

FIRST DIVISION  
December 12, 2016

No. 1-14-2833

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 16999 (01)
	)	
DONALD HAYWOOD,	)	Honorable
	)	Vincent M. Gaughan,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Connors and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's judgment denying motion for leave to file a successive post-conviction petition is affirmed as to petitioner's ineffective assistance of counsel claim, where no prejudice was established given the overwhelming evidence of guilt presented at trial. However, the court's judgment to deny leave to file is reversed as to petitioner's sentencing claim.

¶ 2 Petitioner, Donald Haywood, appeals the judgment of the circuit court denying him leave to file a successive post-conviction petition. On appeal, petitioner contends that the trial court

erred because (1) his petition demonstrated cause for failing to present his ineffective assistance of counsel claim in his prior petition, and that he was prejudiced by his counsel's ineffective assistance; and (2) his petition demonstrated cause and prejudice on his claim that *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and subsequent cases have created a new and retroactive constitutional rule regarding the sentencing of juveniles that was not available to him previously. For the following reasons, we affirm the court's denial of leave to file the petition on petitioner's ineffective assistance of counsel claim. However, we reverse the denial on petitioner's sentencing claim and remand to allow petitioner to file a successive post-conviction petition raising this issue.

¶ 3 JURISDICTION

¶ 4 The trial court denied petitioner's motion to file a successive post-conviction petition on August 14, 2014. Petitioner filed a notice of appeal on August 27, 2014. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Illinois Supreme Court Rule 651 (eff. Feb. 6, 2013) governing appeals in post-conviction proceedings.

¶ 5 BACKGROUND

¶ 6 Petitioner and his brother, Karl Haywood, were convicted of first degree murder in the July 5, 2003, death of Ruby Lasecki, after separate jury trials. The following facts, taken from petitioner's direct appeal, are relevant to the issues in this appeal.

¶ 7 Prior to trial, defense counsel filed a motion to suppress petitioner's statement in which he acknowledged his involvement in the robbery and death of Lasecki. Petitioner alleged that his statement was involuntary and procured through physical and mental coercion. Petitioner also

alleged that his repeated requests for an attorney were ignored. Following a hearing, the trial court denied the motion to suppress.

¶ 8 At trial, assistant state's attorney (ASA) David Weiner testified that he was assigned to investigate Ruby Lasecki's death. He arrived at Area 4 police headquarters and met briefly with Sergeant Sam Cirone, the detective investigating the case. He and Sergeant Cirone went to speak with petitioner. ASA Weiner informed petitioner of his *Miranda* rights and petitioner stated that he understood his rights. ASA Weiner gave petitioner several options in which to memorialize his statement, and petitioner chose to have his statement videotaped.

¶ 9 In the videotaped confession, petitioner stated that on July 5, 2003, his older brother Karl Haywood called the Sure-Way Livery Cab Company from his residence at 7752 South Essex Avenue in Chicago, with the intent to rob the cabdriver. Petitioner knew of Karl's intention and agreed to assist him and act as a lookout for the police. As they waited for the cab to arrive, Karl gave petitioner a gun to hide in the waistband of his pants. When the cab arrived, Karl sat in the front passenger seat and petitioner sat in the backseat. Karl told the driver to go to 1100 North Western Avenue in Chicago. On the way, Karl asked the driver to make a stop at Drake and Cermak, where their sister resided. Karl entered their sister's apartment while petitioner remained in the cab. Karl returned to the cab shortly thereafter.

¶ 10 As Lasecki started driving to 1100 North Western, Karl signaled to petitioner to give him the gun. Karl then pointed the weapon at Lasecki and ordered her to drive into a lot. She complied, and Karl ordered her to remove her jewelry which consisted of a gold chain, a gold bracelet, and several rings. Karl took the jewelry and then removed money from Lasecki's wallet. He gave the jewelry and money, and the gun, to petitioner. Karl then exited the car and walked over to Lasecki's side and opened the door. He grabbed a white bag located near her feet and

examined its contents. While Karl looked through the bag, petitioner exited the vehicle and walked to the back of the vehicle. Karl then ordered petitioner to shoot Lasecki but petitioner refused. Karl repeated his order and petitioner again refused. Karl grabbed the gun from petitioner and petitioner started to walk away from the vehicle. Petitioner heard Lasecki say "don't shoot" and she tried to sound the horn on her vehicle. Petitioner then heard a single gunshot.

¶ 11 Karl caught up with petitioner and they ran from the area through an alley. As they ran, Karl gave petitioner the gun and petitioner later threw the gun away near Central Park in Chicago. Petitioner asked Karl why he shot Lasecki and Karl told him that he shot her because she knew where their sister lived. Petitioner acknowledged that the jewelry found on him by the police belonged to Lasecki. Yvette Freeman, a dispatcher for the cab company who assigned Lasecki to Karl's call for a cab, testified that she had known Lasecki for approximately 25 years and she identified the jewelry recovered as belonging to Lasecki.

¶ 12 Janice George testified that on July 5, 2003, at approximately 7:45 p.m., she was in her apartment on West Washington Boulevard when she observed a bluish-green, four-door car park in a vacant lot in the back of her apartment building. From her back porch, George had an unobstructed view of the vehicle. She saw three people in the car, one female and two males. The woman was in the driver's seat and one of the males was sitting in the front passenger seat and the other was sitting in the back. George saw Karl, who was in the front seat, exit the car and walk to the driver's side. The other male then exited the car and she saw Karl sifting through Lasecki's purse. George heard the driver say, "Please don't shoot me, please don't shoot me" about four or five times before Karl shot her. Karl and the other male immediately began running

down the alley. George called 911 and police arrived shortly thereafter. The next day, George went to the police station to view a lineup in which she identified Karl as the shooter.

¶ 13 Jatuan Evans testified that she was in an alley located off Warren Boulevard on July 5, 2003, at approximately 7:50 p.m. when she heard voices arguing and then popping noises which she thought were firecrackers. Evans then saw petitioner and Karl run past her, "very fast" as if "somebody was chasing them." Evans testified that petitioner nearly ran into her so she had a clear view of his face. After they ran past her, Evans stepped out of the alley and saw a car parked in a nearby lot. Shortly thereafter, the police arrived and surrounded the car. The following day, Evans went to the police station to view a lineup. She identified petitioner and Karl as the two people who ran past her in the alley the previous day.

¶ 14 Officer David Hickey testified that he and his two partners were working on July 5, 2003, when they saw petitioner standing on a porch located at 1502 South Lawndale at approximately 8:40 p.m. Petitioner was holding a firearm and when he saw the police he ran off the porch and down the street. Officer Hickey started chasing petitioner on foot and radioed for assistance. He lost sight of petitioner and used his radio to describe petitioner. He soon received a message that an individual matching the officer's description had been detained a short distance away at 1428 South Central Park. When Officer Hickey arrived at the location, he saw petitioner sitting in the back of the police car. Petitioner did not have a weapon on him at the time.

¶ 15 Officer Hickey requested use of a canine to conduct a search for a missing weapon. Approximately 10 minutes later, he was informed that a .380 caliber semiautomatic handgun was recovered in a vacant lot at 1426 South Central Park. Officer Hickey recognized the gun as the same one he had seen in petitioner's possession.

¶ 16 Sergeant Cirone testified that he was the detective assigned to investigate Lasecki's death. Following petitioner's arrest, Sergeant Cirone met with him in an interview room. He noticed that petitioner wore a gold chain and bracelet which was removed and inventoried. A heart-shaped pendant and a ring engraved with the letter "A" were also recovered. He did not interview petitioner at this time. Sergeant Cirone later interviewed petitioner and was present when petitioner gave his videotaped statement. He testified that the statement was consistent with prior incriminating statements petitioner had made to him.

¶ 17 Tonia Brubaker, an expert in firearm identification and analysis, conducted testing on the handgun recovered, as well as two bullets recovered from Lasecki. One of the bullets was unsuitable for testing. However, Brubaker tested the larger .38 caliber bullet recovered from Lasecki and concluded that this bullet was fired from the recovered handgun "to the exclusion of all other weapons." Fingerprints were also recovered from the cab and the parties stipulated that Christi Fischer, an expert in fingerprint examination and identification, would testify that she received fingerprint impressions recovered in the case, and fingerprint impressions from petitioner and Karl. After conducting tests, Fischer concluded that petitioner's prints were found on the interior glass panel of the cab, as well as outside the cab on the roof near the passenger side door, and on the trunk lid.

¶ 18 The State rested its case and defense counsel moved for a directed verdict which the trial court denied. Petitioner indicated that he did not wish to testify and defense counsel informed the court that she would not present any evidence. In closing argument, defense counsel argued that petitioner would not shoot Lasecki and never knew that Karl intended to kill Lasecki. The jury received instructions on the law of accountability and after deliberations found petitioner guilty of first degree murder.

¶ 19 At the sentencing hearing, the State presented the testimony of Officer Hickey, who testified that he observed petitioner fire a semiautomatic handgun at Benny Hunter within an hour of Lasecki's murder. It was the same weapon used earlier that evening to kill Lasecki. The State also argued that petitioner was a former gang member who attended high school only for a year, and had no concern for his fellow human beings. The State asked for the maximum of 60 years' imprisonment. In mitigation, defense counsel argued that petitioner was "pretty much raised by his brother Karl" who was not a good influence. He stated that petitioner, who was 17 years old at the time of the murder, has "changed" and "matured" and was more aware of his responsibilities. Petitioner never knew his parents and had been previously diagnosed with behavior and attention deficit disorders. Petitioner did not abuse drugs or alcohol, but "all his life he's been under the influence of Karl." Petitioner also stated at the hearing that he was "sorry for the family and sorry for wasting all [your] time with this case."

¶ 20 After arguments in aggravation and mitigation, the trial court noted that the State asked "for the maximum sentence, and [the court] was in mind to do that, also." The court informed petitioner, however, "now, that you've showed some repentance, I am not going to go with a maximum sentence, I am going to sentence you to 55 years in the Illinois Department of Corrections, credit for eight hundred forty-six days."

¶ 21 Petitioner filed an appeal, arguing that his counsel provided ineffective assistance when, in delivering closing argument, she conceded his involvement in Lasecki's death and therefore failed to subject the State's case to meaningful adversarial testing. This court affirmed petitioner's conviction and sentence in an unpublished order filed on January 23, 2008, and petitioner filed a petition for leave to appeal to the supreme court which was denied.

¶ 22 On February 17, 2009, petitioner filed a *pro se* petition for post-conviction relief. His petition alleged that he was denied his constitutional right to a fair trial when (1) jurors slept through the testimony of the State's witnesses; (2) prejudicial other crimes evidence was introduced at his trial and counsel failed to raise the issue on direct appeal; and (3) his counsel provided ineffective assistance. The trial court did not rule on his petition within 90 days, but appointed counsel for petitioner. On January 13, 2011, post-conviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), showing that counsel "consulted with petitioner by phone, mail, electronic means, or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Counsel also filed a supplemental petition alleging that appellate counsel was ineffective for failing to raise the issue of the excessiveness of petitioner's sentence on direct appeal.

¶ 23 The State filed a motion to dismiss the post-conviction petition. On May 11, 2011, the trial court granted the motion to dismiss reasoning that petitioner's sentence was not excessive because "the woman was sitting in the car, in the taxicab, pleading for her life saying she was the mother of two children and then she was shot dead. \*\*\* That just alone would justify that sentence, so that as a basis of relief, that would also be denied." Petitioner appealed the dismissal and on December 24, 2012, this court affirmed finding that the trial court did not abuse its discretion in sentencing petitioner and therefore appellate counsel was not ineffective for failing to raise the issue. *People v. Donald Haywood*, 2012 IL App (1st) 111554-U.

¶ 24 Petitioner filed a successive post-conviction petition, which is the subject of this appeal. In his successive petition, petitioner alleged that he was actually innocent based on newly



discovered evidence in the form of an affidavit from Karl. In the affidavit, dated June 29, 2012, Karl stated that on July 5, 2003, he was at home with his friend Benn[y] Hunter and petitioner. Petitioner told Karl that he was going to their sister's house so that he could get his car keys and retrieve his car from the mechanic. Hunter called for a cab and all three entered the cab. When they got to their sister's residence, petitioner got out while Karl and Hunter waited in the cab. While they were waiting for petitioner to return to the car, Hunter suggested that he and Karl rob the cabdriver. Hunter pulled out a .380 caliber pistol and ordered the cabdriver to drive down the street. Karl had a 9 mm pistol. As they robbed her, the cabdriver was yelling and screaming so Hunter went to the side of the car and shot her. Karl stated that petitioner had nothing to do with the robbery or the murder. Karl tried to contact petitioner's trial attorney but she "would not take Affidavit [sic] I gave to her." He stated that if called to testify, he would testify that everything in the affidavit was true. Petitioner "was not made aware that the affidavit" Karl referred to "had been made available to [his] trial attorneys."

¶ 25 Petitioner also alleged in his successive post-conviction petition that his sentence violated the cruel and unusual punishment clause of the constitution, pursuant to *Miller*, because the trial court did not consider factors that apply specifically to juvenile defendants before sentencing them to life in prison, and the sentence he received was a *de facto* life sentence. Petitioner further alleged that he received ineffective assistance of counsel where (1) counsel failed to ensure that he received a fair fitness hearing; and (b) counsel failed to interview petitioner to ascertain his mental health history or to obtain records of petitioner's medical history. Petitioner's final allegations were that a *bona fide* doubt of his competency existed at the time of his trial, and that he was tortured and coerced to give his statement.

¶ 26 The trial court denied leave to file the successive post-conviction petition. The court found that Karl's affidavit was not newly discovered evidence because petitioner knew Karl could have testified at trial, and the affidavit was not material in light of petitioner's videotaped statement and other evidence presented at trial. Rather, the affidavit "merely recites facts already established and rebutted in the record." Regarding the sentencing issue, the trial court determined that *Miller* only applies to defendants who received mandatory life sentences in which the sentencing court did not consider the defendant's age, background or relative culpability. In this case, petitioner did not receive the maximum sentence and the trial court considered mitigating as well as aggravating factors before determining a sentence. The trial court further found petitioner's ineffective assistance of counsel claim and competency claim meritless, and that his coercion claims were previously raised in a suppression hearing before the trial court and are *res judicata*. Petitioner filed this timely appeal.

¶ 27

#### ANALYSIS

¶ 28 Petitioner challenges the trial court's denial of leave to file a successive post-conviction petition, but only as to his claim involving Karl's affidavit, and his sentencing claim based on *Miller*. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a procedural mechanism for defendants to remedy substantial constitutional violations that occurred at trial or sentencing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). A post-conviction proceeding is not a substitute for a direct appeal; rather, it is a collateral attack on a prior conviction or sentence. *People v. Edwards*, 2012 IL 111711, ¶ 21. "The purpose of a post-conviction proceeding is to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal." *People v. Towns*, 182 Ill. 2d 491, 502 (1998). As such, in a post-conviction

proceeding issues raised and decided on direct appeal are barred from consideration as *res judicata*, and issues that could have been raised on direct appeal but were not, are forfeited. *Pitsonbarger*, 205 Ill. 2d at 456.

¶ 29 Furthermore, the Act contemplates the filing of only one post-conviction petition. *Id.* at 456. "Consequently, a defendant faces immense procedural default hurdles when bringing a successive postconviction petition." *People v. Davis*, 2014 IL 115595, ¶ 14. In the context of a successive petition, "the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute." *Pitsonbarger*, 205 Ill. 2d at 458. Therefore, a defendant who wishes to institute a successive post-conviction proceeding must first obtain leave of court. 725 ILCS 5/122-1(f) (West 2012). The trial court may grant leave if the petition (1) states a colorable claim of actual innocence (*Edwards*, 2012 IL 111711, ¶ 28) or (2) establishes cause and prejudice for failing to raise the claim in an earlier proceeding (*Pitsonbarger*, 205 Ill. 2d at 459). Furthermore, "petitioner must establish cause and prejudice as to each individual claim asserted in a successive petition." *Pitsonbarger*, 205 Ill. 2d at 463. We review the trial court's denial of petitioner's motion for leave to file a successive post-conviction petition *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

¶ 30 Petitioner contends on appeal that his successive petition sufficiently demonstrates cause and prejudice for (1) failing to present his claim that trial counsel was ineffective when she did not have Karl testify at trial; and (2) failing to present his sentencing claim. The State, however, argues that petitioner has forfeited his ineffective assistance of counsel claim by failing to include the issue in his petition. See *People v. Anderson*, 375 Ill. App. 3d 121, 131 (2007) (issues not raised in the postconviction petition cannot be considered on appeal).

¶ 31 In his *pro se* petition, petitioner alleged that (1) he was actually innocent based on newly discovered evidence in the form of an affidavit from Karl; (2) his sentence violated the cruel and unusual punishment clause of the constitution; (3) his counsel provided ineffective assistance where counsel failed to ensure that petitioner received a fair fitness hearing, and failed to interview petitioner to ascertain his mental health history or to obtain medical records; (4) a *bona fide* doubt of his competency existed at the time of his trial; and (5) he was tortured and coerced into giving his statement. Although the petition does allege a claim based on Karl's affidavit, the claim is one of actual innocence, not ineffective assistance and cause and prejudice as petitioner now alleges on appeal. These claims are not interchangeable. As our supreme court held in *Pitsonbarger*, the cause-and-prejudice test is used to determine whether a successive petition may be considered on its merits, but if the petitioner cannot show cause and prejudice, "his failure to raise a claim in an earlier petition will be excused" if he demonstrates actual innocence. *Pitsonbarger*, 205 Ill. 2d at 459. Actual innocence and cause-and-prejudice are distinctly separate bases for the trial court to consider a successive postconviction petition. Therefore, by failing to include the issue in his petition, petitioner has forfeited consideration of his ineffective assistance of counsel claim on appeal.

¶ 32 Even considered on the merits, the petition fails to establish cause and prejudice. The cause-and-prejudice test is codified in section 122-1(f) of the Act. "Cause" is some objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding, and "prejudice" is a constitutional error that infected the entire trial such that the resulting conviction or sentence violates due process. 725 ILCS 5/122-1(f) (West 2012). To prevail, petitioner must satisfy both prongs of the test. *Davis*, 2014 IL 115595, ¶ 14. Here, petitioner alleges that he established cause for failing to raise the ineffective assistance of counsel issue

earlier because he just discovered, through Karl's affidavit, that Karl would have testified at petitioner's trial. He alleges that he was prejudiced by counsel's failure to call Karl to testify because his testimony would have provided evidence that petitioner was not at the scene of the murder, thus providing a defense based on witness credibility in place of the less effective jury nullification strategy counsel pursued at trial. Had counsel used this defense, petitioner argues, there is a reasonable probability the jury would find that he was misidentified as the other person running from the scene.

¶ 33 We are not persuaded by petitioner's arguments. In his affidavit, Karl states that petitioner rode in the cab with Karl and Hunter to get to their sister's residence, but Karl was the only one present when Hunter decided to rob and subsequently shoot Lasecki. Petitioner, however, gave a videotaped statement detailing his involvement in the robbery and his presence at the scene when Lasecki was shot. His statement about what happened at the parking lot prior to the shooting was corroborated by the testimony of Janice George. Petitioner's statement that he and Karl fled the scene down an alley was corroborated by Jatuan Evans, who testified that she heard popping noises which she thought were firecrackers. Evans then saw petitioner and Karl run past her, "very fast" as if "somebody was chasing them." Evans testified that petitioner nearly ran into her so she had a clear view of his face. After they ran past her, Evans stepped out of the alley and saw a car parked in a nearby lot that was soon surrounded by police. At the police station, Evans identified Karl and petitioner as the two people she saw running past her. In light of this overwhelming evidence, we cannot say that counsel's failure to present the contrary testimony of petitioner's brother so infected the trial that petitioner's conviction violated due process. Without prejudice, petitioner fails to establish the cause and prejudice necessary for consideration of this

claim in a successive postconviction petition. We affirm the trial court's denial as to petitioner's ineffective assistance of counsel claim.

¶ 34 Petitioner also argues that he has established cause and prejudice regarding his claim that his sentence violated the Eighth Amendment's cruel and unusual punishment clause. Petitioner's sentencing claim is based on the United States Supreme Court's decisions in *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In *Miller*, the Supreme Court determined that the eighth amendment prohibits the mandatory sentencing of a juvenile to life in prison without parole, even if the juvenile defendant was convicted of murder. 132 S. Ct. at 2475. In *Montgomery*, the Supreme Court elaborated on *Miller*, noting that the "central substantive guarantee" of the amendment is protection against disproportionate punishment, and that *Miller* was based on a "line of precedent holding certain punishments disproportionate when applied to juveniles." *Montgomery*, 136 S. Ct. at 732. The Supreme Court further found that this eighth amendment protection "goes far beyond the manner of determining a defendant's sentence." *Id.* at 732-33. Rather, the sentencing of a juvenile to life without parole was "excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* (internal quotation marks omitted). Therefore, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects the 'unfortunate yet transient immaturity' " of youth rather than "irreparable corruption." *Id.* at 734. In order to comply with the eighth amendment's prohibitions, the judge at a sentencing hearing must consider "youth and its attendant characteristics" so that juveniles who may be sentenced to life without parole can be separated from those who may not. *Id.* at 735.

¶ 35 In *People v. Davis*, 2014 IL 115595, ¶¶ 39, 42, our supreme court reasoned that *Miller* declared a new substantive rule that applied retroactively, and "[i]n terms of the requisite cause

and prejudice of the Post-Conviction Hearing Act, *Miller's* new substantive rule constitutes 'cause' because it was not available earlier to counsel \*\*\*, and constitutes prejudice because it retroactively applies to defendant's sentencing hearing." See also *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶¶ 19-28 (trial court's order denying defendant's motion to file a successive post-conviction petition reversed where the petition demonstrated sufficient cause and prejudice, based on *Miller*, regarding defendant's sentencing claim).

¶ 36 The State, however, argues that petitioner here has not shown sufficient cause because *Miller* was decided on June 25, 2012, while petitioner's appeal of the dismissal of his initial post-conviction petition was pending, and he had challenged his sentence as excessive in his petition. Therefore, the State argues, "there was no objective factor, external to the defense, which impeded his ability to raise the claim" in the initial post-conviction proceedings. We disagree. As petitioner points out, an as-applied challenge to his sentence under *Miller* is forfeited if the issue is raised for the first time on appeal. See *People v. Thompson*, 2015 IL 118151, ¶¶ 38-39. Since *Miller* was decided while his appeal was pending, petitioner could not have included the issue in his initial post-conviction petition. Therefore, an appropriate avenue to pursue this claim is to raise the issue in a successive post-conviction petition. *Id.*, ¶ 44. Pursuant to *Davis*, we find that petitioner has demonstrated sufficient cause for failing to present his sentencing claim in a prior proceeding.

¶ 37 The State also argues that petitioner cannot establish prejudice because *Miller's* new substantive rule applies only to juvenile defendants who received a mandatory life sentence with no chance for parole. Petitioner here did not receive a mandatory life sentence, but was sentenced to 55 years with the maximum for his offense being 60 years' imprisonment. However, since the sentencing statute precludes sentencing credit for homicide offenses, petitioner must

serve the entire sentence which, since he was 19 years old at the time of sentencing, is in effect a life sentence. See 730 ILCS 5/3-6-3(a)(2)(i) (West 2012) ("a prisoner who is serving a term of imprisonment for first degree murder \*\*\* shall receive no sentence credit and shall serve the entire sentence imposed by the court").

¶ 38 In *People v. Nieto*, 2016 IL App (1st) 121604, a division of this court relied on *Montgomery* in determining that *Miller's* prohibition against mandatory life sentences without parole for juveniles also applies to discretionary life sentences without parole. The *Nieto* court reasoned that *Montgomery's* procedural requirement for sentencing hearings merely enables a juvenile defendant to show that he falls within the protected class of persons for whom the eighth amendment prohibits a particular form of punishment. *Id.*, ¶ 47. The prohibited punishment is life in prison without parole which the sentencing judge imposed on a juvenile defendant without consideration of "youth and its attendant characteristics." The *Nieto* court recognized that *Montgomery's* prohibition did not distinguish between mandatory life sentences without parole and life sentences imposed as an exercise of discretion. *Id.*, ¶¶ 46, 49. The juvenile defendant in *Nieto* was sentenced to 78 years. *Id.*, ¶ 43. As the *Nieto* court noted, he "effectively received a sentence of natural life without parole." *Id.*, ¶ 42. See also *People v. Ortiz*, 2016 IL App (1st) 133294.<sup>1</sup> Since we find that the substantive rule as set forth in *Miller* and *Montgomery* applies retroactively to petitioner's case, he has established sufficient prejudice. *Davis*, 2014 IL 115595, ¶¶ 39, 42.

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<sup>1</sup> We acknowledge the State's citations to cases from other districts, *People v. Holman*, 2016 IL App (5th) 100587, and *People v. Walker*, 2016 IL App (3d) 140723, which declined to extend *Miller* to cases where the natural life sentence imposed was discretionary. However, we agree with the reasoning of *Nieto*, a first district case, and find *Miller* and *Montgomery* applicable here.



¶ 39 The State also argues that, even if *Miller* applies, petitioner here received the consideration in sentencing *Miller* requires. At the sentencing hearing, defense counsel in mitigation stated that petitioner was "pretty much raised by his brother Karl" who was not a good influence. She argued that petitioner, who was 17 years old at the time of the murder, has "changed" and "matured." Petitioner also never knew his parents and had been previously diagnosed with behavior and attention deficit disorders. Petitioner did not abuse drugs or alcohol, but "all his life he's been under the influence of Karl." At the hearing, he stated that he was "sorry for the family and sorry for wasting all [your] time with this case."

¶ 40 However, although the trial court considered petitioner's age and his personal history, the record does not indicate that the court considered the corresponding characteristics of his youth as outlined in *Miller* and *Montgomery*, or their effect on his conduct, which may render a lengthy sentence inappropriate. Since petitioner has demonstrated cause for failure to raise the sentencing claim in earlier proceedings, and prejudice as a result, we reverse the trial court's denial of petitioner's motion to file a successive petition and remand for further proceedings consistent with our order.

¶ 41 Affirmed in part and reversed in part; cause remanded.