THIRD DIVISION
November 7, 2018

No. 1-13-2670

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 11925
	)	
JOVANNY MARTINEZ,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence sufficient to prove that defendant personally discharged weapon that killed victim, supporting 25-year enhancement to sentence. Amendment to statute automatically transferring defendant to adult court did not apply retroactively to case pending on direct appeal when amendment enacted. Remanded for resentencing in adult court because juvenile defendant's discretionary, *de facto* life sentence was imposed without adequate consideration of his youth and attendant characteristics, in violation of Eighth Amendment.

¶ 2 Following a bench trial, defendant Jovanny Martinez was convicted of two counts of first degree murder in the death of Alex Arellano. Defendant's 75-year prison sentence included a 25-year mandatory sentencing enhancement for proximately causing the death with a firearm. Defendant, who was 15 years old at the time of the offense, was tried and sentenced as an adult pursuant to the automatic transfer provision of the Juvenile Court Act of 1987 (the Act) (705

ILCS 405/5-130 *et seq*. (West 2010)). On appeal, defendant contends (1) that the 25-year sentence enhancement imposed as part of his prison term should be vacated because the State failed to prove beyond a reasonable doubt that he personally discharged the firearm that killed Arellano; and (2) that the amendments to the automatic-transfer provision of the Juvenile Court Act of 1987 (Act) contained in Public Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a)) apply retroactively to his case. Defendant also raises various sentencing issues, contending, among other things, that his discretionary, *de facto* life sentence violates the Eighth Amendment because it was imposed without adequate consideration of the youth-related factors set forth in *Miller v. Alabama*, 567 U.S. 460 (2012), and *People v. Holman*, 2017 IL 120655. We affirm defendant's conviction, vacate his sentence, and remand for resentencing in adult criminal court.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with multiple counts of murder, aggravated kidnapping, aggravated unlawful restraint and concealment of a homicidal death. Because defendant was 15 years old at the time of the offense, and he had been charged with first-degree murder, he was automatically transferred to adult criminal court. 705 ILCS 405/5-130(1)(a) (West 2008). Portions of defendant's 2013 bench trial were held simultaneously with that of co-defendant Erick Ortiz.

¶ 5 At defendant's trial, Sabrina Arce testified that, between 6 and 7 p.m. on May 1, 2009, she and Arellano, who was her boyfriend, were walking back to Suarez's house on 53rd Street in Chicago after attending a party. Leslie Suarez and another woman were also present.

¶ 6 Arce and Suarez testified that, at 53rd Street and Albany Avenue, two Hispanic male teenagers approached on bikes and asked Arellano about his "shag" haircut, which represented a

gang affiliation. Arce testified that the teens were members of the Latin Kings street gang and asked Arellano what gang he was in, but Arellano did not respond. Arce testified that Arellano also did not respond when the teens asked him to display the Latin Kings gang sign; however, Suarez testified Arellano made the gang sign. Arellano lifted his shirt in response to the teens' request to see his tattoos, though Arellano had none, and the teens left after telling the group to "be careful."

¶ 7 Arce and Suarez said that, a short time later, a car containing five people drove up and four occupants got out. Arce testified that the passenger riding in the front seat, "one of the main Latin Kings," asked Arellano what gang he was in. Arellano did not reply. That person returned to the car, retrieved a baseball bat, and struck Arellano in the head with it. Arellano ran, and the group chased him. Suarez identified defendant as one of the group that got out of the car.

¶ 8 Arce testified that as Arellano ran, he was struck by the car. Arellano rolled onto the hood, fell to the ground, and then got up and continued running. The group chased Arellano out of Arce's sight. The person who hit Arellano with the bat told Arce that she should run away or else she would get hurt.

¶ 9 Daniel Villeda testified that at about 6 p.m. on the night in question, he was in the yard of his house at 3004 West 54th Place, near Albany Avenue. Villeda saw a group of Hispanic teens swinging baseball bats at the ground. Villeda testified that he "didn't see what but they were hitting the [floor] with bats." Other teens were making kicking and punching motions. Villeda called 911 to report the incident. After the attack, three or four of the teens in the group walked past Villeda. Villeda identified defendant in a police photo array and a lineup as one of the individuals in that group.

¶ 10 Edgar Silva testified he was the driver of the car and was a Latin King. Silva pleaded guilty to second-degree murder charges in this case in exchange for a 20-year sentence. As part of Silva's testimony relating to Ortiz, Silva was asked on cross-examination if he saw defendant taking part in the attack on Arellano. Silva responded that defendant "was nowhere in sight."

¶ 11 Chicago police officers Lisa Svihula and Robert Caulfield testified that, around 7 p.m. on the night in question, they received a call of a battery in progress at 54th Place and Albany. As they responded to the call, Svihula and Caulfield saw defendant running toward them and holding his left side near his waist. Defendant, upon seeing the officers, reversed course and ran east on 54th Street.

¶ 12 The officers followed defendant in their car, and Officer Caulfield then pursued defendant on foot. Officer Caulfield testified that he was about 15 feet behind defendant when defendant pulled a firearm from the left side of his waistband and tossed it over a fence. The officer arrested defendant and then recovered the weapon. On cross-examination, Officer Caulfield stated he did not see defendant shoot the gun and he did not know if the gun had been fired. Officer Svihula testified that defendant was wearing blue jeans and a white and blue shirt that night, and she identified those items as having been placed in inventory by police.

¶ 13 Dr. Stephen Cina, the Cook County chief medical examiner, testified as to the post-mortem examination of Arellano by another doctor. Arellano's body displayed "100 percent full thickness burns and body charring." Arellano had a bullet entrance wound on the top of his head. He also had several lacerations on his head due to a "blunt force impact" and his skin was split in each location to expose his skull, though the heat of the fire could have caused the tissues to contract, making the lacerations appear to have split wider. Arellano died of a gunshot wound

to the head and the manner of his death was homicide. A fired bullet was removed from Arellano's head.

¶ 14 The parties stipulated that a fired cartridge case was recovered near Arellano's body. Justin Barr, an Illinois State Police (ISP) expert in firearms identification, testified that he received the weapon recovered in this case, as well as the fired cartridge case and the fired bullet, in a sealed condition. Barr's testing revealed that the bullet recovered from Arellano had been fired by the weapon retrieved by Officer Caulfield.

¶ 15 Scott Rochowicz, an ISP expert in gunshot residue identification, testified that he received defendant's jeans in a sealed condition. His testing revealed that the "left pocket in the exterior of the waistband" was positive for the presence of gunshot residue, meaning the fabric had either contacted an item containing gunshot residue or was in close proximity to a firearm when it was discharged.

¶ 16 The parties stipulated that Arellano's body was burned beyond recognition but could be identified using a DNA comparison analysis with Arellano's mother. The parties further stipulated that Arellano's blood was found on defendant's jeans and shirt.

¶ 17 The defense elected to present no evidence.

¶ 18 The trial court found defendant guilty of first degree murder and also found that defendant personally discharged a firearm proximately causing Arellano's death. The trial court sentenced defendant to 50 years for the murder and an additional 25 years for personally discharging the weapon that caused the victim's death.

¶ 19 II. ANALYSIS

¶ 20 A. Reasonable doubt

¶ 21 Defendant first contends that the 25-year sentence enhancement should be vacated, because the State failed to prove beyond a reasonable doubt that he personally discharged the firearm that caused Arellano's death. He argues that the attack on the victim involved several people, and that he was not identified as the shooter by any eyewitness.

¶ 22 When a defendant challenges the sufficiency of the evidence, the relevant inquiry is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12. It is the purview of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *Id*. Accordingly, a reviewing court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence. *Id*. On appeal from a criminal conviction, this court will not reverse the trial court's judgment unless the evidence is so unreasonable, improbable or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id*. The reasonable doubt standard applies in all criminal cases, whether the evidence is direct or circumstantial. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47.

¶ 23 A trial court must impose a sentence enhancement of 25 years to natural life imprisonment if the court finds that, during the commission of the offense, the defendant personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement or death to another person. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). A defendant's criminal acts are the proximate cause of another's death when they contribute to that person's death, and the death is not caused by an intervening event unrelated to the defendant's acts. *People v. Kaszuba*, 375 Ill. App. 3d 262, 268 (2007). This enhancement may be

added only if the underlying facts are proved by the State beyond a reasonable doubt. *People v. Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 57; see also *Kaszuba*, 375 Ill. App. 3d at 267 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

¶ 24 Here, the State presented sufficient circumstantial evidence to support the sentence enhancement. Several witnesses testified that defendant was among a group of individuals that attacked Arellano. Defendant also was seen walking away after being among a group that kicked and struck Arellano. Officer Caulfield recovered a weapon that he saw defendant throw away during the foot chase immediately following the beating. Ballistics testing established that the bullet recovered from Arellano was fired from that weapon. Gunshot residue testing of defendant's clothing revealed that the area of defendant's left waistband, which he had been holding during the chase, tested positive for gunshot residue, meaning the fabric had contact with an item containing gunshot residue or had contact with a discharged firearm. Thus, the State presented evidence that defendant had possession of the weapon used to kill Arellano. And Arellano's blood was found on defendant's clothing. Given that evidence, a reasonable trier of fact could find that defendant personally discharged the weapon that killed Arellano.

¶ 25 Defendant posits that he could have been present when someone else shot Arellano and was merely holding the weapon later, as directed by a gang leader. He also points out that no gunshot residue was found on his hands. It is not the task of this court of review to retry the defendant. *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). It was the purview of the trier of fact to consider the facts presented and the reasonable inferences to be drawn therefrom. *Bradford*, 2016 IL 118674, ¶ 12. Even if defendant's hypothesis had been presented at trial, the trier of fact was not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d

213, 229 (2009). Viewing the evidence on this point in the light most favorable to the State, the trial court could have rationally found that defendant personally discharged the weapon that proximately caused Arellano's death. Accordingly, we affirm the trial court's imposition of the 25-year sentence enhancement.

¶ 26 B. Automatic transfer

¶ 27 Next, defendant contends that the amendments to the automatic-transfer provision of the Juvenile Court Act of 1987 (Act) contained in Public Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a)) apply retroactively to his case. At the time of defendant's prosecution, section 5-130 of the Juvenile Court Act required that all juveniles 15 years old and up be automatically transferred to adult court when they were charged with certain offenses, including first-degree murder. 705 ILCS 405/5-130(1)(a) (West 2008). After defendant was convicted and sentenced in adult court, and while his direct appeal was pending, the General Assembly raised the age of automatic transfer from 15 years old to 16 years old. Public Act 99-258, § 5. Defendant was 15 at the time of his offense, so the amendment would place him outside the reach of the automatic-transfer provision if it applies to him. The question, then, is whether the amendment applies retroactively to individuals like defendant.

¶ 28 The Illinois Supreme Court recently answered this question in *People v. Hunter*, 2017 IL 121306. The facts of *Hunter* are indistinguishable from this case. In *Hunter*, the defendant was tried and sentenced as an adult pursuant to the automatic-transfer provision, which was later amended while his direct appeal was pending. *Id.* ¶¶ 4-8. If the amendment applied retroactively to his case, it would have placed him outside the reach of the automatic-transfer provision. See *id.* ¶ 17. But the supreme court held that it did not. *Id.* ¶ 43.

¶ 29 The supreme court reiterated in *Hunter* that it applies the United States Supreme Court's test from *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), when addressing the retroactivity of legislation. *Hunter*, 2017 IL 121306, ¶ 20. When applying the *Landgraf* test, a court should first look to whether the legislature clearly indicated the temporal reach of the amended statute. *Id.* If it did, then the legislature's expression of its intent controls, absent some constitutional problem. *Id.* If the legislature did not signal its intent, then the court looks to whether application of the statute would have "a retroactive impact." *Id.*

¶ 30 But, the supreme court noted, "Illinois courts need never go beyond the first step of the *Landgraf* analysis," because the legislature has clearly set forth the temporal reach of every amended statute. *Id.* ¶ 21. The General Assembly did so in section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2014)), a "general savings clause" that has been interpreted "as meaning that procedural changes to statutes will be applied retroactively, while substantive changes are prospective only." *Hunter*, 2017 IL 121306, ¶ 22 (quoting *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 20). In other words, if the statutory amendment itself does not indicate its temporal reach, it is "provided by default in section 4." *Id.*

¶ 31 The supreme court applied that version of the test to the amendment to section 5-130. *Id.* ¶¶ 23-36. The amendment is procedural. *Id.* ¶ 23. And as to procedural amendments, the court explained, section 4 "requires that 'the proceedings *thereafter*'—after the adoption of the new procedural statute—'shall conform, so far as practicable, to the laws in force at the time of such proceeding.'" *Id.* ¶ 31 (quoting 5 ILCS 70/4)). Section 4 thus "contemplates the existence of proceedings after the new or amended statute is effective to which the new procedure could apply." *Id.* But, the court concluded, only trial-court proceedings are "capable of conform[ing] to the amended statute." *Id.* ¶¶ 27-28, 32-33. Thus, if the trial-court proceedings were complete at

the time the amendment took effect, and the appellate court does not find reversible error that requires a remand to the trial court anyway, there are no further proceedings in the case to which the amendment could retroactively apply. *Id.* ¶¶ 32-33. To hold that the amended statute applied retroactively, as it were, on direct appeal—or in other words, that it created an independent basis for a remand—would "effectively creat[e] new proceedings for the sole purpose of applying a procedural statute that postdates [the defendant's] trial and sentence." *Id.* ¶ 33. The supreme court rejected this result as inconsistent with the language of section 4 and noted its "grave concerns" about the "waste of judicial resources" it would cause, were it otherwise. *Id.* ¶¶ 33, 36.

¶ 32 Lastly, the supreme court reconciled this holding with its decision in *Howard*, 2016 IL 120729, in which the court had held that the amendment applied retroactively to "ongoing proceedings" in "pending case[s]." *Hunter*, 2017 IL 121306, ¶ 30; *Howard*, 2016 IL 120729, ¶¶ 28, 31. The court clarified that by a "pending case," it had meant "a case in which the trial court proceedings had begun under the old statute [*i.e.*, before the amendment in Public Act 99-258 took effect] but had not yet concluded." *Hunter*, 2017 IL 121306, ¶ 30. And by "ongoing proceedings," it had meant "proceedings thereafter," within the meaning of section 4, in which the new procedure could be applied—in a word, further proceedings in the trial court. *Id.*

¶ 33 Here, *Hunter*, not *Howard*, is directly on point. As in *Hunter*, defendant's direct appeal was already pending when the automatic-transfer provision at issue was amended, and we have found no independent basis to remand the case to the trial court for further proceedings. Because the amended automatic-transfer provision does not apply retroactively to defendant's case, he was properly tried and sentenced in adult court.

¶ 34 Alternatively, defendant argues that the automatic-transfer provision is unconstitutional. Specifically, he says that it violates the Eighth Amendment to the United States Constitution, the

Proportionate Penalties Clause of the Illinois Constitution, and state and federal guarantees of substantive and procedural due process. U.S. Const. amends. VIII, XIV; Ill. Const. 1970, art. I, §§ 2, 11. Defendant acknowledges that the Illinois Supreme Court rejected all of these arguments in *People v. Patterson*, 2014 IL 115102, ¶¶ 89-111. Because *Patterson* is binding precedent, we have no authority to hold, as defendant contends, that it was wrongly decided. *People v. Artis*, 232 Ill.2d 156, 164 (2009). We need not discuss defendant's arguments any further.

¶ 35 C. Sentencing

¶ 36 In adult court, defendant was subject to a mandatory minimum sentence of 45 years in prison—20 (to 60) years for first-degree murder, plus 25 years (to natural life) for proximately causing Arellano's death with a firearm. 730 ILCS 5/5-4.5-20(a)(1); 5/5-8-1(a)(1)(d)(iii) (West 2009). He was sentenced substantially above that minimum, receiving an aggregate term of 75 years—50 years for Arellano's murder, plus a 25-year firearm enhancement. Defendant raises several challenges to that sentence. He contends, among other things, that it violates the Eighth Amendment's ban on cruel and unusual punishments, because it was a life sentence—albeit a discretionary, *de facto* life sentence—imposed on a juvenile without individualized consideration of his youth, immaturity, and potential for rehabilitation.

¶ 37 The Eighth Amendment prohibits a state from imposing "cruel and unusual punishments" for criminal offenses. U.S. Const., amends. VIII, XIV. This prohibition "flows from the basic precept of justice that punishment for the crime should be graduated and proportioned to both the offender and the offense." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (internal quotations omitted). And this precept, as *Miller* held, prohibits a mandatory sentence of life without parole for an offender younger than 18 years of age. *Id.* No matter what crimes they commit, "children are constitutionally different from adults for purposes of sentencing" because of their "distinctive

(and transitory) mental states and environmental vulnerabilities[.]" *Id*. at 471-73. These distinctive traits are grounded in fundamental differences between juveniles and adults with regard to their neurological and psychological development. *Id*. In particular, "children have a lack of maturity and underdeveloped sense of responsibility, leading to recklessness, impulsivity and heedless risk-taking." *Id*. at 471 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). They are more vulnerable to "negative influence and outside pressures." *Id.* They "lack the ability to extricate themselves from horrific, crime-producing settings." *Id*. And "a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity]." *Id*. "Because juveniles have diminished culpability and greater prospects for reform," for the reasons just described, "they are less deserving of the most severe punishments." *Id*. (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

¶ 38 Having recognized that "youth matters for purposes of meting out the law's most serious punishments," the Court held in *Miller* that a sentencing scheme must afford the judge discretion to consider "an offender's youth and attendant characteristics" before imposing a sentence of life without parole. *Id*. at 483. A sentencing scheme that deprives a juvenile of any chance to re-enter society automatically—without individualized consideration of any mitigating factors that bear on his diminished culpability and increased potential for rehabilitation—poses too great a risk of disproportionate punishment. *Id.* at 479, 483. A mandatory life sentence for a juvenile thus violates the Eighth Amendment. *Id*. at 479.

¶ 39 The Illinois Supreme Court has extended *Miller*'s express holding in two recent cases. In *People v. Holman*, 2017 IL 120655, ¶ 40, the court held that the Eighth Amendment also requires a judge to give individualized consideration to a juvenile defendant's youth and attendant characteristics before imposing a *discretionary* sentence of life in prison. And in *People v. Reyes*,

2016 IL 119271, ¶¶ 9, 12, the supreme court held that a life sentence, for purposes of the Eighth Amendment, includes a "*de facto* life sentence"—a term of years that, while not an "actual" life sentence, is nonetheless "unsurvivable," and thus has the "same practical effect on a juvenile defendant's life."

¶ 40 The State argues that, because the *de facto* life sentence imposed in *Reyes* was the mandatory minimum (*id.* ¶ 2), defendant's discretionary sentence does not "technically" fall within *Reyes*'s holding. But if defendant received a term of years that amounts to a *de facto* life sentence—and the State concedes that it does—*Holman* renders this distinction irrelevant. We recently observed that after *Holman* and *Reyes*, a juvenile defendant should now be able to "raise a *Miller* claim to either a life sentence or a term-of-years sentence that amounts to a *de facto* life sentence, whether the circuit court imposed the sentence pursuant to a mandatory sentencing scheme or a discretionary sentencing scheme." *People v. Croft*, 2018 IL App (1st) 150043, ¶ 20. The relevant part of that observation was *dicta* in *Croft*, since the juvenile defendant in that case received an actual, rather than *de facto*, discretionary life sentence. See *id.* ¶ 1. But we agree with *Croft*'s general observation, and we now hold explicitly that a sentencing judge must consider a juvenile defendant's youth and attendant characteristics before imposing a discretionary, *de facto* life sentence.

¶ 41 Defendant was 15 years old at the time of his offense. He was sentenced to 75 years in prison, and he is ineligible for good-time credits. 730 ILCS 5/3-6-3(a)(2)(i) (West 2009). Thus, if he survived, defendant would be 90 years old when he became eligible for mandatory supervised release. Our supreme court has not (yet) definitively established a threshold for a *de facto* life sentence, but we appreciate and agree with the State's concession that defendant's sentence "is beyond whatever line might eventually be drawn." This conclusion is consistent with our own

attempts to draw a reasonable line. See, *e.g.*, *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 88 (16-year-old defendant, not eligible for MSR until age 83, received *de facto* life sentence); *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 42 (17-year-old not eligible for MSR until age 94); *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 23 (15-year-old, a codefendant in this case, not eligible for MSR until age 75). Even if defendant lived to the age of 90, the prospect of minimal geriatric release does not afford him a meaningful opportunity to prove that he has rehabilitated himself and is fit to reenter society. See *People v. Buffer*, 2017 IL App (1st) 142931, ¶¶ 59, 62 (overall life expectancy of 64 years for inmates in general prison populations probably overstates life expectancy for minors sentenced to lengthy prison terms). Defendant received a *de facto* life sentence.

¶ 42 Thus, the question is whether the trial court gave adequate consideration to defendant's youth before imposing that sentence. Our analysis of this question is governed by *Holman*, 2017 IL 120655. Under *Holman*, a trial court may impose a discretionary life sentence on a juvenile defendant only after finding that his conduct showed "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id.* ¶ 46. And the trial court can make that determination only after considering the defendant's "youth and attendant characteristics." *Id.*

¶ 43 In carrying out this inquiry, it is not enough for the trial court to "consider generally mitigating circumstances related to a juvenile defendant's youth." *Id.* ¶ 42. The trial court is free to consider any relevant youth-related information at its disposal, but it must, at a minimum, consider the specific youth-related factors set out by the United States Supreme Court in *Miller*. *Id.* These factors include, but are not limited to, (1) the juvenile defendant's chronological age at the time of the offense; and any evidence of his particular immaturity, impetuosity, and failure to

appreciate risks and consequences; (2) his family and home environment; (3) his degree of participation in the homicide, and any evidence of familial or peer pressures that may have affected him; (4) his inability to deal with police officers or prosecutors, and his incapacity to assist his own attorneys; and (5) his prospects for rehabilitation. *Id.* ¶ 46 (citing *Miller*, 567 U.S. at 477-78). Our review is limited to "evidence of the defendant's youth and its attendant characteristics at the time of sentencing;" his good or bad conduct in prison since that time can neither undercut nor buttress a finding of incorrigibility. *Id.* ¶ 47.

¶ 44 At his sentencing hearing, defendant did not present any evidence or witnesses. Arguing in mitigation, defense counsel emphasized that defendant was only 15 years old at the time of the offense. Although defendant denied being in a gang when the probation officer interviewed him, counsel said that, "[o]bviously, he was a member of the Latin Kings," and his "heart and sole [*sic*] belonged to that gang." Counsel asserted, without any further elaboration, that "it's beyond contention that a teenager's [*sic*] their rationale, their ability to reason is not fully formed for a number of years," and counsel urged to judge to consider that "this was a very, very young person." After "years of rehabilitation and so forth," counsel urged, there should be "at least some chance for this young man."

¶ 45 The State acknowledged that defendant did not have any criminal history. The PSI listed a juvenile gun-possession case, but as the State clarified, that charge actually pertained to the gun defendant threw over the fence when the police chased and arrested him immediately after Arellano's murder. But the facts of this case alone, the State argued, demand a sentence "at the high end" of the range. The State then asserted, without any further explanation, that "the word rehabilitation [and] this defendant just don't go in the same sentence," that "[s]ometimes there are bad people in the world." Defendant thus had "to be put in a dark deep bad place *** for

whatever years he has left on this planet." The State cited, as statutory aggravating factors, the heinous and brutal nature of the offense, defendant's gang affiliation, and the need to deter other gang members from this type of behavior. The only evidence the State presented was a victim impact statement by Arellano's mother.

¶ 46 Defendant's statement in allocution was cursory: "I mean somebody life got tooken [*sic*] and now my life is tooken [*sic*] for no reason, and that's all I got to say."

¶ 47 The trial court began by noting that Arellano was murdered because gang members like defendant believe they are "somehow entitled to a neighborhood," and "entitled to tell people where they can and can't go" based on the way they dress. Addressing defendant's age, the court repeated variations on its theme of "No one needed to tell a 15-year-old boy that he shouldn't hurt another individual" a total of seven times, reiterating along the way that there are some things you just don't do to other people—run them over, hit them with bats, shoot them, burn them—and that defendant was old enough, at 15, to know better. In the same vein, the judge told defendant, "[y]our young age doesn't excuse your behavior in this."

¶ 48 The judge also told defendant that he "knew guns were a problem," because—the judge claimed—he previously had a juvenile case involving a gun-possession charge. The judge also noted defendant's apparent lack of remorse and his refusal to accept responsibility despite the overwhelming evidence of his guilt. Lastly, the judge characterized Arellano's murder as "one of the most salvage [*sic*] most horrific things I think I've seen in this building to run over and beat and shoot and burn another human being."

¶ 49 We turn now to the five *Miller-Holman* factors, with the caveat that, in fairness to counsel and the trial court, *Holman* was decided after the sentencing hearing in this matter, so they lacked its guidance. And these five factors, which originally came from *Miller*, have also

now been codified in the Unified Code of Corrections, which requires the trial court to consider these factors before sentencing a juvenile defendant. See 730 ILCS 5/5-4.5-105 (West 2016). That law, as well, was passed after the sentencing hearing in this case, so we cannot fault the court or the parties for lacking that statutory guidance. For our purposes, however, it makes no difference whether the sentencing preceded or followed the decision in *Holman* or the statutory change; we apply those constitutional guidelines regardless. See *Holman*, 2017 IL 120655, ¶ 45 ("Because *Miller* is retroactive [citation], all juveniles," regardless of when they were sentenced, "should receive the same treatment at sentencing.").

¶ 50 Regarding the first factor, the trial court considered—at least in some general sense—defendant's chronological age. Defense counsel highlighted defendant's young age at the sentencing hearing, although the State did not; and the trial court referred to it no fewer than eight times throughout its findings. Each time, though, the trial court's point was the same: At the age of 15, defendant was old enough to know that the various acts of violence inflicted on Arellano were (putting it mildly) "wrong," that "[n]o one needed to tell a 15-year-old boy that he shouldn't hurt another individual."

¶ 51 That modest point may be true enough, but it barely scratched the surface of the *individualized* inquiry *Holman* requires into defendant's immaturity, impetuosity, and failure to appreciate risks and consequences. *Id.* ¶ 46. Indeed, no evidence bearing on this specific, individualized inquiry was presented at sentencing. Defense counsel made some general remarks pertaining to age while arguing in mitigation, but those remarks did not comprise any evidence of defendant's own particular level of maturation.

¶ 52 Second, defendant's presentence investigation report (PSI) gave the trial court some basic information about his family and home environment to consider. Defendant's parents divorced

when he was eight years old. Since then, he had been living with, and was being raised primarily by, his mother in Bridgeport; but his father had remained active and involved in his upbringing. Both of his parents were employed, and defendant denied that there was a history of abuse of any kind within the family. Defendant's family and home life thus seemed to be, as he described it, more or less "normal."

¶ 53 Third, defendant's degree of participation in the homicide was, in one sense, obvious. Unlike Leon Miller, for example, defendant was no mere lookout. See *People v. Leon Miller*, 202 Ill. 2d 328, 330, 341 (2002) (life sentence for 15-year-old lookout during shooting violated proportionate penalties clause). The evidence showed that he was part of the group that chased and beat Arellano, and the trial court specifically found that he fired the shot that killed Arellano.

¶ 54 But the evidence at sentencing did not meaningfully address the question whether "peer pressures" may have influenced defendant's participation in this crime. *Holman*, 2017 IL 120655, ¶ 46. One obvious focal point of this inquiry would be defendant's gang affiliation. Although defendant purported to deny any gang affiliation in his interview with the probation officer, the evidence showed that Arellano was attacked, and ultimately killed, by a group of Latin Kings, policing what they deemed to be their territory, because he refused to show allegiance to the gang.

¶ 55 The parties agree that defendant's apparent gang affiliation heralds the possibility that he was susceptible to, or influenced by, peer pressure. But they draw sharply divergent conclusions, neither of which we can accept. Defendant simply asserts that he was "not in full control," that he was "merely a teenager, caught up in an ongoing gang conflict controlled and proliferated by men." Whether defendant got swept up in something beyond his control, subjecting him to pressures he was too young or immature to resist—or whether he was poised and mature enough

to maintain control over his life, despite the negative pressures around him—is exactly the question. But defendant does not cite, and we have not found, any evidence in the record that addresses this question with specificity.

¶ 56 According to the State, the trial court found that peer pressure affected defendant but was not a mitigating factor. We find no support for this conclusion in the record, either. The remarks cited by the State are just generic references to defendant's gang affiliation. For example: "Your [sic] gang affiliated where are they now? They're not here. You're left. They left you and you did this for what? You were representing what, representing nothing." Remarks like this do not remotely show that the trial court specifically considered whether, and if so to what extent, defendant's conduct may have been the product of a youthful susceptibility to peer pressure, rather than the manifestation of a fully formed and enduring character trait.

¶ 57 Although it does not pertain specifically to the youth-related inquiry, we are compelled to note that, in one critical respect, the trial court appears to have overstated defendant's proven involvement in the crime. The trial court attributed the burning of Arellano's body to defendant three times in its findings. The evidence did not support that attribution.

¶ 58 The burning of Arellano's body was the factual predicate for the charge of concealment of a homicidal death. But the State *nolle prossed* the concealment charge against defendant during the trial. As the State later explained in its rebuttal argument, "in a really pathetic, almost idiotic attempt to cover [Arelleno's murder] up, somebody, I would submit a member of the Latin Kings, lit that poor young man on fire." Somebody, yes—but not defendant, as far as the evidence showed. Indeed, there was *no* evidence showing that defendant participated in that act. The evidence did not even show that Arellano's body had been burned by the time defendant was arrested—by all accounts, within minutes of the initial group attack on Arellano.

¶ 59 The trial court's repeated attributions of this act to defendant are concerning for two reasons. First, it is not clear whether the trial court realized that Arellano, thankfully, was not burned alive. In fact, the trial court's remarks suggest that it did not understand that fact. For example: "to run over and beat and shoot and burn another human being," the judge said, was "one of the most salvage [*sic*] and horrific things I think I've seen in this building." But the forensic evidence showed that Arellano was already dead when his body was burned. As the State acknowledges in its brief, the medical examiner testified that no evidence of soot was found in Arellano's airway, indicating that he was not breathing when the fire was lit; that is why a single gunshot wound to the head was ruled the exclusive cause of death. A mistaken belief that Arellano was burned alive, and that defendant committed or aided that horrifying act, would undoubtedly have a powerful impact on his sentence. It would give the false impression that defendant prolonged Arellano's death with unimaginable suffering—that he not only beat and shot Arellano, but also outright tortured him to death.

¶ 60 Even giving the trial court the benefit of that doubt, attributing to defendant the act of burning Arellano's corpse would still be a significant error. Mutilating a deceased's body is a deeply offensive act, not to mention a serious crime. See 720 ILCS 5/12-20.5 (Class X offense of dismembering a human body is committed by one who "knowingly *** mutilates any part of a deceased's body"). Either way, we do not mean to downplay defendant's role in Arellano's murder. But whatever sentence defendant may deserve, it cannot be one that punishes him for the burning. And we cannot say with confidence that defendant's sentence does not.

¶ 61 As to the fourth *Miller-Holman* factor, there was no evidence that defendant was unable to deal with law enforcement or assist his attorneys, or that he suffered from any other similar incapacity. If there had been any meaningful evidence of this sort—especially any evidence of

defendant's inability to participate in his own defense—we would expect it to have come to light during the proceedings, even when no special inquiry into his youth was undertaken at sentencing.

¶ 62 Fifth and finally, there was little or no evidence presented of defendant's prospects for rehabilitation. As the State acknowledges, neither the trial court nor the PSI expressly mentioned this important consideration. Compare, *e.g.*, *Holman*, 2017 IL 120655, ¶¶ 8, 48 (probation officer explicitly assessed juvenile's potential for rehabilitation). The arguments by defense counsel and the prosecutor did not shed any light on it, either. Defense counsel simply urged the trial court to give defendant a chance, eventually, after some "years of rehabilitation and so forth," since he was so young at the time of the offense. And the prosecutor merely urged the trial court to put defendant "in a dark deep bad place *** for whatever years he has left on this planet," since he had no hope at all of rehabilitating himself, for reasons the prosecutor did not care to explain.

¶ 63 The trial court reasonably found that defendant's statement in allocution showed a lack of remorse. Apart from that, the only evidence that had any bearing on defendant's potential for rehabilitation was his criminal history. See *id.* ¶¶ 8, 13, 48 (juvenile's commission of two other murders and lack of remorse showed prospects for rehabilitation were minimal). On this point, here again the trial court erred; defendant had no criminal history.

¶ 64 The trial court incorrectly concluded that defendant "knew guns were a problem" because he had been charged, in a prior juvenile case, with unlawful possession of a firearm. This remark suggests that the trial court found defendant's (supposed) criminal history, however minimal, to diminish his prospects for rehabilitation. But as the State clarified at the sentencing hearing, the gun charge listed on defendant's PSI arose from the events at issue in this case, *not* from a prior

offense. (Defendant was arrested on that gun charge; only later was he connected to, and charged with, Arellano's murder.)

¶ 65 In sum, the trial court gave *some* consideration to defendant's youth. Some of the *Miller-Holman* factors were adequately addressed, as a matter of routine, by defendant's PSI and/or the judge's knowledge of the trial proceedings. But other ostensibly youth-related findings made by the trial court were generic. There was no individualized inquiry into defendant's immaturity, impetuosity, failure to appreciate risks and consequences, or susceptibility to peer pressure and other negative social influences. These "hallmark features" of youth are the essential core of the *Miller-Holman* inquiry. See *Miller*, 567 U.S. at 477. The most important questions raised by that inquiry were thus left unanswered. A sentencing hearing at which the defense and the court knew that the *Miller-Holman* inquiry was the governing law would—we would hope—look markedly different than the sentencing hearing held in this case. We hold that defendant's sentencing did not comply with *Holman*.

¶ 66 D. Considerations on Remand

¶ 67 For guidance on remand, we would reiterate that not every discretionary life sentence imposed on a juvenile before *Holman* will run afoul of the new constitutional requirements announced in that case. Even before *Holman* made youth and immaturity *constitutionally* relevant to the imposition of a discretionary life sentence, these factors were sometimes evaluated in mitigation, with the specificity that is now constitutionally required.

¶ 68 For example, in *Holman* itself, the trial court that sentenced Holman had the benefit of three psychiatric and psychological reports that examined (among other things) the potential effects of Holman's age and maturation on certain aspects of his behavior and culpability. See *Holman*, 2017 IL 120655, ¶¶ 9-12. Three years before the murder, when Holman was 14 years

old, he had been diagnosed as mildly mentally retarded by therapists treating him at a children's home. *Id.* ¶¶ 11-12. A psychiatrist, Dr. Raza, reviewed that diagnosis in connection with defendant's sentencing. *Id.* ¶ 12. The therapists had found that defendant was "at times not aware of his surroundings and [was] easily led into doing 'bad deeds,' due to his lack of confidence and high need for approval from more intelligent peers." *Id.* But in the intervening years, Holman had matured significantly, and his intelligence-test results had improved. *Id.* Dr. Raza explained that "[t]his improvement can be explained by growing up in chronological age and maturation of the central nervous system." *Id.* Dr. Raza opined that Holman had developed the capacity for "socially appropriate judgment" by the time of the murder, even though, in his earlier teen years, his intellectual underdevelopment had left him unduly susceptible to peer pressure. *Id.*

¶ 69 The three evaluations of Holman, and in particular Dr. Raza's developmental findings, thus apprised the sentencing judge of Holman's overall maturation and his level of susceptibility to peer pressure. Here, in contrast, no similar evaluations of defendant—much less any specific youth-related findings about his susceptibility (or resistance) to peer pressure—were submitted to the trial court. Something of this nature must be submitted on remand, should the trial court consider a *de facto* life sentence once more.

¶ 70 With respect to two other key youth-related attributes, the supreme court noted that the reports did not depict Holman as particularly impetuous or prone to heedless risk-taking. *Id.* ¶ 48. These questions intersect with the inquiry into Holman's age and maturation that the therapists' earlier findings prompted Dr. Raza to make. Thus, it was reasonable to expect that he would have discovered, and reported, any notable information about these factors in the context of his conclusion that Holman was capable of exercising "socially appropriate judgment" when he committed the murder. But here, no relevant findings were reported to the trial court for the very

different reason that no serious inquiry into defendant's youth and attendant characteristics was ever made. In *Holman*, the sentencing judge thus had "evidence"—not just argument from the attorneys, but actual evidence—directly "related to the *Miller* factors." *Id.* ¶ 50. There is nothing comparable in this case, and there must be, next time, if the trial court is considering a *de facto* life sentence.

¶ 71 The facts of Arellano's murder, awful as they are, must not completely obscure the fact that a 15-year-old with no prior juvenile record has been sentenced, for all practical purposes, to spend the rest of his life in prison. "*Miller*'s central intuition" is that "children who commit even heinous crimes are capable of change;" even heinous crimes, in other words, may be the product of transient immaturity rather than irreparable corruption. *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718, 736 (2016); *Miller*, 567 U.S. at 479-80. Defendant was sentenced without any meaningful inquiry into which was the case. As a result, whether this was the "uncommon" case in which a juvenile should be permanently deprived of any "hope for some years of life outside prison walls"—for something he did when he was 15 years old—remains an open question. See *Montgomery*, 136 S. Ct. at 737; *Miller*, 567 U.S. at 479. Because *Holman* now requires this inquiry to be undertaken in earnest, we remand for the trial court to do so.

¶ 72 We express no view about the sentence defendant should ultimately receive. In particular, we do not find, as defendant asks us to, that his 75-year sentence was excessive and an abuse of discretion. This was a brutal and senseless murder, and we do not suggest that defendant should be punished lightly. But as we have noted, in addition to the lack of the youth-related inquiry that the law now requires, the trial court also incorrectly stated that defendant had a criminal history, and, even more importantly, seemed to believe that defendant participated in burning Arellano (perhaps further compounding that mistake with the belief that Arellano was still alive at the

time). These factual errors by the trial court further strengthen the conclusion that resentencing is warranted. We trust that these errors will be addressed on remand, and that they will not inform the trial court's decision as to the punishment defendant should receive for his role in Arellano's murder.

¶ 73 On remand, defendant is entitled to be resentenced under the new juvenile sentencing statute, 730 ILCS 5/5-4.5-100 (West 2015), that took effect on January 1, 2016. *Hunter*, 2017 IL 121306, ¶ 54; *Holman*, 2017 IL 120665, ¶ 45; *Reyes*, 2016 IL 119271, ¶ 12; see 5 ILCS 70/4 ("If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."). Pursuant to subsection (b) of the new statute, the trial court will have the discretion not to apply the formerly mandatory firearm enhancement. 730 ILCS 5/5-4.5-100(b). We express no view as to how the trial court should exercise that discretion.

¶ 74 For these reasons, we remand this case to the circuit court with directions that a new sentencing hearing be held in accordance with section 5-4.5-100. In light of this disposition, we need not reach any of the additional challenges defendant raises to his sentence.

¶ 75 E. Mittimus Corrections

¶ 76 Defendant's remaining two contentions on appeal involve the mittimus and are conceded by the State. First, defendant asserts, and the State correctly agrees, that his convictions on two counts of first-degree murder violate the one-act, one-crime doctrine because he was only charged with killing one person. Under that rule, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). The mittimus reflects that defendant was convicted of two counts of first degree murder. Accordingly, defendant's conviction on one of those counts should be vacated.

¶ 77 When there is a one-act, one-crime violation, the less serious count should be vacated and sentence should be entered on the more serious count. *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009). When determining which of two offenses is more serious, we look to the possible punishments for the two offenses and which offense has the more culpable mental state. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Here, we agree with the parties that Count 18 is the more serious count, as it includes the allegation that defendant personally discharged the firearm that caused Arellano's death, thus carrying a greater possible punishment than Count 1. We direct the court, on resentencing, to sentence defendant only on Count 18.

¶ 78 Defendant further argues that the mittimus should be corrected to reflect the accurate count number on which he was sentenced. We see no need to reach this issue, as a new sentencing order will be entered on remand.

¶ 79 Finally, defendant contends, and the State correctly agrees, that the mittimus in this case should be corrected to reflect 1,518 days of credit for time spent in custody prior to sentencing, instead of the 1,125 days listed. Defendant was arrested on May 1, 2009, and he was sentenced, and his mittimus issued, on June 27, 2013; thus, he should receive 1,518 days of presentence incarceration credit. On remand, we direct the court to afford defendant the appropriate amount of credit for his presentence detention.

¶ 80 III. CONCLUSION

¶ 81 We affirm defendant's conviction and vacate his sentence. We remand for resentencing in adult criminal court, in accordance with the new juvenile-sentencing provisions in 730 ILCS 5/5-4.5-100. We vacate defendant's conviction under Count 1 and direct the court to enter sentence, on remand, on Count 18 alone.

¶ 82 Affirmed in part and vacated in part. Remanded for resentencing with directions.