2019 IL App (1st) 180516-U
Order Filed: September 13, 2019

FIRST DISTRICT
Fifth Division

No. 1-18-0516

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. 1997 CR 2487002
	)	
TERRANCE POLK,	)	Honorable
	)	William Lacy,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the denial of the 19-year-old defendant's motion for leave to file a third successive postconviction petition and remanded for second-stage proceedings. We found that defendant satisfied the cause-and-prejudice test by asserting that his mandatory sentence of natural life imprisonment violated the eighth amendment and the proportionate penalties clause as applied to him under *Miller v. Alabama*, 567 U.S. 460 (2012) and its progeny.

¶ 2 A jury convicted the 19-year-old defendant, Terrance Polk (individually referred to as defendant), and his two co-defendants Anthony Whitfield ("Anthony") and Van Whitfield (Van) (collectively referred to as defendants) of two counts of first degree murder and the trial court sentenced them to a mandatory term of natural life in prison based on their commission of multiple murders (730 ILCS 5/5-8-1(a)(1)(c)(ii)(West 1998)). On direct appeal, this court

affirmed defendants' convictions and sentences. *People v. Whitfield*, No. 1-00-1303 (2002) (unpublished order under Supreme Court Rule 23). Defendants subsequently filed a first postconviction petition on May 16, 2001, which the postconviction court denied. On appeal, this court affirmed the denial of the first postconviction petition. *People v. Whitfield*, No. 1-08-1870 (2011) (unpublished order under Supreme Court Rule 23). Defendants subsequently filed two motions seeking leave to file two successive postconviction petitions on September 25, 2012, and May 26, 2015. The postconviction court denied both motions. No appeal was taken from the denial of leave to file the first successive postconviction petition; on appeal from the denial of leave to file the second successive postconviction petition, this court affirmed. *People v. Whitfield*, 2017 IL App (1st) 152407-U. On September 27, 2017, defendant filed a *pro se* motion for leave to file a third successive postconviction petition, alleging that his mandatory sentence of natural life in prison violated the eighth amendment (U.S. Const., amend. VIII) and the proportionate penalties clause (Ill. Const. 1970, art. 1, §11) as applied to him under *Miller v. Alabama*, 567 U.S. 460 (2012). On January 5, 2018, the court denied defendant leave to file the third successive postconviction petition. Defendant appeals, contending he has satisfied the cause-and-prejudice test such that leave to file the third successive postconviction petition should have been granted. For the reasons that follow, we reverse the denial of leave to file the third successive postconviction petition, and remand for second-stage proceedings.[1]

¶ 3 For ease of analysis, we set forth the relevant constitutional provisions addressed in defendant's motion for leave to file a third successive postconviction petition.

¶ 4 I. RELEVANT CONSTITUTIONAL PROVISIONS

[1]In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

A. The Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

B. The Proportionate Penalties Clause

"All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. 1, §11.

A defendant's sentence violates the proportionate penalties clause when it is cruel, degrading, or so wholly disproportionate to the offense committed that it shocks the moral sense of the community. *People v. Vega*, 2018 IL App (1st) 160619, ¶ 51.

¶ 5 II. BACKGROUND

¶ 6 Defendants, members of the Mickey Cobras street gang, were convicted of the first degree murder of Gerard Thomas (Gerard) and Brodie Trotter (Brodie), members of the Black Disciples street gang, stemming from a 1997 shooting at a public housing complex in Chicago. Defendants' convictions largely resulted from the testimony of three residents of the housing complex: Kaneita Billups (Kaneita), Venus Smith (Venus), and Darlene Billups (Darlene).

¶ 7 The evidence at trial established that Kaneita and Venus lived in the building at 4848 South State Street in Chicago. Members of the Black Disciples, including Gerard and Brodie, as well as members of the Mickey Cobras were present in the building and vying for control. Kaneita and Venus knew several members of the Mickey Cobras, including defendant, Anthony, Van, Christopher Whitfield (Christopher), Terrance Thomas (Thomas) and Lionel Blackwell (Lionel).

¶ 8 On August 11, 1997, following a confrontation between the two gangs, Kaneita and Venus heard defendant say, "We fixing to take it to the ground," and then heard a loud commotion in the lobby of the building. While standing on the porch, Kaneita and Venus saw Anthony, Van, and Thomas run down the stairs to the ground floor.

¶ 9 Kaneita testified that a crowd had formed outside the building and she saw Anthony and defendant running out of the building, holding guns. She saw Christopher and defendant fighting with a boy in an orange jacket, and she heard Thomas say, "F**k him up," or "Get him."

¶ 10 Kaneita heard a gunshot but did not know who had fired the gun. Thomas then said, "Work it," or "Work him" and everyone began shooting. She saw Thomas and Lionel shoot their guns, and also saw Christopher holding a gun. Kaneita then saw Brodie walking toward the building, heard a gunshot, and saw him fall to the ground. Christopher and defendant stood over Brodie and said, "Yeah, yeah, yeah," and "We got us one." Defendants then fled the scene in cars. Kaneita went downstairs and saw Gerard lying on the ground.

¶ 11 Venus also testified that she saw Christopher and defendant fighting with a boy. She heard a gunshot but did not see who had fired the gun. Immediately after hearing the gunshot, Venus saw Christopher moving away from the building with something in his hand. Thomas retrieved a gun from a car and said, "Work him" before pointing the gun at the building and firing a shot. Venus saw Lionel and Christopher shooting. Anthony and defendant had guns, but Venus did not see them shoot. She observed Brodie walking and eating. Then he fell. Christopher and defendant stood over his body, high-fived, and said, "We got us one." Defendants, Lionel, Christopher, and Thomas fled the scene in cars. Venus went downstairs and saw Gerard lying on the ground.

¶ 12 Kaneita's mother, Darlene, testified that she heard a commotion, looked down from her apartment window, and saw a group that included defendant, Anthony and Van fighting. She also saw defendant and Christopher fighting with a boy wearing an orange shirt. Defendant, Anthony, Van, Christopher, Lionel, and Thomas were all holding guns. Thomas yelled, "Get them," and fired his gun. Darlene then saw Lionel and Van shoot, but she did not see defendant or Anthony fire their guns. Defendant and Christopher walked to Brodie, stood over his body, and said, "Yeah, we got one" before high-fiving. Defendant, Anthony, and Van left the area in cars. Darlene then went downstairs and saw Gerard lying on the ground.

¶ 13 Defendants were found guilty of two counts of first degree murder and sentenced to mandatory natural life imprisonment under section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii)(West 1998)). We affirmed defendants' convictions and sentences on direct appeal. *Whitfield*, No. 1-00-1303.

¶ 14 Defendants filed a postconviction petition on May 16, 2001, alleging that the State withheld the nature of several witnesses' relationships with members of a rival gang in violation of *Brady v. Washington*, 373 U.S. 83 (1963). Following an evidentiary hearing, the postconviction court denied defendants' petition. On appeal, this court affirmed the court's denial of defendants' postconviction petition on May 2, 2011. *Whitfield*, No. 1-08-1870.

¶ 15 On September 25, 2012, defendants filed a motion for leave to file a successive postconviction petition, which asserted their actual innocence. On November 9, 2012, the postconviction court denied leave to file a successive postconviction petition. Defendants did not appeal the denial.

¶ 16 On May 26, 2015, defendants filed a motion for leave to file a second successive postconviction petition, which asserted actual innocence as well as claims that trial counsel was

ineffective. On July 17, 2015, the postconviction court denied defendants leave to file their second successive postconviction petition. On appeal, this court affirmed on September 22, 2017. *Whitfield*, 2017 IL App (1st) 152407-U.

¶ 17 On September 27, 2017, defendant filed a *pro se* motion to file a third successive postconviction petition, alleging that as applied to him, his mandatory sentence of natural life imprisonment was unconstitutional under *Miller*, 567 U.S. 460 (which we will discuss in more detail later in this order). On January 5, 2018, the postconviction court denied defendant leave to file his third successive postconviction petition. Defendant appeals.

¶ 18 III. ANALYSIS

¶ 19 The Post-Conviction Hearing Act ("Act") (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a procedure for criminal defendants to raise constitutional issues about their trial or sentencing that were not and could not have been raised on direct appeal. *People v. Morales*, 2019 IL App (1st) 160225, ¶ 17. Proceedings under the Act proceed through three stages. *Id.* At the first stage, the postconviction court evaluates the petition to determine whether it is frivolous or patently without merit. *Id.* If the court determines that the petition is not frivolous or patently without merit, it is docketed for second-stage proceedings. *Id.* At the second stage, counsel can be retained or appointed, and defendant must show that his petition makes a substantial showing of a constitutional violation. *Id.* The State can also participate for the first time at the second stage and either answer the petition or move to dismiss. *Id.* If the petition makes a substantial showing of a constitutional violation, it advances to the third-stage evidentiary hearing where the postconviction court receives evidence and determines whether defendant is entitled to relief. *Id.*

¶ 20 The Act contemplates the filing of a single petition: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS

5/122-3 (West 2016). The statutory bar to filing successive petitions will be relaxed only " 'when fundamental fairness so requires.'" *People v. Coleman*, 2013 IL 113307, ¶ 81 (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002)).

¶ 21 Generally, there are two instances where fundamental fairness allows for the relaxation of the bar against successive petitions. The first basis for relaxing the bar is when defendant raises a due process claim of actual innocence to prevent a fundamental miscarriage of justice. *People v. Holman*, 2017 IL 120655, ¶ 26. The second basis is when defendant satisfies the "cause-and-prejudice" test. *Id.* To establish "cause," defendant must show some objective factor external to the defense that impeded his ability to raise the claim in the first postconviction proceeding. *Id.* To establish "prejudice," defendant must show that the claimed constitutional error not raised in the initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. *People v. Johnson*, 2019 IL App (1st) 153204, ¶ 35. The cause-and-prejudice test has been codified in the Act. See 725 ILCS 5/122-1(f) (West 2016). As with an initial postconviction filing, in considering a motion for leave to file a successive petition, all well-pleaded facts and supporting affidavits are taken as true. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25. We review *de novo* the postconviction court's denial of leave to file a successive petition. *Id.*

¶ 22 Our supreme court has held that "the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act." *People v. Smith*, 2014 IL 2014 115946, ¶ 35. "Since a filed successive petition has already satisfied a higher standard, the first stage is rendered unnecessary and the successive petition is docketed directly for second-stage proceedings." *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 20.

¶ 23 In the present case, defendant contends that leave to file his third successive petition should have been granted and the petition should have been docketed for second-stage proceedings because he satisfied the cause-and-prejudice test. Specifically, defendant argues that his third successive petition would assert that as applied to him, his mandatory sentence of natural life in prison violated his rights under the eighth amendment of the federal constitution and the proportionate penalties clause of the Illinois constitution pursuant to a new substantive rule established in *Miller v. Alabama*, 567 U.S. 460 (2012) and its progeny requiring the circuit court to consider his youth and attendant circumstances prior to sentencing him to natural life imprisonment. Defendant contends that this new substantive rule established cause because *Miller* was decided after the initial postconviction proceedings and could not have been raised therein, and that he was prejudiced by the constitutional error.

¶ 24 To fully consider defendant's argument, we first examine *Miller* and its progeny and how they relate to the facts of defendant's case. In *Miller*, two 14-year-old offenders were convicted of murder and sentenced to mandatory life imprisonment without parole. *Id.* at 465. The issue before the United States Supreme Court was whether such a mandatory natural life sentence violated the eighth amendment's prohibition on cruel and unusual punishment. *Id.* In analyzing the issue, the Court noted that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. The Court recognized "three significant gaps between juveniles and adults." *Id.* First, juveniles lack maturity and have an underdeveloped sense of responsibility, leading to dangerous behavior that is reckless, impulsive, and heedless of risks. *Id.* Second, juveniles are more susceptible than adults to negative influences and outside pressures from their family and peers, have limited control over their own environment, and lack the ability to

extricate themselves from crime-producing settings. *Id.* Third, juveniles are more capable of change than adults, and their actions are less likely to evidence irretrievable depravity. *Id.*

¶ 25 The Court held that because juveniles "have diminished culpability and greater prospects for reform *** 'they are less deserving of the most severe punishments.' " *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). The 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.

¶ 26 The Court "insist[ed]" that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. *** "[T]he characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." *Id.* at 473. The mandatory penalty schemes of life imprisonment in *Miller* prevented "the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 474.

¶ 27 The Court summarized its findings:

> "To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have

been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 477-78.

¶ 28 The Court concluded:

"We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. [Citation.] By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 479.

¶ 29 The Illinois legislature subsequently enacted a statute codifying *Miller*. Section 5-4.5-105(a) of the Unified Code of Corrections provides that when a person under the age of 18 commits an offense, the sentencing court shall consider the following factors in mitigation: (1) the person's age, impetuosity and level of maturity at the time of the offense, including his ability to consider the risks and consequences of his behavior, and the presence of any cognitive or developmental disability; (2) whether he was subjected to outside pressure, including peer pressure, familial pressure, or other negative influences; (3) his family, home environment, educational and social background, including any history of parental neglect, physical abuse, or childhood trauma; (4) his potential for rehabilitation or evidence of rehabilitation, or both; (5) the circumstances of the offense; (6) his degree of participation and specific role in the offense, including his level of planning before the offense; (7) whether he was able to meaningfully participate in his defense; (8) his prior juvenile or criminal history; and (9) any other relevant and

reliable information, including an expression of remorse, if appropriate. See 730 ILCS 5/5-4.5-105(a) (West 2016).

¶ 30 The Illinois supreme court subsequently expounded on *Miller* in *People v. Holman*, 2017 IL 120655:

> "Under *Miller* ***, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation. The court may make that decision only after considering the defendant's youth and its attendant characteristics. Those characteristics include, but are not limited to, the following factors: (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation." *Id.* ¶ 46.

¶ 31 The Illinois supreme court also considered *Miller*'s applicability to a young adult defendant in *People v. Thompson*, 2015 IL 118151 and *People v. Harris*, 2018 IL 121932. In *Thompson*, the 19-year-old criminal defendant was convicted after a bench trial of two counts of first degree murder and sentenced to a mandatory term of natural life in prison under section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections. *Thompson*, 2015 IL 118151, ¶¶ 6, 7. Defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401

(West 2016)), which the circuit court dismissed. *Thompson*, 2015 IL 118151, ¶ 15. On appeal, defendant abandoned all the claims in the section 2-1401 petition and instead argued that his sentence was unconstitutional under *Miller*, which had been issued by the United States Supreme Court after the circuit court's dismissal of his section 2-1401 petition. *Id.* ¶ 16. The appellate court affirmed the dismissal order, holding that defendant's constitutional challenge was not properly before the court when it was raised for the first time on appeal. *Id.* ¶ 18.

¶ 32 On appeal to our supreme court, defendant argued that under *Miller*, the sentencing statute mandating a natural life sentence for his murders violated the eighth amendment as applied to him because the statute did not allow the sentencing judge to consider his youth. *Id.* ¶21. Defendant acknowledged that *Miller*'s holding was directly applicable only to minors under the age of 18, but he argued that the "logical underpinning of *Miller*, focused on the unique characteristics of youthful offenders and the recognized distinction between juvenile and adult brains, applies with 'equal force' to individuals between the ages of 18 and 21." *Id.*

¶ 33 In analyzing defendant's argument, our supreme court noted that he was making an as-applied constitutional challenge to the sentencing statute, which required a showing that the statute violates the constitution as it applies to defendant's facts and circumstances. *Id.* ¶ 36. The supreme court further noted that "[b]y definition, an as-applied constitutional challenge is dependent on the particular circumstances and facts of the individual defendant or petitioner. Therefore, it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *Id.* ¶ 37. The record before it, though, contained no factual development on the issue of whether the rationale of *Miller* should be extended to the 19-year-old defendant. *Id.* ¶ 38. Finding that "the trial court is the most appropriate tribunal for the type of factual development necessary to adequately address defendant's as-applied

challenge" (*id.*), the supreme court agreed with the appellate court's determination that defendant forfeited his as-applied challenge to his sentence under *Miller* by raising it for the first time on appeal. *Id.* ¶ 39. The supreme court held, though, that:

> "Although we have determined that defendant cannot raise his as-applied constitutional challenge to his sentence under *Miller* for the first time on appeal from dismissal of his section 2-1401 petition, defendant is not necessarily foreclosed from renewing his as-applied challenge in the circuit court. To the contrary, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)), is expressly designed to resolve constitutional issues, including those raised in a successive petition. *** Similarly, section 2-1401 of the Code permits either a legal or factual challenge to a final judgment if certain procedural and statutory requirements are satisfied." *Id.* ¶44.

¶ 34 In *Harris*, the defendant was convicted of first degree murder, attempted first degree murder, and aggravated battery with a firearm and sentenced to a mandatory minimum aggregate term of 76 years' in prison. *Harris*, 2018 IL 121932, ¶ 1. At the time of the offenses, defendant was 18 years and 3 months of age. *Id.* The appellate court vacated defendant's sentences and remanded for resentencing, holding that, as applied to him, the 76-year aggregate prison term violated the proportionate penalties clause of the Illinois constitution because it shocked the moral sense of the community. *Id.* The appellate court rejected defendant's facial constitutional claim that his aggregate sentence violated the eighth amendment prohibition against cruel and unusual punishment. *Id.* ¶ 18.

¶ 35 On appeal to the supreme court, the State argued that the appellate court erred in holding that defendant's aggregate 76-year sentence violated the proportionate penalties clause as applied to him, because defendant forfeited his as-applied challenge by failing to raise it in the trial court

and by failing to develop the factual and legal bases for his claim. *Id.* ¶ 35. Defendant responded that as applied to him, the statutory sentencing scheme resulted in a mandatory *de facto* natural life sentence violating the proportionate penalties clause, and that the record was sufficient to consider his constitutional challenge. *Id.* ¶¶ 36, 37.

¶ 36 The supreme court cited *Thompson*'s holding that a party raising a facial challenge must establish that a statute is unconstitutional under any set of facts, whereas an as-applied challenge requires a showing that the statute is unconstitutional as it applies to the specific facts and circumstances of the challenging party, meaning that the record must be sufficiently developed in terms of those facts and circumstances for purposes of appellate review. *Id.* ¶¶ 38, 39 (citing *Thompson*, 2015 IL 118151, ¶ 36). Defendant contended that the reasoning in *Thompson* did not apply because *Thompson* involved a collateral proceeding, whereas his case was on direct review. *Id.* ¶ 41. The supreme court disagreed, stating:

> "The critical point is not whether the claim is raised on collateral review or direct review, but whether the record has been developed sufficiently to address the defendant's constitutional claim. As we have emphasized, a reviewing court is not capable of making an as-applied finding of unconstitutionality in the 'factual vacuum' created by the absence of an evidentiary hearing and findings of fact by the trial court." *Id.* ¶ 41.

¶ 37 The supreme court noted that because defendant was legally an adult, *Miller* did not directly apply to his circumstances, and that "[t]he record must be developed sufficiently to address defendant's claim that *Miller* applies to his particular circumstances." *Id.* ¶45. Similar to *Thompson*, the record did not contain evidence about how the evolving science on juvenile maturity and brain development that formed the basis for the *Miller* decision applied to defendant's specific facts and circumstances. *Id.* ¶46. Therefore, defendant's as-applied

challenge under the proportionate penalties clause was premature. *Id.* However, the supreme court also noted, as in *Thompson*, that "the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2016)) is designed to resolve constitutional issues and the defendant's claim could also potentially be raised in a petition seeking relief from a final judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016))." *Harris*, 2018 IL 121932, ¶ 48.

¶ 38 The supreme court then addressed defendant's cross-appeal asserting that his 76-year sentence violated the eighth amendment. The supreme court noted that, unlike his proportionate penalties clause claim, defendant's eighth amendment claim was a facial challenge because "[h]e does not rely on his particular circumstances in challenging his sentence under the eighth amendment but, rather, contends that the eighth amendment protection for juveniles recognized in *Miller* should be extended to all young adults under the age of 21." *Id.* ¶ 53. Our supreme court further noted that the United States Supreme Court has drawn a bright line at the age of 18 as the legal line separating adults from juveniles, that the line was "not based primarily on scientific research," and that "[n]ew research findings do not necessarily alter that traditional line between adults and juveniles." *Id.* ¶60. Our supreme court agreed with other jurisdictions that have "repeatedly rejected" claims for extending *Miller* to offenders 18 years of age or older, and held that "the age of 18 marks the present line between juveniles and adults. As an 18-year-old, defendant falls on the adult side of that line. Accordingly, defendant's facial challenge to his aggregate sentence under the eighth amendment necessarily fails." *Id.* ¶ 61.

¶ 39 Our supreme court further held, though, that "[t]o the extent that defendant may have intended to raise an as-applied challenge under the eighth amendment, that claim would fail for the same reason as his challenge under the Illinois Constitution failed, because no evidentiary

hearing was held and no findings of fact were entered on how *Miller* applies to him as a young adult." *Id.* ¶ 53.

¶ 40 In the present case, in accordance with *Miller*, *Holman*, *Thompson* and *Harris*, defendant alleged in his motion for leave to file a third successive postconviction petition that his youth and attendant circumstances indicated that the evolving science on juvenile maturity and brain development underlying the *Miller* decision applied to his specific facts and circumstances. Specifically, defendant alleged: he was 19 years old at the time of the offense, still a teenager, and only one year removed from being considered a juvenile; he was convicted on an accountability theory and his degree of participation in the offense was "very minimal"; he was not a "career criminal," and he only had a "simple robbery" in his background; his mother was a drug addict and prostitute whose friends abused him; his father was "never around"; a gang bullied him into joining it; he did not attend school on a regular basis due to a lack of clothing, food, and the fear of entering rival gang territories; and he began using drugs at the age of 10 or 11.Defendant contended that his youth and attendant circumstances showed a lack of maturity and undeveloped sense of responsibility making him vulnerable to negative influences and outside pressures, but that his brain was still developing and that he had a high capacity for reform and rehabilitation. Defendant argued that the trial court's failure to take these facts and circumstances regarding his maturity and brain development into account established that his mandatory sentence of natural life imprisonment violated the eighth amendment as applied to him because it constituted cruel and unusual punishment, and violated the proportionate penalties clause as applied to him because it shocked the moral sense of the community.[2]

[2] The State contends that defendant only raised an eighth amendment argument in his motion for leave to file the third successive postconviction petition, and thereby forfeited review of his appellate claim relating to a violation of the proportionate penalties clause. See 725 ILCS 5/122-3 (West 2016)

¶ 41 We find that the allegations underlying defendant's as-applied eighth amendment and proportionate penalties claims, taken as true here (*Edwards*, 2012 IL App (1st) 091651, ¶ 25), were sufficient under *Miller*, *Holman*, *Thompson*, and *Harris* to satisfy the cause-and-prejudice test such that the court should have granted him leave to file the third successive petition, thereby allowing for the requisite factual development of those constitutional claims.

¶ 42 In so finding, we note that the State concedes that defendant satisfied the "cause" prong because the primary authority upon which defendant relied, specifically, the Illinois case law applying *Miller* to young adult defendants, was not decided until after the filing of his initial petition and the motions to file the first two successive petitions.

¶ 43 The State also concedes that defendant satisfied the "prejudice" prong. Our supreme court has held that "leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *People v. Smith*, 2014 IL 115946, ¶ 35. The State acknowledges in its appellee's brief that "[h]ere, the petition should advance, because it cannot be said that it is 'clear' that defendant's as-applied proportionate penalties constitutional claim fails as a matter of law. And, also because defendant has never been provided the opportunity to have a court factually assess his particular circumstances and brain development in light of *Miller* and its progeny, the petition should advance."

("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."). We disagree, as defendant's motion argues that his sentence of mandatory life imprisonment constituted a "disproportionate punishment" under both the eighth amendment of the federal constitution *and* the "Illinois Constitution" (*i.e.*, the proportionate penalties clause). We find no forfeiture.

¶ 44 Even without the State's concession of error, we would find that defendant satisfied the cause-and-prejudice test. *People v. Davis*, 2014 IL 115595, *People v. Warren*, 2018 IL App (1st) 090884-C, and *People v. Craighead*, 2015 IL App (5th) 140468 are controlling. *Davis*, *Warren*, and *Craighead* each held that cause for the respective defendant's failure to bring an eighth amendment challenge to his sentence under *Miller* during the initial postconviction proceedings was satisfied where *Miller* was decided after those proceedings, and that the alleged eighth amendment violation under *Miller* established the requisite prejudice. *Davis*, 2014 IL 115595, ¶42; *Warren*, 2016 IL App (1st) 090884-C, ¶48; *Craighead*, 2015 IL App (5th) 140468, ¶17. Pursuant to *Davis*, *Warren*, and *Craighead*, we find that defendant's motion for leave to file his third successive postconviction petition, alleging an as-applied eighth amendment and proportionate penalties violation pursuant to *Miller* and its progeny, should have been granted as it satisfied the cause-and-prejudice test.

¶ 45 IV. CONCLUSION

¶ 46 For all the foregoing reasons, we reverse the denial of defendant's motion for leave to file a third successive postconviction petition and remand for appointment of postconviction counsel and second-stage postconviction proceedings.