No. 127666

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- MICHAEL WILSON, Petitioner-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-20-0181. There on appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, Illinois, No. 09 CF 426. Honorable Kathy Bradshaw-Elliott, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

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ISSUE PRESENTED FOR REVIEW

WHETHER MICHAEL, WHO WAS 14 YEARS OLD WITH A DEVELOPMENTAL AGE OF 9 OR 10 WHEN HE COMMITTED THE INSTANT OFFENSE, HAS ESTABLISHED THE CAUSE AND PREJUDICE NECESSARY TO FILE A SUCCESSIVE POST-CONVICTION PETITION RAISING AN EIGHTH AMENDMENT CLAIM THAT HIS 59-YEAR SENTENCE WAS AN UNCONSTITUTIONAL *DE FACTO* LIFE SENTENCE WHERE THE ILLINOIS DECISIONS HE RELIES ON WERE ISSUED AFTER THE FILING OF HIS INITIAL POST-CONVICTION PETITION, AND THE SENTENCING COURT FAILED TO CONSIDER THAT MICHAEL WAS NOT THE SHOOTER AND THAT HE HAD REHABILITATIVE POTENTIAL.

STATUTES AND RULES INVOLVED

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishments. U.S. Const., amend VIII.

The Fourteenth Amendment to the United States Constitution incorporates the Eighth Amendment against the States. U.S. Const., amend XIV.

The Illinois Post-Conviction Hearing Act provides a means for criminal defendants to challenge their convictions or sentences by alleging violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (2018).

A post-conviction petitioner may not file a second or successive post-conviction petition unless the circuit court grants leave to do so. 725 ILCS 5/122-1(f) (2018). The court may grant leave to file a successive petition only upon a demonstration of cause for the petitioner's failure to raise the claim earlier and prejudice resulting from that failure. *Id.*

A sentence of more than 40 years of imprisonment for an offense committed as a juvenile constitutes a *de facto* life sentence. *People v. Buffer*, 2019 IL 122327, ¶¶ 40-41.

STATEMENT OF FACTS

On January 13, 2009, the State filed a juvenile delinquency petition against Michael, who was 14 years old at the time, alleging first degree murder and armed robbery (C282). The State moved to transfer the case to the adult criminal court (C282).

At the defense's request, the court appointed Dr. Paul Pasulka, a psychologist, and Monica Mahan, a Professor at Northwestern Law School, to evaluate Michael regarding the potential transfer of the case to adult court (C282).

Dr. Pasulka's report indicated that Michael was born prematurely, with cocaine in his system (SEC C113). Michael suffered from numerous developmental problems, including a possible seizure disorder, Attention Deficit Hyperactivity Disorder ("ADHD"), and speech and language impairments (SEC C113). His I.Q. was 64, which was "at the 1st percentile for his age and in the mentally deficient range" (SEC C115). His "verbal comprehension and conceptual abilities, fund of information, visual-spatial processing, and auditory-verbal attention and concentration" were "at or below the fifth percentile for his age" (SEC C115-16). He was deficient behaviorally, *i.e.*, in communication, home living, health, safety, and social abilities (SEC C116). He was hyperactive,"clingy" to his parents, fearful at school, immature, lonely, teased and unliked by peers, clumsy, and withdrawn (SEC C116). He was unable to write his address or determine the combination of coins that would total 87 cents (SEC C116). At the time of the examination, he was functioning as a nine or ten year old child, and was performing at the second-grade level academically (SEC C116).

Dr. Pasulka concluded that Michael would be at risk if his case were transferred to the adult court, as he would be unable to care for himself in an adult criminal environment and would probably be sexually and physically abused (SEC C117). Michael needed and would benefit from the resources available in the juvenile justice system (SEC C117). With the proper treatment, it was reasonably likely that he would be able to graduate high school, function independently or in a group home, and be employed in a janitorial or maintenance job (SEC C117).

Professor Mahan's report also concluded Michael would benefit from remaining in juvenile court (SEC C120-26). Professor Mahan determined that there was a "reasonable likelihood that Michael Wilson can be rehabilitated before the expiration of the juvenile court's jurisdiction" (SEC C126). However, if he were sentenced as an adult, he would likely"deteriorate and regress," and be subject to sexual and other physical abuse in prison (SEC C126).

The circuit court granted the State's motion to transfer the case to the criminal court (C282).

On August 21, 2009, the grand jury in the criminal court handed down an indictment charging Michael with three counts of first degree murder and one count of armed robbery (C40-41).

The case proceeded to a jury trial (R482, *et seq.*). The jury learned that on December 26, 2008, 14-year old Michael and 17-year old Byron Moore were inside a Kankakee gas station buying snacks (R839-56). At that time, Ryan Graefnitz and his friends Joseph Benegas and Walter Waschke had driven to Kankakee from Manteno, Illinois, to purchase cocaine (R671-78, 738-45). They encountered Michael and Moore at the gas station, and, after Graefnitz had a discussion with Michael and Moore, the two teens got into the vehicle with the three men (R681-83,

745-51, 858-60). Michael directed Waschke to an apartment building, and the two teens and Graefnitz went inside the vestibule (R684-88, 751-52, 863-65). A couple on the building's stairway heard someone say, "break yourself or run it," followed by three gunshots (R658-64). The terms "break yourself or run it" were street slang for a robbery (R664). Graefnitz exited the building and fell to the ground, appearing to be wounded (R753-55). Graefnitz died from gunshot wounds he suffered in this incident (E26-31). Moore testified that Michael chased Graefnitz out of the building and then Moore heard but did not see two gunshots (R867, 902). Moore's testimony had been obtained in exchange for the dismissal of his previous guilty plea to murder and his 37-year sentence in this case; he was now going to receive a reduced 25-year sentence for armed robbery (R840-42, 883-84). Moore's girlfriend at the time testified that she saw him with a handgun two weeks before the shooting (R1081-85). Travis Watson testified that Michael and Moore approached him on the night of the shooting and Michael said he had shot someone (R963-78).

The jury found Michael guilty of both offenses (R1411-12). In response to a special interrogatory, the jury expressly determined that "the defendant Michael Wilson did not personally discharge the weapon that caused the death of Ryan Graefnitz" (R1412).

The record contains a lengthy Pre-Sentence Investigation Report ("PSIR") (SEC C3-243). The following is a summary of that report.

Michael's date of birth was March 19, 1994 (SEC C3). He had a previous juvenile adjudication for criminal damage to property and criminal trespass to property (SEC C4). He had been placed on one year of court supervision, which was revoked because he had been suspended from school four times, had been unsuccessfully discharged from substance abuse treatment, and had violated home detention (SEC C4).

He was born with cocaine and amphetamines in his system and was taken into protective custody by the Department of Children and Family Services (SEC C5). He was adopted by the Wilson family when he was two years old (SEC C5). He was placed into special education at school and was diagnosed with ADHD (SEC C5).

He began using alcohol and marijuana at the age of 13 (SEC C6). He entered outpatient substance abuse treatment in September, 2008, but was discharged a month later for continued drug use (SEC C6). He was placed into residential treatment in October 2008, but he left the facility (SEC C6).

Psychiatric records show that between 2004 and 2007, he was diagnosed with ADHD, oppositional defiant disorder, intermittent explosive disorder, and disruptive behavior disorder (SEC C7). Dr. Pasulka also diagnosed him with mild mental retardation, ADHD, and depression (SEC C7). At the River Valley juvenile detention facility, he attempted to choke himself, fought with peers, threatened staff, possessed contraband, and damaged property (SEC C7).

Reports from the Aurora East Public School District showed that Michael exhibited disruptive behavior, required special education services, had reading problems, fought with other students, and was not functioning in the classroom (SEC C43-46).

Reports from "Aunt Martha's Youth Service Center" showed that he had anger problems, threw objects, was disruptive, made inappropriate gestures and vocalizations, and provoked fights (SEC C36-37). Another report showed that he was "out of control at school" (SEC C39).

A Kankakee School District report showed that Michael lacked impulse control, was easily frustrated by assignments, engaged in verbal and physical

conflicts, and was aggressive physically and verbally to others (SEC C61-68). He had been suspended numerous times (SEC C61-68).

The PSIR also included Dr. Pasulka's and Professor Mahan's reports, which concluded that Michael could be rehabilitated (SEC C113-26).

On August 15, 2013, Michael was sentenced to 55 years for murder and four years for attempted armed robbery, to be served consecutively (C159; R1487-93). This sentence included a mandatory 15-year firearm enhancement since a firearm was involved but Michael did not personally discharge the weapon (R1492). 730 ILCS 5/5-8-1(d) (2008). Michael was ordered to serve 100% of his 55-year sentence for murder (C159; R1493).

In explaining its reasoning, the court stated:

> I'm going to tell you, Mr. Wilson, to this report. It's about an inch-and-a-half to two inches. And, normally, when I read a presentence investigation, normally you can read it and there's some redeeming value, there's something good. You can see some rehabilitative potential. I have to tell you, I started to tag the pages. And page after page after page, there is not one page that I can think of in this entire presentence report that doesn't talk about how bad you are.
>
> Does it mention that you have ADHD? It does. That you have defiance disorder, that you have impulsive behavior, hyperactivity, possibly some mild retardation? It does. And it gives you those labels. But the entire presentence investigation talks about how you didn't make it anywhere, quite frankly. And it wasn't because of other people, it was because of yourself. You were basically noncompliant, a bully, disrespectful, in every place you ever ended up. You made certain that everybody there, you know, was – was miserable around you.
>
> There is not one page, I can pick any one page and it's terrible. Absolutely terrible each and every place you were at. And these are the things that you just did purposefully all the time, whether you were in a facility, or whether you were in the school room, or whether you were in an alternate school. Your behavior was never good – never, ever. And so 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, quite frankly. You don't care. You don't care who you hurt. You don't care what the rules are. And you don't care who's making the rules, because you're not gonna abide

> by those rules. That's what every one of those pages say, that you are simply not going to abide by the rules. And I – I don't believe that will change. I know you're young. But, you know, this is a significant – even though you're young – significant account of your younger years. And, as I said, each page. I can't pick one page out of here that says one – even one good thing about you. Like I said, from the schools to the rehabilitation to the people that have worked for you.
>
> So 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. But there is nothing here that says you're going to turn your life around. Everything in here says you basically don't have a conscience, and you're gonna do what you want to do. And if it causes danger to others, you're gonna do that. And we saw that on the night of December 27 when we heard the facts that, you know, you yelled out that it was gonna be a robbery. Ryan 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 Byron Moore decided that you're gonna shoot him in the back and leave him for dead and drive off and go talk to your friends and do whatever else you wanted to do and leave him lay in the street. And I can consider that (R1489-92).

The Appellate Court affirmed Michael's convictions and sentences on direct appeal (C196-213). *People v. Wilson*, 2015 IL App (3d) 130606-U.

Michael filed his initial *pro se* post-conviction petition on September 26, 2016 (C216-38). He raised three claims: that he was denied his right to the effective assistance of appellate counsel, and two claims of judicial bias in sentencing, one of which included a related claim that the judge's bias implicated the Eighth Amendment's prohibition against cruel and unusual punishment (C216-19). The circuit court dismissed the petition as frivolous and patently without merit (C246-47).

On appeal, Michael argued that he had presented the gist of two viable constitutional claims: judicial bias in sentencing, and that the sentence was an unconstitutional *de facto* life sentence (C281). The Appellate Court affirmed, finding

that the trial court was not biased in sentencing, that Michael had not actually raised the *de facto* life sentence issue in his *pro se* petition, and that the *de facto* life sentence issue was forfeited because it could have been raised on direct appeal (C281-92). *People v. Wilson*, 2019 IL App (3d) 160679-U.

This Court denied Michael's petition for leave appeal (C279).

Michael then filed a "Motion for Leave to File a Combined Motion to Reconsider Denial of Petition for Leave to Appeal and Motion for Supervisory Order Remanding to the Circuit Court For Resentencing in Light Of *Buffer*," along with a "Combined Motion to Reconsider Denial of Petition for Leave to Appeal and Motion for Supervisory Order Remanding to the Circuit Court For Resentencing in Light Of *Buffer*." This Court denied the motion for leave to file on March 16, 2020.

Michael filed the instant *pro se* motion for leave to file a successive post-conviction petition and an accompanying successive post-conviction petition on March 27, 2020 (C294-319).

The motion for leave to file a successive post-conviction petition asserted that the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), this Court's decision in *People v. Buffer*, 2019 IL 122327, and recent Illinois decisions addressing the Illinois Constitution's proportionate penalties clause supported an argument not previously available to Michael: that his sentence of over 40 years, given without meaningful consideration of the *Miller* factors and without a determination that Michael's crimes reflected "permanent incorrigibility," was unconstitutional under the Eighth Amendment to the United States Constitution and the Illinois Constitution's proportionality clause (C298-307).

The motion further asserted that cause for failure to bring this claim earlier existed because the Illinois Supreme Court announced a new rule in *Buffer*, and that prejudice existed because Michael's lengthy sentence was unconstitutional and must be vacated under the Supreme Court's decision in *Buffer* (C298-307).

The petition itself stated a claim for relief under *Miller*, *Buffer*, the Eighth Amendment to the United States Constitution, and the proportionate penalties clause of the Illinois Constitution (C308-18).[1] Under *Miller*, the petition asserted, a sentencing court is required to take into account certain factors related to the juvenile offender's youth such as his maturity, impetuosity, and inability to appreciate risks and consequences (C313-14). Under *Buffer*, a sentence of over 40 years was a *de facto* life sentence that triggered the *Miller* protections, which meant that the sentencing court was required to adequately consider Michael's youth and attendant characteristics when imposing his sentence (C315-16). Since Michael was sentenced to a term of over 40 years, and his youth and attendant characteristics were not fully considered at sentencing, his sentence was unconstitutional under both the Eighth Amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution (C316-18).

The petition asked that the court docket the petition and either vacate Michael's sentences and grant him a new sentencing hearing, or grant him a hearing on the merits of the petition (C296).

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[1] The motion and the petition both erroneously stated that Michael received a 55-year sentence. Michael was given a 55-year sentence for murder and a consecutive four year sentence for attempted armed robbery, for a total of 59 years (C159).

On April 7, 2020, the circuit court denied the motion for leave to file a successive petition (C320).

The Appellate Court reversed the decision of the circuit court and remanded the case for resentencing. *People v. Wilson*, 2021 IL App (3d) 200181-U. The Court reasoned that Michael had shown cause for his failure to raise his "*Miller*-based sentencing claim" earlier, as he could not have raised the claim prior to the decisions in *Miller* and *Buffer*, and that Michael had shown prejudice where the sentencing court had not considered his "youth and attendant characteristics" and his term of 59 years was an unconstitutional *de facto* life sentence. *Id.*, ¶ 16. Justice McDade, in a special concurrence, would have granted Michael's request to assign the case to a different judge on remand. *Id.*, ¶¶ 21-24 (McDade, J., specially concurring)

The Appellate Court denied the State's petition for rehearing on August 20, 2021. This Court allowed the State's petition for leave to appeal on January 26, 2022.

ARGUMENT

MICHAEL, WHO WAS 14 YEARS OLD WITH A DEVELOPMENTAL AGE OF 9 OR 10 WHEN HE COMMITTED THE INSTANT OFFENSE, HAS ESTABLISHED THE CAUSE AND PREJUDICE NECESSARY TO FILE A SUCCESSIVE POST-CONVICTION PETITION RAISING AN EIGHTH AMENDMENT CLAIM THAT HIS 59-YEAR SENTENCE WAS AN UNCONSTITUTIONAL *DE FACTO* LIFE SENTENCE WHERE THE ILLINOIS DECISIONS HE RELIES ON WERE ISSUED AFTER THE FILING OF HIS INITIAL POST-CONVICTION PETITION, AND THE SENTENCING COURT FAILED TO CONSIDER THAT MICHAEL WAS NOT THE SHOOTER AND THAT HE HAD REHABILITATIVE POTENTIAL.

STANDARD OF REVIEW

The denial of a motion to file a successive post-conviction petition is reviewed *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13.

ARGUMENT

I. Introduction

Michael was sentenced to 59 years in prison for offenses he committed when he was chronologically 14 years old and developmentally 9 or 10 years old (C159; R1492-93; SEC C 116). He was ordered to serve 100% of his 55-year sentence for first-degree murder (C159). Following an unsuccessful direct appeal (C196-213) (*People v. Wilson*, 2015 IL App (3d) 130606-U), and an unsuccessful initial *pro se* post-conviction petition (C281-92) (*People v. Wilson*, 2019 IL App (3d) 160679-U), Michael filed the instant *pro se* motion for leave to file a successive post-conviction

petition and an accompanying successive post-conviction petition (C294-319). In the instant motion and the accompanying petition, Michael raised sentencing claims under both the Eighth Amendment to the United States Constitution and the proportionate penalties clause of the Illinois constitution (C294-319). Following the circuit court's denial of Michael's motion for leave to file the successive petition (C320), he raised both of these claims on appeal.

In the Appellate Court's decision vacating Michael's sentence and granting him a new sentencing hearing, the Court addressed only Michael's Eighth Amendment claim. *People v. Wilson*, 2021 IL App (3d) 200181-U, ¶¶ 14-16. Before this Court, the State likewise addresses only this Eighth Amendment claim (St.'s br., 13-30). The State asks that, should this Court reverse the Appellate Court's decision on Michael's Eighth Amendment claim, the Court also remand the case so that the Appellate Court can consider his Illinois proportionate penalties clause claim (St.'s br., 30-32). Michael agrees with the State on this issue, and will likewise address only his Eighth Amendment claim here. See, *e.g.*, *People v. Clendenin*, 238 Ill. 2d 302, 331 (2010) (remanding to the Appellate Court to consider issues presented to that Court but not decided). In the event this Court would reverse the decision of the Appellate Court, this Court should thus remand the case to the Appellate Court for consideration of Michael's claim under the Illinois Constitution.[2]

It should, however, be unnecessary for this Court to remand the case to the Appellate Court, as Michael has shown both the cause and prejudice necessary

[2] If this Court would prefer to consider Michael's claim under the Illinois Constitution's proportionate penalties clause at this time, he respectfully requests that this Court allow him to file a supplemental brief on that issue.

to raise a sentencing claim under the Eighth Amendment in a successive post-conviction petition.

II. The Illinois Post-Conviction Hearing Act and Successive Post-Conviction Petitions.

The Illinois Post-Conviction Hearing Act (the "Act") provides a means for criminal defendants to challenge their convictions or sentences by alleging violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (2018); *People v. Domagala*, 2013 IL 113688, ¶ 32. "A proceeding brought under the Act is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). The purpose of a petition brought under the Act is to inquire into constitutional issues relating to the conviction or sentence that were not, and could not have been, raised on direct appeal. *People v. Borizov*, 2019 IL App (2d) 170004, ¶ 10.

The Act normally allows a petitioner to file just one post-conviction petition. 725 ILCS 5/122-1(f) (2018); 725 ILCS 5/122-3 (2018). A petitioner may not file a second or successive post-conviction petition unless the circuit court grants leave to do so. 725 ILCS 5/122-1(f) (2018). The court may grant leave to file a successive petition only upon a demonstration of cause and prejudice for not including the claim in the first petition. *Id.* A petitioner shows cause by identifying an objective factor that impeded his or her ability to include the claim in the first petition, and shows prejudice by demonstrating that the claimed error so infected the trial court proceedings that his or her conviction or sentence violated due process. *Id.*

The cause-and-prejudice test balances the interest of finality against the need to ensure that constitutional claims can be heard on the merits. See, *e.g.*, *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002) ("[w]e hold today that the

cause-and-prejudice test is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 so that a claim raised in a successive petition may be considered on its merits").

III. Michael has Shown Cause for His Failure to Raise His Eighth Amendment Claim in His Initial Post-Conviction Petition.

Michael has established cause to challenge his *de facto* life-without-parole sentence in his successive petition because his claim was not available to him prior to this Court's decisions in *People v. Buffer*, 2019 IL 122327, *People v. Holman*, 2017 IL 120655, and *People v. Reyes*, 2016 IL 119271. This Court has recognized that a new legal rule, not previously available to a post-conviction petitioner, establishes cause for filing a successive petition under the Act. *Pitsonbarger*, 205 Ill. 2d at 460 ("a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . would constitute cause under" the cause-and-prejudice test for filing successive petitions) (citing *Stickler v. Greene*, 527 U.S. 263, 284 n.24 (1999)).

This Court and the Illinois Appellate Court have repeatedly affirmed that a new rule of law establishes cause for filing a successive petition under the Act. *People v. Hudson*, 195 Ill. 2d 117, 126-27 (2001) (petitioner established cause for failing to raise issue on direct appeal because the Supreme Court did not definitively speak to issue until after petitioner's direct appeal); *People v. Flowers*, 138 Ill. 2d 218, 234 (1990) ("[t]here is an important principle involved and the failure of defendant to raise the issue prior to the court's resolution of it in [a later case] should not bar consideration of it now"); *People v. Partee,* 268 Ill. App. 3d 857, 864 (1st Dist. 1994) (granting petitioner an evidentiary hearing because "the law has changed significantly since this court ruled on [petitioner's] direct appeal");

People v. Cowherd, 114 Ill. App. 3d 894, 898 (2d Dist. 1983) ("[s]ince the basis of defendant's claim is predicated upon case law which developed after affirmance of his conviction on direct appeal, fundamental fairness under the circumstances here requires relaxation of the doctrine of *res judicata*").

Here, Michael's claim that his *de facto* life-without-parole sentence is unconstitutional under the Eighth Amendment was not available to him prior to this Court's decisions in *Buffer*, *Holman*, and *Reyes.*

The Third District Appellate Court, in *People v. Gregory*, 2020 IL App (3d) 190261, aptly summarized the "relevant precedents relating to the sentencing of juvenile offenders." The Court wrote,

> In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the United States Supreme Court held that the eighth and fourteenth amendments prohibited the imposition of the death penalty upon offenders who were under 18 years old at the time the offense was committed. Five years later, in *Graham v. Florida*, 560 U.S. 48, 74 (2010), the Court held that a sentence of life imprisonment without the possibility of parole, when imposed on a juvenile for a nonhomicide offense, was also violative of the eighth and fourteenth amendments.
>
> A still more drastic change in this area of the law occurred in *Miller*. In that case, the Court considered a scenario in which juvenile offenders convicted of murder had been sentenced to mandatory life imprisonment without the possibility of parole. [*Miller v. Alabama*, 567 U.S. 460, 465 (2012).] Drawing upon its decisions in *Roper* and *Graham*, the Court opined that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. The Court found that the mandatory nature of the sentences in question necessarily precluded a sentencing court from considering the relevant characteristics of youth. *Id.* at 477-78. Accordingly, the Court held that a mandatory life sentence without the possibility of parole, when imposed upon a juvenile offender, violated the eighth and fourteenth amendments. *Id.* at 489.
>
> In 2014, our own supreme court considered the impact of the *Miller* line of decisions. *People v. Davis*, 2014 IL 115595. Notably, the *Davis* court held that *Miller* announced a new substantive rule, and must therefore be applied retroactively. *Id.* ¶ 39. The United States Supreme Court would reach the same decision two years later in *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718 (2016).

Furthermore, and particularly relevant to the case at hand, the *Davis* court concluded that:

> "In terms of the requisite cause and prejudice of the [Act], *Miller's* new substantive rule constitutes 'cause' because it was not available earlier to counsel ([*People v. Pitsonbarger*, 205 Ill. 2d 444, 460-61 (2002)]), and constitutes prejudice because it retroactively applies to defendant's sentencing hearing. See 725 ILCS 5/122-1(f) (West 2012)." *Davis*, 2014 IL 115595 ¶ 42.

Following *Davis*, our supreme court extended the scope of *Miller* in a series of cases beginning with *Reyes*, 2016 IL 119271. In *Reyes*, the court considered a juvenile who had been sentenced to the mandatory minimum aggregate sentence of 97 years' imprisonment. *Id.* ¶ 10. Finding that the sentence amounted to a *de facto* mandatory life sentence, the court held that *Miller* rendered the sentence violative of the eighth and fourteenth amendments.

The next year, in *People v. Holman*, 2017 IL 120655, ¶ 40, the court held that "Life sentences, whether mandatory or discretionary, for juvenile offenders are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." Most recently, in *Buffer*, 2019 IL 122327, ¶ 27, the court essentially synthesized its two prior holdings, finding that the rationale of *Miller* and its progeny apply to any "life sentence, mandatory or discretionary, natural or *de facto*." Moreover, the *Buffer* court created a bright-line for determining what constituted a *de facto* life sentence, drawing that line at 40 years' imprisonment. *Id.* ¶ 40.

Gregory, 2020 IL App (3d) 190261, ¶¶ 18-22 (additional case reporters omitted).

It is true, as the State asserts, that the United States Supreme Court's *Roper-Graham-Miller* line of cases were decided before Michael was sentenced in 2013 and before he filed his initial post-conviction petition in 2016 (St.'s br., 15-17). However, the arguments Michael made in his motion to file a successive post-conviction petition and his successive petition rely largely on Illinois decisions that were decided after both his direct appeal and the filing of his initial post-conviction petition: *Buffer*, 2019 IL 122327, *Holman*, 2017 IL 120655, and *Reyes*, 2016 IL 119271 (C294-319).[3]

[3] Michael's direct appeal was decided on October 28, 2015 (C196-213). He placed his initial *pro se* post-conviction petition into the prison mail system on

Perhaps most importantly regarding the issue of whether Michael has shown cause for not including his instant claim in his initial *pro se* post-conviction petition, it was only in April, 2019, that this Court held in *Buffer* that a prison sentence of more than 40 years constitutes a *de facto* life sentence, and triggers *Miller* protections, such that when the sentencing court failed to adequately consider youth and its attendant characteristics in imposing the sentence, a new sentencing hearing was required. *Buffer*, 2019 IL 122327, ¶¶ 41-42. For youth with consecutive sentences, *de facto* life is measured by the aggregate of those sentences. *Reyes*, 2016 IL 119271, ¶ 10. Michael received an aggregate sentence of 59 years with 55 of those years to be served at 100% (C159), so his sentence was clearly a *de facto* life term triggering the protections of *Miller* and its progeny. The key legal principle Michael relies upon here – that a prison sentence of more than 40 years constitutes a *de facto* life sentence for a juvenile offender, and triggers the protections afforded by *Miller*, such that when the sentencing court failed to adequately consider youth and its attendant characteristics in imposing the sentence, a new sentencing hearing is required – was thus not available to Michael when he filed his initial petition on September 26, 2016 (C216-38).

Accordingly, the Fifth District Appellate Court has ruled that *Reyes* and *Buffer* establish cause for a petitioner seeking sentencing relief for an offense committed as a juvenile to file a successive post-conviction petition. *People v. Parker*, 2019 IL App (5th) 150192, ¶ 18 ("the defendant has demonstrated cause because *Reyes* and *Buffer* had not been decided when he filed his initial postconviction

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September 18, 2016 (C243). Under the "mailbox rule," his petition was considered filed on that date. *People v. Liner*, 2015 IL App (3d) 140167, ¶ 13. *Reyes* was decided on September 22, 2016. *Reyes*, 2016 IL 119271.

petition and, thus, [were] not available to the defendant"); see also *Gregory*, 2020 IL App (3d) 190261, ¶ 30 ("it was not until our Supreme Court's decision in *Buffer* just last year that a person in defendant's situation is covered by the new constitutional requirements"). In addition, several Appellate Court decisions concerning an issue closely related to the issue presented here, the constitutionality of *de facto* life sentences imposed on emerging adults, have agreed that *Buffer*, *Holman*, and *Reyes* establish cause for a the petitioners to file their successive post-conviction petitions. *People v. Horshaw*, 2021 IL App (1st) 182047, ¶ 124 ("*Miller* was then extended to apply to discretionary *de facto* life sentences in *Holman* in 2017, while *Buffer* established that a sentence over 40 years constitutes a *de facto* life sentence in 2019") (internal citations omitted); *People v. Ross*, 2020 IL App (1st) 171202, ¶ 21 (*Miller* was not extended to *de facto* life sentences until *Reyes* was decided); *People v. Bland*, 2020 IL App (3d) 170705, ¶ 10. This Court should reach a similar conclusion as to the issue of cause here.

Moreover, the State's insistence that Michael should have raised the instant issue in his first post-conviction petition is simply unreasonable (St.'s br., 13-19). The question of whether a post-conviction petitioner should be allowed to file a successive petition is one of fundamental fairness. *Pitsonbarger*, 205 Ill. 2d at 459. Michael drafted his initial petition *pro se* (C216-38). The record establishes that he suffers from a plethora of developmental problems, including ADHD, speech and language impairments, had an I.Q. of 64, which was in the first percentile, and was functioning at the level of a 9 or 10 year old child when he committed this offense (SEC C113-16). Unfortunately for Michael, he was not granted the assistance of counsel during the proceedings on his initial petition (C246-47, 281-92).

This Court has recognized that a lack of legal knowledge might cause a *pro se* petitioner to file an inadequate post-conviction petition. *People v. Pearson*, 216 Ill. 2d 58, 66 (2005) (citing *People v. Shellstrom*, 216 Ill. 2d 45, 51 (2005)). This Court should thus not punish Michael for his lack of legal sophistication by summarily rejecting his Eighth Amendment claim on the issue of cause. To do so in these circumstances would completely upend the principle of fundamental fairness.

Because this Court's decisions in *Buffer*, *Holman*, and *Reyes* had not been issued before Michael filed his initial post-conviction petition, his Eighth Amendment claim challenging his *de facto* life-without-parole sentence was not previously available to him. He has therefore established cause to challenge his *de facto* life sentence in his successive petition. *Horshaw*, 2021 IL App (1st) 182047, ¶ 124; *Gregory*, 2020 IL App (3d) 190261, ¶ 30; *Ross*, 2020 IL App (1st) 171202, ¶ 21; *Bland*, 2020 IL App (3d) 170705, ¶ 10; *Parker*, 2019 IL App (5th) 150192, ¶ 18. In addition, the principle of fundamental fairness should lead this Court to find that Michael has demonstrated the cause necessary to file a successive post-conviction petition. *Pitsonbarger*, 205 Ill. 2d at 459.

IV. Michael has Shown that He was Prejudiced by His Failure to Raise His Eighth Amendment Claim in His Initial Post-Conviction Petition.

A. The Eighth Amendment and *De Facto* Life Sentences.

The United States Supreme Court, in *Miller*, wrote,

> The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. That right, we have explained, flows from the basic precept of justice that punishment for the crime should be graduated and proportioned to both the offender and the offense. As we noted the last time we considered life-without-parole sentences imposed on juveniles, the concept of proportionality is central to the Eighth Amendment. And we view that concept less through a historical prism

> than according to the evolving standards of decency that mark the progress of a maturing society.

Miller, 567 U.S. at 469-70 (internal citations and quotation marks omitted). The "concept of proportionality" thus forms the foundation of Michael's claim under the Eighth Amendment. *Id.*

This Court has held that a prison sentence of more than 40 years constitutes a *de facto* life sentence, and triggers *Miller* protections for juvenile offenders, such that when the sentencing court fails to adequately consider youth and its attendant characteristics in imposing the sentence, a new sentencing hearing is required. *Buffer*, 2019 IL 122327, ¶¶ 41-42.

B. Michael's Chronological and Developmental Ages and His Level of Involvement in the Instant Offense.

This Court should keep Michael's chronological and developmental ages at the time of this offense, his extraordinarily difficult developmental background, and the nature of his involvement in this offense in mind when determining whether he has shown the prejudice required to file a successive post-conviction petition.

Michael was 14 years old when he committed this offense (C282). This was his chronological age. However, he was not functioning at the level of a 14-year-old juvenile at that time. He was functioning at the intellectual and developmental level of a *nine or ten year old child* (SEC C116). Illinois' infancy statute reads, "No person shall be convicted of any offense unless he had attained his 13th birthday at the time the offense was committed." 720 ILCS 5/6-1 (2008); see also *People v. Rich*, 2011 IL App (2d) 101237, ¶ 7 (indictment charging the defendant with committing a criminal offense at age 12 was legally defective under the infancy statute). Michael does not argue here that the infancy statute should have prohibited

his prosecution in this matter. He acknowledges that he was, chronologically, 14 years old at the time of the offense. What he respectfully requests this Court keep in mind is that, due to his undisputed developmental and functional age at the time of this offense, he could not have had the intellectual capacity to form criminal intent in the State of Illinois. 720 ILCS 5/6-1 (2008); *Rich*, 2011 IL App (2d) 101237, ¶ 7. In addition, as Michael has explained above, he was born with cocaine and amphetamines in his system and suffers from a multitude of serious developmental disorders (SEC C113-16).

Moreover, the jury expressly determined that Michael did not discharge the weapon that proximately caused the victim's death (R1412). He was convicted on a theory of accountability (C207-09). See 720 ILCS 5/5-2(c) (2008) (a person is legally accountable for the actions of another if he, with the intent to facilitate the commission of the offense, aids or abets another individual in the commission of the offense). It should be self-evident to this Court that an individual in Michael's position should not be sentenced to life without parole.

Michael takes serious issue with the State's improper assertion, in its statement of facts, that he was the shooter (St.'s br., 3-4). The jury here was presented with a special interrogatory asking it to determine whether Michael personally discharged the weapon that killed the victim (R1397). The jury expressly determined that Michael did *not* personally discharge the weapon (R1412). The State presents no formal challenge to the jury's finding on this issue, and it is not clear on what authority it could do so. After hearing all of the evidence in this case, the jury made an express factual finding that Michael was not the shooter. This Court should reject the State's misguided attempt to relitigate this matter.

Despite Michael's chronological and developmental ages at the time of this incident, despite his significant and numerous developmental problems, and despite the fact that the jury determined he was not the shooter, the State nevertheless seeks to imprison him for the rest of his life. This does not seem to comport with the State's duty to seek justice. *People v. Reed*, 2020 IL 124940, ¶ 32 (the State's interest in a criminal case is not to win, but to see that justice is done).

C. The United States Supreme Court's decision in *Jones v. Mississippi*.

The State's arguments regarding prejudice center on the United States Supreme Court's decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (St.'s br., 20-30). It is true, as the State asserts, that state courts may not interpret the United States Constitution to provide greater protections than provided for by the United States Supreme Court's decisions (St.'s br., 25-26). *E.g.*, *Page v. Palmateer*, 84 P. 3d 133, 136-37 (Or. 2004) (collecting cases). It is thus important to understand what *Jones* does and does not hold.

The issue presented in *Jones* was narrow: in cases where a defendant commits a homicide when he or she is under the age of 18, whether the Eighth Amendment to the United States Constitution requires a sentencing court to make an express or implied finding that the defendant was "permanently incorrigible" when sentencing the juvenile to life without parole. *Jones*, 141 S. Ct. at 1311. The Court answered that narrow question in the negative. *Id.* In so doing, the Court expressly stated that it was not overruling, expressly or implicitly, its prior precedents on juvenile sentencing. *Id.* at 1321; see also *Id.* at 1337 ("*Miller* and *Montgomery* are still good law") (Sotomayor, J., dissenting).

At the start of the *Jones* Court's analysis of the issue presented, the Court outlined the defendant's argument, which was that a sentencing court's discretion to impose a life sentence for an offense committed as a juvenile is not enough to satisfy the Eighth Amendment. *Id.* at 1313. The defendant asserted that the sentencing court must also do one of two things: make a factual finding that the defendant was permanently incorrigible, or provide an explanation for the record that contains an implicit finding of permanent incorrigibility. *Id.* In rejecting the defendant's arguments, the Court wrote that since the Eighth Amendment did not require a separate finding of incorrigibility, "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id.*

Michael acknowledges that, read in isolation, the Court's statement that a "discretionary sentencing system" is sufficient, in and of itself, under the Eighth Amendment, could be read to implicitly overrule some aspects of the Court's prior precedents on juvenile sentencing such as *Miller* and *Montgomery*. *State v. Kelliher*, 873 S.E. 2d 366, 379 (N.C. 2022). Under this interpretation of the *Jones* Court's statement regarding states' discretionary sentencing systems, as long as the sentencing court had the discretion to impose a sentence of less than life, a life sentence comports with the Eighth Amendment. *Id.* This is the argument the State makes here (St.'s br., 20-30). The State's argument, however, relies on cherry-picking individual lines from the *Jones* decision and expanding its holding far beyond what the Court intended.

The *Jones* Court repeated, over and over, that the sole issue it was addressing was whether the Eighth Amendment required a sentencing court, when sentencing a juvenile to a term of life imprisonment, to make a separate factual finding that

the defendant was permanently incorrigible. *Jones*, 141 S. Ct. at 1313, 1314, 1318, 1319, 1320. The Court rejected the defendant's argument that such a finding was required and held that "a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18." *Id.* at 1318-19. This was the only holding of the Court. As to its previous precedents on juvenile sentencing, the *Jones* Court expressly stated, "The Court's decision today carefully follows both *Miller* and *Montgomery* . . . Today's decision does not overrule *Miller* or *Montgomery*." *Id.* at 1321.

The *Jones* Court's narrow holding is therefore clear: a sentencer need not make an express or implied finding that a juvenile defendant is permanently incorrigible before sentencing the defendant to life in prison. *Id.* at 1318-19. It is also clear, from the Court's express language, that it did not overrule its prior precedents on juvenile sentencing. *Id.* at 1321.

The State's overly broad and simplistic reading of *Jones* here is thus unfounded. In *Kelliher*, the North Carolina Supreme Court wrote,

> The problem with the State's proposed interpretation of *Jones* is that it is irreconcilable with the Supreme Court's own characterization of the question it was answering in *Jones*, the narrowness of its holding, and its description of the relationship between *Jones* and the Supreme Court's prior juvenile sentencing decisions. By its plain terms, *Jones* makes clear that the Supreme Court intended only to reject an effort to append a new procedural requirement to *Miller's* and *Montgomery's* substantive constitutional rule; the Court did not intend to retreat from the substantive constitutional rule articulated in those cases.

Kelliher, 873 S.E. 2d at 379. This Court, of course, is not bound by the decision of the North Carolina Supreme Court. This Court should, however, find the *Kelliher* Court's reasoning persuasive. The *Jones* Court's holding was narrow, and it did

not disturb the Court's previous precedents on juvenile sentencing. *Jones*, 141 S. Ct. at 1321; *Kelliher*, 873 S.E. 2d at 379.

D. This Court's Previous Interpretations of *Jones v. Mississippi*.

On page 20 of its brief, the State argues that Michael's *de facto* life sentence comports with the Eighth Amendment simply and only because the sentencing court had the discretion to sentence Michael to a term of less than 40 years of imprisonment. The State cites to this Court's decisions in *People v. Dorsey*, 2021 IL 123010, and *People v. Jones*, 2021 IL 126432, in support of its argument (St.'s br., 20-22).

The narrow issue presented in *Dorsey* was "whether good-conduct credit is relevant to the determination of what constitutes a *de facto* life sentence for a juvenile offender." *Dorsey*, 2021 IL 123010, ¶ 1. This Court answered that question in the affirmative. *Id.* This Court held that the defendant's sentence, which included the opportunity for good-time credit allowing the defendant to be released after 38 years of imprisonment, did not violate the Eighth Amendment. *Id.*, ¶ 65. This Court took note of the United States Supreme Court's decision in *Jones*, and observed that it rendered this Court's holding in *Holman*, 2017 IL 120655, "questionable in light of *Jones*." *Dorsey*, 2021 IL 123010, ¶¶ 40-41.[4]

The narrow issue presented in this Court's *Jones* case was whether a guilty plea entered into by a juvenile barred the juvenile from alleging that his 50-year sentence violated the Eighth Amendment. *Jones*, 2021 IL 126432, ¶ 13. This Court answered that question in the affirmative, reasoning that a knowing and voluntary guilty plea waived any constitutional challenge to the defendant's fully negotiated

[4] Michael will discuss *Holman* in subsection "F" of this Argument, *infra.*

sentence. *Id.*, ¶¶ 12-26. This Court then added the observation that since the circuit court had the discretion to accept or reject the fully negotiated plea agreement, there could have been no violation of the Eighth Amendment under *Miller*. *Id.*, ¶¶ 27-29.

In both of these cases, this Court briefly observed that the United States Supreme Court's decision in *Jones* established that the Eighth Amendment allowed juveniles to be sentenced to life in prison as long as the sentence was discretionary. *Jones*, 2021 IL 126432, ¶¶ 27-29; *Dorsey*, 2021 IL 123010, ¶¶ 40-41. The problem with this Court's reading of the United States Supreme Court's decision in *Jones* is that it does not comport with what *Jones* actually said and held. The United States Supreme Court, in *Jones*, did *not* hold that a discretionary sentencing scheme is all that is necessary to comport with the Eighth Amendment when sentencing a juvenile to life imprisonment. *Jones*, 141 S. Ct. at 1318-19. The Court held that a sentencer need not make a separate factual finding of permanent incorrigibility before sentencing a juvenile to life in prison, and that is all that it held. The *Kelliher* Court wrote, "*Jones* does not alter the substantive Eighth Amendment rule announced in *Miller* and *Montgomery* which forbids a sentencing court from sentencing redeemable juveniles to life without parole." *Kelliher*, 873 S.E. 2d at 380. This Court should find the *Kelliher* Court's reasoning persuasive and reconsider whether its recent observations regarding the United States Supreme Court's *Jones* decision were correct.

E. Under Still Binding United States Supreme Court Precedent, the Eighth Amendment Requires Sentencing Courts to Consider Youth and Its Attendant Characteristics in Determining Whether to Impose a Sentence of Life Without Parole.

The State interprets *Jones* to hold that, in sentencing a juvenile for the offense of homicide, the Eighth Amendment requires only that the court have

the discretion to consider the defendant's youth and that the court not refuse to consider the defendant's youth as a matter of law (St.'s br., 21-24). The State misinterprets the *Jones* Court's reasoning and its plain language. Again, the *Jones* Court made clear that it was not overruling *Miller* or *Montgomery*. *Jones*, 141 S. Ct. at 1321. The *Jones* Court quoted *Montgomery's* key Eighth Amendment principle: "That *Miller* did not impose a formal factfinding requirement *does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole.* To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id.* at 1315 n.2 (quoting *Montgomery*, 577 U.S. at 211) (emphasis added). This principle is still good law and cannot be reconciled with the State's overly simplistic interpretation of *Jones*. Sentencing courts in the State of Illinois are thus not free, under the Eighth Amendment, to simply sentence a juvenile to life without parole without actually considering the defendant's youth and attendant characteristics. *Montgomery*, 577 U.S. at 211; *Miller*, 567 U.S. at 477-78.

The State asserts that the *Jones* Court reasoned that if the sentencer has the discretion to consider a defendant's youth, the sentencer will necessarily do so (St.'s br., 21-22). *Jones*, 141 S. Ct. at 1319-20. Michael acknowledges that there is language in the *Jones* decision stating that an on-the-record explanation of the "mitigating circumstances of youth" is not required by the Eighth Amendment. *Id.* at 1320-21. However, this language must be placed into the larger context of the entire decision, which expressly states that it does not overrule *Miller* or *Montgomery*, and reaffirms that life sentences without parole for juvenile offenders will be rare. *Id.* at 1321-22.

The State goes on to argue, broadly, that "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" (St.'s br., 22). This argument is again overly simplistic and ignores the fact that the *Jones* Court did not overrule *Miller* or *Montgomery*. *Jones*, 141 S. Ct. at 1321.

In *Miller*, the Court held that the Eighth Amendment precluded juveniles from receiving mandatory sentences of life without parole. *Miller*, 567 U.S. at 479. While not entirely foreclosing the possibility that a juvenile could receive such a sentence, the Court required sentencers "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The *Miller* Court identified the circumstances attendant to youth: the juvenile's chronological age and its features, including "immaturity, impetuosity, and failure to appreciate risks and consequences;" the juvenile's family and home environment; the circumstances of the offense, including the extent of his participation in the offense and any evidence of how peer pressure may have affected him; the juvenile's ability to deal with police officers and attorneys; and the juvenile's prospects for rehabilitation. *Id.* at 477-78. A sentencing court must therefore hold a hearing where "youth *and its attendant characteristics*" are considered in order to separate those juveniles who should not be sentenced to life in prison from those rare juveniles for whom a sentence of life without parole may be appropriate. *Montgomery*, 577 U.S. at 211.

It is therefore not correct, as the State argues, that a sentencing court need do no more than consider a juvenile's youth and have the discretion to impose a sentence of less than life imprisonment to comport with the Eighth Amendment (St.'s br., 22-24). The *Jones* Court repeatedly recognized that a sentencer must consider a juvenile offender's youth *and* its attendant characteristics before imposing a sentence of life without parole. *Jones*, 141 S. Ct. 1311, 1314, 1316, 1317-18. Juvenile offenders who can be rehabilitated thus should not be sentenced a lifetime of imprisonment. *Montgomery*, 577 U.S. at 211.

As to the instant case, the reports in the PSIR submitted by Dr. Pasulka and Professor Mahan both concluded that Michael had rehabilitative potential (SEC C117, 126). The sentencing court here was required to consider this rehabilitative potential, yet the record shows that it refused do so (R1489-92). The court stated, incorrectly, "there is nothing in [the PSIR] that says you're going to turn your life around" (R1491). This was an improper, willful, rejection of two experts' opinions that Michael had rehabilitative potential. *Montgomery*, 577 U.S. at 211; *Miller*, 567 U.S. at 477-78. Under the plain language of both *Miller* and *Montgomery*, Michael should not have received a life term, as the experts who examined him both concluded that he was one of the majority of juvenile offenders who *could* be rehabilitated. *Montgomery*, 577 U.S. at 211; *Miller*, 567 U.S. at 480.

The State's next argument, on page 29 of its brief, is another overly simplistic and unwarranted interpretation of the *Jones* decision. The State writes, "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 characteristics for a discretionary sentence of life without parole to satisfy the Eighth Amendment"

(St.'s br., 29). The *Jones* Court did no such thing. The *Jones* Court wrote, "In *Miller*, the Court mandated 'only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing' a life-without-parole sentence.'" *Jones*, 141 S. Ct. at 1311 (quoting *Miller*, 567 U.S. at 483). The *Jones* Court repeated this statement three pages later. *Jones*, 141 S. Ct. at 1314 (quoting *Miller*, 567 U.S. at 483). The *Jones* Court repeated this statement again on the next page of its decision, and added the observation that "[i]n that process, the sentencer will consider the murderer's 'diminished capacity and heightened capacity for change.'" *Jones*, 141 S. Ct. at 1315 (quoting *Miller*, 567 U.S. at 479). Later, the *Jones* Court wrote, "'A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.'" *Jones*, 141 S. Ct. at 1317-18 (quoting *Montgomery*, 577 U.S. at 210). The State's argument here that a sentencing court need not be presented with or consider evidence regarding the attendant characteristics of youth under *Jones* is thus not just overly simplistic, it is demonstrably incorrect.

Jones did *not* overrule *Miller* or *Montgomery*. *Jones*, 141 S. Ct. at 1321. Both *Miller* and *Montgomery* require a sentencing court to consider youth *and* its attendant characteristics before imposing a lifetime of imprisonment on a juvenile offender. *Montgomery*, 577 U.S. at 211; *Miller*, 567 U.S. at 483. *Jones* does not alter this principle of law. This Court should therefore reject the State's attempt to take this State's Eighth Amendment jurisprudence regarding the sentencing of juvenile offenders back to the days before *Miller* was decided.

F. This Court Should Not Entirely Overrule its Decision in *People v. Holman*.

In the final portion of its argument, the State urges this Court to overrule its decision in *People v. Holman*, 2017 IL 120655 (St.'s br., 28-30). The State points to two distinct aspects of the *Holman* decision as having been purportedly overruled by the United States Supreme Court's decision in *Jones*: (1) the holding that *Miller* applies to discretionary life sentences for juveniles, and (2) the rule that a court may not sentence a juvenile to life without parole without first having made a formal determination that the juvenile is permanently incorrigible (St.'s br., 30).

As to the second of these aspects of the *Holman* decision, Michael concedes that this rule (if indeed *Holman* adopted such a rule) does not survive the *Jones* decision. The plain and unambiguous holding of *Jones* makes it clear that "a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18." *Jones*, 141 S. Ct. at 1318-19.

However, the *Holman* Court's holding that *Miller* applies to discretionary life sentences for juveniles (*Holman*, 2017 IL 120655, ¶ 40) does survive the *Jones* decision. To understand why this is, we start again with the principle that *Miller* has not been overruled and is still good law. *Jones*, 141 S. Ct. at 1321; see also *Id.* at 1337 ("*Miller* and *Montgomery* are still good law") (Sotomayor, J., dissenting).

As the *Holman* Court correctly observed, "*Miller* contains language that is significantly broader than its core holding. None of what the Court said is specific to only mandatory life sentences." *Holman*, 2017 IL 120655, ¶ 38. Indeed, the *Miller* Court's requirement that sentencers "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" makes no sense if the *Miller* Court meant for its decision

to apply only to mandatory life sentences. *Miller*, 567 U.S. at 480. If all the *Miller* Court intended to do was abolish mandatory life sentences for juveniles, it would have done that and nothing more. But the *Miller* Court *did* do something more: it went on to mandate "that a sentencer follow a certain process – considering an offender's youth and attendant characteristics" before imposing a sentence of life without parole. *Id.* at 483. A sentencing court can only follow this process in a hearing in which it has been presented with evidence of the juvenile offender's youth and attendant characteristics, actually considers those factors, and has the discretion to impose a sentence other than life in prison based on its understanding of those factors. *Id.* The State's argument that *Miller* does not require a sentencing court to consider youth and its attendant characteristics when sentencing a juvenile offender to life without parole, and its corresponding request that this Court overrule *Holman's* holding that *Miller* applies to discretionary life sentences, should therefore be rejected as logically unsound.

Even though a formal determination of permanent incorrigibility is no longer required after the United States Supreme Court's decision in *Jones*, this Court should determine that the question of whether a juvenile offender is permanently incorrigible must be considered by a sentencing court that is determining whether to sentence a juvenile to life in prison. First, the *Jones* Court did not prohibit a sentencing court from considering this factor. More importantly, a sentencing court must still consider the *Miller* factors when determining whether to sentence a juvenile to life in prison. *Jones*, 141 S. Ct. at 1311, 1314, 1315, 1317-18. Many of these factors inexorably point to the ultimate question of whether a juvenile offender is permanently incorrigible. *Miller*, 567 U.S. at 477-78. Why else would

the *Miller* Court have mandated that a sentencer consider the juvenile's "immaturity, impetuosity, and failure to appreciate the risks and consequences," the juvenile's "family and home environment," the level of the juvenile's participation in the offense, and, crucially, the juvenile's potential for rehabilitation, if not to aid the sentencer in determining whether the offender is one of those rarest of juveniles who is permanently incorrigible? *Id.* If the sentencer is going to consider these factors, and under *Miller*, which is still good law, it must do so, the sentencer cannot avoid considering whether the juvenile is permanently incorrigible. While a formal determination of permanent incorrigibility is no longer necessary when sentencing a juvenile offender to life in prison, the question of permanent incorrigibility is impossible for a sentencing court to avoid. *Jones*, 141 S. Ct. at 1319-20.

In Part III of its decision, the *Jones* Court explained that *Miller's* sentencing procedure (which is still good law) has resulted in numerous instances where juvenile offenders have received sentences of less than life without parole. *Id.* at 1322. In addition, under *Montgomery*, many juveniles who had been sentenced to life without parole have now obtained new sentencing hearings in which they have received less than life. *Id.* The *Jones* Court observed that life without parole sentences for juveniles are now "relatively rare." *Id.* (quoting *Miller*, 567 U.S. at 484 n. 10). A court determining whether to sentence a juvenile to life in prison should thus start with the presumption that the juvenile can be rehabilitated. See *Montgomery*, 577 U.S. at 208-09 (after *Miller*, only "the rarest of juvenile offenders," those who show no rehabilitative potential whatsoever, may be sentenced to life in prison).This is consistent with the notion that only those rare juvenile offenders who are permanently incorrigible should receive a sentence of life without

parole. *Jones*, 141 S. Ct. at 1322. Again, Michael recognizes that a formal determination of permanent incorrigibility is no longer required after the United States Supreme Court's decision in *Jones*. But it cannot be true that the notion of permanent incorrigibility no longer matters at all. This Court should therefore not simply dispose of the notion of permanent incorrigibility in the sentencing of juvenile offenders convicted of murder, but should instead declare that courts must consider permanent incorrigibility as a factor in determining whether to sentence juvenile offenders to life in prison. *Montgomery*, 577 U.S. at 209 ("*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility").

This approach would comport with Illinois' current codification of the *Miller* factors in 2016. 730 ILCS 5/5-4.5-105 (2016). The fourth of these factors, which sentencing courts are now mandated to consider when sentencing juvenile offenders, is "the person's potential for rehabilitation or evidence of rehabilitation." *Id.*, (a)(4). When considering whether a juvenile offender should be sentenced to life in prison, a sentencing court in Illinois thus now cannot avoid the question of permanent incorrigibility. *Id.* This is yet another indication that the notion of permanent incorrigibility cannot simply be dispensed with in juvenile sentencing, as the State urges (St.'s br., 28-29). See *Jones*, 141 S. Ct. at 1323 (States are free to enact their own limitations involving juvenile sentencing, which may require sentencers to make factual findings); see also *People v. Taylor*, __N.W. 2d__, 2022 WL 3008301, * 10 (Michigan statutory law requires the prosecution to overcome a presumption against life without parole before a juvenile may be sentenced to such a term).

While it seems unavoidable that this Court will determine that, pursuant to the United States Supreme Court's decision in *Jones*, a formal determination of permanent incorrigibility is no longer required in order to sentence a juvenile to life in prison, this Court should not overrule the portion of *Holman* that held *Miller* was applicable to discretionary life sentences, nor should it rule that the notion of permanent incorrigibility no longer has any relevance in juvenile sentencing. Instead, this Court should determine that the *Miller* protections apply to discretionary life terms for juvenile offenders, and that the notion of permanent incorrigibility is still an important factor that sentencing courts must take into account when sentencing juvenile offenders.

G. This Court Should Not Abandon the Well-Established Body of Law Regarding Juvenile Sentencing that has Developed Since *Buffer*.

In further support of Michael's claim that he has established prejudice, he points out that the Appellate Court has, prior to the United States Supreme Court's decision in *Jones*, granted juvenile offenders relief under *Buffer* in a number of cases.

In *Daniel*, the petitioner sought leave to file a successive post-conviction petition, arguing that his 70-year sentence for a crime he committed as a juvenile was an unconstitutional *de facto* life sentence. *People v. Daniel*, 2020 IL App (1st) 172267, ¶ 7. The circuit court dismissed the petition, finding that the petitioner had failed to meet the cause and prejudice test. *Id.*, ¶ 9. The Appellate Court reversed, finding that the petitioner's 70-year term of imprisonment was a *de facto* life sentence, and that the sentencing court had failed to fully consider the petitioner's "youth and attendant circumstances" in imposing the sentence. *Id.*, ¶¶ 26-28. The Court remanded directly for resentencing "in the interest of judicial

economy." *Id.*, ¶¶ 30-31. Another division of the First District reached the same result in *People v. Harvey*, 2019 IL App (1st) 153581. The *Harvey* Court found that the successive post-conviction petitioner, a juvenile who had been sentenced to a 52-year term of imprisonment, had established both cause and prejudice to bring his claim that his sentence was unconstitutional under *Miller* and *Buffer*. *Id.*, ¶¶ 5-13. The *Harvey* Court also remanded directly for resentencing. *Id.*, ¶ 14.

Other recent Appellate Court decisions have reached similar conclusions in cases like Michael's, where juvenile offenders had filed successive post-conviction petitions challenging their terms of imprisonment as unconstitutional *de facto* life sentences. *People v. Jackson*, 2020 IL App (1st) 143025-B, ¶¶ 42-51 (finding a 50-year sentence for a crime committed as a juvenile an unconstitutional *de facto* life sentence); *People v. Paige*, 2020 IL App (1st) 161563, ¶¶ 28-40 (same); *Gregory*, 2020 IL App (3d) 190261, ¶ 13-30 (finding the juvenile offender's 45-year term an unconstitutional *de facto* life sentence); see also *People v. Nieto*, 2016 IL App (1st) 121604-B, ¶¶ 49-62 (on remand from the petitioner's initial post-conviction petition, juvenile offender's 78-year term an unconstitutional *de facto* life sentence); *People v. Reyes*, 2020 IL App (2d) 180237, ¶¶ 19-34 (on direct appeal, juvenile offender's 66-year term an unconstitutional *de facto* life sentence).

What the State asks is that this Court essentially abandon this well-established body of law and take Michael and other juvenile offenders currently seeking resentencing under *Buffer* back to the pre-*Miller* days in which the juvenile's chronological age could be a mitigating factor, but sentencing courts were not required to consider the attendant characteristics of youth. This Court should

not do that. The United States Supreme Court's decision in *Jones* does not require that this Court take such a drastic step backwards in Eighth Amendment jurisprudence. *Jones*, 141 S. Ct. at 1321 (*Miller* and *Montgomery* are still good law).

H. Michael's Eighth Amendment Rights under *Miller* and *Montgomery* Were Violated During His Sentencing Hearing.

In asking this Court to find that Michael has not established the prejudice required to file a successive post-conviction petition under the Eighth Amendment, the State fails to mention that the record shows Michael has rehabilitative potential (St.'s br., 20-30). Behind all of the cold legal arguments and assertions made by both the State and undersigned counsel in this case, this Court should keep in mind that there is a real human being here whose future is at stake, a human being who, despite his significant developmental and cognitive problems, has the potential to be rehabilitated (SEC C117, 126). Michael's chronological and developmental ages at the time of this offense cannot be stressed enough here. He was 14 years old with a developmental age of 9 or 10 when he committed this offense (C282; SEC C116). Despite Michael's cognitive and developmental problems, both of the experts who examined him during the proceedings on the transfer of his case to adult court concluded that he had rehabilitative potential (SEC C117, 126). The trial court did not consider this rehabilitative potential when it sentenced him; in fact, the court erroneously found that Michael had no such potential (R1489-92). The State and the trial court's failure to at least acknowledge Michael's rehabilitative potential is inexplicable, and, in the case of the court's failure, it is a large part of the Eighth Amendment violation regarding Michael's sentence.

There is no question that Michael's 59-year sentence, of which he must serve 100% of his 55-year term for murder (C159), is a *de facto* life sentence under this Court's decision in *Buffer*, 2019 IL 122327, ¶¶ 40-41. Michael is therefore serving a *de facto* term of life without the possibility of parole.

The *Miller* Court emphasized that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. In other words, "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.* at 473. Because youth matters, the *Miller* Court required sentencers "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The *Montgomery* Court observed,

> *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption . . . [and] it rendered life without parole an unconstitutional penalty for a class of juvenile offenders whose crimes reflect the transient immaturity of youth . . . After *Miller*, it will be the rare juvenile offender who can receive that same sentence.

Montgomery, 577 U.S. at 208-09 (internal citations and quotation marks omitted).

The sentencing court here thus improperly failed to take into account not only that Michael was young (both chronologically and developmentally) when he committed this offense, but also that the attendant characteristics of Michael's youth should have counseled against a sentence of life imprisonment. *Id.*; *Miller*, 567 U.S. at 480.

The court failed to consider several of the *Miller* factors. As to the first *Miller* factor, the court considered Michael's chronological age, but failed to take into account the characteristics of his youth: his immaturity, his impetuosity, and his

failure to appreciate the risks and consequences of his actions. *Miller*, 567 U.S. at 477-78; *Holman*, 2017 IL 120655, ¶ 46. The court did not consider Michael's family environment at all, but, in fairness, the court did consider Michael's failures to comply with the rules in the various residential treatment programs in which he had participated (R1489-92). *Miller*, 567 U.S. at 477-78; *Holman*, 2017 IL 120655, ¶ 46. The court did not consider Michael's competence in dealing with police officers or attorneys (R1489-92). *Miller*, 567 U.S. at 477-78; *Holman*, 2017 IL 120655, ¶ 46.

The court did consider the other two *Miller* factors, but it made serious errors when it did so.

The third *Miller* factor is the juvenile's degree of participation in the homicide and any evidence of peer pressure that may have affected him. *Miller*, 567 U.S. at 477-78; *Holman*, 2017 IL 120655, ¶ 46. As to the question of who actually shot the victim, the court appeared to mistakenly believe that Michael was the shooter. The court said: "But you decided to shoot – you and Byron Moore decided that you're gonna shoot him in the back and leave him for dead . . . And I can consider that (R1492)." The importance of the court's misapprehension of Michael's involvement in this offense cannot be overstated. The court seemed to believe Michael was the shooter, and it relied on that belief in fashioning Michael's sentence (R1492). The jury, however, expressly determined that Michael was *not* the individual who shot the victim (R1412). This means that as matters currently stand, Michael, who was 14 years old when this offense occurred (and was functioning as a 9- or 10-year old child (SEC C116)), will spend the rest of his life in prison for a shooting that was actually done by another individual. Regardless

of how this Court interprets the case law pertinent to the issue presented here, this sentence is fundamentally unfair and wildly disproportionate to the level of Michael's functioning and his actual involvement in this offense. See *Miller*, 567 U.S. at 478 ("'[W]hen compared to an adult murder, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability'") (quoting *Graham*, 560 U.S. at 69).

As to the final *Miller* factor, the potential for rehabilitation (*Miller*, 567 U.S. at 477-78; *Holman*, 2017 IL 120655, ¶ 46), the court seemed to believe that Michael had none (R1489-92). The court clearly overlooked the reports by both Dr. Pasulka and Professor Mahan indicating that Michael had rehabilitative potential, which were in the PSIR relied upon by the court in sentencing (SEC C113-26). Dr. Pasulka concluded that with the proper treatment, it was likely that Michael would be able to graduate high school, function in a group home, and be employed in a maintenance job (SEC C117). Professor Mahan determined that there was a reasonable likelihood that Michael could be rehabilitated before the end of the juvenile court's jurisdiction in this matter (SEC C126). It is therefore clear that, contrary to the sentencing court's apparent determination, Michael was not permanently incorrigible. The court's failure to consider this sentencing factor was a serious Eighth Amendment violation. *Miller*, 567 U.S. at 477-78; *Holman*, 2017 IL 120655, ¶ 46.

Moreover, Michael's crime did not reflect "irreparable corruption." *Montgomery*, 577 U.S. at 209. He was 14 years old at the time of the offense, with a developmental age of 9 or 10 (SEC C116). He was not the shooter (R1412). He had rehabilitative potential (SEC C117, 126). The court nevertheless saw fit to

sentence him to a lifetime of imprisonment (C159). *Buffer*, 2019 IL 122327, ¶¶ 40-41. The magnitude of the Eighth Amendment violation here is obvious and startling. It cannot be the case that a sentence of life imprisonment for such an individual comports in any meaningful way with the Eighth Amendment.

Since Michael has shown that there was a serious violation of his Eighth Amendment right against cruel and unusual punishment, this Court should determine that he has shown the necessary prejudice to file a successive post-conviction petition. 725 ILCS 5/122-1(f) (2018); *Pitsonbarger*, 205 Ill. 2d at 459.

V. This Court Should Affirm the Decision of the Appellate Court.

The record here needs no further development, as no new proceedings are necessary to determine whether the sentencing court's reasoning comported with the constitutional requirements articulated in *Miller*, *Buffer*, *Holman*, and the other cases cited in this brief. Michael therefore respectfully requests that this Court affirm the decision of the Appellate Court and remand the case directly to the circuit court for resentencing. In the alternative, he requests that this Court remand the case to the circuit court for further post-conviction proceedings.

CONCLUSION

Michael has been sentenced to spend the rest of his life in prison for an offense he committed when he was 14 years old and had a developmental age of 9 or 10. Michael was not the shooter, and he had rehabilitative potential. His life sentence thus violates the Eighth Amendment's prohibition against cruel and unusual punishments. He therefore requests that this Court affirm the decision of the Appellate Court and remand the case to the circuit court for a new sentencing hearing, or, in the alternative, remand the case to the circuit court for further proceedings on his successive post-conviction petition. In the event this Court were to reverse the decision of the Appellate Court, Michael agrees with the State that this Court should remand the case to the Appellate Court for consideration of his claim under the proportionate penalties clause of the Illinois Constitution.

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 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, is 43 pages.

/s/Andrew J. Boyd
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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- MICHAEL WILSON, Petitioner-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-20-0181. There on appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, Illinois, No. 09 CF 426. Honorable Kathy Bradshaw-Elliott, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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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 September 20, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled case. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellee in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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