25 different counts, including first degree murder, aggravated criminal sexual assault, and home invasion "caused by exceptionally brutal or heinous behavior indicative of wanton cruelty."

Although he was ineligible for the death penalty because of his youth, the State's brutal and heinous allegations subjected Lusby to a potential maximum sentence of 130 years' imprisonment. The court found "no factors in mitigation" and imposed the maximum sentence after a hearing at which defense counsel neither presented any evidence nor pointed the court to specific evidence of Lusby's capacity for rehabilitation like the probation officer's conclusion that Lusby might benefit from counseling and the fact that Lusby had obtained his GED while in custody, and did not argue that the copious evidence of Lusby's immaturity, impetuosity, and failure to appreciate risks and consequences that the State argued in aggravation should actually be considered as mitigation.

Trial proceedings

Lusby was arrested in early 2001, after Williams told police that he and Lusby had "had a conversation ... with regards to [Happ's] murder" in the

summer of 1996, when they were both incarcerated in the Will County Jail.[1] (C. 62-64, 103-105) Before the trial commenced, the State pointed out that "while this case would qualify for the death penalty[,]" Lusby was ineligible due to his age at the time of the offenses. (R. 70)

Evidence adduced at trial established that Happ's next-door neighbors heard a gunshot at approximately 9:30 p.m. on February 8, 1996. (R. 420) A friend of Happ's who was also a detective discovered Happ's body on the couch in her living room after she failed to show up at school the next morning. (R. 109-126) The medical examiner testified that Happ died from a single gunshot wound to her head. (R. 211, 234-235, 238) Happ also sustained injuries to her pelvic area that were consistent with sexual assault, not consensual sex. (R. 235, 253) DNA from semen on rectal and vaginal swabs matched Lusby's blood sample, which he provided pursuant to a search warrant. (R. 268-69, 321, 327)

Joliet Detective Brian Lewis testified that during an interrogation on April 13, 2001, Lusby was told that the police investigation clearly pointed to him as the person responsible for Happ's death. (R. 405-409) Lusby denied knowing anything about Happ or her murder. (R. 413)

Lusby's ex-girlfriend, Darylyn Phillips, testified that on the night of the offenses, Lusby, Williams, and Fabian Carpenter left Lusby's home after watching a pornographic film; Lusby had a gun in his waistband. (R. 337-

---

[1] This brief will follow the format for record citations that the State established in its opening brief for this Court. (St. Ill. Sup. Ct. AT Br. at 3, fn 1)

348) The boys returned 30–45 minutes later, around 9:30 p.m., went into Lusby's bedroom, closed the door, and ignored Phillips when she tried to talk to them. (R. 347, 349-351, 354, 379) Lusby seemed nervous and "kind of excited a little bit," which was unusual because he "was normally laid back and calm." (R. 349-350, 378) But Phillips, who was then a 16-year-old high-school student, "didn't think it was a big deal at that time." (R. 359, 366)

Lusby testified that he was 16 years old on February 8, 1996. (R. 507) He was not attending school because he had been expelled the previous year. (R. 507, 524) At approximately 5:30 p.m., Lusby was walking home from a friend's house when he heard two people (male and female) yelling and then saw Happ standing outside her front door wearing nothing but a T-shirt. (R. 508-511) When Happ asked Lusby, who did not know her, why he was looking at her and how old he was, Lusby said he was 18 years old. (R. 512) He then accepted when Happ invited him inside. (R. 512)

Once inside, they sat down on the couch. (R. 513) Lusby said that they eventually engaged in consensual sex. (R. 517-518)

After its rebuttal evidence, the State published a certified statement of conviction providing that Lusby had pled guilty to felony robbery on April 30, 1999. (R. 646) During its closing argument, the State described what Happ had been wearing, detailed her injuries, and asked the jury "to think about what Jennifer Happ endured those last moments of her life." (R. 699-711)

Defense counsel, who did not object during the State's argument,

acknowledged that this was a "[d]ifficult case," but told the jury that justice would not be served by convicting an innocent man. (R. 712)

That evening, the jury found Lusby guilty of all 25 charges after deliberations at which they were given all of the published photographs, including several that showed the full extent of Happ's injuries and which the court had ruled necessary for the State to prove its "brutal and heinous" allegations. (C. 160-174; R. 395-398, 470, 787-788, 793-798; St. Exs. 11-14, 53, 54, 56, 87) The court then scheduled sentencing around the availability of Happ's family and an unidentified "witness victim advocate." (R. 799)

Sentencing

At sentencing, the State introduced 21 victim impact letters, all of which discussed Happ's positive impact on the community as evidence in aggravation. (IC. 3-41) Defense counsel objected that such a large quantity of victim impact statements was unnecessarily prejudicial, but the court overruled the objection after noting it had already reviewed the letters and would not base its decision on "the passion and grief of those who have been left behind." (R. 812-813) The State then presented two witnesses to testify in aggravation. (R. 818)

Robert Miller testified that in 2001, he and Lusby fought while they were both in pretrial detention in Will County. (R. 818-821) Miller suffered several injuries, including a broken nose. (R. 827-828) Happ's mother read a prepared statement in which she discussed Happ's goodness, the horror of her death, and the effect it had on her friends, family, students, and even

strangers before asking the court to impose the maximum sentence on Lusby, who Mrs. Happ believed to be guilty from the moment of his arrest and described as "this monster." (R. 830-842)

Defense counsel presented no evidence in mitigation. (R. 842)

In aggravation, the State first argued that Lusby was subject to a mandatory sentence of 60-100 years' imprisonment for the murder count based on the jury's finding of "exceptionally brutal and heinous behavior indicative of wanton cruelty," plus two concurrent 30-year terms of imprisonment for aggravated criminal sexual assault and home invasion, to be served consecutively with the murder count. (R. 843-845) Pointing to his criminal background, the State then argued that Lusby was "a dangerous young man likely to grow more dangerous with time." (R. 846-847) Continuing, the State said that, in addition to murdering Happ, Lusby's testimony in his own defense "tried to take her reputation away, and that's particularly I think offensive." (R. 847-848) The State also argued that Lusby's trial testimony showed him to be "completely devoid of all the things that we call human" and that there was nothing in mitigation because "he just doesn't have it in him." (R. 848-849)

The State did not request a specific sentence, but instead asked the court to, "Never again let this guy out because if he's out, there is going to be another Jennifer Happ," and, "never again, never again let this individual out on our streets in this county again." (R. 849-850)

Part I of Lusby's presentence investigation report ("PSI") consists of Counts 1-14 of the Amended Indictment. (IC. 43-46) Part III details his criminal record in addition to this case: a juvenile conviction for aggravated discharge of a firearm in August, 1996; a robbery conviction in September 1999; a "resisting a peace officer" conviction in April 2001; and an aggravated battery conviction from October 2002 for a jail fight that happened while he was awaiting trial in this case. (IC. 47)

Parts VI - XIV of the PSI provide that Lusby was born in Chicago on April 11, 1979, where he lived for ten years until his family moved to Joliet, Illinois. (IC. 49) Lusby returned to Chicago for one year when he was 14 years old, but returned to Joliet thereafter. (IC. 49) He was expelled after his sophomore year due to "gang banging," but received his GED in the Illinois Youth Center in Joliet, Illinois. (IC. 49) Lusby told the probation officer that he had a good relationship with both parents and that they visited him often in jail, but, the probation officer noted, "According to the Will County Adult Detention Facility, [his] father is not even listed as one of the defendant's visitors, and there is no record that he has ever visited." (IC. 48) Lusby also had two sisters and two children of his own. (IC. 48) Part XV provides that Lusby "reportedly used marijuana every day" and had used marijuana, PCP, and alcohol in the past. (IC. 51) The PSI concludes with the probation officer's opinion that Lusby "may benefit from counseling to control his violent tendencies." (IC. 52)

Defense counsel did not discuss any of the information contained in the PSI during his argument or argue that the vast majority of the State's aggravation should actually be considered as mitigation in light of Lusby's youth at the time of the offense. Instead, counsel just said the court lacked sufficient evidence about the alleged fight in Will County Jail to use that evidence as aggravation. (R. 851) Counsel then argued that Lusby had steadfastly maintained his innocence and said that Lusby was 17 years old (even though Lusby had actually only been 16) when the offense took place. (R. 851) Lusby's youth was relevant, counsel said, because people change as they age. (R. 851-852)

Speaking in allocution, Lusby expressed sympathy for Happ and her family and, acknowledging the fight in Will County Jail, said that he was "rough around the edges." (R. 852) But Lusby insisted that he had never raped or killed anyone. (R. 852)

The circuit court first found Lusby's age to be "a factor at the very least to the extent that he is not eligible for the imposition of capital punishment based solely because of his age[.]" (R. 852) After stating that it found it "very difficult ... to consider any leniency" or "to see any factors in mitigation" given what it described as "a depraved act" that "shows absolutely no respect for human life[,]" the court found there were "no factors in mitigation that apply." (R. 853-854)

Continuing, the circuit court acknowledged that youthful choices "are sometimes in very very poor judgment," but found that "this is not one that

can be taken back, and this is not one that can be considered minor, and this is not one that can be considered for anything but setting your future in the Department of Corrections." (R. 854-855) The court concluded, "From what I've seen here from everything that I have seen and heard in this trial this is a life you chose, a life of carrying weapons, a life of showing no respect for human life[.]" (R. 855) The court then sentenced Lusby to 100 years' imprisonment for murder followed by a consecutive 30-year term for aggravated criminal sexual assault and a concurrent 30-year term for home invasion. (R. 855)

Defense counsel filed a Motion to Reconsider asserting that the sentence "was excessive in that it failed to adequately consider the fact" of Lusby's youth or "his potential for rehabilitation and return to useful citizenship." (C. 321) Without including details, the motion also asserted that, "given his young age, and appropriate counseling and direction, the Defendant maintains an excellent potential to be restored to useful to [*sic*] citizenship, given an opportunity to do so" and that the consecutive term failed "to give due regard" to Lusby's "history and character." (C. 321)

Both Lusby's mother and Happ's family were present for the hearing, at which defense counsel stood on his written motion. (R. 868) The circuit court found as follows:

> All right. I think these motions are required prior to a thorough appellate review. It's always difficult for the Trial Judge because you prepare yourself for sentencing like this, you sit down and you look at everything. You look at the law and look at the sentencing Code, because it's confusing, and you try to fashion the sentence appropriate and consistent with the sentencing

> Code and appropriate to the facts. I believe I felt comfortable with my sentence at the time. I believe I followed the law as I understood it and took into account all the factors both in aggravation and in mitigation that apply here. So show the motion to reconsider sentence presented and argued and denied.

(R. 870-871)

Direct Appeal

On direct appeal, Lusby argued that reversible error occurred when the State impeached him with his post-*Miranda* silence and his refusal to provide a blood sample for which a warrant had not yet been issued. *See People v. Lusby*, No. 3-03-0058 (Nov. 19, 2004) (Rule 23 Order). (C. 356-359) The appellate court affirmed his conviction and sentence after finding that the evidence was not closely balanced. (C. 359)

First Postconviction Petition

Lusby filed his initial *pro se* postconviction petition on September 7, 2005. (C. 361-371) The petition alleged that his constitutional rights to due process and effective assistance of counsel were violated because he was forced to wear a stun belt at trial without first receiving the hearing required by *People v. Boose*, 66 Ill. 2d 261 (1977). The circuit court dismissed the petition at the first stage. (C. 374; R. 895-901) A majority of the appellate court affirmed. *People v. Lusby*, No. 3-06-0018 (Dec. 4, 2007) (R. 23 Order). (C. 417-425) But the dissent would have reversed and remanded for second-stage proceedings before a new judge. (C. 426) Specifically, the dissent believed that the circuit court showed bias and that Lusby stated the gist of a constitutional claim that the circuit court had violated his fundamental right

to a fair trial by forcing him to wear a physical restraint without holding a hearing pursuant to *Boose* and *People v. Allen*, 222 Ill. 2d 340 (2006). (C. 427) This Court denied Lusby's petition for leave to appeal. (C. 415)

Successive Postconviction Petition

On November 21, 2014, Lusby filed the *pro se* postconviction petition and accompanying motion for leave to file the petition that are at issue in this appeal. (C. 437-451) Lusby argued that his *de facto* life sentence violates both the United States' and Illinois' constitutions, and he requested a new sentencing hearing for his youth and attendant circumstances to be considered in mitigation. (C. 448-451) The State filed an objection in which it argued in relevant part that *Miller v. Alabama* does not apply to discretionary or *de facto* life sentences. (R. 922-923) The judge responded, "All right. Show that I have reviewed all the pleadings; leave to be filed is denied based upon the law." (R. 923) Lusby timely filed his notice of appeal from the circuit court's order of denial. (C. 466, 469-471)

In granting relief, a majority of the appellate court relied on both Illinois and Federal law to hold that Lusby's discretionary, *de facto* life sentence of 130 years' imprisonment was subject to the protections of *Miller*, and that Lusby showed cause under section 122-1(f) because "*Miller* was not available to Lusby's counsel at the time of his sentencing or at the time [Lusby] filed his initial postconviction petition." *Lusby*, 2018 IL App (3d) 150189, ¶¶ 20-24. The appellate court majority then relied primarily on *People v. Davis*, 2014 IL 11595, and *People v. Holman*, 2017 IL 120655, to

hold that Lusby also showed prejudice and that his case should therefore be remanded for resentencing. *Lusby*, 2018 IL App (3d) 150189, ¶¶ 25-29. Although the majority said there was no need to address Lusby's remaining issues because his Eighth Amendment claim was dispositive, it noted that the State correctly conceded that the circuit court erred by allowing the State to file and argue objections to Lusby's *pro se* motion for leave to file a successive postconviction petition in violation of *People v. Bailey*, 2017 IL 121450, ¶¶ 24, 27. *Lusby*, 2018 IL App (3d) 150189 at ¶ ¶ 29-33.

The dissent, which did not address *Bailey*, would have found that Lusby failed to establish prejudice because "the trial court's comments show that it considered defendant's youth and its attendant circumstances in sentencing defendant." *Lusby*, 2018 IL App (3d) 150189, ¶¶ 40-41 (Carter, PJ, *dissenting*). The dissent also believed that the circuit court made a finding that Lusby's "horrendous conduct ... showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id*. at ¶ 41. This Court allowed the State's petition for leave to appeal. *People v. Lusby*, 116 N.E.3d 927 (Ill. 2019).

ARGUMENT

In this appeal, the State asks this Court to reverse the appellate court because (I) the circuit court relied on the State's input at the leave-to-file stage, (II) the State disagrees with the appellate court's holding that Ashanti Lusby's *de facto* life sentence violates the Eighth Amendment, and (III) according to the State, the appellate court "exceeded its authority" by granting postconviction relief and should instead at most remand for second-stage proceedings. However, the appellate court properly applied existing law in (I) holding that Lusby's sentence violates the Eighth Amendment, and (II) remanding for resentencing rather than wasting judicial resources by ordering additional postconviction proceedings where none are needed given the issue presented. This Court should therefore affirm the appellate court's decision remanding this case for resentencing.

I. Ashanti Lusby's *de facto* life sentence violates the Eighth Amendment because the record does not demonstrate that the circuit court properly considered the specific attendant circumstances of Lusby's youth in mitigation at sentencing as required by *Miller* and its progeny.

Ashanti Lusby was sentenced to 130 years' imprisonment for an offense that took place when he was only 16 years old after a sentencing hearing at which the circuit court did not consider the attendant circumstances specific to Lusby's individualized youth as mitigation. Instead, the court merely "gave a generalized statement about youth and their poor judgment" before imposing a *de facto* life sentence. *People v. Lusby*, 2018 IL App (3d) 150189, ¶ 27. Claiming that "the appellate majority imposed a new

requirement on the circuit court and announced a new standard for reviewing juvenile life sentences" that conflicts with existing law, the State now asks this Court to reverse. (St. Ill. Sup. Ct. AT Br. at 20) In fact, however, the appellate court simply applied existing precedent in holding that reversal and resentencing were required. *Lusby*, 2018 IL App (3d) 150189, ¶¶ 15-38.

A. The appellate court correctly held that Lusby's sentence violates the Eighth Amendment under this Court's precedent.

The appellate court's decision in this case is entirely consistent with existing precedent. This Court has decided that, in Illinois, defendants who have been sentenced to life imprisonment for offenses committed as juveniles must receive a new sentencing hearing that comports with the requirements of *Miller* if they show that (1) they were "subject to a life sentence, mandatory or discretionary, natural or *de facto*, and (2) the sentencing court failed to consider youth and its attendant characteristics [as mitigation] in imposing the sentence." *People v. Buffer*, 2019 IL 122327 at ¶ 27; *see also People v. Holman*, 2017 IL 120655, at ¶ 37, quoting *Miller v. Alabama*, 567 U.S. 460, 489 (2012) ("a trial court must consider a juvenile's 'age and age-related characteristics and the nature of their crimes' as 'mitigating circumstances.'"); *People v. Reyes*, 2016 IL 119271, ¶ 9 ("*Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation."). The appellate court's decision that Lusby is constitutionally entitled to a new sentencing hearing is correct because Lusby made both showings.

1. Lusby is currently serving a life sentence.

Under Illinois' current standards of decency for Eighth Amendment purposes, a life sentence means anything more than 40 years' imprisonment. *Buffer*, 2019 IL 122327, at ¶¶ 34-41. The State concedes that Lusby's discretionary sentence of 130 years' imprisonment is a *de facto* life sentence subject to *Miller*. (St. Ill. Sup. Ct. AT Br. at 18) There is thus no issue as to whether Lusby met the first requirement to prevail on a postconviction *Miller* claim under this Court's precedent.

2. The circuit court failed to properly consider Lusby's youth and its attendant circumstances as mitigation.

Although the circuit court did mention the fact of Lusby's age, it did so only in relation to (1) his ineligibility for capital punishment, and (2) the poor judgment that is generally associated with adolescence. *Lusby*, 2018 IL App (3d) 150189, ¶ 27. The record in this case includes nothing to show that Lusby himself was so irretrievably depraved as to be beyond redemption. The appellate court therefore correctly held that the circuit court's generalized statement about the fact of Lusby's youth was insufficient to comply with constitutional requirements because the cold record does not show "that the trial court considered the [specific] evidence of Lusby's 'immaturity, impetuosity, and failure to appreciate risks and consequences' or family environment in the PSI" before imposing a *de facto* life sentence of 130 years' imprisonment. *Id.*

In so holding, the appellate court applied the analysis from this Court's recent decisions in *Buffer* and *Holman*. In *Buffer*, this Court applied existing Eighth Amendment law to hold that Buffer's sentence violated the Eighth Amendment because the circuit court imposed a *de facto* life sentence without proper consideration of Buffer's youth and its attendant circumstances as mitigation as required by *Miller* and its progeny. *Buffer*, 2019 IL 122327, at ¶ 42; *see also Holman*, 2017 IL 120655, ¶¶ 37-46 (explicitly rejecting the "narrow" reading of *Miller* under which "trial courts must [merely] consider generally mitigating circumstances related to a juvenile defendant's youth[,]" and instead holding that circuit courts may not impose life imprisonment unless they first "consider a juvenile's 'age and age-related characteristics and the nature of their crimes' as 'mitigating circumstances" and then determine that the juvenile's conduct "showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation.").

In *Holman*, this Court held that consideration of "generally mitigating circumstances related to a juvenile defendant's youth" is not sufficient to comply with *Miller*. *Holman*, 2017 IL 120655, ¶¶ 42-47. Instead, the record must affirmatively show that the circuit court determined "that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation" after having considered specific evidence of the individual defendant's youth and its attendant circumstances as mitigation. *Id.*

This Court ultimately held that Holman's original sentencing hearing complied with constitutional requirements. But it reached that decision only after thoroughly reviewing the record. First, the circuit court stated that it had considered all relevant statutory factors, Holman's PSI, the significant amount of evidence that was presented at the sentencing hearing, and both parties' arguments in aggravation and mitigation. 2017 IL 120655, at ¶ 17. Second, and significantly, that evidence included three detailed psychological reports that thoroughly explored Holman's specific level of culpability as well as the probation officer's opinion that Holman had "no predilection for rehabilitation." *Id*. at ¶¶ 7-13. Third, before closing arguments, defense counsel had advised the circuit court that Holman had expressly directed counsel *not* to present any evidence in mitigation and that Holman's mother did *not* want to testify on his behalf in mitigation. *Id*. at ¶ 14.

According to the State, "[a]s in *Holman*, [Lusby] had every opportunity to present evidence to show that his criminal conduct was the product of immaturity and not incorrigibility[,]' but '[h]e chose to offer nothing.' " (St. Ill. Sup. Ct. AT Br. at 24-25, quoting *Holman*, 2017 IL 120655, ¶ 49) But the record in *Holman* showed that the defendant affirmatively told his attorney not to present any mitigation and that the defendant's mother expressly said she did not want to testify on her son's behalf. 2017 IL 120655, ¶ 14. Thus, the defendant in *Holman* had an opportunity to present mitigation and the record shows he affirmatively chose not to. The record in this case includes no such affirmative action on Lusby's part. It instead suggests the opposite

where, at the outset of trial, Lusby complained that his attorney told him he was going to be sentenced to life imprisonment. (R. 68) Lusby also used his statement in allocution to tell the circuit court that he was not beyond redemption. (R. 852-853) But that effort was hopeless without support from counsel, who was responsible for presenting evidence and legal argument in mitigation but failed to do so here despite the probation officer's finding that Lusby could benefit from counseling.

Indeed, contrary to the State's assertion, a careful review of the record compels a different outcome than in *Holman*. The record in *Holman* included extensive evidence about the defendant's individual circumstances and mental state as well as the probation officer's explicit finding that Holman lacked the potential for rehabilitation. *Holman*, 2017 IL 120655, ¶¶ 7-13. By contrast, the record in this case shows there was no discussion of Lusby's individual characteristics and the attendant circumstances of his youth at sentencing, and that his sentencing hearing instead focused on Happ with 21 different victim impact letters and her mother's testimony detailing "the passion and grief of those who have been left behind." (IC. 3-41; R. 812-813, 830-842) Yet almost no personal information was presented about Lusby except his criminal history, which included a jail fight that happened while Lusby was awaiting trial in this case.

The State did mention that Lusby had been expelled from high school, but that was presented only as aggravation. Finally, the State also

characterized Lusby's trial testimony as "offensive," arguing that he "tried to take [Happ's] reputation away[,]" and said,

> at 16 years old this particular defendant has shown us what he can do at a young age. And as you begin to consider what to do in sentencing, you've got to consider what this guy can do the older he gets and what he might do in the latter part of his life because if the younger part of his life is an indication of what this guy's potential is, this is a dangerous individual and he will continue to be dangerous well into his senior citizen years.

(R. 818-828, 846-848)

In mitigation, defense counsel asserted only that the mere fact of Lusby's youth weighed against a long sentence because people change as they age. (R. 851-852) But counsel did not mention, much less argue in mitigation, any individual facts about Lusby's particular youth. Counsel presented no mitigation evidence, made no argument that the State's evidence in aggravation should be considered as mitigation in light of Lusby's youth, and failed to highlight the probation officer's opinion that Lusby "may benefit from counseling to control his violent tendencies" in response to the State's evidence and arguments in aggravation. (R. 842; IC. 52)

In allocution, Lusby maintained his innocence but expressed sympathy for Happ's family and explained that the fight in jail had happened because "we have problems" and that he had "been a little rough around the edges." (R. 852) However, he said, "I ain't no killer" and "I ain't no rapist, and for those times that I was out that this happened, I never - - it was never come up that I killed or raped anyone else in the five years or whatever they say I was out." (R. 852)

The circuit court's first statement in pronouncing sentence illustrates that it was focusing more on the decedent and the nature of the offense than on Lusby. Immediately after Lusby's allocution, the court said, "this is a case that is a very difficult case from the standpoint of the facts of the injuries and of the method of murder of the victim." (R. 853) The court then briefly mentioned the fact of Lusby's age. *Lusby*, 2018 IL App (3d) 150189, ¶ 27. But the court "did not address Lusby's age-related characteristics; rather, it gave only a generalized statement about youth and their poor judgment." *Id*. The appellate court therefore correctly held that Lusby's life sentence violates the Eighth Amendment. *Id*. at ¶¶ 28-29.

The State claims that the circuit court correctly found that Lusby lacked rehabilitative potential after reviewing the PSI. (St. Ill. Sup. Ct. AT Br. at 22-23) This claim is incorrect. While the circuit court referenced the PSI, nothing in the record suggests that the court complied with *Miller* by considering its contents and Lusby's individual characteristics as mitigation. Such consideration was necessary to determine whether Lusby's crime was reflective of the transient immaturity that is common to all youth rather than the irreparable corruption and irretrievable depravity that would justify the court in deciding that Lusby was one of those rare juvenile offenders who was beyond redemption and therefore deserved life imprisonment.

Indeed, one of the central tenets of *Miller* and its progeny is that courts may not rely solely on the nature of the offense when imposing sentences for offenses committed by juveniles. *See United States v. Briones*, - - F. 3d - -,

2019 WL 2943490, *4 (9th Cir. 2019), citing *Miller*, 567 U.S. at 471, 480 (courts are required to consider that children are constitutionally different from adults for purposes of sentencing). To the extent the State argues otherwise (St. Ill. Sup. Ct. AT Br. at 23-24), the State is simply wrong. Lusby acknowledges that the jury found the crimes to be "brutal and heinous." (C. 160-174) However, the jury was tasked only with deciding (1) if the State proved guilt beyond a reasonable doubt, and, if yes, (2) whether the *offenses* had been "caused by exceptionally brutal or heinous behavior indicative of wanton cruelty." (R. 85-87) It is now well settled "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*." *Miller*, 567 U.S. at 472 (emphasis added). The jury was not tasked with assessing Lusby's rehabilitative potential and determining the appropriate sentence—that was up to the circuit court, and the court did not do so here. (C. 192; R. 70-71)

Instead, the circuit court here characterized Lusby's offense as "a depraved act" that showed "absolutely no respect for human life." (R. 853) But the record shows that the court considered almost no information about Lusby as a unique, individual human being with unique, individual thoughts and feelings. The circuit court's findings were instead based on the nature of the offense alone. Moreover, that same court—based solely on the nature of the offense—forced Lusby to wear a stun belt without making the findings of necessity as required by *People v. Boose*, 66 Ill. 2d 261 (1977). (C. 431; R. 897-

900) The legal landscape has evolved such that it now recognizes the constitutional differences between juveniles and adults for purposes of sentencing. The nature of the offense alone does not provide a reasoned basis on which to find that Lusby was one of those rare juvenile offenders who is beyond rehabilitation instead of one who suffered from the unfortunate yet transient immaturity endemic to youth.

The State's suggestion that Lusby's sentence complies with *Miller* based on the circuit court's consideration of the nature of the offense alone (St. Ill. Sup. Ct. AT Br. at 29) is particularly unconvincing because the circuit court "did not have the benefit of [the United States' Supreme] Court's repeated exhortation that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption[.]" *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring in decision to grant, vacate, and remand for reconsideration under *Montgomery*). Lusby acknowledges that this case involves a terrible crime. But, under *Miller*, even a horrific offense says nothing about the offender's capacity—or lack of capacity—for rehabilitation. The State's suggestion to the contrary contravenes this principle and should be rejected.

Similarly, the circuit court's reference to Lusby's criminal history also fails to show that the court complied with *Miller*. The offense at issue occurred in February 1996. Although Lusby was subsequently convicted of additional crimes, none were as serious as the offense for which he was convicted in this case. Lusby's criminal history thus does not demonstrate

that he was one of those rare juvenile offenders so irretrievably depraved as to be beyond redemption because this history is entirely consistent with the transient immaturity that is a hallmark of youth and that makes youth more susceptible to rehabilitation. *See People v. Brown*, 2015 IL App (1st) 130048, ¶ 46 (citing Dana Goldstein, *Too Old to Commit Crime?*, N.Y. TIMES, 4SR (March 22, 2015) ("Social science research has shown that most criminals, including violent ones, mature out of lawbreaking before reaching middle age."); *see also Miller*, 567 U.S. at 471-472 (youthful qualities of transient rashness, proclivity for risk, and inability to assess consequences both lessen moral culpability and enhance the prospect that, "as the years go by and neurological development occurs," a juvenile offender's "deficiencies will be reformed").

In fact, when properly considered in light of what we now know about the differences between adolescent brains and adult brains that render juveniles more capable of rehabilitation and less likely to be irretrievably depraved, evidence in the record shows that Lusby possessed the precise qualities of immaturity, impetuousness, and unawareness of risks that are typical of adolescence. *See Miller*, 567 U.S. at 476 (adolescence "is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'"); *see also People v. House*, 2019 IL App (1st) 110580-B, ¶ 55 (adolescents "are more susceptible to peer pressure, less future-oriented and more volatile in emotionally charged settings" than "fully mature adults"). In this context, it is important to consider the prosecutor's characterization of Lusby's

testimony that his sex with Happ was consensual as "a 16 year old's lie ... like something you would read in a dirty magazine." (R. 748)

Lusby's immaturity, impetuousness, and unawareness of risks is also illustrated by the fact that he was expelled from high school due to his gang membership. (IC. 49; R. 507, 524) Although it was not understood when he was sentenced, we now know that gang membership is inextricable from peer pressure and susceptibility to peer pressure is one of the hallmarks of youth that render youth categorically less culpable and with a greater capacity for rehabilitation than their adult counterparts. *See* National Research Council. (2013). *Reforming Juvenile Justice: A Developmental Approach.* Committee on Assessing Juvenile Justice Reform, Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers, and Julie A. Schuck, Eds. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press, pp. 106 ("Participation in a gang is perhaps the most striking case of exposure to deviant peer influences."); *see also People v. Nieto*, 2016 IL App (1st) 121604, ¶ 55 (equating gang membership with peer pressure, then stating that "susceptibility to peer pressure and recklessness erode with age").

As the appellate court correctly held, the record must show that at sentencing, the circuit court considered evidence of the defendant's immaturity, impetuosity, and failure to appreciate risks and consequences, and the circuit court did not do so in this case. *Lusby*, 2018 IL App (3d) 150189, ¶ 27. Juvenile offenders may be sentenced to life imprisonment only

if at sentencing, the circuit court has found them to be beyond redemption after properly considering youth and attendant circumstances as mitigation. *Montgomery v. Alabama*, 577 U.S. __, 136 S. Ct. 718, 733 (2016) (a sentence of life without parole for juvenile offenders is justified only when "rehabilitation is impossible"). Contrary to the State's assertion, the appellate majority did not impose a new requirement on the circuit court or announce a new standard for reviewing juvenile life sentences by requiring courts to use "magic words" before imposing life imprisonment. (St. Sup. Ct. AT Br. at 19-22) Instead, the holding in *Lusby* follows directly from this Court's precedent, which requires that reviewing courts must carefully examine the cold record to determine if the circuit court at the original sentencing hearing properly considered evidence of the individual defendant's youth and attendant circumstances as mitigation before imposing a life sentence. *See Buffer*, 2019 IL 122327, ¶ 42; *Holman*, 2017 IL 120655, ¶ 47.

To support its claim that the appellate court imposed a new requirement for circuit courts to use magic words before imposing a life sentence for offenses committed by juveniles, the State relies on two appellate court decisions, *People v. Walker*, 2018 IL App (3d) 140723-B, and *People v. Johnson*, 2018 IL App (1st) 153266. (St. Ill. Sup. Ct. AT Br. at 20-21) However, neither *Walker* nor *Johnson* support the State's argument because both cases conflict with *Holman* where the records in those cases do not demonstrate that the circuit courts adequately considered the defendants' individual youth and attendant circumstances as mitigation before imposing

a life sentence. *Walker*, 2018 IL App (3d) 140723-B, ¶¶ 32-34; *Johnson*, 2018 IL App (1st) 153266, ¶ 25.

Lusby agrees that circuit courts are not required to utter magic words. *See Montgomery*, 136 S. Ct. at 735 ("*Miller* did not impose a formal factfinding requirement"). But that "does not leave the states free to sentence a child whose crime reflects transient immaturity to life without parole" because "*Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id*. While no magic words are required, offenders being sentenced for crimes committed as juveniles may not be sentenced to life imprisonment unless they have been found to be completely incapable of rehabilitation after a hearing at which their individual youth and attendant circumstances have been considered in mitigation.

As this Court recently reiterated, "*Roper*, *Graham*, and *Miller* emphasize 'that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes.*'" *Buffer*, 2019 IL 122327, at ¶ 24, quoting *Miller*, 567 U.S. at 472 (emphasis added). This Court has thus instructed that Illinois courts "revisiting a discretionary sentence of life without parole must look at the cold record to determine if the trial court considered such evidence at the defendant's original sentencing hearing." *Holman*, 2017 IL 120655, ¶ 47. The only substantive issue now before this Court is whether the record demonstrates that the sentencing judge properly considered the particular facts of Lusby's youth and its attendant characteristics as mitigation before

sentencing him to life imprisonment. The appellate court majority correctly held that the answer to that question is, "No."

B. This Court should reject the State's effort to circumvent the appellate court's correct ruling by suggesting a narrowing of the application of the Eighth Amendment in a manner contrary to settled precedent.

As set forth above, this Court looks to the cold record in considering whether the circuit court complied with *Miller* at sentencing. Yet the State makes the novel claim that this Court can both presume that the circuit court complied with *Miller* and that defendants who were sentenced to life imprisonment for crimes committed as juveniles have the burden to prove themselves part of some "protected class" of juveniles who are protected by *Miller*. (St. Ill. Sup. Ct. AT Br. at 12) The State's claim conflicts with existing law.

Regardless of their offense, all juvenile defendants are presumed to be categorically less culpable and more capable of change than adults because youth itself "is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness[, and] ... its 'signature qualities' are all 'transient.'" *Miller*, 567 U.S. at 476, quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *see also Buffer*, 2019 IL 122327, at ¶ 24 (after *Miller*, sentences of life imprisonment for crimes committed by juveniles are constitutionally excessive for all but the rare juvenile offender whose crime reflects irreparable corruption.) (internal quotes omitted). The State's suggestion that defendants must prove

themselves to be in a "protected class" is in direct conflict with the now settled principle that "appropriate occasions for sentencing juveniles" to life imprisonment "will be uncommon" given the difficulty even expert psychologists have in differentiating "'between the juvenile offender whose crime reflects unfortunate yet transient immaturity, *and the rare juvenile offender whose crime reflects irreparable corruption*.'" *Miller*, 567 U.S. at 479, quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010), quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (emphasis added); *see also Buffer*, 2019 IL 122327, ¶ 21 (same).

The State's argument is also fundamentally at odds with *Miller* because *Miller* requires circuit courts to affirmatively "consider a juvenile offender's youth and attendant characteristics before" imposing a life sentence in order "to separate those juveniles who may be sentenced to life without parole from those who may not.'" *Holman*, 2017 IL 120655, ¶ 38, quoting *Montgomery*, 136 S. Ct. at 734-735; *see also Briones*, 2019 WL 2943490 at *4 (at sentencing, circuit courts must consider how the constitutional differences between children and adults "counsel against irrevocably sentencing them to a lifetime in prison" even "when terribly serious and depraved crimes are at issue"). It would be nonsensical to require circuit courts to consider the youth and attendant circumstances of all juveniles at sentencing if only those juveniles who were able to show themselves to be part of a "protected class" were entitled to such consideration.

In addition to suggesting that Lusby was required to show that he was part of a protected class, the State also suggests that this Court may presume the original sentencing court in this case followed the law because nothing in *Miller* alters the traditional presumption to which sentencing courts are entitled. (St. Ill. Sup. Ct. AT Br. at 19-20) However, the entire universe that is juvenile sentencing law turns the ordinary presumption of compliance that is applied to adult sentencing hearings on its head. *See Montgomery*, 136 S. Ct. at 733 (*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'"). Thus, the State's reliance on adult sentencing hearings in support of this proposition is inapposite. (St. Ill. Sup. Ct. AT Br. at 19-20, citing *People v. Carter*, 2015 IL 117709, *People v. Thompson*, 222 Ill. 2d 1 (2006), *People v. LaPointe*, 88 Ill. 2d 482 (1981). Yet it is against this backdrop that the State suggests the outcome of this case should be the same as in *Holman*. (St. Ill. Sup. Ct. AT Br. at 24-25) The State overlooks this Court's careful review of the record in *Holman*.

It is true that, following a record review, this Court ultimately held that the circuit court in *Holman* complied with *Miller*. 2017 IL 120655 at ¶ 50. This Court did not, however, apply traditional principles of adult sentencing law, defer to the circuit court, and presume that the court complied with *Miller* and its progeny in the absence of evidence to the contrary. Instead it "look[ed] at the cold record to determine if the trial court

considered such evidence at the defendant's original sentencing hearing." *Holman*, 2017 IL 120655, ¶ 47. *Holman* disproves the State's argument that *Miller* "does not alter the settled presumptions that attach to the sentencing court's ultimate decision" (St. Sup. Ct. AT Br. at 20) because there would be no need to examine the record if traditional adult sentencing law, with its "settled presumptions about compliance," applied to *Miller* claims.

Similarly, in *Buffer*, the circuit court said it had reviewed all relevant statutory requirements and considered the presentence investigation report (PSI) as well as Buffer's potential for rehabilitation. 2019 IL 122327, ¶ 5. The record in *Buffer* also showed that defense counsel asked the circuit court to consider in mitigation Buffer's youth and the fact that he "was very susceptible to the influence of others." *Buffer*, 2017 IL App (1st) 142931, ¶ 24. But this Court did not merely presume that the circuit court complied with *Miller*. *Id*. at ¶¶ 5, 42, 46. The record in *Buffer* showed that the circuit court had considered the relevant statutory requirements but it did not show the court affirmatively considered Buffer's youth and attendant circumstances before imposing a life sentence. *Id*. at ¶ 42. Accordingly, this Court held that Buffer's sentence violated the Eighth Amendment. *Id*. at ¶ 46. This Court's precedent soundly rebuts the State's argument that "settled principles" of traditional adult sentencing law apply to *Miller* claims.

Next, contrary to the dissenting Justice and the State, the appellate court majority's opinion in *Lusby* did not require reversal "merely because the trial court did not expressly state that it had considered the PSI." *Lusby*,

2018 IL App (3d) 150189, ¶ 41 (Carter, PJ, dissenting). (St. Ill. Sup. Ct. AT Br. at 20-21) Instead, the majority pointed out the circuit court's lack of explicit consideration of mitigation to distinguish Lusby's case from *Holman*, where the record showed that the circuit court considered a great deal of evidence about Holman's individual qualities and where Holman affirmatively declined the opportunity to present mitigating evidence. *Lusby*, 2018 IL App (3d) 150189 at ¶¶ 27-28. This Court should affirm the appellate court, which followed *Holman* and *Buffer* and found that the circuit court did not properly consider evidence of Lusby's specific youth and its attendant circumstances as mitigation at sentencing before imposing life imprisonment.

This Court has explicitly recognized that " 'clear, predictable, and uniform constitutional standards are especially desirable' in applying the eighth amendment." *Buffer*, 2019 IL 122327, ¶ 29, quoting *Roper*, 543 U.S. at 594 (2005) (O'Connor, J., dissenting). When it comes to juvenile offenders, the evolving standards of decency reflect "a changing moral compass." *People v. Aikens*, 2016 IL App (1st) 133578, ¶ 38. Thus, the United States Supreme Court has held, "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, 136 S. Ct. at 733, quoting *Miller*, 567 U.S. at 479-480. "'It is for the State, in the first instance, to explore the means and mechanisms for compliance' with eighth amendment mandates pertaining to juvenile sentencing." *Buffer*, 2019 IL 122327, ¶ 40, quoting *Graham*, 560 U.S.

at 75; *see also Danforth v. Minnesota*, 552 US. 264, 288 (2008), quoting *American Trucking Associations, Inc. v. Smith*, 496 U.S 167, 178-179 (1987) ("Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.' "). Through *Holman* and *Buffer*, this Court has taken a clear and expansive approach requiring affirmative consideration of youth-specific mitigation prior to imposing a life sentence for offenses committed by juveniles: this Court should reject the State's effort to overturn settled precedent.

In sum, it is now well established that adolescence is marked by "transient rashness, proclivity for risk, and inability to assess consequences" and that these factors both lessen a child's moral culpability and enhance the prospect that the child's deficiencies will be reformed "as the years go by and neurological development occurs[.]" *Miller*, 567 U.S. at 471-472. Current Eighth Amendment law provides that reviewing courts should not blindly defer to circuit courts when evaluating life sentences imposed for offenses that were committed when the defendant was a juvenile. Which makes sense because, as set forth above, sentences of life imprisonment for crimes committed by juveniles are constitutionally excessive "for all but the rare juvenile offender whose crime reflects irreparable corruption." *Buffer*, 2019 IL 122327, at ¶ 24 (internal quotations omitted).

Moreover, "[a] claim that punishment is constitutionally excessive is judged not by the standards of the past 'but rather those that currently prevail.'" *Buffer*, 2019 IL 122327, ¶ 15, quoting *Atkins v. Virginia*, 536 U.S.

304, 311 (2002). A presumption that Lusby's sentencing judge complied with these factors without a showing on the record would be entirely unreasonable under currently prevailing norms. Lusby's sentence violates the Eighth Amendment because the cold record does not show that the circuit court considered the specific facts about his youth and its attendant circumstances as mitigation before imposing a *de facto* life sentence of 130 years imprisonment for a crime committed when Lusby was only 16 years old. This Court should reject the State's attempt to argue otherwise and affirm the appellate court.

II. If this Court finds that Ashanti Lusby's *de facto* life is unconstitutional, it should remand for a new sentencing hearing.

The State concedes that Ashanti Lusby established cause sufficient to justify filing a successive petition. (St. Ill. Sup. Ct. AT Br. at 18, citing *People v. Davis*, 2014 IL 115595, at ¶ 42) The only question is thus whether he established prejudice by showing a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process, which is identical to the burden he must meet to obtain substantive relief. As discussed in Argument I, *supra*, all of the facts and circumstances to decide this claim are already in the record. This Court should therefore deny the State's requested relief of remand to the circuit court for either second-stage or additional leave-to-file proceedings (St. Ill. Sup. Ct. AT Br. at 13-15, 26-29) and instead affirm the appellate court's decision to remand directly for resentencing.

A. *Buffer* definitively establishes that resentencing is the proper remedy when relief is granted for a postconviction *Miller* claim.

In *People v. Buffer*, this Court held that defendants who have been sentenced to life imprisonment in Illinois for offenses committed as juveniles will prevail on a *Miller* claim if they show that (1) they were "subject to a life sentence, mandatory or discretionary, natural or *de facto*, and (2) the sentencing court failed to consider youth and its attendant characteristics [as mitigation] in imposing the sentence." *Buffer*, 2019 IL 122327, at ¶ 27. *Buffer* also clearly stated that relief for postconviction *Miller* claims differs from other claims because, unlike most postconviction claims, "[a]ll of the facts and circumstances to decide [a postconviction *Miller* sentencing] claim are already in the record" and thus the "the proper remedy is to vacate defendant's sentence and to remand for a new sentencing hearing." *Buffer*, 2019 IL 122327 at ¶¶ 46-47, citing *People v. Holman*, 2017 IL 120655, ¶ 32, and *Davis*, 2014 IL 115595, ¶ 1.

Lusby acknowledges that *Buffer* involved an initial postconviction petition rather than a motion for leave to file a successive postconviction petition. But this Court's decisions in *Davis* and *Holman* illustrate that this is a distinction without a difference.

In *Davis,* this Court affirmed the appellate court, which reversed the circuit court's denial of leave to file a successive postconviction petition raising a *Miller* claim and remanded directly for resentencing. *Davis*, 2014 IL 115595, ¶¶ 1, 9, 43. *Holman* also involved denial of leave to file a successive

postconviction petition. 2017 IL 120655, ¶ 20. On appeal, Holman raised a *Miller* claim that the appellate court rejected because it had not been raised before the circuit court. *Id*. After this Court remanded for reconsideration in light of *Davis*, the appellate court reached the merits but ultimately denied relief on Holman's postconviction *Miller* claim. *Id*. at ¶ 22. This Court then granted Holman's post-remand petition for leave to appeal. In affirming the appellate court's substantive decision in *Holman*, however, this Court did not discuss the leave-to-file proceedings but instead followed *Davis* and proceeded directly to the merits of Holman's substantive claim. *Id*. at ¶¶ 1, 29-32. The same result should follow in this case.

B. It would be a waste of judicial resources to remand for additional leave-to-file proceedings where Ashanti Lusby has raised a substantive argument that can be resolved based on the record.

Ashanti Lusby appealed the circuit court's denial of leave to file a successive postconviction petition that raised a *Miller* claim. (C. 466) On review, the appellate court majority held that the circuit court erred because Lusby established cause where *Miller* was decided after he filed his initial postconviction petition, and that he established prejudice "because *Miller* is applied retroactively and the trial court did not consider his age and the attendant characteristics described in *Miller* before sentencing him to *de facto* life." *Lusby*, 2018 IL App (3d) 150189, ¶¶ 24, 28. The appellate court majority acknowledged that cases in which the circuit court has denied leave to file a successive postconviction petition generally "advance to the three-stage process for reviewing postconviction petitions when the court

determines that the petitioner has satisfied the cause and prejudice test." *Id.* at ¶ 29. However, because it held that Lusby's sentence violates the Eighth Amendment, the appellate court majority instead remanded directly for resentencing since there was no need for any further postconviction proceedings. *Id.*

The State now contends that the appellate court lacked power to reach the merits of Lusby's substantive claim and suggests this Court has power only because of its supervisory authority. (St. Ill. Sup. Ct. AT Br. at 17, 26-29) As discussed above, however, this Court did not discuss the leave-to-file proceedings in affirming the appellate court's substantive decision in *Holman*. It proceeded directly to review the appellate court's ruling on the merits of Holman's substantive claim because "[a]ll of the facts and circumstances to decide the defendant's claim—that his sentencing hearing did not comply with *Miller*—[we]re already in the record." *Id.* at ¶¶ 1, 29-32. Accordingly, the interests of judicial economy were furthered by addressing the merits rather than requiring the defendant to return to the circuit court. *Id.* at ¶ 32.

The same approach makes sense in this case because, for *Miller* claims, the prejudice analysis for leave to file a successive petition, which requires the petitioner to show a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process, is virtually indistinguishable from the substantive question of whether the circuit court failed to consider youth and its attendant characteristics as

mitigation in imposing the sentence. In suggesting that this Court should remand for new leave-to-file proceedings, the State relies on cases in which it was asking the court to affirm denial of leave to file and trying to avoid a remand that the defendants were seeking solely because of the State's improper involvement at the leave-to-file stage. (St. Ill. Sup. Ct. AT Br. at 13-17, citing *People v. Munson*, 2018 IL App (3d) 150544, ¶ 1; *People v. Baller*, 2018 IL App (3d) 160165, ¶¶ 7-16; and *People v. Partida*, 2018 IL App (3d) 160581, ¶¶ 7, 10-12). In this case, however, as in *Davis* and *Holman*, Lusby raised a substantive *Miller* issue that the appellate court found meritorious despite the State's input below. Accordingly, none of the State's cited authority is relevant.

Moreover, it would be fundamentally unfair to allow the State to avoid relief based on an error that the State itself created. *See People v. Carter*, 2015 IL 117709, ¶ 25 ("any section 2–1401 petitioner who seeks to use, on appeal, his own error, by way of allegedly defective service, in an effort to gain reversal of a circuit court's *sua sponte* dismissal of his or her petition on the merits, must affirmatively demonstrate the error via proceedings of record in the circuit court."). It is also difficult to imagine how the State's requested relief would present any benefit given that the record already contains everything that is needed to resolve Lusby's substantive claim.

The State also seems to suggest that both this Court and the appellate court lack jurisdiction to consider the substantive issues raised by Lusby's appeal. (St. Ill. Sup. Ct. AT Br. at 17-18, 26-29) But Lusby timely filed a

notice of appeal that fairly and adequately identified the circuit court's denial of leave to file the successive postconviction petition at issue in this case. (C. 466-467, 469-472) Under this Court's precedent, it is thus beyond question that both the appellate court and this Court have jurisdiction to consider the merits of Lusby's postconviction claim. *See People v. Young*, 2018 IL 122598, ¶ 14 ("The appellate court obtained jurisdiction in this matter when defendant timely filed a notice of appeal from the dismissal of his successive postconviction petition.").

In sum, the appellate court correctly followed this Court's precedent by remanding for resentencing after reviewing the cold record and determining that Lusby's sentence violates the Eighth Amendment. The appellate court and this Court also have jurisdiction to consider the merits of Lusby's appeal. This Court should therefore affirm the appellate court and remand for resentencing. If this Court disagrees, however, at the very least it should remand for further postconviction proceedings because Lusby's postconviction petition mentioned an Illinois constitutional claim that was not raised on appeal.

CONCLUSION

For the foregoing reasons, Ashanti Lusby, defendant-appellee, respectfully requests that this Court either affirm the appellate court's decision and remand to the circuit court for resentencing in accordance with *Miller* and its progeny or, in the alternative, remand for further postconviction proceedings.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

DEBORAH NALL
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE

I, Deborah Nall, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 39 pages.

/s/Deborah Nall
DEBORAH NALL
Assistant Appellate Defender

No. 124046

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- ASHANTI LUSBY Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0189. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 01 CF 664. Honorable David Carlson, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

James Glasgow, Will County State's Attorney, 121 N. Chicago St., Joliet, IL 60432;

Mr. Ashanti Lusby, Register No. R16921, Hill Correctional Center, P.O. Box 1700, Galesburg, IL 61402

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 July 18, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Carol Chatman
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us