2020 IL App (1st) 17-0463-U

SECOND DIVISION
April 28, 2020

No. 1-17-0463

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division
v.	)	
	)	
DAVON HUDSON,	)	No. 11CR 16860
	)	
Petitioner-Appellant.	)	The Honorable
	)	Matthew E. Coghlan,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justice Pucinski concurred in the judgment.
Justice Lavin dissents.

ORDER

¶ 1 *Held*: The trial court erred in summarily dismissing the petitioner's *pro se* postconviction petition where the petition stated the gist of a constitutional claim that, as applied to him, the combination of the automatic transfer provision (705 ILCS 405/5-130 (West 2010)) and the mandatory firearm enhancement statute (720 ILCS 5/18-2(b) (West 2010)), which resulted in the imposition of a mandatory minimum 21-year sentence for his first-time, non-violent offense, committed when he was only 15 years old, violated the Illinois proportionate penalties' clause (Ill. Const. 1970, art. I, § 11).

¶ 2 The petitioner, Davon Hudson, appeals form the summary dismissal of his *pro se*

postconviction petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2016)). On appeal, the petitioner contends that his 21-year adult sentence, imposed for a non-violent crime he committed when he was only 15 years old, is unconstitutional as applied to him both under the eight amendment to the United States constitution (U.S. Const. amend. VIII), and Illinois' proportionate penalties clause (Ill. Cons. 1970, art. I, § 11). The petitioner also contends that this sentence violated his constitutional right to due process. For the reasons that follow, we find that the petitioner's sentence is unconstitutional under the Illinois proportionate penalties' clause (Ill. Cons. 1970, art. I, § 11), and therefore vacate that sentence and remand for a resentencing hearing, with instructions.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. In October 2011, the 15-year-old petitioner was charged as an adult with one count of armed robbery in that, on September 18, 2011, while carrying a firearm, he knowingly took keys from the victim, Stacey Dixon, by the use of force or by threating the imminent use of force. (720 ILCS 5/18-2(a)(2) (West 2010). Under the statute as written at the time, the charged crime was a Class X offense, with a sentencing range between 6- and 30-years imprisonment and a mandatory 15-year firearm enhancement. 720 ILCS 5/18-2(b) (West 2010). As such, the minimum sentence for the crime was 21-years and the maximum sentence 45-years imprisonment.

¶ 5 The charge against the petitioner was brought in adult criminal court pursuant to the automatic transfer provision of the Juvenile Court Act in effect at the time (705 ILCS 405/5-130 (West 2010)). On May 27, 2013, the petitioner, represented by private counsel, *inter alia*, filed a motion to prohibit the automatic application of the 15-year sentencing enhancement as *per se* unconstitutional under the eight amendment to the United States constitution (U.S. Const.

amend. VIII). The parties agree that the trial court denied that motion on July 29, 2013. However, the record before us does not contain a transcript from the hearing on this motion or the court's denial order. We can discern that the motion was denied only from the handwritten notation on the trial court's half-sheet for that day.

¶ 6 The record further reflects that on October 21, 2013, the petitioner entered a negotiated plea agreement with the State. At the plea hearing, the State indicated that it had offered the petitioner the minimum 21-year mandatory sentence in exchange for a guilty plea to armed robbery. The trial court inquired whether the sentence was to be served at 50% and the State answered in the affirmative, acknowledging that the sentence would be served at 50% because "there was no finding of great bodily harm." The petitioner then waived his right to a jury trial and to a presentence investigation report (PSI).

¶ 7 The trial court admonished the petitioner that the negotiated sentence was 21 years imprisonment and that it would be followed by 3 years of mandatory supervised release (MSR), and the petitioner indicated that he understood. The court then asked the petitioner several questions and determined: (1) that he was a United States citizen, who resided in Illinois; (2) that he was 17 years old; (3) that he would be graduating high school in two weeks; and (4) that he had "discussed the plea with his family." The court also admonished the petitioner of the charge and the applicable sentencing range (21 to 45 years imprisonment) and ascertained that other than the negotiated agreement nobody had promised or threatened him with anything in exchange for his guilty plea.

¶ 8 The State then proffered the factual basis for the plea. According to the State, if called to testify the then 44-year-old victim, Dixon, would state that in the late morning hours of September 18, 2011, she parked her car and was walking towards her church, when she was

approached by the petitioner and several other young men. Dixon exchanged a good morning with the young men and continued walking, but the petitioner approached her from behind. When Dixon turned around, she saw the petitioner point a silver revolver at her before saying, "Give me that." Dixon asked the petitioner, "Give you what?" and he responded, "the keys." Dixon, who had been holding her car keys in her hand, gave them to the petitioner, and watched as he and two other young men ran towards her car. Dixon fled into her church and told her deacon what had happened, and the deacon notified the Chicago police. The State further proffered that if called to testify, several Chicago police officers would aver that they received a flash message of a robbery in progress in the vicinity of 11592 South Lafayette. Once there, the officers observed the petitioner and two other offenders. A foot chase ensued after which all three offenders were stopped, and a handgun was picked up from the ground "around the route of the flight." The recovered handgun was a chrome .22 caliber revolver with a 2.5-inch barrel, and four live rounds. According to the State, Dixon would testify that, at the scene, she was able to identify the petitioner, the two other juvenile offenders and the revolver used in the robbery.

¶ 9 After the parties stipulated to the factual basis, the trial court accepted the negotiated plea agreement. In doing so, the court noted that the defendant understood "the nature of the charge against him, the possible penalties, [and] his rights under the law" and that he was making the plea freely and voluntarily. The court then proceeded with sentencing.

¶ 10 The petitioner was admonished of his right to a PSI and again asked if he wished to waive it. The petitioner indicated that he did, and his signed waiver of the PSI was entered into the record. The parties then made brief arguments. In aggravation, the State made a single pronouncement: "This defendant has no adult convictions." In mitigation, defense counsel noted only that the petitioner was 15 years old when he committed the crime and that he was about to graduate from

high school. Defense counsel also asked, and was permitted, to submit a report from the petitioner's teacher.[1] The petitioner made no statement in allocution. As per the parties' agreement, the trial court then sentenced the petitioner to the negotiated 21 years imprisonment, "the minimum of 6 plus the 15-year enhancement" followed by 3 years of MSR. In doing so, the court stated:

> "I don't know what motivates a young man to stick a gun in the face of a woman and take her property. Such a young man is throwing away much of [his] youth. You're going to be in prison. You have a long time to think about that choice and hopefully when you get out you won't repeat that mistake."

¶ 11 The petitioner never appealed his conviction or sentence. Instead, three years after his plea, on October 13, 2016, he filed a *pro se* postconviction petition. Therein, he alleged, *inter alia*, that the combined application of the then-applicable automatic transfer provision and the 15-year mandatory firearm sentencing enhancement violated the eight amendment (U.S. Const. amend. VIII) and the Illinois proportionate penalties clause (Ill. Cons. 1970, art. I, § 11), as applied to him. He also challenged the sentence as violating his constitutional right to due process. With respect to all three claims, the petitioner argued that the combined effect of the automatic transfer provision and the mandatory firearm sentencing enchantment prevented the trial court from meaningfully considering his youth and its attendant characteristics, including any rehabilitative potential he may have had. As such, he argued the effect of these two statutes, as applied to him violated the principles announced in the United State Supreme Court's decisions in *Miller v. Alabama*, 567 U. S. 489 (2012), *Graham v. Florida*, 560 U.S. 48, 68 (2010), and *Roper v. Simmons*, 543 U.S. 551, 560 (2005), that minors are constitutionally different from and less

[1] This report, however, is not part of the record on appeal.

culpable than adults. The petitioner further argued that the Illinois legislature's recent statutory changes to the sentencing of juveniles (730 ILCS 5/5-4.5-105 (eff. Jan 1. 2016)) established that Illinois law has evolved in light of the decisions in *Miller* and its progeny.

¶ 12 In support of his *pro se* postconviction petition, the petitioner attached an affidavit that attested that had he known that the trial court was supposed to consider his age, his background, his social history and the corresponding traits of his youth, including his rehabilitative potential, he would not have accepted the 21-year sentencing offer from the State. The affidavit then detailed numerous instances of abuse, which the petitioner had suffered as a child, and which he claimed should have been considered by the trial court in sentencing.

¶ 13 Specifically, the petitioner attested that in 2004-2005, when he was nine years old, he was physically and sexually abused by his mother's girlfriend, Mashunda Washington, and two of Washington's children. As a result, in fourth grade the petitioner ran away from home and told a child psychiatrist at his grade school about the abuse. After the Department of Children and Family Services (DCFS) was notified and investigated the matter, a court order was issued prohibiting Washington from living with the petitioner, and transferring custody of the petitioner to his grandmother, Emma Hudson. The petitioner's mother, Lisa Hudson, however, refused to cooperate with the DCFS investigation, and shortly after it was terminated, she "duped" the petitioner's grandmother into allowing the petitioner to visit her in Georgia for spring break. The petitioner attested that the same people who had previously abused him, namely Washington and her children, then drove him to Georgia where he was again forced to live with his mother and his abusers. The petitioner averred that their abuse continued between 2006 and 2007.

¶ 14 The petitioner also stated that he ran away from home in 2007, 2009, 2010 and 2011. The 2010 incident stemmed from physical abuse by his mother and two of her other friends (Kelly and

Devin).

¶ 15 In addition, the petitioner stated that as a child he had a history of codeine and THC abuse. Since entering the Illinois Department of Corrections (IDOC), the petitioner has participated in "psych-therapy." In support, the petitioner attached an IDOC referral document recommending him for psychiatric services and noting "CD/THC abuse," as his chronic condition.

¶ 16 On January 9, 2017, the trial court summarily dismissed the petitioner's *pro se* postconviction petition finding that it was frivolous and patently without merit. In doing so, the court held that because the petitioner had voluntarily pleaded guilty and never moved to withdraw his guilty plea, he had forfeited all non-jurisdictional claims, including the constitutional ones he was now raising in his petition. In addition, the court held that the *Miller* decision and its progeny did not apply to the petitioner because both our supreme court and the United States Supreme Court have since closely limited the application of the *Miller* rationale to cases involving *de facto* life sentences (*i.e.*, sentences greater than 40 years imprisonment), which does not include the petitioner's 21-year sentence. The petitioner now appeals from this summary dismissal.

¶ 17 II. ANALYSIS

¶ 18 At the outset, we note that the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a three-step process by which a convicted defendant may assert a substantial denial of his or her constitutional rights in the proceedings that led to the conviction. *People v. Edwards*, 2012 IL 111711, ¶ 21; *People v. Tate*, 2012 IL 112214, ¶ 8; see also *People v. Walker*, 2015 IL App (1st) 130530, ¶ 11 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). A proceeding under the Act is a collateral attack on a prior conviction and sentence and is therefore "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill.

2d 325, 328 (1994); see *Edwards*, 2012 IL 111711, ¶ 21; *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, any issues that were decided on direct appeal are *res judicata*, and any issues that could have been presented on direct appeal, but were not, are waived. *Edwards*, 2012 IL 111711, ¶ 21; see also *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006).

¶ 19 At the first stage of a postconviction proceeding, such as here, the trial court must only determine whether the petition sets forth a "gist" of a constitutional claim. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002); see also 725 ILCS 5/122–2.1 (West 2012); *People v. Ross*, 2015 IL App (1st) 120089, ¶ 30 (citing *People v. Jones*, 213 Ill. 2d 498, 504 (2004)). At this stage of postconviction proceedings, all well-pleaded allegations in the petition must be construed as true, and the court may not engage in any factual determinations or credibility findings. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("The Illinois Supreme Court *** [has] recognized that factual disputes raised by the pleadings cannot be resolved by a motion to dismiss at either the first stage *** or at the second stage *** [of postconviction proceedings], rather, [they] can only be resolved by an evidentiary hearing"); see also *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998) (Noting that the supreme court has "foreclosed the circuit court from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding.").

¶ 20 The "gist" is a low threshold and the trial court may summarily dismiss the petition only if it finds the petition to be frivolous or patently without merit. See *Jones*, 213 Ill. 2d at 504; *Ross*, 2015 IL App (1st) 120089, ¶ 30; see also *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition is frivolous or patently without merit if it has no arguable basis either in law or in fact. *Tate*, 2012 IL 112214, ¶ 9. Our supreme court has explained that a petition lacks an arguable basis where it "is based on an indisputably meritless legal theory or a fanciful factual allegation"—in other

words, an allegation that is "fantastic or delusional," or is "completely contradicted by the record." *Hodges*, 234 Ill. 2d at 11-12; *People v. Brown*, 236 Ill. 2d 175, 185 (2010); see also *Ross*, 2015 IL App (1st) 120089, ¶ 31. Our review of summary dismissal is *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 21 On appeal, the petitioner contends that the trial court erred when it summarily dismissed his *pro se* petition because he made the gist of meritorious claims that his 21-year sentence violated his constitutional rights under procedural and substantive due process, the eighth amendment (U.S. Const., amend. VIII) and Illinois' proportionate penalties clause (Ill. Const. 1970, art. I, § 11). The petitioner explains that the combination of the two statutes under which he was automatically charged as an adult even though he was only 15 years old (705 ILCS 405/5-130(a)(1) (West 2010)) and then sentenced to a mandatory minimum of 21 years imprisonment (720 ILCS 5/18-2(a)(2), (b) (West 2010)) for a first-time non-violent offense, proscribed the trial court from exercising any discretion and from taking into consideration his background, his youth and its attendant characteristics, and any rehabilitative potential. The petitioner therefore argues that the sentence as applied to him was unconstitutional under the principles articulated in *Miller* and its progeny. He further argues that had he known that his negotiated sentence was unconstitutional, he would not have accepted the State's plea offer, but would have instead bargained for a better deal or taken his luck at trial. In addition, he contends that the trial court itself would not have imposed the sentence as described in the plea agreement, had it known of its unconstitutionality. Accordingly, the petitioner asks this court to allow him to withdraw his guilty plea, or in the alternative to remand the matter for a new sentencing hearing, or in the very least, to reverse the summary dismissal of his *pro se* petition, and remand for second-stage postconviction proceedings, where he will be appointed counsel to represent him in this matter.

¶ 22 The State first counters that the petitioner has waived or forfeited all constitutional challenges to his sentence by entering a voluntary guilty plea. The State argues that by accepting the plea agreement and waiving his right to a PSI, the petitioner voluntarily, intelligently and knowingly waived any consideration of his youth and attendant characteristics in his sentencing. In addition, the State points out that the petitioner knowingly waived these same considerations where prior to the plea agreement, his defense counsel filed a motion challenging the mandatory 15-year sentencing enhancement as per se unconstitutional under the eight amendment. In support, the State cites to *People v. Jackson*, 199 Ill. 2d 286, 288-301 (2002), where, in the context of a claim based on *Apprendi v. New Jersey*, 530 U.S. 466), our supreme court held that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones. For the following reasons, we disagree and find that case inapposite.

¶ 23 As a preliminary matter, we note that on appeal the parties interchangeably use the terms "waiver" and "forfeiture." Our supreme court, however, has repeatedly observed that while our case law often uses these terms interchangeably, they are two distinct and separate concepts. See *People v. Phipps*, 238. Ill. 2d 54, 62 (2010); *People v. Blair*, 215 Ill. 2d 427, 443 (2005). As our supreme court has explained, "waiver" denotes the voluntary relinquishment of a known right, while "forfeiture" is defined as the failure to raise an issue in a timely manner, thereby barring its consideration on appeal. *Id*. at 444. In the context of guilty pleas, a defendant is said to have "waived" non-jurisdictional errors in the sense that he voluntarily relinquished a known right, rather than failed to raise an issue in the trial court. See *People v. Townsell*, 209 Ill. 2d 543, 547-58 (2004). Accordingly, we will proceed to analyze the State's argument in this context.

¶ 24 "In determining whether a legal claim has been waived, courts examine the particular facts

and circumstances of [each] case." (citing *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). In this analysis our supreme court has repeatedly stated that waiver principles should be "construed liberally in favor of the defendant." *Phipps*, 238 Ill. 2d at 62 (citing *United States v. Jaimes–Jaimes*, 406 F.3d 845, 848–49 (7th Cir.2005)).

¶ 25 Taking, as we must, at this stage of postconviction proceedings, the petitioner's well-pleaded allegations as true, we find that that the petitioner has made an arguable claim that he did not voluntarily relinquish any known right to challenge the constitutionality of his sentence. In coming to this conclusion, we find the recent decision in *People v. Parker*, 2019 Ill. App (5th) 150192, *petition for leave to appeal denied*, 135 N.E.3d 568, instructive. In that case, the 16-year-old defendant filed a *pro se* motion for leave to file a successive postconviction petition asserting, among other things that his 35-year sentence, entered as part of a negotiated guilty plea, without the trial court's ability to consider his youth and its attendant characteristics amounted to a *de facto* life sentence in violation of the eight amendment (U.S. Const., amend. VIII). Id., ¶ 9. After the trial court denied the defendant's motion for leave to file his successive postconviction petition, the defendant appealed. *Id*. On appeal, the defendant argued, among other things, that his 35-years sentence violated the proportionate penalties clause of the Illinois Constitution where it was grossly disproportionate to his moral culpability and did not comport with the objective of restoring him to useful citizenship. *Id*., ¶ 16.

¶ 26 In making this argument, the defendant relied on the Illinois Supreme Court's recent decision in *People v. Buffer*, 2019 IL 122327, ¶ 46, which was decided while his case was pending on appeal. That decision, which applies retroactively, held that a prison sentence greater than 40 years amounted to a constitutionally impermissible *de facto* life sentence for a juvenile, absent evidence of incorrigibility. *Id*. Relying on *Buffer*, the defendant argued that he should be

allowed to challenge his negotiated plea and sentence through a successive postconviction petition where *Buffer* changed the applicable sentencing range and eliminated his justification for entering the guilty plea in the first place—*i.e.* to avoid a natural life-sentence and for the State's recommendation to cap the sentence at 50 years—as neither sentence was constitutionally available absent evidence of incorrigibility. *Parker*, 2019 IL App (5th) 150192, ¶ 16. In other words, the defendant argued that his negotiated plea could not have been knowing or voluntary because he was not apprised of the constitutionally permissible maximum sentence (40 years, absent evidence of incorrigibility) but rather believed that the maximum was life imprisonment. *Id*. The defendant also argued that he had demonstrated prejudice because he would not have pleaded guilty had he been aware of the guidelines set forth in *Buffer*. *Id*. This court agreed with the defendant, and found that he had established both cause and prejudice even though the actual sentence imposed by the trial court as part of the negotiated plea agreement was only 35 years imprisonment and therefore did not fall into the rubric of *de facto* life sentences prohibited by *Buffer*. *Id*., ¶ 18.

¶ 27 Just as in *Parker*, in the present case, without the benefit of *Buffer*, which was decided while his appeal was pending, the petitioner could not have entered the plea knowingly or voluntarily, where he was not properly apprised of the constitutionally permissible maximum sentencing range of 40 years, absent any evidence of incorrigibility, but rather believed that if he proceeded with trial the maximum possible sentence was 45 years (a *de facto* life sentence), regardless of any evidence of incorrigibility. Moreover, the petitioner's burden here is considerably smaller than that of the defendant in *Parker*, as he was only required to state the gist of an arguable claim that his plea was not knowing. Where the petitioner's affidavit affirmatively states that had he been made aware that under proper adherence to *Miller* "the

judge was supposed to consider [the] corresponding characteristics of [his] juvenile status (such as age and history of abuse), [he] would not have accepted the 21 years," we find that this "low threshold" has been met. See *Tate*, 2012 IL 112214, ¶ 19 (at the first stage of postconviction proceedings the petitioner is not required to "demonstrate," "prove" or "show" a constitutional violation); *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 48 ("Because a *pro se* petitioner will likely be unaware of the precise legal basis for his claim, the threshold for survival is low, and a *pro se* petitioner need allege only enough facts to make out a claim that is arguably constitutional for purpose of invoking the Act"). Under these facts and consistent with *Parker*, we find that where the petitioner's plea could not have been knowing, for purposes of this appeal, he did not voluntarily waive any known constitutional rights.

¶ 28 In coming to this conclusion, we have considered the decision in *Jackson* cited to by the State and find it inapposite. *Jackson* addressed whether the defendant waived, *i.e.*, voluntarily relinquished, her right to an *Apprendi* challenge when as part of her negotiated open guilty plea she was informed that an extended sentencing term was possible but was not told that the extended term factors were elements that had to be proven beyond a reasonable doubt at trial. *Id.* at 295-296. The court in *Jackson* found that the defendant had waived her *Apprendi* challenge, because such a challenge goes to the heart of the well-established constitutional rights to a jury trial and proof beyond a reasonable doubt, "rights which a guilty plea is specifically designed to waive." *Id*. at 302. As the court explained:

> "A clear understanding of *Apprendi* explains why defendant's guilty plea waived her *Apprendi*-based argument. The underlying lesson of *Apprendi* is, "[p]ut simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." [Citations.] Every fact necessary to

> establish the range within which a defendant may be sentenced is an element of the crime and thus falls within the constitutional rights of a jury trial and proof beyond a reasonable doubt, made applicable to the states by the due process clause of the fourteenth amendment. But by pleading guilty, a defendant waives exactly those rights. A knowing relinquishment of the right to a trial by jury is the *sine qua non* of a guilty plea. Thus, it is clear that *Apprendi*-based sentencing objections cannot be heard on appeal from a guilty plea." *Id*. at 295-96.

¶ 29 As is evident from this language, the holding in *Jackson* is narrowly limited to constitutional challenges raised under *Apprendi*. Contrary to the State's position, a constitutional challenge under *Miller* is not analogous. Unlike *Apprendi*, which *Jackson* itself acknowledged, "did not deal with novel constitutional rights," but was instead "concerned with the applicability of the well-established constitutional rights to a jury trial and proof beyond a reasonable," (*Jackson*, 199 Ill. 2d at 302), *Miller* is not concerned with either of those rights, and instead sets forth a new substantive constitutional rule, with a procedural component. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016) ("*Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it ' "necessarily carr[ies] a significant risk that a defendant" '—here, the vast majority of juvenile offenders—' "faces a punishment that the law cannot impose upon him." ' [Citations.] *** To be sure, *Miller's* holding has a procedural component. *Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. [Citation.]" *** A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. [Citation.] The hearing does not replace but rather gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for

children whose crimes reflect transient immaturity.). *Miller*-based arguments deal purely with the constitutionality of juvenile sentences and whether those sentences constitute cruel and unusual punishment and/or are grossly disproportionate to a juvenile defendant's moral culpability and comport with the objective of restoring him to useful citizenship.

¶ 30 Accordingly, the application of waiver was proper in *Jackson* because the defendant there was extended term eligible both before and after *Apprendi* and the admonishments she was given by the trial court were sufficient to apprise her of the constitutional rights (to a jury trial and proof beyond a reasonable doubt) that she was waiving. See *Jackson*, 199 Ill. 2d at 298. Conversely, under *Miller*, *Montgomery* and *Buffer*, at the time of his plea agreement, the petitioner could only have received a sentencing term of 40 years if the trial court had considered his age and its attendant characteristics and found him to be incorrigible. Thus, unlike the defendant in *Jackson*, the petitioner here was never properly admonished about the constitutionally appropriate sentencing range or the factors that could extend or shorten his sentence and therefore did not waive any of his challenges.

¶ 31 The State nonetheless further argues that under *Jackson* the petitioner's arguments are also waived because he does not make a facial challenge to the statutory framework under which he was sentenced. We disagree. Subsequent to *Jackson* and relying on the United States Supreme Court's decision in *Class v. United States*, 138 U.S. 788 (2018), this appellate court held that an as applied constitutional challenge could be raised even after a negotiated guilty plea. See *People v. Patterson*, 2018 IL App (1st) 160610, ¶ 18, *leave to appeal denied*, 119 N. E. 3d 1042. Therein, we held that where a defendant's constitutional claim does not contradict the terms of his indictment or his plea agreement and does not focus upon case-related constitutional defects that occurred prior to the entry of his guilty plea, the defendant does not waive his constitutional

claim by voluntarily pleading guilty. *Id*., ¶ 21. In doing so, we pointed out that in *Class* the United States Supreme Court reviewed its holdings about the nature of guilty pleas, which " 'stretch[ed] back nearly 150 years,' and reflected, in broad outline an understanding that 'a guilty plea does not bar a claim on appeal "where on the face of the record the court had no power to enter the conviction or impose the sentence." ' " (Internal quotation marks omitted.) *Id*., ¶ 20 (quoting *Class*, 138 S. Ct. at 804). Accordingly, in *Patterson* we held that because the defendant's as applied vagueness challenge to the Armed Habitual Criminal statute under which he was prosecuted did not contradict the terms of his indictment and plea agreement and did not focus upon any case-related defects that occurred prior to the entry of his guilty plea, but rather focused on the State's power to prosecute his admitted conduct, and thereby questioned the State's power to constitutionally prosecute him, his voluntary plea did not bar his appeal. *Id.*

¶ 32 Applying the rationale of *Patterson* and *Class* to the facts of this case, we similarly find that the petitioner's claim, as we understand it, does not contradict the terms of his indictment or his plea agreement and does not focus upon any case-related defects that occurred prior to the entry of his guilty plea. Rather, the petitioner's challenge to the constitutionality of the combined effects of the automatic transfer provision and the mandatory 15-year firearm sentencing enhancement, as applied to him, questions the State's power to prosecute and sentence him for his admitted conduct in such a manner that would mandate that he serve a minimum of 21 years without giving the trial court any discretion to consider his youth and its attendant characteristics and the petitioner's rehabilitative potential as is required under both the eight amendment and the Illinois proportionate penalties clause. While it is true that under *Buffer*, the negotiated 21-year sentence does not fall into the category of impermissible *de facto* life sentences, the State nonetheless had no power to impose (or threaten the petitioner with) a sentence of 45 years,

without the trial court first considering the petitioner's youth and its attendant characteristics, and finding him to be incorrigible. Therefore, in these circumstances and in accordance with *Patterson*, we hold that the petitioner's guilty plea does not bar this appeal.

¶ 33 Turing to the merits, because we find this issue to be dispositive, we begin by addressing the petitioner's sentence in context of the Illinois proportionate penalties clause (Ill. Const. 1970, art I., § 11). It is axiomatic that every statute carries a strong presumption of constitutionality. *People v. Sharpe*, 216 Ill. 2d 418, 487 (2005). To overcome such a presumption, the challenging party must clearly establish that the statute violates the constitution. *Id*. We review a statue's constitutionality *de novo*. *Id*. at 486-87.

¶ 34 The Illinois Constitution states that "[a]ll 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 I., § 11. Although the exact relationship between the Illinois proportionate penalties' clause (*Id*.) and the eight amendment (U.S. Const. amend. VIII) remains unclear, our supreme court has held on at least one occasion that it is inaccurate to state that they are synonymous. See *People v. Clemons*, 2012 IL 107821, ¶¶ 36-37, 40 (holding that the proportionate penalties clause "focuses on the objective of rehabilitation" and places greater limitations on the legislature's ability to prescribe harsh sentences than the eighth amendment). But see *People v. Patterson*, 2014 IL 115102, ¶ 106.

¶ 35 We have previously held that the Illinois proportionate penalties clause is broader than the eighth amendment (see *Clemons*, 2012 IL 107821, ¶ 39; *People v. Harris*, 2016 IL App (1st) 141744, ¶ 38; *People v. Coty*, 2018 IL App (1st) 162383, ¶ 77) and requires consideration of the constitutional objective of "restoring an offender to useful citizenship" (*People v. Leon Miller*, 202 Ill. 2d 328, 338 (2002)), an objective that is "much broader than defendant's past conduct in

committing the offense" (*People v. Gipson*, 2015 IL App (1st) 122451, ¶ 72). While we continue to adhere to this viewpoint, we do not find it dispositive to the issues raised here. Instead, we believe that the sentencing scheme as applied to this particular petitioner is unconstitutional under the proportionate penalties' clause (Ill. Const. 1970, art. I., § 11) regardless of the relationship between that clause and the eight amendment (U.S. Const. amend. VIII).

¶ 36 To succeed on his proportionate penalties' claim, the petitioner here had to make an arguable claim that the combination of the automatic transfer provision and the mandatory firearm enhancement statute, as applied to him, resulted in a punishment so "cruel, degrading or so wholly disproportionate to the offense as to shock the moral sense of the community." *Coty*, 2018 IL App (1st) 162383, ¶ 59; *People v. Klepper*, 234 Ill. 2d 337, 348-49 (2009); *People v. Aikens*, 2016 IL App (1st) 133578, ¶ 33; *Leon Miller*, 202 Ill. 2d at 338. Our supreme court has never defined what kind of punishment qualifies as cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community, because "as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Leon Miller*, 202 Ill. 2d at 339 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (whether a punishment shocks the moral sense of the community is based upon an "evolving standard[ ] of decency that mark[s] the progress of a maturing society")). To determine whether a punishment shocks the moral sense of the community, reviewing courts must consider objective evidence as well as the community's changing standard of moral decency. *Aikens*, 2016 IL App (1st) 133578, ¶ 33. Stated differently, we must consider "the gravity of the [petitioner's] offense in connection with the severity of the statutorily mandated sentence within our community's evolving standard of decency." *Leon Miller*, 202 Ill. 2d at 340.

¶ 37 For the following reasons, we believe that under our community's evolving standards of

decency the imposition of the mandatory 21-year-minium sentence on the 15-year-old petitioner, for a first-time non-violent offense, was a punishment so cruel and degrading, and so wholly disproportionate to the offense as to shock the moral sense of our community. Accordingly, we find that the sentence violated the Illinois proportionate penalties clause (Ill. Const. 1970, art I., § 11) as applied to the petitioner.

¶ 38 The three seminal United States Supreme Court decisions in *Roper*, *Graham* and *Miller*, set the tone for our community's evolving standard of decency by prohibiting the imposition of the death penalty (*Roper*, 543 U.S. at 574-75) and mandatory life imprisonment without the possibility of parole (*Graham*, 560 U.S. at 82; *Miller*, 567 U.S. at 471) on juveniles. All three decisions relied on the rationale that juveniles have less moral culpability and greater rehabilitative potential than adults. *Miller*, 567 U.S. at 471. As *Miller* explained, "juveniles are constitutionally different form adults because they have diminished culpability and a greater prospect for reform," and therefore are "less deserving of the most severe punishments." *Miller*, 576 U.S. at 471. The three characteristics that differentiate adults from juveniles are that children: (1) lack maturity and responsibility, which leads them to act recklessly and impulsively; (2) are more vulnerable to negative influences, including family and peer pressure and have limited control over their environment so as to be able to extricate themselves from crime-producing settings; and (3) are not fully formed in character, such that their actions alone do not necessarily evidence irretrievable depravity. *Id*.

¶ 39 Adopting the rationale of these decisions, over the last decade our courts and legislature have acted in tandem to change the landscape of our criminal juvenile justice system. Recognizing that juveniles are less morally culpable and have greater rehabilitative potential than adults, our jurisprudence has evolved to prohibit the imposition of *de jure* and *de facto* mandatory and

discretionary life sentences for juveniles, where the trial court fails to consider the attendant characteristic of their youth. See *People v. Reyes*, 2016 IL 119271, ¶ 9; *People v. Holman*, 2017 IL 120655, ¶ 46; *Buffer*, 2019 IL 122327, ¶¶ 34-41 As noted above, our supreme court has held that a sentencing term of 40 years or more imposed on a juvenile is a *de facto* life sentence. *Buffer*, 2019 IL 122327, ¶ 41.

¶ 40 Similarly, effective January 1, 2016, our legislature has amended the Juvenile Court Act to make the minimum age for mandatory transfer to adult court 16, and not 15, and to remove armed robbery with a firearm from the list of enumerated offenses that would disqualify offenders from the definition of "delinquent minor." See Pub. Act 99-285 § 5 (amending 705 ILCS 405/5-130(1)(a) (West 2014)). That same year, the legislature also amended the Unified Code of Corrections to create a new sentencing scheme for youthful offenders. See Pub. Act 99-69, § 10 (eff. Jan 1, 2016) (adding 730 ILCS 5/5-4.5-105(a) (West 2016)). Effective January 1, 2016, when a youth under 18 years old commits a crime, before any sentence can be imposed, the trial court must first consider numerous "additional factors in mitigation in determining the appropriate sentence." Pub. Act 99-69, § 10 (eff. Jan 1, 2016) (adding 730 ILCS 5/5-4.5-105(b) (West 2016)). The list of additional factors, which includes, age, impetuosity, and level of maturity, is taken directly from *Miller's* discussion of a juvenile defendant's youth and its attendant characteristics. See *Holman*, 2017 IL 120655, ¶¶ 45-46. In addition, under the new amendments the imposition of firearm enhancements on a juvenile's sentence is a matter of discretion with the court. *Id*. While we recognize that these legislative enactments apply only prospectively (see *People v. Hunter*, 2017 IL 121306), they nonetheless evince "a changing moral compass" in the way our society chooses to prosecute and sentence its juvenile offenders. See *Aikens*, 2016 IL App (1st) 133578, ¶ 38.

¶ 41 In the context of these societal changes, very recently, this court considered the constitutionality of the same mandatory firearm sentencing scheme under which the petitioner here was sentenced to the mandatory minimum of 21 years and found that it violated the Illinois proportionate penalties clause because it shocked the moral sense of our community. See *People v. Barnes*, 2018 IL App (5th) 140378. In *Barnes*, a 17-year-old juvenile defendant was charged with armed robbery while carrying a firearm, and then prosecuted as an adult under the automatic transfer provision. *Id.*, ¶ 3. After he was convicted by a jury, the defendant faced a prison term of 21 to 45 years (6- to 30-years for the Class X felony plus a mandatory 15-year firearm enhancement). *Id.*, ¶ 4. In its discretion, the trial court imposed a 7-year sentence, which when added to the mandatory 15-year enhancement equated to 22 years in prison. *Id.*

¶ 42 The defendant appealed his sentence, arguing, *inter alia*, that it was unconstitutional as applied to him under the Illinois proportionate penalties clause. *Id.*, ¶ 9. The appellate court agreed finding that under our society's evolving standards of decency the trial court's inability to consider the defendant's youth and its attendant characteristics in imposing the sentence violated his rights under the Illinois constitution. *Id.*, ¶ 25. The court therefore vacated the defendant's sentence, and remanded the cause for resentencing, without imposition of the mandatory firearm enhancement. *Id.*, ¶ 29.

¶ 43 In coming to this conclusion, the *Barnes* court relied on the decisions in *Leon Miller*, 202 Ill. 2d 339-42, and *Aikens*, 2016 IL App (1st) 133578.

¶ 44 In *Leon Miller*, our supreme court held that sentencing a 15-year-old juvenile defendant, who had been convicted of two murders under the theory of accountability for merely serving as a lookout, to mandatory life imprisonment without parole, violated our constitution's proportionate penalties clause. *Leon Miller*, 202 Ill. 2d at 330-31. Our supreme court held that this sentence

"grossly distort[ed] the factual realties of the case and [did] not accurately represent [the] defendant's personal culpability such that it shock[ed] the moral sense of [our] community." *Id.* at 341. In reaching this conclusion, the court noted that when combined, the automatic transfer statue, the accountability statue, and the multiple-murder sentencing statute precluded the trial court form considering the actual facts of the crime, including the defendant's age and his level of culpability, which "present[ed] the least culpable offender imaginable." *Id.* Our supreme court explained that its decision was consistent with the longstanding distinction made in Illinois between adult and juvenile offenders, a distinction emphasized by the reality that our state had been the first to create a court system exclusively dedicated to juveniles. *Id.* Furthermore, the court emphasized that as a society, our state had recognized that young defendants have greater rehabilitative potential. *Id.* at 342.

¶ 45 More recently, in *Aikens*, this court held that the combination of the automatic transfer provision and the mandatory firearm sentencing enhancements under which a first-time 17-year-old juvenile offender was sentenced to 40 years imprisonment (20 years for attempted murder of a peace officer plus the mandatory 20-year firearm enhancement for personally discharging a firearm), violated the Illinois proportionate penalties clause as applied to that defendant because it "shocked our evolving standard of moral decency." *Aikens*, 2016 IL App (1st) 133578, ¶ 37. In reaching its decision, the *Aikens* court relied on the "evolving standards for juvenile offenders in this State," which it believed was demonstrated by the recent legislative changes that had been made "in the way that juveniles are tried and sentenced." *Id.*, ¶ 37 (citing Pub. Act 99-69, § 10 (eff. Jan 1, 2016) (adding 730 ILCS 5/5-4.5-105(a) (West 2016)). While the appellate court in *Aikens* acknowledged that these provisions did not apply retroactively and therefore did not apply to the defendant in that case, it found that they clearly indicated "a changing moral

compass in our society when it comes to trying and sentencing juveniles as adults." *Aikens*, 2016 IL App (1st) 133578, ¶ 38. Accordingly, the court held that the sentencing scheme as applied to the 17-year old defendant in that case shocked the moral sense of our community and violated our constitution. *Id*., ¶ 38. As such, the court reversed the sentence and remanded for a new sentencing hearing, without the mandatory enhancement. *Id*.

¶ 46 Relying on the rationale of *Leon Miller* and *Aikens*, the court in *Barnes* held that the mandatory firearm enhancement sentencing scheme employed by the trial court in that case, as applied to the first-time offending, 17-year-old defendant, which resulted in a term of 22 years for a non-violent armed robbery offense, violated the proportionate penalties clause of the Illinois constitution. *Barnes*, 2018 IL App (5th) 140378, ¶ 25.

¶ 47 Since the mandatory firearm enchantment sentencing scheme employed in *Barnes* is identical to the one used in this case, we find that the rationale of that decision directly applies here. In fact, *Barnes*' analysis of our community's evolving moral standards is even more compelling here, where the petitioner's sentence arose not only from the mandatory firearm enhancement (720 ILCS 5/18-2(a)(2), (b) (West 2010)) but from the automatic transfer provision, which has since been legislatively changed in a way that directly impacts the 15-year old petitioner, in a way that it did not impact the 17-year old defendant in *Barnes* (see Pub. Act 99-285 § 5 (amending 705 ILCS 405/5-130(1)(a) (West 2014)). In considering the changing moral compass of our society we cannot ignore the fact that had the petitioner committed this same crime only five years later, as a 15-year old offender, he could not have been automatically transferred to adult court, and, based on his prior clean record and history of family abuse would likely never have been subjected to the mandatory firearm sentencing enhancements that resulted in his present 21-year sentence. Accordingly, taking as we must, at this stage of the postconviction

proceedings, the allegations in the petitioner's *pro se* postconviction and affidavit as true, we find that in the very least, it is arguable that the combination of the two statutes, under which the 15-year old petitioner was automatically charged as an adult and then sentenced to a minimum of 21 years in prison for a first-time non-violent offense, without the court having any opportunity to consider his youth, background or rehabilitative potential, shocks the moral sense of our community and violates our constitution. *Id*., ¶ 25. Under this particular statutory scheme, in condemning the petitioner to spend more years in prison than he had been alive on earth, for an offense that lasted no more than a few minutes and did not injure anyone, the trial court was without any opportunity to consider the petitioner's upbringing, youth, or its attendant circumstances, including as alleged in the petitioner's affidavit his drug addiction and repeated physical and sexual abuse by family members, all of which would have been relevant to his diminished culpability and the increased potential for his rehabilitation.

¶ 48 Since we find the sentence unconstitutional as applied to the petitioner under the Illinois proportionate penalties clause, we find it necessary to vacate that sentence and remand to the trial court for a new sentencing hearing, without the imposition of the mandatory firearm enhancement. In this respect, we acknowledge that ordinarily relief following a first-stage dismissal of a postconviction petition involves remand for second stage postconviction proceedings. See *e.g.*, *People v. Brown*, 236 Ill. 2d 175, 195-96 (2010). Nonetheless, we find that in the present case, where the petitioner's IDOC website confirms that he has already served a third of his adult sentence and will be eligible for parole in two years (on February 10, 2022),[2] judicial economy and expedience necessitate that we directly proceed with a resentencing

[2] See *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 8 (a reviewing court may take judicial notice of IDOC's website).

hearing. See *People v. Davis*, 2014 IL 115595, ¶ 43 (remanding for a new sentencing hearing on appeal from the denial of leave to file a successive postconviction petition); *People v. Nieto*, 2016 Il App (1st) 121604, ¶ 57 (remanding for a new sentencing hearing on appeal from the summary dismissal of a postconviction petition.) On remand, we urge that a PSI be prepared before resentencing, and that the trial court, acting with the utmost expedience, take into consideration the petitioner's youth, his background, his non-violent criminal past, and his rehabilitative potential. Since we vacate the petitioner's sentence on these grounds, we need not consider the remainder of his constitutional arguments on appeal.

¶ 49 III. CONCLUSION

¶ 50 For the foregoing reasons, we reverse the trial court's summary dismissal of the petitioner's *pro se* postconviction petition and vacate the petitioner's sentence. We further remand for a new sentencing hearing with instructions.

¶ 51 Sentenced vacated; trial court's judgement reversed, and the caused remanded for a new sentencing hearing with instructions.

¶ 52 JUSTICE LAVIN, dissenting:

¶ 53 I dissent, as defendant's contentions lack an arguable basis in law or fact. First, defendant's conviction and sentence arose from a negotiated guilty plea. This has significant consequences.

¶ 54 Once a voluntary plea has been entered, the plea waives all irregularities or errors, including those of a constitutional dimension. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). Additionally, "following the entry of judgment on a negotiated guilty plea, even if a defendant wants to challenge only his sentence, he must move to withdraw the guilty plea and vacate the judgment so that, in the event the motion is granted the parties are returned to the status quo."

People v. Evans, 174 Ill. 2d 320, 332 (1996). Conversely, a defendant who enters a negotiated plea cannot attempt to unilaterally reduce his sentence while holding the State to its part of the agreement. Id. at 326. To obtain leave to withdraw a guilty plea, a defendant must show a manifest injustice occurred. *Id*. This happens where a defendant shows the guilty plea was not made voluntarily or with full knowledge of the consequences. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005).

¶ 55 Because defendant entered a negotiated guilty plea, he cannot seek to have his sentence altered without withdrawing the plea. The United States Supreme Court's decision in *Class v. United States*, 583 U.S. __, 138 S. Ct. 798 (2018), does not provide otherwise under these circumstances.

¶ 56 The Illinois Supreme Court has recognized *Class's* holding that "a guilty plea does not 'bar a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution.' " *People v. Johnson*, 2019 IL 122956, ¶ 27 (quoting *Class*, 583 U.S. at__-__, 138 S. Ct. at 801-05). Yet, Illinois' high court has found this statement merely reflects the principle, well settled in Illinois law, that a defendant is not required to move to withdraw his negotiated guilty plea before challenging a sentence as being facially unconstitutional and, thus, void *ab initio*. *Johnson*, 2019 IL 122956, ¶ 27 (citing *People v. Guevara*, 216 Ill. 2d 533 (2005)); *In re N.G.*, 2018 IL 121939, ¶ 36 (same); but see *People v. Patterson*, 2018 IL App (1st) 160610, ¶¶ 1, 8, 18-21 (Where the defendant pled guilty to being an armed habitual criminal (AHC) and later filed a postconviction petition asserting that the AHC statute was unconstitutionally vague as applied, the reviewing court found, pursuant to *Class*, that the defendant had not waived the assertion by pleading guilty.).

¶ 57 Here, however, defendant raises as-applied challenges. Indeed, the majority finds he has

raised an arguable claim that as applied to him, Illinois' sentencing scheme violates the proportionate penalties clause. This as-applied challenge is subject to the normal proscription against altering a sentence without moving to withdraw a negotiated plea. *People v. Thompson*, 2015 IL 118151, ¶ 32 (recognizing that the void *ab initio* doctrine does not apply to as-applied challenges); *cf. Guevara*, 216 Ill. 2d at 542-43 (recognizing that "a guilty plea does not preclude a defendant from arguing on appeal that he was sentenced under a statute that was facially unconstitutional and void *ab intitio*" and considering the defendant's facial proportionate penalties claim based on the identical elements test). Moreover, defendant has not shown an arguable basis for withdrawing his plea.

¶ 58 There is no dispute that at the time of his plea, defendant knew he had a right to be sentenced "according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art I., § 11. Additionally, defendant filed a pretrial motion challenging the automatic application of the 15-year sentencing enhancement as violative of the eighth amendment, citing the United States Supreme Court's recent decisions pertaining to juveniles. Defendant now raises an as-applied challenge to his sentence, albeit under the proportionate penalties clause, based on those same principles. See also *People v. Townsell*, 209 Ill. 2d 543, 546-47 (2004) (finding that because *Apprendi* did not deal with novel constitutional rights, but rather, the applicability of well-settled rights to a jury trial and proof beyond a reasonable doubt, the defendant's guilty plea waived his challenge under *Apprendi*, notwithstanding that that decision was rendered after his plea). Specifically, he contends that his sentence shocks the moral sense of the community. Because defendant's contention arises from a right and argument both known to him and waived at the time he pled guilty, defendant cannot show that a manifest injustice occurred.

¶ 59 Defendant's briefs, and the majority's opinion, also suffer from an inability to consistently and articulately identify the alleged defect in defendant's plea or sentence. In his opening brief, defendant argues that "had [he] known the sentence was unconstitutional, he would not have taken the plea deal and have instead bargained for a better deal or taken his luck at trial." Thus, he initially focuses on the sentence actually imposed and what he perceives to be the trial court's inability to consider mitigating factors. Defendant's reply brief adds, however, that "[t]he statutory scheme that created the threat of a de facto life sentence – for a crime committed at 15- coerced [defendant] into pleading guilty." This is a substantially different contention. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (stating that "[p]oints not argued are forfeited and shall not be raised in the reply brief").

¶ 60 At one point, the majority seems to characterize defendant's argument as a challenge to the process that led to his plea, *i.e.*, the court's alleged limited ability to consider mitigating factors unique to youth. The majority then crafts another argument on defendant's behalf, however. Specifically, the majority states that defendant entered into his plea with the belief that the maximum sentence was 45 years in prison, when, after *People v. Buffer*, 2019 IL 122327, the maximum permissible sentence was 40 years in prison. This is not defendant's contention and it is not the holding of *Buffer*.

¶ 61 In *Buffer*, the Illinois Supreme Court held in the context of the eighth amendment that a juvenile defendant's sentence of at least 40 years in prison constitutes a "*de facto* life sentence without parole." *Id.* In contrast, a sentence of 40 years or less provides a juvenile with a meaningful opportunity to be released upon showing maturity and rehabilitation. *Id.* ¶ 41. Because the trial court imposed a *de facto* life sentence without considering the defendant's

youth and its attendant characteristics, the court vacated the sentence and remanded for resentencing. *Id*. ¶¶ 42, 44. *Buffer* held no more and no less.

¶ 62 The thrust of *Buffer* is that 40 years is a life sentence, just as 45 years is a life sentence. Thus, at all relevant times, defendant could conceivably receive a life sentence. Admonishing defendant that a life sentence would take the form of a 45-year sentence rather than a 40-year sentence did not render his sentence unknowing. Under either scenario, defendant would die in prison. Defendant cannot show he would have pled differently had he known of this all but meaningless distinction. See also *People v. Brown*, 2017 IL 121681, ¶¶ 47- 48 (stating that a conclusory allegation that the defendant would have demanded trial is insufficient to show prejudiced under an ineffective assistance of counsel claim; rather the defendant must demonstrate that it would have been rational for him to reject the plea bargain under the circumstances).

¶ 63 I also disagree with *People v. Parker*, 2019 IL App (5th) 150192. There, the juvenile defendant entered a negotiated guilty plea to murder in exchange for the State's recommendation of a sentence of no more than 50 years and the dismissal of three other counts of murder. *Id*. ¶¶ 2-3. Before accepting the plea, the court admonished defendant that the possible sentencing range was 20 to 60 years or, in some cases, life imprisonment. Id. ¶ 3. The court then sentenced the defendant to 35 years in prison. *Id*. ¶ 4. On appeal from the denial of the defendant's motion for leave to file a successive postconviction petition, the reviewing court was persuaded by the defendant's argument that he would not have pled guilty in exchange for a 50-year sentencing cap if, at that time, he knew that 50 years would constitute a life sentence under *Buffer*. *Id*. ¶¶ 9, 18. The defendant asserted that although he had previously been admonished that he could receive a natural life sentence, the threat was not reasonable following *Buffer*. *Id*. ¶ 18.

¶ 64 First, it was *Miller*, not *Buffer*, that took life sentences off the table for most juvenile defendants. In any event, it is imperative that trial courts advise all juveniles of the statutory sentencing range, including the possibility of a life sentence: no juvenile defendant knows whether he will be the one to be found irretrievably depraved. See Ill. S. Ct. R. 402(a) (eff. July 1, 2012). (stating that "[t]he court shall not accept a plea of guilty *** without first, by addressing the defendant personally in open court, informing him or her of and determining that he or she understands the following: *** the minimum and maximum sentence prescribed by law"). That the circumstances of most cases render the sentence inappropriate do not mean the sentence is truly out of the realm of possibility. Failing to advise defendants of the full range of potential sentences would render guilty pleas infirm.

¶ 65 Finally, defendant's sentence does not shock the conscience. Defendant was sentenced to 21 years in prison, of which he must serve 50%. According to the Illinois Department of Corrections website, defendant will be released on mandatory supervised release on February 10, 2022, when he is 25 years old. *Cf. People v. Reyes*, 2016 IL 119271, ¶ 10 (finding the defendant's mandatory minimum sentence of 97 years, of which he had to serve at least 89 years, constituted a de facto life sentence for purposes of *Miller*); but see *People v. Peakcock*, 2019 IL App (1st)170308, ¶¶ 18-19 (declining to consider day-for-day good conduct sentencing credit in applying *Buffer* because such credit was not guaranteed); *People v. Thorton*, 2020 IL App (1st) 2020 IL App (1st) 170677, ¶ ¶ 20-22 (same). Additionally, defendant cites literature stating that at 25, most individuals cease committing crimes. Thus, defendant will be released at precisely the time when, by his own account, he will stop engaging in criminal activity. *Cf. Buffer*, 2019 IL 122327, ¶¶ 27, 35 (acknowledging that courts generally defer to the legislature's determination of an appropriate penalty and that "to prevail on a claim based on *Miller* and its progeny, a

defendant sentenced for an offense committed while a juvenile must show that *** the defendant was subject to a life sentence, mandatory or discretionary, natural or de facto"). Furthermore, defendant negotiated for and agreed to this sentence. *People v. Applewhite*, 2016 IL App (1st) 142330, ¶¶ 22-23 (abrogated on other grounds by *Buffer*, 2019 IL 122327, ¶ 40) (finding the defendant's minimum sentences of 45 and 12 years in prison for first degree murder and aggravated battery did not shock the conscience where "he negotiated and agreed to that sentence" (emphasis in original) and rejecting the idea that mandatory minimum juvenile sentences were unconstitutional).

¶ 66 Defendant pointed a loaded revolver at another human being, Dixon. This surely left a permanent mark on her life. Additionally, while no one was hurt, this could have ended very differently. Although the majority finds this sentence was harsh, the sentence does not "shock the conscience," notwithstanding that no one was killed and that defendant had no prior convictions.

¶ 67 The record also rebuts the suggestion that the court completely failed to consider defendant's youthfulness. Specifically, the court stated, "I don't know what motivates a young man to stick a gun in the face of a woman and take her property." This comment reflects the court's understanding that youthfulness leads individuals to act impulsively and recklessly. Furthermore, the court expressed its hope that defendant would not repeat this mistake upon release. Thus, the court acknowledged that defendant had rehabilitative potential.

¶ 68 Defendant's petition raised allegations that he used controlled substances and was abused as a juvenile. The trial court did not consider those facts, however, because defendant agreed to forgo the preparation of a presentencing investigation report. 730 ILCS 5/5-3-1 (West 2012). Defendant has not asserted in his petition or on appeal that the waiver was involuntary or invalid.

¶ 69 Because defendant's petition is based on an indisputably meritless legal theory, the trial court properly dismissed his petition.