No. 120655

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 5-10-0587.
Respondent-Appellee,	)	There on appeal from the Circuit Court of the Third Judicial Circuit,
-vs-	)	Madison County, Illinois, No. 80-CF-5.
RICHARD HOLMAN	)	Honorable Charles V. Romani,
Petitioner-Appellant	)	Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

MICHAEL J. PELLETIER
State Appellate Defender

ELLEN J. CURRY
Deputy Defender

AMANDA R. HORNER
Assistant Deputy Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

***** **Electronically Filed** *****

120655

04/07/2017

Supreme Court Clerk

****

No. 120655

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RICHARD HOLMAN Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 5-10-0587. There on appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 80-CF-5. Honorable Charles V. Romani, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

I. Neither forfeiture nor *People v. Jones*, 213 Ill. 2d 498 (2004), apply to Mr. Holman's claim.

The State asserts that Mr. Holman "thrice-forfeited" the issue of whether his sentence was constitutional in light of *Miller* and its progeny, arguing that Mr. Holman raised an as-applied challenge for the first time following this Court's supervisory order rather than his earlier facial challenge to the statute. (St. Br. at 12-20). But the State fails to note in its abbreviated discussion of the litigation in the appellate court that it never argued forfeiture or waiver when it had the chance during supplemental briefing and oral argument following this Court's remand, nor did the State assert this argument by filing a petition for rehearing

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

or a petition for leave to appeal. See (St. Sup. Br.).[1] Instead, it is asserting forfeiture for the first time in its answer brief. So, it is the State that must now contend with forfeiture, not Mr. Holman. *People v. Williams*, 193 Ill. 2d 306, 348 (2000) ("The rules of waiver are applicable to the State as well as the defendant in criminal proceedings, and the State may waive an argument that the defendant waived an issue by failing to argue waiver in a timely manner."); *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) (The State's forfeiture argument must be properly preserved.).

A. Mr. Holman did not forfeit his as-applied challenge because *Miller v. Alabama*, 136 S.Ct. 2455 (2012), was not available to counsel when counsel initially briefed the case.

The State's own forfeiture aside, its argument that Mr. Holman has forfeited his claim that his sentence is unconstitutional in light of *Miller v. Alabama,* 567 U.S. __, 136 S.Ct. 2455 (2012), must fail. The State attempts to show that Mr. Holman forfeited his Eighth Amendment claim because he raised it as a facial challenge in his post-conviction petition rather than an as-applied challenge (St. Br. at 15-16). But, of course, it is well settled that *pro se* post-conviction pleadings should be liberally construed because defendants are not attorneys and need not be experts in the law. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009) ("Because most

[1]Mr. Holman will refer to his initial opening brief filed in the appellate court, file-stamped May 22, 2012, as Def. App. Ct. Br.; the State's initial answer brief, file-stamped October 4, 2012, as St. App. Ct. Br.; and his reply brief, file-stamped October 24, 2012, as Def. App. Ct. Rply. Br. Mr. Holman will refer to his "Brief and Argument Upon Remand," file-stamped April 8, 2015, as Def. Sup. Br.; the State's "Brief and Argument Upon Remand," file-stamped June 18, 2015, as St. Sup. Br.; and the "Supplemental Reply Brief," file-stamped July 20, 2015, as Def. Sup. Rply. Br.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low."). More importantly, Mr. Holman filed his petition two years before *Miller*. Compare (R.472-80, file-stamped October 7, 2010; *Miller*, 136 S.Ct. 2455 (2012), released June 25, 2012). Pursuant to the State's theory of forfeiture, Mr. Holman forfeited his right to raise an issue that did not yet exist. Even attorneys are not held to this standard – nor should *pro se* petitioners.

As to the State's argument that Mr. Holman forfeited his claim because appellate counsel initially raised the issue as a facial challenge, the State simply asks too much of Mr. Holman's counsel. At the time of the filing of Mr. Holman's opening brief – May 22, 2012 – *Miller* did not exist. See (Def. App. Ct. Bf., file-stamped on May 22, 2012). *Miller* would not be filed for another month on June 25, 2012. Rather, counsel's argument was for an extension of the law in juvenile sentencing based on *Graham v. Florida,* 560 U.S. 48 (2011), and *Roper v. Simmons*, 543 U.S. 551 (2005), a fairly prescient argument given *Miller* and its subsequent progeny. The State also makes much of the fact that "in his reply brief, defendant cited *Miller*, but only in support of his facial statutory challenge." (St. Br. at 15). But Mr. Holman's initial reply brief does more than raise a facial challenge. Specifically, Mr. Holman asserted that "the sentencing court did not consider youth as a mitigating factor (as required by *Graham* and *Miller*)." (Def. App. Ct. Rply. Br. at 6). Mr. Holman also noted that the sentencing court found no factors in mitigation, certainly arguments that counsel would only make in light of an as-applied challenge to the sentencing statute. (Def. App. Ct. Rply. Br. at 6).

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

Given the law at the time Mr. Holman filed his briefs and his initial petition for leave to appeal, his arguments were sufficient to alert the reader that the sentence was being challenged, even if the avenue for challenge was murky given the constantly evolving law. Further, this Court did not resolve the issue of a facial challenge based on *Miller* for sometime after Mr. Holman's case was fully briefed. *People v. Davis*, 2014 IL 115595, ¶¶ 26-31, 42, holding that the sentencing statute was not facially unconstitutional but was a substantive new law that satisfied cause-and-prejudice.

Besides, Mr. Holman's challenges that his sentence was disproportionate under the Eighth Amendment and facially unconstitutional are inextricably intertwined in that both arguments asserted that his sentence was unconstitutional, because the trial court did not take youth into consideration before sentencing a juvenile to natural life in prison. See (Def. App. Ct. Rply. Br. at 6); *People v. McKown*, 236 Ill. 2d 278, 310 (2010), citing *In re Rolandis G.*, 232 Ill. 2d 13, 37 (2008) ("When an issue is not specifically mentioned in a party's petition for leave to appeal, but it is 'inextricably intertwined' with other matters properly before the court, review is appropriate.").

Even the best attorney cannot predict the future with perfect clarity, which is precisely what the State wants from Mr. Holman's attorney.[2] But of course, this is not what the law demands. See *Maryland v. Kulbicki*, 136 S.Ct. 2, 4 (2015) (To combat the tendency to speculate whether a different strategy might have

[2]Undersigned counsel did not represent Mr. Holman in the appellate court.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

been better, the Supreme Court developed the "rule of contemporary assessment of counsel's conduct"). After all, counsel need not be perfect, just reasonable within the context of the Post Conviction Hearing Act, and only a perfect attorney could predict future case law. See *Yarborough v. Gentry*, 124 S.Ct. 1, (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

Forfeiture and waiver, of course, are not jurisdictional for this Court but are in place to ensure "administrative convenience." *People v. Bailey*, 159 Ill. 2d 498, 506 (1994). Though Mr. Holman believes he has not forfeited his right to have these issues reviewed as discussed *supra*, to the extent that this Court may agree with the State's forfeiture argument, this Court should still review Mr. Holman's claim with the "goals of obtaining a just result and maintaining a sound body of precedent [, which] may sometimes override considerations of waiver. *Id*.

B. *Jones* does not bar Mr. Holman's claims because the State forfeited its argument by not raising it below, and in any event, this Court has broad supervisory authority to reach the issue.

The State also argues that the appellate court exceeded its authority in considering Mr. Holman's claims because "the appellate court lacked authority to 'relax the forfeiture rule' and consider defendant's new claim." (St. Br. at 16, citing Sup. Ct. Rule 341(h)(7) and *People v. McNeal*, 194 Ill. 2d 135, 147 (2000)). Like the State's forfeiture argument, this argument is also forfeited because the State did not argue *Jones* in its supplemental briefing, when it had the opportunity.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

Williams, 193 Ill. 2d at 348.

As to the merits of the State's argument, it posits that the appellate court exceeded its authority by relaxing the forfeiture rule because "the appellate court does not possess the supervisory powers enjoyed by this [C]ourt and cannot, therefore, reach post-conviction claims not raised in the initial petition[.]" (St. Br. at 17, citing *Jones*, 213 Ill. 2d 498 (2004)). But the State's forfeiture of the issue aside, this claim must fail on the merits.

In order to further its *Jones* argument, the State points to this Court's holding in *People v. Thompson*, 2015 IL 118151. (St. Br. at 19). But this reliance is misplaced. First, the reasoning in *Jones* is based on the statutory language of the Post Conviction Hearing Act, which was inapplicable to the defendant in *Thompson*, who pursued a 2-1401 petition. *Jones*, 213 Ill. 2d at 505; *Thompson*, 2015 IL 118151, ¶ 14. As a result, any subsequent corollaries should be rejected. But the differences between *Thompson* and this case are much deeper than the vehicle used to challenge a defendant's sentence. Thompson was not a juvenile, but was seeking to take advantage of *Miller* in a way that had yet to be recognized by courts. *Thompson*, 2015 IL 118151, ¶ 38 (The record does not contain "any factual development on the issue of whether the rationale of *Miller* should be extended beyond minors under the age of 18."). Thus, he needed to present expert testimony at the trial court in order to prove any scientific claims regarding brain development in adults that were 18 to 21 years of age. Thompson also never mentioned sentencing in his 2-1401 petition, and he only brought up *Miller* for the first time on appeal. *Id.* ¶¶ 13, 17. Finally, and most importantly, Thompson did not ask this Court

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

to review his as-applied challenge, but instead asked this Court to focus solely on whether the appellate court could review his case. *Id.* at ¶ 22. This Court, of course, refused, but instructed Thompson to file a successive post-conviction petition instead. *Id.* at ¶ 44.

Unlike Thompson, Mr. Holman reaches this Court via a successive post-conviction petition, and he has most certainly asked this Court to review his as-applied challenge. See (Def. PLA, dated April 6, 2016, arguing that *Miller* requires more than mere age buried in a PSI but real consideration of youth, which did not occur in Mr. Holman's case; Def. Op. Br. at 41). And while an evidentiary hearing is needed for many, if not most, as-applied challenges, here, everything needed to decide Mr. Holman's claim is already on the record. The application of scientific knowledge regarding brain development has been adopted and applied to juveniles by the highest court in this land as well as by this Court, and *Miller* and *Montgomery* make clear that youth is a constitutional factor in mitigation that must be considered by the trial court when sentencing youth to natural life in prison. So the only question is whether the sentencing hearing that Mr. Holman received complied with *Miller* and its progeny. This compliance is a matter of law, and no further facts could help this Court or the appellate court reach a conclusion. Therefore, the State's reliance on *Thompson* is misplaced. Similarly, because the reasoning in *Jones* echoes concerns expressed in *Thompson* – that a record needs to be developed in the trial court before the appellate court can reach a decision – the reasoning of *Jones* is similarly inapplicable here. (St. Br. at 17); *Jones,* 213 Ill. 2d at 504-05.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

But *Thompson* aside, the State's argument that *Jones* barred Mr. Holman's as-applied challenge overlooks *People v. Davis,* 2014 IL 115595. This Court ordered the appellate court to reconsider Mr. Holman's case in light of *Davis*, which the appellate court was bound to follow. Thus, to the extent that the appellate court ruled on an issue that would ordinarily be beyond its reach due to *Jones*, it did so pursuant to this Court's order. Now the State argues that *Davis* "disposed of the facial challenge that defendant raised," which should have effectively ended the inquiry. (St. Br. at 16) But this interpretation of *Davis* ignores the facts and the holding of the case and the purpose of this court's remand.

In *Davis,* the juvenile raised an issue regarding sentencing in his successive post-conviction petition, which relied on *Graham* because *Miller* was not in existence yet. See (*Davis*, 2014 IL 115595, ¶¶ 9-10, noting that *Miller* was decided while Davis's appeal was pending). Similarly, Mr. Holman filed his successive post-conviction petition on October 10, 2010, less than four months after *Graham* was decided but almost two years before *Miller*.[3] (R.474). In *Davis*, the juvenile raised *Miller* for the first time on appeal; here, Mr. Holman raised *Miller* for the first time on appeal after *Miller* was decided. (*Davis*, 2014 IL 115595, ¶ 10; Def. App. Ct. Rply. Br. at 2, 4, 6) Davis alleged that the sentencing statute was void *ab initio*, a facial challenge based on *Miller*. *Id.* at ¶¶ 23-24. So, too, did Mr. Holman. (Def. App. Ct. Rply. Brf. at 1-6; Def. PLA, filed on February 4, 2013). And this Court in *Davis* held that Davis's argument – and by extension, Mr. Holman's argument

[3]Mr. Holman does not contest that his petition did not raise an Eighth Amendment claim under any theory espoused in *Graham* or *Miller*.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

in his first appellate briefs – that the statute was facially unconstitutional was wrong. *Id.* at ¶ 30. But this Court did not stop its analysis there. Instead, it found *Miller* was retroactive, and it ordered a new hearing for Davis. *Id.* at ¶ 43. As will be discussed *Infra*, Mr. Holman also deserves a new sentencing hearing. But, of course, that goes to the merits. As to the *Jones* issue, the appellate court was following this Court's holding and reasoning in reaching Mr. Holman's underlying claim, and any argument otherwise stands contrary to *Davis*.

Ultimately, *Jones* only applies to the appellate court because this Court has wide supervisory authority. So, to the extent that this Court finds the appellate court exceeded its authority, Mr. Holman respectfully requests that this Court reach the merits anyway. First, as the State concedes, Mr. Holman need only file a new successive post-conviction petition in order to avail itself of *Miller*. (St. Br. at 19). Consider, though, that this case has been pending since October 10, 2010 – at this point, over six years. For the sake of judicial economy and finality, Mr. Holman would request that this Court reach the merits of his argument now rather than at a later date after Mr. Holman files another successive post-conviction petition.

Second, the reasoning of *Miller* indicates that juveniles are not adults, and while their age may increase as they are locked away in prison, in many ways, their status as an undeveloped person does not. A child not in prison becomes an adult, and perhaps has a job, continues an education, or begins a family, and as a result, he or she matures in a variety of ways that are impossible to quantify. But unlike those juveniles, Mr. Holman has not had the benefit of any of these

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

steps in the process of maturity, so despite his increasingly advanced age, common sense would dictate that in many ways, he is still a juvenile trying to navigate a complicated legal system that is changing rather quickly.

Mr. Holman believes that he is entitled to relief. Perhaps this Court will agree; perhaps it will not. But instead of making that determination, the State would have this Court – after years of litigation and limbo – refuse to consider whether he is entitled to relief in order to send him to the trial court again to file a new successive post-conviction petition. But as we know, justice delayed is justice denied, and to avoid a decision because Mr. Holman failed to properly identify an issue that did not yet exist in the law would seem the height of justice denied.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

II. This Court should remand Mr. Holman's case for a new sentencing hearing because after applying the *Miller*-factors, it is clear that the trial court did not adequately consider youth as a mitigating factor.

As to the merits of the State's argument, the State posits that Mr. Holman's brief "rests on the erroneous presumption that *all* natural-life sentences imposed on juveniles before Miller – regardless of whether the sentence was imposed at the trial court's discretion – are unconstitutional." (St. Br. at 20) (emphasis in original). The State reiterates this misstatement of Mr. Holman's argument multiple times, but Mr. Holman did not make this assertion in his opening brief.[4] See (St. Br. at 35, asserting that "Defendant argues that every natural-life sentence imposed on an Illinois juvenile before *Miller* is unconstitutional because the trial judge could not have adequately considered youth as a mitigating factor before *Miller*"; St. Br. at 55, arguing that "defendant's analysis would create a categorical ban on life-without-parole sentences for all juveniles.").[5] Nor does Mr. Holman disagree with the State's premise that "a minor may still be sentenced to natural life

[4]Mr. Holman argued that natural life sentences should be categorically barred for juveniles in his briefings before the appellate court, but he abandoned that claim in both his petition for leave to appeal and in his opening brief before this Court.

[5]The State, in making this assertion, refers to pages 25-26 of Mr. Holman's opening brief, but in those pages, Mr. Holman merely argued that trial courts sentencing juveniles to natural life prior to *Miller*, *Roper*, and *Graham*, did so without the benefit of scientific research regarding the development of juveniles brains as adopted by the Supreme Court in its trilogy of cases. Mr. Holman also argues that *Miller* requires more than the trial court to know how old the juvenile was at the time of sentencing; rather the trial court must consider youth as a mitigating factor in a way that would have been acceptable pursuant to *Miller*.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

imprisonment" under the current state of the law. (St. Br. at 20). Nothing in this Court's jurisprudence or *Miller* held that a natural life sentence may *never* be appropriate, only that it should be rare. And as to the State's "threshold question" regarding whether *Miller* requires a new sentencing hearing for all juveniles sentenced to natural life, even if the sentence was imposed at the trial court's discretion," Mr. Holman would agree that the answer to this question must be no. (St. Br. at 20)

In any event, the State mischaracterizes Mr. Holman's argument. The crux of his argument is really quite simple. *Miller* stands for two basic propositions: that youth and its characteristics are factors in mitigation of constitutional magnitude; and trial courts must consider youth and its characteristics before sentencing a juvenile to natural life. See (*Miller*, 132 S.Ct. at 2464). A trial court might, after considering youth and its attendant circumstances as a mitigating factor, determine that Mr. Holman deserved a lesser sentence – the trial court might also determine that Mr. Holman should still be sentenced to natural life. But again, this determination should rest with the trial court after it has taken careful pains to not only consider youth, but to do so in the way prescribed by *Miller* and its subsequent progeny. Some trial courts, regardless of the year of sentence, might have already complied with this requirement, and for those juveniles, a new sentencing hearing would not be necessary. Here, however, because the trial court, based on both the evidence presented at the sentencing hearing and the trial court's own statement, did not consider youth and its attendant circumstances in the way required by *Miller,* Mr. Holman is entitled to a new

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

sentencing hearing.

The State also takes great pains to argue that Illinois has long since "treated juveniles differently," and has been on the frontlines of juvenile law for decades.[6] (St. Br. at 20-21; 29-33) In particular, the State noted that Mr. Holman was not eligible for the death penalty because of his age, decades before *Roper* made it the law of the land. (St. Br. at 33). Mr. Holman does not deny that Illinois has a long and proud history of being on the forefront of a number of legal issues, including juvenile law. But being on the forefront does not mean that the system is perfect or that Illinois will be impervious to evolving law in every circumstance. Consider that Illinois was one of 29 states that required mandatory natural life for juveniles in certain circumstances - not discretionary, but mandatory. *Miller*, 132 S.Ct. at 2455; *Davis*, 2014 IL 115595, ¶ 27. In fact, Illinois had a law that directly violated *Miller*. *Miller*, 132 S.Ct. at 2455; *Davis*, 2014 IL 115595, ¶ 27. So, while historical perspective certainly has some innate value, its recitation here has no relevance to whether the law actually complied with *Miller* in Mr. Holman's case.

The State has conceded two issues in its answer brief. First, Mr. Holman can establish cause. (St. Br. at 34) Though in conceding this point – as the State was bound to do pursuant to *Davis* – the State wants to continue its historical argument, positing that the legal underpinnings of *Miller* were available to Mr. Holman prior to the Supreme Court's watershed decision in *Miller*. (St. Br.

[6]Mr. Holman does not disagree with the State's lengthy recitation of federal juvenile law. (St. Br. at 22-28).

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

at 34). To the extent that this reasoning is relevant to the State's arguments, it should be rejected, of course, given that this Court held that *Miller* was a new substantive law, and therefore capable of satisfying the cause-and-prejudice test. See (St. Br. at 10, 34; *Davis*, 2014 IL 115595, ¶¶ 26-31, 42). Second, the State has conceded that where a trial court has sentenced a juvenile to natural life in prison, and where that trial court does not take youth into consideration, a remedy is available to him via *Miller*. (St. Br. at 45)

As for prejudice, the State argues that Mr. Holman was not prejudiced for two reasons. First, the State argues that Illinois is unique because Illinois law "has long required [a hearing where youth and its attendant characteristics] was required for all discretionary sentences." (St. Br. at 35). The State draws this conclusion based upon nothing more than a citation to the 1970 Illinois Constitution, which "mandates that courts impose sentences with the goal of rehabilitating the offender." (St. Br. at 35) This, coupled with a citation to *Leon Miller*, 202 Ill. 2d 328 (2008), hardly establishes that Illinois trial courts – especially in 1980 – were considering youth and its attendant circumstances pursuant to the new substantive law of *Miller*.[7] After all, if Illinois had long since had the type of hearings required by Miller, why was the decision a new substantive law to be applied retroactively? But, of course, the State does not answer this question in its brief.

The State then argues that Mr. Holman cannot satisfy prejudice because

---

[7]The State uses *Leon Miller* in its discussion of discretionary sentences, while seemingly ignoring that *Leon Miller* existed due to the intersection of three mandatory statutes. Never mind that Leon Miller is hardly typical of the average sentencing hearing in juvenile cases.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

"the trial court expressly found that defendant could not be rehabilitated." (St. Br. at 46) Importantly, prejudice occurs any time a juvenile is sentenced to natural life and youth is not taken into account. This is why juveniles sentenced under mandatory sentencing schemes survive cause-and-prejudice, and it is why Mr. Holman should as well. *Davis*, 2014 IL 115595, ¶ 42 (*Miller* satisfies the cause-and-prejudice standard of the Post Conviction Hearing Act.).

Mr. Holman does not dispute that the trial court made this finding, but the court did so while also finding that there were no factors in mitigation. (R.742) None, not one factor. Not his brain damage, not his low I.Q., and certainly not his youth and attendant circumstances. But the State does not want to address this part of the trial court's finding, instead arguing that *Miller* requires only that the trial court consider "youth," not that it make any express findings regarding youth. (St. Br. at 36)

But this is disingenuous. It is not as if the trial court made no findings on the record, and the State wants to presume that the trial court considered youth along with all of the factors in mitigation and aggravation. No, the State wants this Court to believe that the trial court made express findings – both that there were no factors in mitigation and that Mr. Holman could not be rehabilitated – but that the trial court must have silently considered youth and its attendant circumstances. The argument is especially artful given that the State concedes that the trial court must consider youth as a mitigating factor; the trial court expressly stated that it did not find factors in mitigation; but pursuant to the State's argument we are now to presume that the trial court considered the opposite of

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

its expressed findings. (St. Br. at 52)

The State argues that "defendant infers that because the trial court stated that it found no statutory mitigating factors, it also ignored all other mitigating factors." (St. Br. at 52) Well, yes, actually, that is what Mr. Holman is arguing. The trial court made findings on the record,[8] but much of the knowledge we have about juvenile development as a mitigating factor was not available to the court at the time. *Miller*, as will be discussed *infra*, is too important for courts to make assumptions or to speculate beyond the record about what a trial court might have known and might have thought more than thirty years ago in order to determine if it complied with new constitutional law. Again, this asks too much based on this record. Finally, the State's argument is even more spurious in light of its request that we take the court at face value regarding Mr. Holman's inability to be rehabilitated. Apparently, silent consideration of factors contrary to expressed findings must only work when the State is making the argument.

The State also deliberates for some time on the procedure that Mr. Holman might have followed had he wished to present evidence of his youth and attendant circumstances in 1980, even speculating that trial counsel could have requested more time to prepare, because after all, "nothing in the record suggests that the trial court refused to admit or consider any evidence." (St. Br. at 46-47) To further its point, the State cites to *People v. Coleman*, 168 Ill. 2d 509, 556-57 (1995), for

[8]At Mr. Holman's sentencing hearing, aside from the PSI, no other evidence was offered regarding his youth and attendant circumstances, though as noted in his opening brief, counsel did make arguments that the trial court should consider whether to remove Mr. Holman from society forever. (R.738-40); (Op. Br. at 5-6).

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

the proposition that an Eighth Amendment violation does not occur where a defendant chose not to present evidence in mitigation. (St. Br. at 46, arguing that Mr. Holman "could have provided information about 'the circumstances that led him to participate in the murder' and his ability to work with his attorneys, prosecutors, or police.'")

But the State's persistence that Mr. Holman should have presented evidence based on scientific data and legal reasoning that would not exist for more than three decades is implausible, if not bordering on mendacious. In light of all we recognize to be true following *Roper*, *Graham*, and *Miller*, hindsight and the benefit of decades of research in brain development and evolving law make the argument that juveniles are, for the most part, not incorrigible seem almost mundane. But at the time of Mr. Holman's sentencing hearing, he was considered an adult by the law. And as indicated by the State's cry that but for age, the State could put Mr. Holman to death,[9] it is hard to imagine that anyone involved in this case – even defense counsel – was able to have the foresight to understand what it took everyone else decades to recognize – that juveniles are categorically less culpable. It is simply not enough for the State to point to individualized sentencing as a failsafe.

In any event, the State ignores that the trial court has a duty to consider

---

[9]The State makes the bizarre claim in its brief that Mr. Holman argued that the prosecutor had an obligation to argue for mitigation based on youth. (St. Br. at 54) Mr. Holman never made this claim; rather, he argued that the State's argument that had Mr. Holman been a few weeks older, then it could have sought the death penalty only underscored the way youth and its circumstances were characterized at Mr. Holman's sentencing hearing. (Op. Br. at 38).

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

factors in mitigation and aggravation. See (R.738-40 (trial counsel arguing that the trial court should consider whether this Court should remove this individual from society forever, or whether he should be given an opportunity to again participate in society); 730 ILCS 5/5-4-1 ("At the hearing the court shall *** consider evidence and information offered by the parties in aggravation and mitigation"); 730 ILCS 5/5-4.5-105 (West 2016) (requiring the trial court to consider a variety of factors before sentencing a juvenile); *Miller*, 132 S.Ct. at 2463-64 (explaining that the Court's death penalty cases required "that sentencing authorities consider the characteristics of a defendant and the details of his offense," which was one of two lines of cases leading to the Court's decision in *Miller*). This Court and the Supreme Court have made clear that youth is a mitigating factor. So whether counsel adequately presented evidence that did not yet exist is beside the point where a trial court expressly found that there were no mitigating factors, and the defendant is a juvenile.

The State also spends a great deal of time discussing why Mr. Holman's crimes were so deplorable that he suffers no prejudice because, in its opinion, the trial court will surely sentence him to natural life anyway. (St. Br. at 48-50). Mr. Holman will not belabor the facts of his case; there are bad facts. But consider the crimes of those children involved in *Miller* and its companion case *Jackson*. *Miller*, 132 S.Ct. at 2461-63. Both involved fairly cold-blooded murder, yet the Supreme Court still found that it was only the rare juvenile that was so incorrigible that the mitigation of youth and its attendant circumstances could overcome the strong indication that children have rehabilitative potential. Again, after the trial

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

court considers Mr. Holman's youth as we understand it today, perhaps it will choose to sentence him to natural life anyway. Perhaps, though, the trial court will view Mr. Holman differently. Perhaps as youth and lessened culpability intertwine with Mr. Holman's intellectual disability and propensity for following others, even to his own detriment, the trial court may find that he is not one of the few incorrigible juveniles worthy of natural life. But really, is this not a question for the trial court? The State's arguments are premised on what it would do if it were sentencing Mr. Holman, but of course, neither Mr. Holman nor the State can sit in judgment. Only the courts have that particular power, and regardless of whether the State thinks Mr. Holman is "incorrigible," he deserves to have an independent judiciary weigh the factors in aggravation and mitigation as they are understood pursuant to *Miller* before sentencing him.

The State has conceded that Mr. Holman would be entitled to relief had the trial court not properly considered youth as a mitigating factor. (St. Br. at 45). A review of the sentencing hearing makes it clear that the trial court did not do so, despite the State's persistent battle-cry of individualized sentencing. The trial court was explicit; there are no factors in mitigation. (R.742). Thus, the merits of Mr. Holman's case demands that he receive a new sentencing hearing that comports with *Miller*.

What that means is up to some debate, of course. Mr. Holman argued in his opening brief that in order for the trial court to adequately consider youth and its attendant circumstances, the trial court needed to consider a certain set of factors, as recognized by *Miller*, numerous other courts, and even our own

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

legislature. (Op. Br. 12-26). The State, with only a passing citation to our own legislature's recent action, argues that the only process required is the consideration of "youth," but fails to explain what that means. Rather, once again, the State falls back on its position that individualized sentencing is a cure-all for every sentencing hearing deficiency – and invites this Court to consider the question at a later date. (St. Br. at 423, stating that "Of course, for future cases, this Court and/or the legislature can, as defendant suggested, guide Illinois courts or impose additional procedural requirements ***).

But we know individualized sentencing is often not enough. Trial courts make mistakes or do not properly understand the law. See *People v. Maggette*, 195 Ill. 2d 336, 350 (2001) (finding 10-year sentence was disproportionate); *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000) (reducing a sentence, finding that "although the trial court is vested with wide discretion in sentencing, such discretion is not without limitation"); and *People v. Guevara*, 216 Ill. 2d 533, 546-47 (2005) (discussing whether the trial court erred in relation to double enhancements). And trial courts are even less likely to make the proper judgment call when there is a lack of guidance. Thus, the adoption of the *Miller*-factors as a baseline provides the necessary guidance in determining how juveniles subject to *Miller* hearings should be sentenced where they do not fall within the parameters of the new statutory guidelines.

Also consider a recent order by the Supreme Court. In *Tatum v. Arizona,* 137 S.Ct. 11 (2016), the Court vacated and remanded the sentences of multiple juveniles serving natural life. *Id.* at 12. In these cases, the trial courts considered

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

youth – in other words, individualized sentencing occurred because the sentencing hearings took place after *Miller*. *Id.* ("The sentencing judge found that Purcell's age at the time of his offense – 16 years old – qualified as a statutory mitigating factor."). Yet Justice Sotomayor, in concurring in the remand, noted that the trial court: "minimized the relevance of [the juvenile's] troubled childhood, concluding that this case sums up the result of defendant's family environment: he became a double-murderer at age 16. Nothing more need be said." *Id.* (internal citations removed). The trial court's comments in *Tatum* echo the trial court's here. The trial court focused on Mr. Holman's crimes – a relevant inquiry – but failed to weigh that against the mitigation of Mr. Holman's youth, troubled childhood, and intellectual disabilities. As the Court's decision to remand suggests, simply acknowledging a factor is not sufficient; it must be considered in a meaningful way. Here, the trial court did not consider youth in the meaningful way required by *Miller*.

The State is eager to point out that the "backdrop" of *Montgomery's* statement – that while "*Miller* does not impose a formal fact finding requirement [, this] does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole" – only applied to mandatory natural life sentences. See (St. Br. at 39-40; *Montgomery*, 136 S.Ct. at 734). But this Court has focused on whether juveniles sentenced to die in prison had sentencing hearings that adequately took youth into account. *People v. Reyes*, 2016 IL 119271, ¶ 9. In *Reyes,* this Court held that "A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

an actual mandatory sentence of life without parole – in either situation, the juvenile will die in prison." *Id.* ("*Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation."). After all, a discretionary hearing that fails to take youth into account is no better than a mandatory one. In both, the juvenile is sentenced without the trial court exercising discretion after weighing youth and its attendant circumstances as a mitigating factor.

Really, the State's response to Mr. Holman's argument in favor of adopting the *Miller*-factors is more of a non-response. See (Def. Op. Br. at 10-26, arguing for the adoption of a set of factors). Individualized sentencing does nothing in the way of providing guidance to courts as they continue to grapple with how to conduct sentencing hearings, and upon review, whether sentencing hearings complied with *Miller*. See (St. Br. at 42, noting that "In Illinois, every discretionary life-without-parole sentence was imposed under a constitutionally mandated procedure that satisfies at least this baseline."). If the courts are uncertain as to the parameters of how youth should be considered as a mitigating factor, how can they adequately provide individualized sentencing?

As this Court has expanded *Miller's* application to *de facto* life sentences, then this guidance has become more and more necessary. Even though defendants in cases like *Reyes* and *Davis* were sentenced under mandatory sentencing schemes, by applying *Miller*, these juveniles are now able to receive discretionary sentences. In other words, the State's failure to respond, relying instead only on the discretionary nature of Mr. Holman's sentence, misses the point. Even where natural

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

life sentences are discretionary, the trial courts and litigants need more particular guidelines than a blanket mandate to consider youth.

Factors, like those listed in *Miller* or in the Illinois statute, provide a baseline for courts conducting sentencing hearings. Youth, at least as it is viewed via *Miller*, is more than a number. It is at least about the juvenile's lack of maturity, his ability to navigate the justice system, his lessened culpability when making poor decisions, his inability to perceive far-reaching consequences. And these types of issues can be hard to quantify, which is why this Court should simplify the process and adopt factors similar to those espoused in *Miller*.

Here, when those factors are applied to Mr. Holman, it is clear that the trial court did not consider age as anything other than a number. While the State may argue that Illinois' individual sentencing won the day, and Mr. Holman received due process, the trial court's express findings say otherwise. It found no factors in mitigation. And we can speculate about what the trial court may or may not have thought, but the record is all that we have to review. It is undeniable that *Miller* changed the landscape of juvenile law. It may not be true that every juvenile sentenced prior to *Miller* did not receive an adequate sentencing hearing. Perhaps some did. However, it seems unjust to presume that a trial court considered youth as a mitigating factor in the way imagined by *Miller* despite the court's opposite statement on the record. Thus, Mr. Holman is entitled to a new sentencing hearing.

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

CONCLUSION

For the foregoing reasons, Richard Holman, petitioner-appellant, respectfully requests that this Court adopt the *Miller*-factors as a parameter for *Miller* hearings and remand Mr. Holman's case for a new sentencing hearing pursuant to *Miller*.

Respectfully submitted,

ELLEN J. CURRY
Deputy Defender

AMANDA R. HORNER
Assistant Deputy Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 6571 words.

/s/Amanda R. Horner
AMANDA R. HORNER
Assistant Deputy Defender

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM

No. 120655

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RICHARD HOLMAN Petitioner-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, No. 5-10-0587. There on appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 80-CF-5. Honorable Charles V. Romani, Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 730 E. Illinois Hwy 15, P.O. Box 2249, Mt. Vernon, IL 62864; 05dispos@ilsaap.org;

Mr. Thomas D. Gibbons, Madison County State's Attorney, 157 N. Main St., Suite 402, Edwardsville, IL 62025;

Mr. Richard Holman, Register No. N06132, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764

Under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statement set forth in this instrument are true and correct. An electronic copy of the Reply Brief in the above-entitled cause was submitted to the Clerk of the above Court for filing on April 6, 2017. On that same date, we mailed three copies to the Attorney General of Illinois, mailed three copies to opposing counsel, and mailed one copy to Madison County State's Attorney Office and one copy to the petitioner-appellant in envelopes deposited in a U.S. mail box in Mt. Vernon, Illinois with proper postage prepaid. The original and twelve copies of the Reply Brief will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

/s/Kishanna Hawthorne
LEGAL SECRETARY
Office of the State Appellate Defender
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
Service via email will be accepted at
5thdistrict.eserve@osad.state.il.us

I2F SUBMITTED - 1799924053 - AMANDAHORNER - 04/06/2017 12:08:22 PM DOCUMENT ACCEPTED ON: 04/07/2017 04:20:58 PM