No. 124046

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate
	)	Court of Illinois, Third
Respondent-Appellant,	)	District, No. 3-15-0189
	)	
	)	There on Appeal from the
v.	)	Circuit Court of the Twelfth
	)	Judicial Circuit, Will
	)	County, No. 01 CF 664
ASHANTI LUSBY,	)	
	)	The Honorable David M.
Petitioner-Appellee.	)	Carlson, Judge Presiding.

REPLY BRIEF OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. The Appellate Court Must Remand When the Circuit Court Erroneously Obtains the State's Input at the Leave-to-File Stage.

The circuit court must decide whether a petitioner has made the requisite prima facie showing of cause and prejudice to warrant granting leave to file a successive postconviction petition without input from the State. *People v. Bailey*, 2017 IL 121450, ¶¶ 24-25. As the People's opening brief established, St. Br. 13-17,[1] consistent with *People v. Gaultney*, 174 Ill. 2d 410, 419-20 (1996), upon finding that the State improperly provided input during the leave-to-file stage, the appellate court must reverse and remand for the circuit court to conduct leave-to-file review without state participation. *See, e.g., People v. Baller*, 2018 IL App (3d) 160165, ¶¶ 14-16. Defendant does not appear to contest that the appellate court must provide this remedy for a *Bailey* error, Def. Br. 13; indeed, he argued for this very remedy below, Def. App. Ct. AT Br. 24. This Court should therefore resolve the appellate court split on this question and hold that upon finding a *Bailey* error, the appellate court must reverse and remand for the circuit court to conduct leave-to-file review without State participation. St. Br. 13-17.

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[1] "C_" refers to the common law record; "IC_" to the impounded common law record; "R_" to the report of proceedings; "St. Br.," "Def. Br.," and "Amicus Br." to the briefs filed in this Court and "A_" to the appendix to that opening brief; and "Def. App. Ct. AT Br." to defendant's appellate court opening brief, a certified copy of which has been filed in this Court under Rule 318(c). Citations to the common law record are to the typewritten page numbers appearing at the top and bottom right-hand corners (not the Bates stamp number at the bottom right-hand corner).

Contrary to defendant's assertion, Def. Br. 37-38, the State's view is not that the appellate court and this Court lack jurisdiction to address the *Bailey* error that occurred here, *see* C456-64; R921-23; A64-65. Rather, the Post-Conviction Hearing Act (Act) bars the circuit and appellate courts from evaluating whether a petitioner should receive leave to file a successive petition with input from the State, and when such input erroneously occurs, new leave-to-file proceedings are required in the circuit court. *See* St. Br. 13-17 (citing *Bailey*, 2017 IL 121450, ¶¶ 24-25 (holding that the Act requires circuit court to decide leave-to-file issue without State input)); *see also Gaultney*, 174 Ill. 2d at 419-20 (holding that reversal is "required" when circuit court seeks or relies upon input from the State during first-stage review of initial postconviction petition). Because *Bailey* relied heavily on *Gaultney* in recognizing that such State involvement is erroneous, there is no reasoned basis to decline to follow *Gaultney* in fashioning the remedy for this error. *See* St. Br. 15-17.

This Court should resolve the growing appellate split, *see People v. Conway*, 2019 IL App (2d) 170196, ¶¶ 17-23, and clarify the appellate court's authority to remedy a *Bailey* error. Unlike the appellate court, however, this Court can and should address, under its broad supervisory authority, whether the circuit court properly denied leave to file here. *See* St. Br. 17-18.

II. This Court Should Affirm the Circuit Court's Denial of Defendant's Leave-to-File Motion.

As explained, St. Br. 17-26, although defendant showed cause for not raising the alleged errors in his initial postconviction petition, he failed to demonstrate prejudice because the record rebuts his Eighth Amendment claim. *See* 725 ILCS 5/122-1(f) (2014) (defining cause and prejudice).

In *People v. Holman*, this Court set forth the analytical approach for assessing whether a defendant's life sentence imposed before *Miller v. Alabama*, 567 U.S. 460 (2012), comports with the Eighth Amendment. *Holman*, 2017 IL 120655, ¶ 47. Under this approach, a court must review the record from the original sentencing hearing and determine whether the sentencing court found that the defendant's conduct "showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation" after considering the defendant's youth and its attendant characteristics — i.e., the *Miller* factors. *Id.*, ¶¶ 46-47 (adopting *Miller*'s five-factor non-exhaustive list of "youth and attendant characteristics").

Contrary to defendant's position, neither *Holman* nor *Miller* requires courts to use magic words or make specific findings before determining that life is the appropriate sentence for a particular offender. Nor did those cases overturn this Court's longstanding precedent that a defendant's sentence is presumed constitutional, and that courts are presumed to know and follow the law and consider any mitigating evidence in the record. Moreover,

neither case established a hard-and-fast rule regarding the type of evidence that must be found in a record to sustain a juvenile offender's life sentence. To the contrary, *Holman* directs courts to review the totality of the record to determine whether it shows that the sentencing court considered the individual defendant's youth and its attendant characteristics before determining that his crime reflected irretrievable depravity and imposing the life sentence. *Id.*, ¶ 47. Here, the trial court reviewed the record, which included such evidence, and found that defendant's conduct showed irretrievable depravity. St. Br. 17-26. Accordingly, defendant's sentence comports with *Miller*, and this Court should affirm the circuit court's decision denying defendant leave to file a successive postconviction petition.

A. The Appellate Majority Erred in Requiring Courts to Use Magic Words Before Sentencing a Juvenile Offender to Life Imprisonment.

As explained, St. Br. 19-22, a sentencing court need not use "magic words" to comply with *Miller*. Defendant "agrees that circuit courts are not required to utter magic words." Def. Br. 26 (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016) ("*Miller* did not impose a formal factfinding requirement")). Yet, like the appellate court majority, defendant presumes that the sentencing court did not consider the evidence about his youth and its attendant characteristics that was included in his PSI because the court did not expressly state that it considered the *contents* of the PSI. *Compare* A6, ¶¶ 27-28 (finding no indication in the record that trial court considered

evidence of youth and its attendant characteristics that was "in the PSI," because "trial court did not 'explicitly' state that it considered the evidence in [defendant]'s PSI during sentencing") *with* Def. Br. 20 ("While the circuit court referenced the PSI, nothing in the record suggests that the court complied with *Miller* by considering its contents and [defendant]'s individual characteristics as mitigation."). But neither *Holman* nor *Miller* makes Eighth Amendment compliance contingent on whether the sentencing court expressly confirmed that it considered the evidence that was before it, including the PSI and its contents.

To the contrary, *Holman* instructs courts to confirm that there was evidence of the defendant's youth and its attendant characteristics before the trial court at the time of the original sentencing hearing. 2017 IL 120655, ¶ 47. However, *Holman* does not require the sentencing court to have expressly stated that it considered the evidence before it. *Id.*, ¶¶ 49-50 (explaining that, based on review of the record, "trial court had no evidence to consider on any of the statutory factors in mitigation," "some evidence related to the *Miller* factors," and "significant evidence . . . on the statutory factors in aggravation"); *id.*, ¶ 48 (trial court had evidence of defendant's age at time of offense, and parties highlighted age in arguments at sentencing); *id.*, ¶¶ 9-12, 48 (PSI and attached psychological reports provided "insight into [defendant's] mentality," family, susceptibility to peer pressure, low

intelligence, and rehabilitative prospects); *id.*, ¶¶ 48, 50 (record shows that trial court knew about facts pertaining to defendant's offense).

Indeed, nothing in *Holman* purports to overturn the settled legal principles that a sentencing court is presumed to have considered the evidence before it, *People v. Thompson*, 222 Ill. 2d 1, 45 (2006) (citing *People v. Burton*, 184 Ill. 2d 1, 34 (1998)), and to know and follow the law, which requires it to consider the PSI, *People v. Carter*, 2015 IL 117709, ¶ 19; 730 ILCS 5/5-3-1 & 5-4-1(a)(2) (1996); *see also People v. La Pointe*, 88 Ill. 2d 482, 493 (1981) (sentencing court not required to detail process used in selecting penalty imposed). And here, the appellate majority and defendant appear to agree that evidence of defendant's youth and its attendant characteristics was included in the PSI. A6, ¶¶ 27-28; Def. Br. 15, 20. Accordingly, the sentencing court is presumed to have considered that evidence and did not separately need to state that it did so.

In any event, as explained, St. Br. 21-22, the record shows that the trial court stated that it considered the PSI's contents (and the trial evidence) before sentencing defendant. *See, e.g.*, A10 ("Now I have reviewed the presentence investigation [report]"); A55 (when imposing sentence, explaining that sentence was based on "what [the court had] seen here" and "everything that [it] ha[d] seen and heard in th[e] trial"). Thus, the appellate majority's determination that the trial court did not consider the contents of the PSI when imposing sentence is contracted by the record.

B. *Miller* Does Not Alter the Longstanding Principles that Apply to Reviewing the Constitutionality of Sentences.

Defendant vaguely invokes "the entire universe that is juvenile sentencing law" to claim that none of the longstanding sentencing presumptions apply to juvenile cases after *Miller*. Def. Br. 29. But *Miller* did not purport to cause such a drastic shift in juvenile sentencing principles. And, as *Holman* explained, even before *Miller*, Illinois courts had recognized that "age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance." 2017 IL 120655, ¶ 44 (citing, among other cases, *People v. McWilliams*, 348 Ill. 333, 336 (1932), which held in juvenile sentencing context that court should consider any mitigating and aggravating evidence, including age and its attributes). Thus, Illinois courts have long considered age-related attributes when sentencing juvenile offenders. *See, e.g.*, *People v. Leon Miller*, 202 Ill. 2d 328, 341 (2002) (affirming trial court's finding that mandatory natural-life sentence was unconstitutional for particular juvenile offender due to youth and minimal role in crimes); *see also* Ill. Const. 1970, art. I, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."). And, after *Miller*, reviewing courts have relied on sentencing presumptions in rejecting Eighth Amendment challenges to juvenile offenders' sentences. *See, e.g.*, *People v. Lopez*, 2019 IL App (3d) 170798, ¶¶ 23, 25. This is not surprising given that this Court applied such presumptions when reviewing the most serious

punishment once available under Illinois law, a capital sentence. *See, e.g.*, *Thompson*, 222 Ill. 2d at 34-38.

Nor is there merit to defendant's argument that, after *Miller*, a defendant no longer bears the burden of demonstrating that his sentence is unconstitutional. *See* Def. Br. 27-28 (arguing that juvenile offenders need not show that they fall within protected class for whom life imprisonment is unconstitutional). To the contrary, this Court recently reaffirmed that "a defendant sentenced for an offense committed while a juvenile *must show* that (1) [he] was 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 in imposing the sentence." *People v. Buffer*, 2019 IL 1721435, ¶ 27 (emphasis added). Defendant's contrary argument disregards that in this postconviction proceeding, he bears the burden of establishing a substantial deprivation of his constitutional rights, *see People v. Johnson*, 154 Ill. 2d 227, 239 (1993), i.e., of showing that the trial court imposed a sentence in violation of *Miller*, *see Montgomery*, 136 S. Ct. at 735; *Buffer*, 2019 IL 1721435, ¶ 27. As now explained, defendant cannot make that showing here.

C. Defendant's Sentence Comports with the Eighth Amendment.

As explained, St. Br. 22-26, the sentencing court here, as in *Holman*, concluded that defendant's "conduct placed him beyond rehabilitation." 2017 IL 120655, ¶ 50; *see also* A45-46, 53-55 (trial court's findings that defendant

lacked rehabilitative potential, because his acts were "depraved," "show[ed] absolutely no respect for human life," and were not the product of youthful immature judgment). And it did so only after considering the evidence of defendant's youth and its attendant characteristics as set forth in the PSI and from the trial. *See supra*, Part II.A. Defendant's de facto life sentence is thus constitutional. St. Br. 22-26.

Defendant seeks to distinguish *Holman* on the basis that the evidence presented at his sentencing hearing was not identical to that presented in *Holman*. *See, e.g.*, Def. Br. 17, 18 (arguing that, unlike *Holman*, this record lacks psychological reports and probation officer's opinion as to rehabilitation). But *Holman* did not hold that certain evidence *must* be in the record to sustain a juvenile offender's life sentence; it recognized that each record will differ. *See* 2017 IL 120655, ¶ 47. And appropriately so: *Miller*'s rule is grounded in the need for individualized consideration of characteristics such as age, background, and the nature of the crime that can differ among juvenile offender cases; as a result, *Miller*, too, declined to require the presence or absence of particular circumstances. *See, e.g., Miller*, 567 U.S. at 476-77, 479-80 & n.8. Thus, that certain types of evidence present in *Holman* are missing here is neither surprising nor dispositive.

Defendant also argues that the record here is inadequate to show that his sentence was constitutional because it contains no indication that he personally chose not to present additional mitigating evidence. Def. Br. 17-

18. But, again, *Holman* did not establish any bright-line rules about what must be (or not be) in the record for a sentence to be constitutional. 2017 IL 120655, ¶¶ 46-50. And in particular, this circumstance should not be added to the short list of decisions that a criminal defendant, rather than his attorney, ultimately gets to make, none of which involves sentencing. *See People v. Clendenin*, 238 Ill. 2d 302, 318-19 (2010) (listing five decisions reserved for defendant: (1) what plea to enter; (2) whether to waive a jury trial; (3) whether defendant will testify; (4) whether to appeal; and (5) whether to submit a lesser-included offense jury instruction). Thus, this factual distinction has no constitutional significance.

Moreover, nothing on this record shows that the sentencing court prevented defendant from presenting mitigation evidence. To the contrary, defendant objected to portions of the PSI, but declined to present, or indicate that he wanted to present, additional evidence. A10-17, 42. If defendant believed trial counsel should have proceeded differently, he could have alleged those supposed shortcomings as grounds for finding ineffective assistance of counsel in earlier proceedings.[2] In short, defendant, like Holman, was given "every opportunity to present mitigation evidence to show that his criminal conduct was the product of immaturity and not

[2] Any such ineffectiveness claim is now forfeited because defendant did not assert it in the lower courts. Def. App. Ct. Br.; *see, e.g., People v. Lucas*, 231 Ill. 2d 169, 175 (2008). Moreover, defendant describes no available mitigating evidence that was not before the sentencing court.

incorrigibility," but he declined. *Compare Holman*, 2017 IL 120655, ¶ 49 *with* A42.

Defendant's attacks on the sentencing court's factual finding of irretrievable depravity, Def. Br. 22-23, are also unavailing. His argument rests on the mistaken belief that the question is whether he is irretrievably depraved. Applying this assumption, *id.* at 21-22, defendant discounts the jury's finding that his crime — a brutal sexual assault and murder — reflected "exceptionally brutal or heinous behavior indicative of wanton cruelty," R767-68, 773-74. But the sentencing court properly considered this jury finding, Def. Br. 21-22, because *Miller* requires courts to distinguish between "the juvenile offender whose *crime* reflects unfortunate yet transient immaturity, and the rare juvenile offender whose *crime* reflects irreparable corruption." 567 U.S. at 479-80 (emphasis added and internal quotation marks omitted).

Moreover, defendant's assertion that his criminal history did not reflect irretrievable depravity, Def. Br. 22-23, ignores that his offense and criminal history are relevant to his prospects for rehabilitation, which is a part of the *Miller* analysis. *See, e.g., Holman*, 2017 IL 120655, ¶¶ 46-48 (defendant's criminal history relevant to show lack of rehabilitative potential); *People v. Simms*, 192 Ill. 2d 348, 424 (2000) (offender sentenced to death had "demonstrated lack of rehabilitative potential as evidenced by numerous prison infractions"). During the five years after he sexually

assaulted and murdered Happ but before he was sentenced for those offenses, defendant committed multiple violent acts, both as a juvenile and adult, while in custody and on probation. IC47; A45-46; *see also* St. Br. 6. The sentencing court thus appropriately considered the nature of defendant's crimes and his criminal history, along with the evidence of his youth and its attendant characteristics, in determining that defendant's crime reflected irretrievable depravity and warranted a life sentence. *See* St. Br. 22-26.

Lastly, defendant characterizes *Buffer* as holding that the sentencing court failed to "properly consider[ ]" evidence of Buffer's youth and its attendant circumstances even though the court stated that it considered the PSI, the trial evidence, and Buffer's potential for rehabilitation. Def. Br. 16, 25, 30 (citing 2019 IL 122327, ¶¶ 5, 42, 46).[3] But defendant's reliance on *Buffer* is misplaced, because that case involved what was, in effect, a mandatory rather than a discretionary life sentence. Under the sentencing statutes in effect at the time, the trial court was required to sentence Buffer to at least 45 years in prison, which, this Court held in *Buffer*, was de facto life. *See* 2019 IL 122327, ¶¶ 40-42. Because any sentence chosen from the applicable sentencing range constituted de facto life, the sentencing court had no discretion to impose a non-de-facto-life sentence. Thus, Buffer's 50-year sentence violated the Eighth Amendment regardless of what occurred at the sentencing hearing. *See, e.g., People v. Davis*, 2014 IL 115595, ¶ 43. To the

[3] This Court decided *Buffer* after the State filed its opening brief in this case.

extent that *Buffer*'s holding that an Eighth Amendment violation occurred could be construed as commenting on or evaluating the contents of the sentencing hearing, it was dicta.

In any event, defendant misapprehends *Buffer*. When *Buffer* stated that the sentencing court "failed to consider [Buffer]'s youth and its attendant characteristics in imposing" Buffer's sentence, 2019 IL 122327, ¶ 42; *see also id.*, ¶ 46, it meant that the sentencing court failed to give adequate *weight* to such evidence and, therefore, Buffer's sentence violated the Eighth Amendment. Indeed, *Buffer* and *Holman* are factually indistinguishable on this point because the sentencing courts in both cases stated that they had considered the PSI and trial evidence in formulating the sentence. *Id.*, ¶ 5; *Holman*, 2017 IL 120655, ¶ 48. There is no reason to conclude that *Buffer* changed the *Holman* analysis — about whether such a record sufficiently indicates that the sentencing court considered youth and attendant characteristics — less than two years after *Holman* and without explicitly stating that it disagreed with *Holman*. Instead, the severity of Holman's crimes and his related "crime spree" consisting of at least nine homicides, 2017 IL 120655, ¶¶ 3-5, contrasts sharply with Buffer's minimal criminal history and single homicide, which involved firing two shots into a car that he mistakenly believed belonged to a rival gang member, *People v. Buffer*, 2017 IL App (1st) 142931, ¶¶ 5-8, 11, 17, 23. Therefore, *Holman* and *Buffer*

reached different outcomes because of the difference in the evidence before the sentencing courts.

Further, as described, the nature of Buffer's crime and limited criminal history also sharply contrasts with defendant's crimes and criminal history, so *Buffer* is factually distinguishable and does not justify finding an Eighth Amendment violation here. *See generally People v. Fern*, 189 Ill. 2d 48, 55-57 (1999) ("[n]o two cases are every truly the same," and thus, "one sentence is no precedent for another" in an individualized sentencing scheme) (internal quotation marks omitted).

In sum, as in *Holman*, the sentencing court here had "some evidence related to the *Miller* factors," no evidence as to the statutory mitigating factors, and significant evidence on the statutory aggravating factors. *Holman*, 2017 IL 120655, ¶ 50; *see* St. Br. 5-9. Considering this evidence, the trial court permissibly concluded that defendant's crimes reflected irretrievable depravity and sentenced him to life.[4]

[4] This Court should reject amici curiae's requests to overrule *Holman* and invalidate defendant's sentence under the Illinois Constitution. Amici Br. 7-11. "An *amicus* takes the case as he finds it, with the issues as framed by the parties." *See In re J.W.*, 204 Ill. 2d 50, 73 (2003). This Court has therefore "repeatedly rejected attempts by *amicus* to raise issues not raised by the parties to the appeal." *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 61-62 (2001). Because defendant is not raising the issues argued by amici, this Court should decline to address them. *See id.*; *see also J.W.*, 204 Ill. 2d at 73.

III. The Appellate Court Exceeded Its Authority in Bypassing the Post-Conviction Hearing Act's Procedural Requirements and Granting Relief.

As explained, St. Br. 26-29, the appellate majority erred when, upon reversing the circuit court's denial of defendant's leave-to-file motion, it addressed the merits of the Eighth Amendment claim and ordered resentencing rather than remanding for second-stage postconviction proceedings. Since then, this Court in *Buffer* also ordered resentencing upon reversing the trial court's first-stage dismissal of a postconviction petition. This Court should clarify that the appellate court lacks authority to provide this remedy.

The circuit court summarily dismissed Buffer's initial postconviction petition at the first stage. *Buffer*, 2019 IL 122327, ¶ 1. This Court reversed the dismissal after concluding that Buffer's sentence violated the Eighth Amendment. *Buffer* acknowledged that the "usual remedy" upon reversing first-stage dismissal is a remand for second-stage proceedings. *Id.*, ¶ 45. But citing "judicial economy," *Buffer* ordered a new sentencing hearing because all facts and circumstances needed to decide Buffer's claim were already in the record. *Id.*, ¶¶ 46-47. Under the Act, factual development normally occurs at the *third* stage of the postconviction process. At that time, the circuit court "may receive proof by affidavits, depositions, oral testimony, or other evidence." 725 ILCS 5/122-6; *Gaultney*, 174 Ill. 2d at 418-19. *Buffer*

correctly observed that this third stage would be unnecessary in a case where no additional factual development is required. 2019 IL 122327, ¶¶ 46-47.

But *Buffer* overlooked the importance of the *second* stage, at which counsel is appointed and the State has its first opportunity to file responsive pleadings. *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001) (citing 725 ILCS 5/122-5 (1998)); *see also Gaultney*, 174 Ill. 2d at 418-20. It is at this stage that the State may raise procedural defenses, including that the petition is untimely. *See, e.g., People v. Perkins*, 229 Ill. 2d 34, 43 (2007) (citing 725 ILCS 5/122-1(c) (2002)); *see also* St. Br. 27 (citing cases and statute showing that *Miller* and other similar Eighth Amendment claims may be deemed untimely filed). Indeed, this Court has recognized that the postconviction process should not be "short circuit[ed]" by skipping the second stage. *People v. Wrice*, 2012 IL 111860, ¶¶ 71, 87, 90 (remanding for second-stage proceedings after finding that violation of petitioner's constitutional rights — a physically coerced confession — was so serious that it was not subject to harmless-error review).

To be sure, in *People v. Davis*, this Court also remanded for resentencing after finding that defendant's motion for leave to file a successive postconviction petition established that his mandatory life sentence violated the Eighth Amendment. 2014 IL 115595, ¶¶ 1, 9, 43. But in *Davis*, the futility of second- and third-stage proceedings was stark: the State could not argue that the Eighth Amendment claim was untimely

because Davis's petition was filed in April 2011, *before Miller* was decided. *Id.*, ¶¶ 9-10. In any event, like *Buffer*, *Davis* does not explain the propriety of bypassing postconviction procedures. *Id.*, ¶ 43.

Moreover, while this Court has broad supervisory authority to order resentencing in a particular case, the *appellate court* lacks the authority to bypass the Act's procedures and prevent the State from asserting procedural defenses. Rule 615(b) defines the scope of the appellate court's authority, which, as relevant here, is limited to reversing, affirming, or modifying the judgment below. *See People v. Whitfield*, 228 Ill. 2d 502, 520-21 (2007) (citing 134 Ill. 2d R. 615(b)). The appellate court "must act within statutory bounds when exercising these powers" because it lacks the "inherent supervisory authority" conferred on this Court by the state constitution. *Id.* at 521 (citing Ill. Const. 1970, art. VI, § 16).

The Act does not authorize the appellate court to provide postconviction relief — e.g., skipping both the second and third stages — upon reversing the circuit court's first stage dismissal of an initial postconviction petition (*Buffer*) or upon reversing the circuit court's denial of leave to file of a successive petition (this case), particularly without knowing whether the State would raise second-stage procedural defenses if given an opportunity to do so. The Act mentions providing relief only in the provision describing the third stage, 725 ILCS 5/122-6, and not in the provisions describing the first and second stages, 725 ILCS 5/122-2.1; 725 ILCS 5/122-5.

And with regard to successive petitions, upon satisfaction of section 122-1(f)'s cause-and-prejudice test, the trial court must grant leave to file, after which "[t]he legislature clearly intended for further proceedings on [the] petitions." *People v. Smith*, 2014 IL 115946, ¶ 29. The appellate court therefore lacks authority to "short circuit" the postconviction process, especially for a successive postconviction case where it would be granting postconviction relief on a petition that has never been filed. *See* St. Br. 27-28.

Moreover, judicial economy concerns, *see Buffer*, 2019 IL 122327, ¶ 47, provide an insufficient basis to allow the appellate court to issue a remedy that skips the second stage of the postconviction process. The trial court can render a prompt ruling if it rejects any second-stage defenses that the State may choose to raise because further factual development will be unnecessary at the third stage. Requiring the trial court to consider the State's defenses before granting postconviction relief serves an important interest that should not be subverted by insubstantial judicial economy concerns.

Contrary to defendant's argument, establishing prejudice for the cause-and-prejudice test — i.e., the prerequisites for leave to file a successive postconviction petition — is not equivalent to establishing an entitlement to relief on the merits. *See* Def. Br. 33, 36 (asserting that a defendant's burden to establish prejudice is "identical" to or "virtually indistinguishable" from his burden to prove that he is entitled to substantive relief). To be sure, a postconviction petitioner who *cannot* establish prejudice necessarily has a

meritless underlying claim. *See, e.g., Smith*, 2014 IL 115946, ¶ 37. But the reverse is not true; at the leave-to-file stage, the defendant need only make "a *prima facie* showing" of prejudice, which is less than what is required to prevail on the merits. *See Bailey*, 2017 IL 121450, ¶¶ 22-25 ("satisfying the . . . cause and prejudice requirement does not entitle the defendant to relief").

Given the strictures of the Act and the lack of an apparent reason for treating Eighth Amendment violations differently than other constitutional errors warranting reversal of a conviction, *see Wrice*, 2012 IL 111860, ¶¶ 71, 90, this Court should clarify that the proper remedy when the trial court erroneously dismisses a postconviction petition at the first stage or denies leave to file a successive petition is to remand to the trial court for second-stage proceedings.[5]

[5] Alternatively, at the very least, such a remedy should be limited to cases involving Eighth Amendment violations under *Miller*. *Cf. Holman*, 2017 IL 120655, ¶ 32 (creating, for an as-applied *Miller* claim, "a very narrow exception" to the rule requiring defendants to raise an as-applied constitutional challenge in the trial courts).

CONCLUSION

For these reasons, the People of the State of Illinois respectfully ask this Court to reverse the portions of the appellate court's judgment that (1) reversed the trial court's denial of defendant's motion for leave to file a successive postconviction petition and (2) remanded for resentencing, and to affirm the circuit court's judgment. Alternatively, the State asks this Court to reverse solely the portion of the appellate court's judgment that remanded for resentencing, and remand to the trial court with instructions to (1) grant the leave-to-file motion, and (2) hold further postconviction proceedings.

August 29, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 20 pages.

/s/ Leah M. Bendik
LEAH M. BENDIK
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PROOF 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 August 29, 2019, the **Reply Brief of Respondent-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen duplicate paper copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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