No. 127666

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	On Appeal From the Appellate Court of Illinois, Third Judicial District, No. 3-20-0181
Respondent-Appellant,	
	There on appeal from the Circuit Court of the 21st Judicial Circuit,
v.	Kankakee County, Illinois, No. 09-CF-426
MICHAEL WILSON,	The Honorable Kathy Bradshaw Elliott,
Petitioner-Appellee.	Judge Presiding.

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

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POINTS AND AUTHORITIES

NATURE OF THE CASE

The People appeal the appellate court's judgment reversing the Kankakee County Circuit Court's denial of petitioner Michael Wilson's motion for leave to file a successive postconviction petition, granting postconviction relief, and remanding for a new sentencing hearing. A1-2, 6, ¶¶ 2, 16.[1] An issue is raised on the pleadings: whether petitioner's motion made a *prima facie* showing of cause and prejudice, as required under 725 ILCS 5/122-1(f), to excuse his failure to raise his Eighth Amendment claim in his initial postconviction petition.

ISSUE PRESENTED

Whether the trial court properly denied petitioner leave to raise an Eighth Amendment claim in a successive postconviction petition because he did not show cause for his failure to raise the claim in his initial postconviction petition and prejudice under *Miller v. Alabama*, 567 U.S. 460 (2012).

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. This Court allowed leave to appeal on January 26, 2022.

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[1] "C__" refers to the common law record; "SC__" to the secured common law record; "R__" to the report of proceedings; "E__" to the exhibits; and "A__" to this brief's appendix.

STATEMENT OF FACTS

I. Pretrial and Trial

In December 2008, 23-year-old Ryan Graefnitz was shot and killed outside an apartment building in Kankakee, Illinois. C160; R867-68, 872-73; E25-31. The People filed a juvenile delinquency petition charging petitioner with first degree murder and other crimes; petitioner was 14 years old at the time of the offenses. C197-200, 282; R5. Following an evidentiary hearing, the juvenile court transferred petitioner's case to criminal court. C197-200, 282; R5. A grand jury returned an indictment charging petitioner with one count of armed robbery, one count of unlawful use of a weapon, and three counts of first degree murder (intentional, knowing, and felony murder). C40-41.

In June 2012, petitioner filed a pretrial motion to dismiss the felony murder charge. C118-21. Petitioner cited *Roper v. Simmons*, 543 U.S. 551 (2005), *Thompson v. Oklahoma*, 487 U.S. 815 (1988), *People v. Miller*, 202 Ill. 2d 328 (2002), and two law review articles from 2004 and 2008, and argued that the rationale that supports the felony murder rule does not apply to juveniles due to their immaturity and other youth-related characteristics. C118-21.

While petitioner's motion was pending, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), which held that mandatory life without parole for juvenile homicide offenders violates the

Eighth Amendment. *See* R290-91. After reviewing *Miller*, R306, and hearing the parties' arguments, R307-09, the trial court denied petitioner's motion to dismiss the felony murder count, R309-11.

The case proceeded to trial on the first degree murder and attempted armed robbery charges. R494-95. The evidence showed that petitioner and then 17-year-old Byron Moore, both of whom were carrying concealed firearms, encountered Graefnitz, who was driving around with two friends looking to buy drugs. R742-47, 839, 845-59. Petitioner and Moore knew where they could buy crack cocaine, joined Graefnitz's group in their SUV, and provided Graefnitz's friend directions to an apartment building. R747-51, 858-63. There, petitioner, Moore, and Graefnitz got out of the SUV, R751-52, 863; when one of Graefnitz's friends attempted to join, petitioner or Moore told him to wait in the car, and Graefnitz agreed. R687-88, 719-20.

Petitioner, Moore, and Graefnitz entered the building's vestibule, and petitioner pressed a button to be buzzed into the building. R752-53, 863. While they waited, two people entered the vestibule, opened the interior door, left it propped open, and walked upstairs. R664, 864-65, 1077-78. When Graefnitz complained that petitioner and Moore were taking too long, R864, petitioner pulled out a small-caliber handgun and demanded Graefnitz's money. R848-58, 864-69; *see also* R1084-87, 1140-41. Graefnitz ran outside; petitioner followed and shot him twice. R688-89, 867-68, 1077-78, 1139-40, 1236; E31. Petitioner and Moore then fled. R868.

Later that night, petitioner confessed to Travis Watson that he had shot someone, R872-73, 971-72, and described his and Moore's attempt to rob Graefnitz of $200, R971-79; E66. Petitioner specified that he shot the man twice in the back as the man was running away, but he did not get any money. R977-79; E66. The autopsy revealed that Graefnitz suffered two gunshot wounds to his back; the fatal shot was a .22 caliber bullet that perforated his lung, aorta, and esophagus, and caused massive blood loss into the left chest. R1139-40, 1236-37; E30-31.

In closing argument, petitioner emphasized his young age of 14 and contended that Moore was the shooter and there was no plan to rob or kill Graefnitz. R1330-50. The trial court instructed the jury, in relevant part, that petitioner could be found guilty under an accountability theory. R1389-91. The jury found petitioner guilty of attempted armed robbery and three counts of first degree murder. R1411-12. It did not find that petitioner personally discharged the firearm that caused Graefnitz's death. R1412.

II. Sentencing

Petitioner's convictions subjected him to an aggregate prison term of 35 to 90 years in prison. R1470, 1492. Specifically, his crimes required that any prison terms be served consecutively, 730 ILCS 5/5-8-4(i) (2008), and the sentencing ranges were (1) 20 to 60 years for first degree murder, *id.* § 5-8-1(a)(1)(a), plus a mandatory enhancement of 15 years for being armed with a firearm, *see id.* § 5-8-1(a)(1)(d)(i), to be served at 100%, *id.* § 3-6-3(a)(2)(i); and

(2) probation, or 4 to 15 years in prison, for attempted armed robbery, *id.* §§ 5-5-3(b), 5-8-1(a)(4); 720 ILCS 5/8-4(c)(2), 18-2(b) (2008), to be served at 50%, 730 ILCS 5/3-6-3(a)(2.1) (2008).

At the August 2013 sentencing hearing, the trial court reviewed a presentence investigation report (PSI), received the parties' aggravating and mitigating evidence, and heard the parties' arguments and petitioner's statement in allocution. R1457-87. The parties had no corrections, additions, or deletions to the nearly 250-page PSI, which detailed petitioner's life history. R1458-59; SC1-243.

According to the PSI, petitioner was born with drugs in his system and placed in foster care where he remained until about age two, when he was adopted by the Wilsons, who provided a supportive home environment for him. SC5-6. During his childhood, petitioner was "happy" at home, SC5, but experienced substantial learning and behavioral issues beginning in kindergarten, SC5-6, 121. According to years of medical, psychological, and school records, petitioner had been diagnosed with, and where appropriate received treatment for, multiple mental health disorders, including attention deficit hyperactivity disorder (ADHD), oppositional defiance disorder, intermittent explosive disruptive behavior disorder, disruptive behavior disorder, and cannabis abuse disorder. SC7, 106-11. Despite multiple interventions, petitioner remained intellectually and functionally "immature," SC122, 124, and his difficulties with impulse control, frustration

tolerance, anger management, and inability to accept responsibility for his actions escalated, SC4-7, 11-112, 122-25.

At age 13, petitioner was adjudicated delinquent for criminal damage to property and criminal trespass to property and placed on court supervision. SC4. While on supervision, petitioner robbed and murdered Graefnitz. *Id.* Following petitioner's arrest, he was diagnosed with mild intellectual disability,[2] ADHD, and depressive disorder with atypical features. SC116-17. While in pretrial juvenile detention, petitioner had difficulty following rules, threatened deadly violence against others, and provoked fights. C42-59; SC7, 134-47.

The People submitted a victim impact statement from Graefnitz's mother. R1459-64; E87-88. Petitioner's adoptive father testified that at home petitioner would do everything that was asked of him, but he was a slow learner and had always been in special education classes. R1466-68. Petitioner's father also reported that petitioner's brother had recently been fatally shot. R1465-66. In allocution, petitioner apologized to Graefnitz's family for their loss and stated that he had experienced the "same type of loss" when his "brother was shot down." R1468-69.

Defense counsel asked for the minimum sentence based on petitioner's youth, minimal criminal history, and mental disorders. R1483-86. Counsel

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[2] The record uses the term "mental retardation." SC7, 117. Because mental health experts now use the term "intellectual disability," *see Hall v. Florida*, 572 U.S. 701, 704-05 (2014), this brief uses the updated term where feasible.

emphasized that petitioner needs help and "doesn't have the ability to help himself" due to his mental disorders, which provided substantial grounds tending to excuse or justify his conduct. R1485-86. The prosecutor requested a prison term totaling 64 years in prison (45 years for murder, plus the mandatory 15-year enhancement, and 4 years for attempted armed robbery). R1481-82. He recognized that petitioner was young at the time of the offenses, but contended that other factors, including the seriousness and nature of petitioner's crimes and his demonstrated inability to reform despite repeated opportunities to do so, showed that petitioner lacked rehabilitative potential and necessitated a sentence greater than the minimum. R1471-81, 1487.

Before sentencing petitioner, the trial court stated that it had considered the evidence of petitioner's crimes and mitigating and aggravating factors. R1487-88. It found that the crimes were "just cold," as petitioner and Moore intended to rob Graefnitz, shot him in the back as he ran away, and then left him for dead. R1489, 1491-92. The court recognized that petitioner was "young," R1490, "only 14 years of age when he committed th[e] crime[s]," R1488-89, but found that his repeated behavioral difficulties and actions on the night of the crimes showed that he lacked a "conscience," R1490-91, would do what he wanted to do without regard for others, *id.*, and was "a very dangerous person," R1490. Concluding that petitioner would "continue to be a danger to society," R1491, the trial court sentenced him to

consecutive prison terms of 40 years for murder, plus the mandatory 15-year firearm enhancement, and 4 years for attempted armed robbery, for an aggregate term of 59 years in prison, with an opportunity for release after 57 years, R1492.

III. Direct Appeal

On appeal, petitioner argued, in relevant part, that his sentence for murder was excessive because the trial court failed to consider mitigating factors such as his age, developmental delays, and mental health history. C212-13. The appellate court rejected petitioner's claim, explaining that the trial court had considered the mitigating factors but reasonably "found that the aggravating factors far outweighed the mitigating ones because of [petitioner]'s conduct, including his behavior in juvenile detention, which showed a pattern of aggressiveness and violence." C213. Petitioner's subsequent petition for leave to appeal (PLA) did not challenge his sentence and was denied in January 2016. *See People v. Wilson*, No. 120145 (Ill.).

IV. Initial Postconviction Petition

In September 2016, petitioner filed a pro se postconviction petition, which alleged, in relevant part, that the trial court was biased at sentencing, and, as a result, his sentence violated the Eighth Amendment. C219, 243, 247. The trial court dismissed the petition. C247.

On appeal, petitioner argued for the first time that his sentence amounted to life without parole and violated the Eighth Amendment under

Miller. C290-92. The appellate court found that petitioner forfeited that claim because he did not raise it in his postconviction petition. C291-92.

This Court denied petitioner's subsequent PLA in May 2019. C279. Petitioner asked for leave to file a motion to reconsider the denial of his PLA and for a supervisory order remanding to the circuit court for resentencing in light of *People v. Buffer*, 2019 IL 122327 (decided Apr. 18, 2019), and this Court denied leave to file in March 2020. *People v. Wilson*, No. 124525 (Ill. Mar. 16, 2020).

V. Motion for Leave to File a Successive Postconviction Petition

About 10 days later, petitioner filed in the trial court a motion for leave to file a successive postconviction petition, which sought to raise claims against his sentence under the Eighth Amendment and article I, section 11, of the Illinois Constitution (the penalties provision). C298-305. As relevant here, petitioner argued that *Buffer* provided cause for his failure to raise his *Miller*-based Eighth Amendment claim in his initial postconviction petition, C301-03, and he was prejudiced because he "was sentenced to 55 years [for murder] without proper consideration of [his] youth" and its attendant characteristics, as required by *Miller*, *Montgomery v. Louisiana*, 577 U.S. 190 (2016), *Buffer*, and *People v. Holman*, 2017 IL 120655, C314-17. The trial court denied leave to file. C320.

VI. Appellate Court's Decision

In July 2021, the appellate court reversed the trial court's denial of leave to file, granted postconviction relief on petitioner's *Miller* claim, and remanded for a new sentencing hearing. A6, ¶ 16. Citing *People v. Davis*, 2014 IL 115595, ¶ 42, the appellate court found that petitioner "established cause because he could not raise his claim prior to *Miller* and *Buffer*." A6, ¶ 16. And, relying on this Court's interpretation of *Miller* as stated in *Holman* and reiterated in *Buffer* and *People v. Lusby*, 2020 IL 124064, A15, ¶ 15, the appellate court found that petitioner's sentence violates the Eighth Amendment because he was sentenced to *de facto* life without parole and the trial "court did not to [*sic*] consider [his] youth and its attendant characteristics when it sentenced [him] to a *de facto* life sentence of 59 years' imprisonment," A6, ¶ 16.

The People sought rehearing, arguing, in relevant part, that the appellate court failed to consider the impact of *Jones v. Mississippi*, 141 S. Ct. 1307 (decided Apr. 22, 2021), on petitioner's claim. Peo. Reh'g Pet., *People v. Wilson*, No. 3-20-0181 (Ill. App. Ct.) (filed Aug. 13, 2021), at 1-4.[3] The People explained that petitioner could not satisfy the cause-and-prejudice test because *Jones* held that the right articulated in *Miller* turns on whether the sentencing court had discretion to consider youth and its attendant

[3] This Court may take judicial notice of the contents of the People's rehearing petition. *See People v. Mosley*, 2015 IL 115872, ¶ 16 n.6; *People v. Mata*, 217 Ill. 2d 535, 539-40 (2006).

characteristics and does not require, as the appellate court had held, that the record show that the court considered those mitigating circumstances. *Id.* The appellate court denied rehearing.

STANDARD OF REVIEW

This Court reviews the denial of a motion for leave to file a successive postconviction petition *de novo*. *People v. Dorsey*, 2021 IL 123010, ¶ 33.

ARGUMENT

I. Petitioner Faces Significant Procedural Hurdles to Obtaining Leave to File His Successive Postconviction Petition.

The Post-Conviction Hearing Act (Act) allows a criminal defendant to assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1). But because "[p]ostconviction proceedings are collateral to proceedings on direct appeal," *Dorsey*, 2021 IL 123010, ¶ 31, and "the State has a legitimate interest in preserving the finality of" a judgment of conviction affirmed on direct appeal, *People v. Owens*, 129 Ill. 2d 303, 316 (1989), proceedings under the Act "'focus on constitutional claims that have not and could not have been previously adjudicated,'" *Dorsey*, 2021 IL 123010, ¶ 31 (quoting *People v. Holman*, 2017 IL 120655, ¶ 25). Thus, "forfeiture precludes issues that could have been raised [on direct appeal] but were not." *Id.*

Moreover, the Act contemplates the filing of a single postconviction petition. *Id.* ¶ 32. Accordingly, it requires a petitioner to obtain leave to file

a successive petition and imposes "'immense procedural default hurdles [to] bringing" that petition, which "are lowered only in very limited circumstances so as not to impede the finality of criminal litigation." *Id.* (quoting *People v. Davis*, 2014 IL 115595, ¶ 14). Specifically, the Act provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended [postconviction] petition is waived." 725 ILCS 5/122-3. To clear this statutory waiver bar, the petitioner must "demonstrate 'cause' for the failure to raise the claim in the initial petition and that 'prejudice' resulted from that failure." *Dorsey*, 2021 IL 123010, ¶ 32; *see* 725 ILCS 5/122-1(f).

A petitioner "shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings," and "prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f). The "petitioner must establish cause and prejudice as to each individual claim asserted in a successive petition." *People v. Pitsonbarger*, 205 Ill. 2d 444, 463 (2002); *accord People v. Bailey*, 2017 IL 121450, ¶ 21. Absent this showing of cause and prejudice, the trial court must deny leave to file a successive postconviction petition. *Dorsey*, 2021 IL 123010, ¶ 33 (trial court must deny leave "when it is clear from a review of the successive petition and supporting documents that the claims raised fail as a matter of law or are insufficient to justify further proceedings").

II. Petitioner Cannot Establish Cause and Prejudice to Raise an Eighth Amendment Claim in a Successive Postconviction Petition.

Petitioner waived his claim that his sentence violates the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012), when he failed to include it in his initial postconviction petition, 725 ILCS 5/122-3, and he fails to overcome the statutory waiver bar, 725 ILCS 5/122-1(f). First, petitioner cannot establish cause for not raising his Eighth Amendment claim in his original postconviction petition because *Miller* was decided before petitioner was sentenced and the claim was reasonably available to him when he filed his initial petition in September 2016. Second, petitioner cannot establish prejudice under *Miller* because the trial court had discretion to consider youth and impose a sentence of less than *de facto* life without parole, and did not refuse to consider those circumstances "as a matter of law." *Jones v. Mississippi*, 141 S. Ct. 1307, 1313, 1315-16, 1319-20 & n.7, 1322 (2021). Accordingly, the appellate court improperly granted petitioner leave to raise an Eighth Amendment claim in a successive postconviction petition.

A. The appellate court erred in finding cause for petitioner's failure to raise his *Miller* claim in his initial postconviction petition.

To establish "cause" based on a change in the law, petitioner must establish that his "'constitutional claim is so novel that its legal basis [wa]s not reasonably available to [counsel]'" during his initial postconviction proceedings. *Pitsonbarger*, 205 Ill. 2d at 461 (quoting *Reed v. Ross*, 468 U.S.

1, 16 (1984)).[4] "[T]he question is not whether subsequent legal developments have made [counsel]'s task easier, but whether at the time of the default the claim was 'available' at all." *Smith v. Murray*, 477 U.S. 527, 536-37 (1986). "[T]he mere fact that a defendant or his counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *People v. Guerrero*, 2012 IL 112020, ¶ 19 (citing *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986)). To

[4] *Reed*'s holding is in tension with the United States Supreme Court's later holding in *Teague v. Lane*, 489 U.S. 288 (1989), that a decision announcing a new constitutional rule — *i.e.*, one not dictated by prior precedent — generally does not apply retroactively to cases on collateral review. *See*, *e.g.*, *Daniels v. United States*, 254 F.3d 1180, 1194-95 (10th Cir. 2001) (collecting cases questioning continuing viability of *Reed* and observing that "if one has cause for not raising a constitutional claim in earlier petitions because it is sufficiently 'novel,' that same novelty ensures the claim is barred from application on collateral review as a new rule under *Teague* (unless one of two exceptions applies)"); *see also People v. Flowers*, 138 Ill. 2d 218, 237-39 (1990) (adopting *Teague* framework for determining whether new decisions apply retroactively on collateral review). The Seventh Circuit has held that only legal changes that qualify as retroactive under *Teague* may constitute cause. *See, e.g.*, *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018); *McKinley v. Butler*, 809 F.3d 908, 912 (7th Cir. 2016); *cf. Reed*, 468 U.S. at 17-20 (finding cause where new constitutional rule applied retroactively). This Court, instead, requires that the new right be retroactive as a condition to showing prejudice, not cause. *See Davis*, 2014 IL 115595, ¶ 42 (holding that juvenile offender sentenced to mandatory life established cause under *Miller* and prejudice because *Miller*'s rule is retroactive and therefore outside of *Teague*'s prohibition). Practically, under either formulation, a petitioner cannot satisfy the cause-and-prejudice test based on a change in the law without showing *both* that his claim rests on a newly recognized constitutional right and that the right applies retroactively to his case. Otherwise, the *Teague* nonretroactivity doctrine would be rendered meaningless. *See United States v. Vargas-Soto*, 35 F.4th 979, __, 2022 U.S. App. LEXIS 15297, at *28-29 (5th Cir. June 2, 2022).

the contrary, there is no cause "'where the basis of a . . . claim is available, and other defense counsel have perceived and litigated that claim.'" *Bousley v. United States*, 523 U.S. 614, 623 n.2 (1998) (quoting *Engle v. Isaac*, 456 U.S. 107, 134 (1982)).[5] Thus, even if the "law [wa]s against him" or there was a "lack of precedent for [the] position," a petitioner cannot show "'cause' for failing to raise" a claim if its legal basis was reasonably available at the time that he filed his initial postconviction petition. *Guerrero*, 2012 IL 112020, ¶ 20 (citing *People v. Leason*, 352 Ill. App. 3d 450, 454-55 (1st Dist. 2004), and *People v. Johnson*, 392 Ill. App. 3d 897 (1st Dist. 2009)). In sum, a petitioner must rely on a new constitutional right to establish cause and cannot invoke novelty "where he was legally able to make the putatively novel argument" in a prior pleading. *United States v. Vargas-Soto*, 35 F.4th 979, __, 2022 U.S. App. LEXIS 15297, at *24-25 (5th Cir. June 2, 2022).

Petitioner's Eighth Amendment claim is not novel so as to satisfy the cause requirement to file a successive postconviction petition. His claim rests on the new legal right announced by *Miller*. But *Miller* was decided *before* petitioner was sentenced in August 2013; indeed, citing *Roper* and *Graham*, petitioner relied on the foundational principle of *Miller* — that children are

[5] "[T]his [C]ourt has in the past relied on [federal] *habeas* case law in interpreting and applying the Act," and specifically the cause-and-prejudice test for filing a successive postconviction petition. *People v. Hodges*, 234 Ill. 2d 1, 12 (2009) (citing *People v. Flores*, 153 Ill. 2d 264, 278-79 (1992), which relied on *McClesky v. Zant*, 499 U.S 467 (1991), in defining the cause-and-prejudice test).

constitutionally different from adults — to support his challenge to the felony murder count before trial, *compare* C118-2, *with Miller*, 567 U.S. at 466-67, 471-80, and the court considered *Miller* when it decided that issue, R306.

Moreover, by the time petitioner was sentenced in August 2013, other juvenile defendants were raising, and obtaining relief on, arguments that (1) lengthy term-of-years sentences are equivalent to life without parole for purposes of the Eighth Amendment because *Graham* and *Miller* required that juvenile offenders be provided "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *see, e.g.*, *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012); *State v. Null*, 836 N.W.2d 41, 78-79 (Iowa 2013) (Mansfield, J., concurring in part, dissenting in part) (citing additional cases); and (2) a sentencer must consider the *Miller* factors before imposing life without parole on a juvenile homicide offender, *see State v. Riley*, 110 A.3d 1205, 1214-16 (Conn. 2015); *Parker v. State*, 119 So. 3d 987, 998 (Miss. 2013); *Bear Cloud v. State*, 294 P.3d 36, 46-48 (Wyo. 2013); *see also Null*, 836 N.W.2d at 79-81 (Mansfield, J., concurring in part, dissenting in part) (citing additional cases); *cf., e.g.*, *State v. Long*, 8 N.E.3d 890, 894 (Ohio 2014) (briefs submitted before petitioner was sentenced successfully argued "that *Miller* requires a trial court to consider the defendant's youth and its attendant characteristics when imposing [a life] sentence" on a juvenile homicide offender and "that the record must show that the trial court actually considered the defendant's youth"). Thus, at the time he was

sentenced, petitioner had not only the legal basis for his Eighth Amendment claim — *Miller* itself — but also additional case law applying the new right to cases that, like petitioner's, featured lengthy discretionary sentences.

In addition, by the time petitioner filed his initial postconviction petition in September 2016: (1) *Montgomery v. Louisiana*, 577 U.S. 190 (2016), had been decided and provided additional support for petitioner to argue that *Miller* prohibited discretionary life sentences, *see Holman*, 2017 120655, ¶¶ 38-40; (2) the appellate court had detailed the nationwide split regarding "how to apply *Miller* in the context of discretionary natural-life sentences," *People v. Holman*, 2016 IL App (5th) 100587-B, ¶¶ 33-35; (3) a split had developed in the appellate court regarding whether *Miller* applied to lengthy term-of-years, *compare, e.g.*, *People v. Reyes*, 2015 IL App (2d) 120471, ¶¶ 23-25 (describing nationwide split on issue and declining to apply *Miller* to aggregate prison sentence of 97 years); *with People v. Sanders*, 2016 IL App (1st) 121732-B, ¶ 23, 25-28 (citing cases and applying *Miller* to discretionary sentence that provided opportunity for release after 49 years in prison); and (4) this Court had granted review in *Reyes*, which presented the question of whether *Miller* applies to *de facto* life sentences, *see People v. Reyes*, No. 119271 (Sept. 30, 2015). In sum, petitioner's claim that his discretionary *de facto* life sentence violates *Miller* was reasonably available at the time he filed his initial postconviction petition, and, accordingly, petitioner cannot establish cause for his failure to raise it.

The appellate court determined that petitioner "established cause because he could not raise his claim prior to *Miller* and *Buffer*." A6, ¶ 16. But, as discussed above, petitioner was sentenced before *Miller*, so he could have raised a claim based on it both at the time he was sentenced and in his later postconviction petition. Moreover, *Buffer* actually demonstrates that petitioner's claim *was* available to him when he filed his initial postconviction petition in 2016. Buffer himself raised a *Miller* challenge to his term-of-year sentence on direct appeal in 2012, and again in a 2014 postconviction petition. *See People v. Buffer*, 2017 IL App (1st) 142931, ¶¶ 29-36. Plainly, this Court's decision in *Buffer* was not a necessary predicate to raising such a claim. *See* C290-92 (postconviction appeal decision showing that petitioner argued, prior to *Buffer*, that his sentence violates the Eighth Amendment).

Petitioner's contention in his motion for leave to file his successive petition — that *Buffer* itself announced a new rule that provides cause, C301-03 — is incorrect. *Buffer* merely applied the new rule announced in *Miller*. *See* 2019 IL 122327, ¶¶ 32, 41. Indeed, this Court held in *Davis* that it was "*Miller*'s new substantive rule [that] constitutes 'cause' because it was not available earlier." 2014 IL 115595, ¶ 42. In other words, the new legal right upon which petitioner rests his claim — and which constitutes the objective factor that impeded his ability to raise the claim earlier — is the rule announced in *Miller*. This Court's decisions interpreting *Miller* did not themselves announce new legal rights under the Eighth Amendment, *see*

Buffer, 2019 IL 122327, ¶ 41 (holding that "a prison sentence of 40 years or less imposed on a juvenile offender" satisfies *Miller* because it "provides some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (quotation marks and citations omitted)); *Holman*, 2017 IL 120655, ¶ 40 (holding that "*Miller* applies to discretionary sentences of life without parole for juvenile defendants"); *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."), but merely applied *Miller*'s rule to various defendants' circumstances.

In sum, because *Miller* was decided before petitioner was convicted and sentenced, and long before he filed his initial postconviction petition, petitioner's claim was readily available to him at the time of his first petition. In fact, by the time petitioner filed his first petition, there was a wealth of jurisprudence on the specific question of how *Miller* applied to discretionary *de facto* life sentences. Accordingly, the appellate court erred in concluding that petitioner established cause for his failure to raise his *Miller* claim in his initial postconviction petition.

B. The appellate court improperly found that petitioner showed prejudice.

1. Petitioner's discretionary *de facto* life sentence comports with *Miller*.

Even if petitioner had cause for his failure to raise his *Miller* claim in his initial postconviction petition, the appellate court erred in finding that he could show prejudice. "'Prejudice' refers to a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process." *Davis*, 2014 IL 115595, ¶ 14. But petitioner's *de facto* life sentence comports with *Miller* because the trial court had discretion to impose a sentence of less than *de facto* life without parole, *i.e.*, a sentence that would have provided him an opportunity for release before he served more than 40 years in prison. *Dorsey*, 2021 IL 123010, ¶¶ 40-41, 65-66. And the trial court did not "expressly refuse[] as a matter of law to consider [petitioner's] youth." *Jones*, 141 S. Ct. at 1320 n.7. Thus, petitioner cannot show prejudice under *Miller*.

Miller "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. In *Jones*, the United States Supreme Court clarified that *Miller* "allow[s] *discretionary* life-without-parole sentences for [juvenile homicide] offenders," and held that "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient" to satisfy *Miller*. *Jones*, 141 S. Ct. at 1312-13 (emphasis in

original). The Court further held that neither "an on-the-record sentencing explanation [n]or an implicit finding regarding th[e] mitigating circumstances" of youth is "necessary to ensure that the sentencer in juvenile life-without-parole cases considers the defendant's youth." *Id.* at 1320. Indeed, even "in th[e] highly unlikely scenario" that "the sentencer might somehow not be aware of the defendant's youth," a juvenile homicide offender sentenced to life without parole under a discretionary sentencing scheme at most "may have a potential ineffective-assistance-of-counsel claim, not a *Miller* claim." *Id.* at 1319 n.6.

Moreover, the Supreme Court explained, *Miller* accepts that "one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case," such that "[s]ome sentencers may decide that a defendant's youth supports a sentence less than life without parole," while "[o]ther sentencers presented with the same facts might decide that life without parole remains appropriate despite the defendant's youth." *Id.* at 1319. The "key point" for purposes of *Miller*'s individualized sentencing requirement is that, "in a case involving a murderer under 18, a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor." *Id.* at 1319-20. Accordingly, unless a sentencing court "expressly refuses as a matter of law to consider the defendant's youth (as opposed to, for example, deeming the defendant's youth

to be outweighed by other factors or deeming the defendant's youth to be an insufficient reason to support a lesser sentence under the facts of the case)," *id.* at 1320 n.7, a discretionary life sentence for a juvenile homicide offender comports with *Miller*, *id.* at 1319-20 & n.6; *see also id.* at 1311 (rejecting argument that "a sentencer's discretion to impose a sentence less than life without parole does not alone satisfy *Miller*"). Applying these principles, the Supreme Court upheld Jones's life sentence "because [it] was not mandatory and the trial judge had discretion to impose a lesser punishment in light of [his] youth." *Id.* at 1313.

In sum, a juvenile homicide offender's life sentence satisfies the Eighth Amendment under *Miller* if the sentencing court had discretion to consider youth and impose a sentence of less than life without parole, and did not refuse to consider that mitigating circumstance as a matter of law. *Id.* at 1313, 1316, 1319-20 & n.7, 1322; *see also People v. Jones*, 2021 IL 126432, ¶¶ 1, 17, 27-29 (applying *Jones v. Mississippi* and holding that juvenile offender's "*Miller* claims require[d] him to show that the *de facto* life sentence he received was not entered as a result of the trial court's use of its discretion"); *Dorsey*, 2021 IL 123010, ¶¶ 40-41, 66 (*Jones v. Mississippi* "found that the eighth amendment allows juvenile offenders to be sentenced to life without parole as long as the sentence is not mandatory and the sentencing court had discretion to consider youth and attendant characteristics but that no factfinding by the sentencer is required"); *People v.*

Haines, 2021 IL App (4th) 190612, ¶ 26 (after *Jones v. Mississippi*, "[a] discretionary sentencing procedure is all that *Miller* demands").

Like Jones's life sentence, petitioner's *de facto* life sentence "complie[s] with [*Miller*] because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of [petitioner's] youth." *Jones*, 141 S. Ct. at 1322. Petitioner's statutory minimum sentence was 35 years in prison, which is less than *de facto* life without parole. *See Dorsey*, 2021 IL 123010, ¶¶ 1, 45-49, 65 (sentence that offers an opportunity for release before the juvenile offender serves more than 40 years in prison is not *de facto* life without parole for purposes of *Miller*). Moreover, the trial court had discretion to "consider 'all matters reflecting upon [petitioner's] personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding,'" *People v. Fern*, 189 Ill. 2d 48, 55 (1999) (quoting *People v. Barrow*, 133 Ill. 2d 226, 281 (1989)); *accord People v. LaPointe*, 88 Ill. 2d 482, 497 (1981), including his youth and its mitigating circumstances, *see People v. Dukett*, 56 Ill. 2d 432, 452 (1974); *People ex rel. Bradley v. Ill. State Reformatory*, 148 Ill. 413, 423 (1894). Indeed, Illinois law has long recognized the "special status of juvenile offenders," *Davis*, 2014 IL 115595, ¶ 45, and "the differences between persons of mature age and those who are minors for purposes of sentencing," *Dorsey*, 2021 IL 123010, ¶ 74, and has for "decades . . . required the sentencing court to take into account

the defendant's 'youth' and 'mentality,'" *Haines*, 2021 IL App (4th) 190612, ¶ 43 (citations omitted); *accord People v. McWilliams*, 348 Ill. 333, 336 (1932).

Nothing in this record suggests that the trial court here refused to consider petitioner's youth "as a matter of law." *Jones*, 141 S. Ct. at 1320 n.7.[6] And, as noted, the trial court could have imposed a sentence shorter than *de facto* life without parole. Accordingly, petitioner's sentence comports with *Miller*, *see Dorsey*, 2021 IL 123010, ¶ 66 (even assuming that juvenile offender was sentenced to *de facto* life, under *Jones*, the sentence complied with *Miller* because "the trial court had discretion to consider defendant's youth and impose less than a *de facto* life sentence"), and petitioner cannot show prejudice to overcome his statutory waiver.

2. The appellate court misapplied *Miller*, as established by the United States Supreme Court's opinion in *Jones v. Mississippi*.

In finding prejudice, the appellate court failed to acknowledge, much less follow, *Jones v. Mississippi*. Instead, the appellate court applied *Holman* and other pre-*Jones* decisions that rested on *Holman*'s interpretation of *Miller*. A5-6, ¶¶ 15-16. The court did not explain why it disregarded *Jones*, but other appellate court decisions that have also declined to follow *Jones*

[6] Although no explanation or finding regarding the mitigating circumstances of youth is necessary for a discretionary life sentence to comply with *Miller*, *Jones*, 141 S. Ct. at 1320, the appellate court's finding that the trial court did not consider petitioner's youth and its attendant characteristics, A6, ¶ 16, is refuted by both the record, R1483-86, 1489-90, and the appellate court's prior decision on direct appeal, C212-13.

have held that the appellate court must apply *Holman* until this Court "says otherwise." *People v. Griffin*, 2021 IL App (1st) 170649-U, ¶ 54; *see also, e.g.*, *People v. Ruiz*, 2021 IL App (1st) 182401, ¶ 62; *People v. Estrada*, 2021 IL App (1st) 191611-U, ¶ 29.

The appellate court's refusal to apply binding United States Supreme Court precedent violates the Supremacy Clause, U.S. Const., art. VI, cl. 2, and neither of the cases the appellate court cited in another decision as a basis for declining to follow *Jones v. Mississippi — Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 835-36 (1st Dist. 2004), and *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23 (one-justice opinion), *see Griffin*, 2021 IL App (1st) 170649-U, ¶ 54 — support its conclusion. "Pronouncements of Federal constitutional law by the United States Supreme Court are, of course, binding on [state courts]" under the Supremacy Clause, and the appellate court is "not free to grant greater rights [to a petitioner] under the United States Constitution than the Supreme Court has chosen to do." *People v. Griggs*, 152 Ill. 2d 1, 37 (1992) (Miller, C.J., dissenting) (citing *Oregon v. Hass*, 420 U.S. 714, 719 & n.4 (1975), and *In re Estate of Karas*, 61 Ill. 2d 40, 53 (1975)); *see also Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (state court may not "interpret the United States Constitution to provide greater protection than th[e] [Supreme] Court's own federal constitutional precedents" provide). Once the United States Supreme Court "finally and conclusively decided," *Ableman v. Booth*, 62 U.S. 506, 518 (1859), that the

Eighth Amendment rule announced in *Miller* is satisfied by a sentencing procedure that provides the sentencer discretion to consider the juvenile homicide offender's youth and impose a sentence of less than life without parole, *Jones*, 141 S. Ct. at 1312-13, 1322, the appellate court was bound by the Supremacy Clause to follow and apply that precedent when reviewing petitioner's *Miller* claim, *Ableman*, 62 U.S. at 518-19; *People v. Nally*, 216 Ill. App. 3d 742, 764 (2d Dist. 1991). But the appellate court disregarded *Jones* altogether, even after the People brought it to the court's attention in their rehearing petition. In doing so, the appellate court granted petitioner greater protection under the Eighth Amendment than that permitted by the United States Supreme Court, which it may not do. *Sullivan*, 532 U.S. at 772; *Haas*, 420 U.S. at 719.

Neither *Mekertichian* nor *Fountain*, on which the appellate court has elsewhere relied to apply *Holman* and disregard *Jones v. Mississippi*, *see Griffin*, 2021 IL App (1st) 170649-U, ¶ 54, supports the appellate court's overreach. *Mekertichian* correctly observed that "federal circuit court decisions are considered persuasive, but not binding on [the appellate court] or [this] [C]ourt *in the absence of a decision by the United States Supreme Court*." 347 Ill. App. 3d at 835 (emphasis added) (citations omitted). Indeed, it recognized the longstanding rule that this Court's "'decisions are binding on all Illinois courts, but decisions of Federal courts *other than United States Supreme Court decisions concerning questions of Federal statutory and*

constitutional law are not binding on Illinois courts.'" *Id.* at 836 (quoting *People v. Spahr*, 56 Ill. App. 3d 434, 438 (4th Dist. 1978)) (emphasis added); *accord People v. Stansberry*, 47 Ill. 2d 541, 544-55 (1971). Thus, *Mekertichian* underscores that the appellate court *is* bound by "'United States Supreme Court decisions concerning questions of Federal . . . constitutional law.'" 347 Ill. App. 3d at 836 (citations omitted).

Fountain also does not support the appellate court's refusal to follow *Jones*. In *Fountain*, the court addressed whether the appellate court may disagree with this Court's interpretation of a United States Supreme Court decision on a federal constitutional question. 2012 IL App (3d) 090558, ¶ 23. The single-justice opinion authored by Justice Holdridge, and upon which the appellate court has relied, *see Griffin*, 2021 IL App (1st) 170649-U, ¶ 54, concluded that the appellate court was required to follow this Court's interpretation of a Supreme Court decision, even if it believed that this Court's construction conflicted with the Supreme Court's decision, *Fountain*, 2012 IL App (3d) 090558, ¶ 23. But in that case, the United States Supreme Court had not rejected this Court's interpretation of federal constitutional law. Indeed, *Fountain* noted that the appellate court was bound by this Court's interpretation only until it was "revisited" by this Court "*or* overruled by the United States Supreme Court." *Id.* (emphasis added). Therefore, *Fountain* recognized that in a case where a subsequent United States Supreme Court decision overruled this Court's interpretation of federal

constitutional law, the appellate court would be bound by the subsequent United States Supreme Court holding. *See* U.S. Const., art. VI, cl. 2.

That is precisely the circumstance here: *Jones v. Mississippi* overruled *Holman*'s holdings that *Miller* applies to discretionary life sentences and requires a trial court to "consider specifically the characteristics [of youth]" before sentencing a juvenile homicide offender to life without parole. *Holman*, 2017 IL 120655, ¶¶ 43-44, 46. *Holman* found that "*Miller* contains language that is significantly broader than its core holding," and that "[n]one of what the [Supreme] Court said [in that case] was specific to only mandatory life sentences." *Id.* ¶ 38. Thus, *Holman* rejected cases from other States that had "limited *Miller* and *Montgomery* to only mandatory life sentences" because they gave "insufficient regard to the Supreme Court's far-reaching commentary about the diminished culpability of juvenile defendants," and held, instead, that under *Miller*, "[l]ife sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." *Id.* ¶ 40. In sum, *Holman* "h[e]ld that *Miller* applies to discretionary sentences of life without parole for juvenile defendants." *Id.*

Holman then "decide[d] what it means to apply *Miller*" to discretionary life sentences. *Id.* *Holman* "read *Miller*" to require trial courts to "consider specifically the characteristics [of youth] mentioned by the Supreme Court."

Id. ¶¶ 43-44. It concluded: "Under *Miller* and *Montgomery*, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation," and "only after considering the defendant's youth and its attendant characteristics." *Id.* ¶ 46; *see also Ruiz*, 2021 IL App (1st) 182401, ¶¶ 60-62 (*Holman* "require[s] sentencing courts to consider a juvenile offender's youth and its attendant characteristics and make a finding of permanent incorrigibility prior to imposing a life sentence"); *Griffin*, 2021 IL App (1st) 170649-U, ¶¶ 55, 67 (same).

As discussed in Part II.B.1, *supra*, *Jones* rejected this construction of *Miller* and *Montgomery*. First, the Supreme Court limited *Miller*'s holding to mandatory life sentences. *Jones*, 141 S. Ct. at 1313, 1322. Moreover, the Supreme Court clarified that *Miller* does not require that a sentencing court be presented with evidence of an offender's youth and its attendant circumstances for a discretionary sentence of life without parole to satisfy the Eighth Amendment. *Id.* at 1313, 1319-21, 1319 n.6. Nor does *Miller* require that a court make any finding, explicit or implicit, that the juvenile homicide defendant is permanently incorrigible before it sentences the offender to discretionary life without parole. *Id.* at 1319-20. Rather, *Jones* explained, *Miller* requires only that a court have discretion to determine whether life without parole or a lesser sentence is appropriate for the juvenile homicide

offender, and that the court not refuse as a matter of law to consider the offender's youth when exercising that discretion. *Id.* at 1313, 1319-20, 1320 n.7. In other words, *Holman* is no longer good law after *Jones*.

Given the appellate court's reluctance to apply *Jones* instead of *Holman*, this Court should now explicitly recognize that *Holman* — and specifically, its holding that *Miller* applies to discretionary life sentences for juvenile homicide offenders and precludes a trial court from sentencing a juvenile homicide offender to life without parole absent an incorrigibility determination made following consideration of youth-related factors — has been overruled by *Jones*.

Accordingly, the appellate court erred in finding that petitioner established prejudice under *Miller*, and this Court should reverse its judgment granting petitioner leave to raise an Eighth Amendment claim in a successive postconviction petition.

III. This Court Should Remand to the Appellate Court for Consideration of Whether Petitioner Satisfied the Cause-and-Prejudice Test for His Remaining Claim.

Because the appellate court granted relief on petitioner's *Miller* claim, it did not address petitioner's request for leave to raise a claim under the penalties provision in a successive petition. Thus, upon reversing the appellate court's judgment as to the Eighth Amendment claim, this Court should remand to the appellate court for it to consider in the first instance

petitioner's argument that he satisfied the cause-and-prejudice test as to his penalties-provision claim. *See People v. Schoonover*, 2021 IL 124832, ¶ 52.

"It is well settled that argument of counsel on questions other than the one decided by the Appellate Court is not properly directed to this [C]ourt until they have been decided by th[e] [Appellate] [C]ourt." *People ex rel. Hahn v. Hurley*, 9 Ill. 2d 74, 79 (1956). Thus, where the appellate court reverses a judgment "based upon an erroneous view of the law with respect to one branch of the case, and it appears from the opinion that for such reason it has refused to consider and pass upon other assignments of error which it should consider," the ordinary remedy is to reverse the appellate court's judgment and remand the case with directions for the appellate court to consider and pass upon the undecided questions. *Id.*; *see People v. Janis*, 139 Ill. 2d 300, 320-21 (1990) ("in cases where trial errors were raised but not ruled upon in the appellate court, it is ordinarily appropriate to remand the cause to the appellate court for consideration of the alleged errors"); *see also, e.g.*, *People v. Clendenin*, 238 Ill. 2d 302, 331 (2010) ("Because the appellate court declined to reach the remainder of the issues raised in defendant[-appellee]'s brief, we remand this cause to the appellate court to dispose of those claims raised before that court, but not previously ruled upon."); *People v. Lowery*, 178 Ill. 2d 462, 473 (1997) ("where trial errors were raised but not ruled upon in the appellate court, it is appropriate for this [C]ourt to remand the cause to the appellate court for resolution of those remaining issues").

Accordingly, this Court should reverse the appellate court's judgment and "remand[] to the appellate court for consideration of the remaining issues raised in defendant's appeal." *People v. Johnson*, 75 Ill. 2d 180, 189 (1979).

CONCLUSION

This Court should reverse the appellate court's judgment allowing petitioner leave to raise an Eighth Amendment claim in a successive postconviction petition and granting relief on that claim. Upon reversing the judgment, the Court should also remand to the appellate court for consideration of the remaining issues raised in petitioner's appeal.

July 15, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 32 pages.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

APPENDIX

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2021 IL App (3d) 200181-U

Order filed July 14, 2021

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2021

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-20-0181
v.	)	Circuit No. 09-CF-426
	)	
MICHAEL WILSON,	)	Honorable
	)	Kathy S. Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Wright concurred in the judgment.
Presiding Justice McDade specially concurred.

ORDER

¶ 1 *Held*: The circuit court failed to consider defendant's youth and its attendant characteristics before imposing an aggregate sentence of 59 years' imprisonment.

¶ 2 Defendant, Michael Wilson, appeals from the Kankakee County circuit court's denial of his motion for leave to file a successive postconviction petition. Defendant asserts that the court erred by denying his motion because he established cause and prejudice. Further, defendant

requests that, if we remand the case, we order the case be assigned to a different judge. We vacate defendant's sentence and remand for a new sentencing hearing.

¶ 3 I. BACKGROUND

¶ 4 The State filed a juvenile petition against defendant, who was 14 years old. The State's petition alleged that defendant had committed first degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2008)), and armed robbery (*id.* § 18-2(a)). Subsequently, the court granted the State's motion to transfer defendant's case to criminal court, and a grand jury indicted defendant with the charges alleged in the juvenile petition. The cause proceeded to a jury trial.

¶ 5 The trial evidence established that on December 27, 2008, the date of the alleged murder, defendant was 14 years old. On that date, Ryan Graefnitz approached defendant and Byron Moore and asked if they knew where to purchase cocaine. Defendant indicated that he did. Defendant and Moore left in a vehicle with Graefnitz and two other individuals. Following defendant's directions, they arrived at an apartment building. Defendant, Moore, and Graefnitz exited the vehicle and entered the apartment building. An individual announced that a robbery was about to occur, and then several gunshots were fired. Witnesses observed Graefnitz exit the building and collapse and defendant and Moore run from the scene. After fleeing, defendant told a friend that he shot a man that he wanted to rob. Later, an autopsy confirmed that Graefnitz died from gunshot related injuries.

¶ 6 The jury found defendant guilty of first degree murder and the lesser included offense of attempted armed robbery. Additionally, the jury found that defendant did not personally discharge the weapon. In anticipation of sentencing, the court ordered a presentence investigation report (PSI).

¶ 7 During the sentencing hearing, the court explained that defendant's PSI was "about an inch-and-a-half to two inches," and within that report, there was no support for defendant's rehabilitative potential. Further, the court noted that defendant was "only 14 years of age" when he committed the offenses. The court indicated the PSI showed defendant had attention deficit hyperactivity disorder, defiance disorder, impulsive behavior, and "mild retardation." The court stated,

> "the problem is when I look at you, even though you're young, the past tells you a lot about the future. And this shows you to be a very dangerous person ***. *** I don't believe that will change. I know you're young. ***
>
> *** I do believe you're a danger to society. I believe you will continue to be a danger to society. I'm not sure there's any rehabilitation factor there that you're gonna follow. I guess you can prove me wrong when you are in prison. *** [W]e saw that on the night of December 27th when we heard the facts that, you know, you yelled out that it was gonna be a robbery. *** Graefnitz turns around and runs away. At that point you could have just let him run. Nothing had happened. But you decided to shoot—you and *** Moore decided that you're gonna shoot him in the back and leave him for dead ***."

¶ 8 The court sentenced defendant to 55 years' imprisonment for first degree murder and a consecutive term of 4 years' imprisonment for attempted armed robbery. On direct appeal, we affirmed defendant's convictions. *People v. Wilson*, 2015 IL App (3d) 130606-U, ¶ 69.

¶ 9 On September 26, 2016, defendant filed a postconviction petition. The court summarily dismissed defendant's petition. On appeal, we affirmed the court's summary dismissal. *People v. Wilson*, 2019 IL App (3d) 160679-U, ¶ 24.

¶ 10 On March 27, 2020, defendant filed a motion for leave to file a successive postconviction petition. He argued that under *People v. Buffer*, 2019 IL 122327, ¶ 42, his juvenile status at the time of the offenses and his *de facto* life sentence required vacatur and remand for the court to consider the *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012) factors before imposing a *de facto* life sentence. The court denied defendant's motion. Defendant appeals.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues that the circuit court erred in denying his motion for leave to file a successive postconviction petition because he established cause where he could not have brought his claim prior to *Buffer*, 2019 IL 122327, and prejudice because the court's failure to consider his youth and its attendant characteristics at sentencing rendered his *de facto* life sentence unconstitutional. Defendant also asks, if we remand the case, that we order the case be assigned to a different judge.

¶ 13 The Post-Conviction Hearing Act (Act) permits a criminal defendant to challenge the proceedings which resulted in his conviction by asserting that "there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2018). The Act contemplates the filing of a single postconviction petition. *People v. Robinson*, 2020 IL 123849, ¶ 42. A defendant must obtain leave of the court before he may obtain review of a subsequent postconviction petition. 725 ILCS 5/122-1(f) (West 2018); *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010). To obtain leave, defendant must satisfy the cause and prejudice test. *McDonald*, 405 Ill. App. 3d at 135. That is, the defendant must demonstrate "cause" for failing to raise the error in prior proceedings and actual "prejudice" resulting from the claimed error. *Id.* " 'Cause' has been defined as an objective factor that impeded defense counsel's efforts to raise the claim in an earlier proceeding and 'prejudice' has

been defined as an error which so infected the entire trial that the defendant's conviction violates due process." *Id.* We review *de novo* the denial of leave to file a successive postconviction petition. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 14 Defendant's claim derives from the Supreme Court's holding in *Miller* that mandatory life sentences for a juvenile offender violates the eighth amendment prohibition against cruel and unusual punishment. *Miller*, 567 U.S. at 479. *Miller* requires that before imposing a life sentence on a juvenile, the court shall consider the juvenile's youth and its attendant characteristics. *Id.*

¶ 15 In *People v. Davis*, 2014 IL 115595, ¶ 34, our supreme court determined that *Miller* applies retroactively. In *People v. Reyes*, 2016 IL 119271, ¶¶ 7, 8, our supreme court extended *Miller* to *de facto* life sentences. In *Buffer*, 2019 IL 122327, ¶ 42, our supreme court established a bright-line rule that a sentence greater than 40 years' imprisonment constitutes a *de facto* life sentence. Following *Buffer*, to prevail on a *Miller* claim, "a defendant sentenced for an offense committed while a juvenile must show that (1) the defendant 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." *Id.* ¶ 27. The sentencing court may impose a *de facto* life sentence " 'only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation.' " *People v. Lusby*, 2020 IL 124046, ¶ 34 (quoting *People v. Holman*, 2017 IL 120655, ¶ 46). To make this determination, the court may consider:

> " '(1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the [offenses] and any

> evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation.' " *Id.* (quoting *Holman*, 2017 IL 120655, ¶ 46).

See also *Miller*, 567 U.S. at 477-78. We "look[ ] back to the trial and the sentencing hearing to determine whether the trial court at that time considered evidence and argument related to the *Miller* factors." *Lusby*, 2020 IL 124046, ¶ 35.

¶ 16 Here, we find that defendant's *Miller*-based sentencing claim satisfied the cause and prejudice test. First, defendant established cause because he could not raise his claim prior to *Miller* and *Buffer*. See *Davis*, 2014 IL 115595, ¶ 42 (noting "*Miller*'s new substantive rule constitutes 'cause' because it was not available earlier"). Second, defendant established prejudice, as our review of the record shows that the court did not to consider defendant's youth and its attendant characteristics when it sentenced defendant to a *de facto* life sentence of 59 years' imprisonment. See *Buffer*, 2019 IL 122327, ¶¶ 27, 40. Given the record's support for defendant's postconviction claim, we find defendant is entitled to postconviction relief. See, *e.g.*, *Davis*, 2014 IL 115595, ¶ 43 (granting postconviction relief on review of the denial of a motion for leave to file a successive postconviction petition raising a *Miller* claim); *People v. Wells*, 2019 IL App (3d) 160636-U, ¶ 28 (on appeal from the denial of leave to file a successive postconviction petition, the appellate court vacated defendant's sentence and remanded for a new sentencing hearing pursuant to *Buffer*, 2019 IL 122327, ¶¶ 44-47). Therefore, we vacate defendant's sentence and remand for a new sentencing hearing with directions that the court consider defendant's youth and its attendant characteristics. See *Buffer*, 2019 IL 122327, ¶ 42.

¶ 17 Finally, we take no position on defendant's request for a new judge. We note that this court previously found the circuit court did not exhibit bias when sentencing defendant. *Wilson*, 2019 IL App (3d) 160679-U, ¶ 24. Our prior opinion does not preclude the filing of a motion with the circuit court to substitute judge.

¶ 18 III. CONCLUSION

¶ 19 The judgment of the circuit court of Kankakee County is vacated in part and remanded with directions.

¶ 20 Vacated in part and remanded with directions.

¶ 21 PRESIDING JUSTICE McDADE, specially concurring

¶ 22 I concur in the decision to vacate the sentence and remand for a new sentencing hearing. I write separately to say that I believe we should accede to defendant's request that we direct that the case be assigned to another judge.

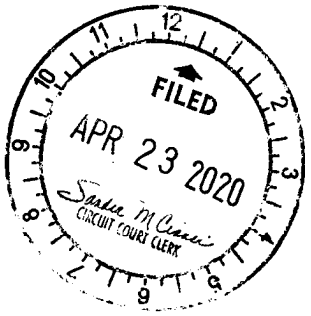
¶ 23 The trial court in this case has granted the State's motion to try the juvenile defendant as an adult; presided over the trial at which he was convicted; sentenced him while expressing its belief that he had no rehabilitation potential; summarily denied an initial postconviction petition; and denied him leave to file a successive postconviction petition, which has led to this appeal.

¶ 24 In this latter effort, Wilson invoked *Buffer*, demonstrating that there was clearly cause to grant leave to file the petition. The basis for the court's denial of leave to file was that it found no prejudice—an assessment we have found to be erroneous. As indicated in ¶ 15 of the Order, a *de facto* life sentence is warranted "only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *People v. Holman*, 2017 IL 120655, ¶ 46. The trial court's prior

decisions relative to this defendant are persuasive indicators that its denial of defendant's petition reaffirms its earlier assessment of defendant's total lack of rehabilitative potential, implies that reconsideration in light of the *Miller* factors would not make any difference, and permits an appearance that the court is sufficiently *invested* in its earlier conclusions that defendant would not get a fair and unbiased rehearing.

Rule 606. Perfection of Appeal
(d) Form of Notice of Appeal.

In the Circuit Court of the Twenty First Judicial Circuit,
Kankakee County, Illinois
(Or, In the Circuit Court of Cook County, Illinois)



THE PEOPLE OF THE STATE OF ILLINOIS,

v. Michael Wilson No. 09 CF 426

Notice of Appeal
Joining Prior Appeal / Separate Appeal / Cross Appeal
(circle one)

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Third District Judicial Court

(2) Name of appellant and address to which notices shall be sent.
Name: Michael Wilson
Address: Po Box 112 Joliet IL 60434 E-mail:

(3) Name and address of appellant's attorney on appeal.
Name: Office of the State Appellate Defender
Address: 770 E Etna Road Ottawa E-mail: IL 61350

If appellant is indigent and has no attorney, does he want one appointed?

(4) Date of judgment or order: April 7, 2020

(5) Offense of which convicted First degree Murder and attempted armed Robbery

(6) Sentence: 59 years

(7) If appeal is not from a conviction, nature of order appealed from:
Denial of Motion to File successive Post conviction petition

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Common Law Record

Secured Common Law Record

Report of Proceedings

Exhibits

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 15, 2022, the **Brief and Appendix of Respondent-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email address:

Andrew J. Boyd
Assistant Appellate Defender
Office of the State Appellate Defender
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Ottawa, Illinois 61350
3rddistrict.eserve@osad.state.il.us

Counsel for Petitioner-Appellee

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General