2021 IL App (2d) 190112-U
No. 2-19-0112
Order filed April 13, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-1875
ELVER HERNANDEZ,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justice Schostok concurred in the judgment.
Justice McLaren specially concurred.

ORDER

¶ 1 *Held*: We affirm, concluding the trial court correctly denied defendant leave to file a successive postconviction petition asserting his 84-year sentence for a murder he committed at the age of 20 violated the eighth amendment to the United States Constitution and the proportionate-penalties clause of the Illinois Constitution. Defendant could not claim his sentence, as applied to him, violated the eighth amendment because he was not a juvenile at the time of the offense. He failed to establish cause for his failure to earlier raise his proportionate-penalties claim and, further, the record showed his sentencing hearing passed constitutional muster.

¶ 2 Defendant appeals from the circuit court's order denying him leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West

2018)). His proposed petition asserted, in relevant part, his 84-year sentence for a murder he committed when he was 20 years old violated the eighth amendment to the United States Constitution (U.S. Const., amend. VIII) and the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). In this appeal, defendant contends the court erred in denying him leave to file the successive petition where he satisfied the cause-and-prejudice test set forth in section 122-(f) of the Act (725 ILCS 5/122-1(f) (West 2018)) to excuse his failure to raise his claim in his initial postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In the early morning hours of May 9, 2009, defendant, who had turned 20 years old two days earlier, and his 17-year-old brother, Edwin Hernandez, set fire to a home in Mundelein. The fire killed 12-year-old Jorge Juarez and seriously injured Jorge's mother, Virginia Estrada, who was paralyzed jumping from a second-story window to escape the fire, and 11-year-old sister, Virginia Juarez, who suffered severe burns about her body before escaping the fire. The intended target of the fire, Rafael Juarez, was not home at the time. The Lake County Major Crimes Task Force investigated the fire and, as part of its investigation, obtained video-recorded statements from defendant and Edwin, during which they admitted to being members of the Mundelein Latin Kings street gang and confessed to setting the fire while carrying out a "smash on sight" order on Rafael that was given by Manuel Flores, who was another, higher-ranking member of the gang.

¶ 5 A grand jury indicted defendant with several counts of first degree murder and aggravated arson based on those acts. The count on which defendant was ultimately convicted additionally alleged that defendant was eligible for an extended-term sentence based on the fact it was committed in furtherance of the criminal activities of an organized gang.

¶ 6 Before trial, defendant moved to quash his arrest and suppress his statement based on

various legal theories. At the hearing on the motions, the State presented testimony from the investigating police officers and detectives, as well as defendant's and Edwin's statements, briefly summarized as follows.

¶ 7 The night before the fire, on May 8, 2009, defendant and his brother attended a gang meeting at a house in Antioch, Illinois, where several members were present. During the meeting, the gang discussed the "smash on sight" order that had issued against Rafael, and Flores assigned to defendant the order.

¶ 8 After the meeting, defendant and Edwin went to a party at which Latin Kings were present, and defendant began drinking beer. Defendant and Edwin returned home. Defendant drank another beer to work up the "nerve" to carry out the "smash on sight" order and, after he armed himself with a metal pipe and Edwin fashioned a firebomb out of a 40-ounce beer bottle filled with gasoline, the two walked two or three blocks to the Juarez house. There, defendant used the metal pipe to break the windows of a van parked in the driveway and Edwin ignited a cloth wick which he had placed into the firebomb and threw it at the front of the house, causing a small fire on the front porch. (The presentence investigation report (PSI) prepared for defendant before sentencing stated that the fire investigation revealed the fire spread from the front porch to the first and second floors of the Juarez house.) Defendant and Edwin returned home and went to sleep.

¶ 9 Later that morning, the police came to their residence and asked to speak with them. Defendant and Edwin both initially gave statements in which they denied their involvement with the fire but later gave the video-recorded statements referenced above. In his statement, defendant told the officers he felt compelled to carry out the "smash on sight" order because Flores told him, if he did not, defendant or his family would be harmed. He expressed remorse during his statement, telling police "it wasn't meant to be like that" and he did not intend to kill anyone.

¶ 10 The trial court denied defendant's motions, and defendant elected to proceed to a stipulated bench trial (to preserve his appellate rights on the motions). The court considered the evidence presented at the hearing on defendant's motions and found him guilty of first degree murder.

¶ 11 Before sentencing, the court ordered a PSI be prepared for defendant. The PSI indicated defendant declined to participate with the investigation, failed to fill out an "investigation interview packet," and told the probation officer he "felt [it] would be a waste of time" given he was facing 60 to 100 years' imprisonment. As a result of defendant's refusal to cooperate, the probation officer compiled information received from defendant's sister, Nidia Hernandez, Edwin's PSI interview, his probation records (including a PSI prepared in a prior case), and police documents to prepare defendant's PSI.

¶ 12 According to the PSI, defendant was one of seven children born to his parents, who immigrated to the United States from El Salvador around 1995 and had lived at the same home in Mundelein for 15 years. Defendant's parents held steady employment as factory workers and raised him and his siblings "with love and manners." Defendant spent most of his free time with Edwin and was always respectful at home. Nidia reported she and defendant had a close relationship and that defendant "was a thoughtful and respectful brother." He helped her "a lot" when she became a mother at a young age. Defendant had no significant health issues and had not been psychologically or psychiatrically evaluated. He began smoking cannabis at age 14 and drinking alcohol at age 15.

¶ 13 Defendant dropped out of high school while in the 11th grade, stating he "didn't understand and felt it was a waste of his time." Nidia told the probation officer she believed defendant had some "learning difficulties" but was not enrolled in special education classes in school. The PSI further indicated defendant was briefly enrolled in general equivalency diploma (GED) classes

while incarcerated but made little progress, and he was "currently engaged in self-study." The PSI further noted defendant, prior to his incarceration in this case, had been employed as a landscaper at a golf course, a shopping cart collector at Walmart, and the factory which employed his mother.

¶ 14 The PSI stated defendant joined the Latin Kings while in middle school and would often leave home for weeks at a time. It also set forth defendant's criminal history. Defendant's first two convictions, for conduct occurring in May 2005 and October 2006 and which involved criminal defacement of property and alcohol consumption, resulted in sentences of court supervision which were satisfactorily completed. The remainder of his criminal history showed he was repeatedly arrested for mostly alcohol-related offenses, with the exception of convictions for criminal trespass to residence, battery, resisting a peace officer. Each time defendant received noncustodial sentences, those sentences were terminated unsatisfactorily, resulting in jail time. (It also showed he was released from his most-recent jail sentence four days before the offense at issue.)

¶ 15 The PSI also stated that defendant had been incarcerated since his arrest in this case in May 2009 and had been sent to the administrative segregation unit as a result of four jail citations. The first was based on the fact that, on May 13, 2010, jail personnel discovered gang-related graffiti on the wall of his cell. The second was based on the fact that, on June 15, 2010, defendant and another incarcerated Latin King carried out "a hit" on an inmate who belonged to a rival gang, attacking the inmate and causing him two black eyes. The third was based on the fact that, on August 4, 2010, defendant left his cell during a lockdown. The fourth was based on the fact that, on September 10, 2010, he stole batteries from a radio.

¶ 16 At sentencing, the court offered defendant the opportunity to make additions or corrections to the PSI. Defense counsel stated defendant had never gone by an alias listed in the PSI but otherwise offered no additions or corrections. The State presented a victim impact statement,

which was read by Jorge's sister. Defendant tendered letters from his father and his younger sister's boyfriend, Eddie Rodriguez. In his letter, defendant's father stated he had always tried to set a positive example for defendant, discouraged his friendships with gang members, and was heartbroken by defendant's current circumstances. He stated the family had fled to the United States to escape political tyranny and to give his children an opportunity at a better life, working multiple jobs to do so. He also stated defendant helped him with his oldest son, Nelson, who was apparently disabled.

¶ 17 In his letter, Rodriguez stated that defendant was "a young man full of a good future," who respected his parents, brothers, and sister, and was "always there for them" in times of need. He also stated he had "the pleasure to work with him in a few of his jobs." Further, he stated defendant's "so called friends were not to [his] liking," he had cautioned defendant to stay away from them, and defendant "was a guinea pig to the problem," not a killer.

¶ 18 In mitigation, defendant asked the court to consider the minimum sentence. He argued he came from a loving and supportive family but, because his parents were "scraping and doing everything to survive" and provide, they were not able to provide the nurturing and social skills necessary for him to avoid becoming involved in the Latin Kings. He argued the "gang call is a horrible one," which is difficult to grow out of, and most people grow out of it only if they avoid the situation he was currently in. He highlighted the remorse and regret he exhibited during his video-recorded statement. He emphasized the need to look at his humanity as opposed to focusing on the "buzz words" present in this case like "gang involvement" and "substance abuse." He argued he was young at the time of the offense, noting the frontal lobe of the brain, which holds common sense, is not fully developed until the age of 25, and young people do not understand they are not immortal, the consequences of their actions, or how society functions.

¶ 19 The court sentenced defendant to an extended-term of 84 years' imprisonment, to be followed by a 3-year term of mandatory supervised release (MSR). In setting forth its decision, the court noted it had considered all the information before it, including the evidence at trial, the victim impact statement, the letters submitted by defendant, the arguments of counsel, the PSI, the statutory and nonstatutory factors in aggravation and mitigation, defendant's family's presence, "as well as the constitutional command to fashion a sentence that would facilitate the defendant's rehabilitative potential and restore him to useful citizenship." The court observed the events leading to defendant's convictions were a tragedy, both for the Juarez family and defendant's family, and those events were the results of defendant's choices to attach himself to a "group bent on committing crimes" and actually carry out the "smash on sight" order, and not "because society ha[d] failed us on gangs or all of the other issues." The court noted there was "humanity" in defendant's home, based on defendant's respectfulness and supportiveness at there, but defendant's acts on the night of the offense were inhumane. The court further observed its responsibility was to sentence defendant based on what he did and who he is. The court remarked defendant was a 22-year-old man who had chosen to actively participate in a street gang, of which he was a "self-professed and proud member," since middle school. The court addressed defendant's criminal background, noting defendant had previously committed offenses with his brother, and, where defendant received sentences of probation or court supervision, those sentences "didn't go well" because defendant continued to engage in criminal activity while serving those sentences. The court also took note of the fact defendant had been placed in the segregation unit while incarcerated in this case, including twice for gang-related activity. The court continued:

"The defendant has also shown the ability to make good choices when he's out. He

works variously at the golf club, in landscaping and at Walmart. These are good things, good things he's done and they count in his favor. *He's young. This happened the day after his 20th birthday. He's 22 today. In my book that's still young*.

[Defendant], whether you know it or not, you are blessed by a loving and supportive family who have been there for you and are still there for you. The way you choose to behave toward them is different than the way you're behaving in other contexts.

***

There are a couple other factors I'm going to mention to know I've thought about them, although there are others that I thought about that I will not mention. Two of them are whether you acted under a strong provocation or whether there was substantial grounds tending to excuse or justify your conduct, though failing to establish a defense. *I considered your concern that you had to do this or you might put your family at risk.* That's not an excuse. That's not provocation. That's your reason for making the choice you did. But that's all on you.

*I've also considered *** whether your conduct was induced or facilitated by someone other than you. Actually I find that it was and I find that factor in mitigation present.* You committed this offense with your brother. You're certainly accountable for it certainly along with him. And to the extent that the idea came from another in the gang, I find that factor present.

***

*I've also considered *** whether your criminal conduct was the result of circumstances unlikely to recur and whether your character and attitudes indicate you're unlikely to commit another crime. Based upon the choices you made before this and based*

upon how you decided to act in custody, I cannot find those factors here.

***

[Defendant], you're here today because of a series of decisions you made *** that seem to be a big part of a pattern of choices you've made for years and years and years. Somebody who participates in a fight in jail because a gang put a hit on somebody or graffitis their wall in jail *tells me they're going to do worse when they're out.* And that said, there is not a whole lot worse than this.

After you made the choice to do this the evidence is you went home and went to bed. That's cold. [Defense counsel] tells me to look at the humanity in this case. There's humanity in each and every one of us. I don't know where you put that humanity that night. This was cold, heartless, premeditated[,] and brutal. It was terrible and *** inhumane." (Emphases added.)

¶ 20 Defendant appealed, arguing the trial court improperly (1) admitted his confession, (2) found him eligible for an extended-term sentence, and (3) imposed a public-defender fee without considering his ability to pay it. We vacated the public-defender fee, remanded the matter for the court to consider defendant's ability to pay it, and affirmed the court's judgment in all other respects. *People v. Hernandez,* 2012 IL App (2d) 110817-U.

¶ 21 In June 2013, defendant filed a petition under the Act. He asserted (1) the application of MSR was unconstitutional, and (2) various claims of ineffective assistance of trial and appellate counsel. The circuit court summarily dismissed defendant's petition and, on appeal, we affirmed. *People v. Hernandez,* 2014 IL App (2d) 131082.

¶ 22 In March 2018, defendant sought leave to file a successive petition under the Act. In the proposed petition, defendant asserted, in relevant part, his 84-year sentence, as applied to him,

violated the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). Relying on *People v. House*, 2015 IL App (1st) 110580 (*House I*), and *People v. Harris*, 2016 IL App (1st) 141744 (*Harris I*), defendant contended his sentence "shocked the moral sense of the community" and eliminated his prospects of becoming a contributing member of society. He noted he had no violent criminal history, did not personally throw the firebomb at the Juarez residence, was "taking orders from higher[-]ranking member's [*sic*] of his gang," was raised by his parents, attended GED classes while in custody, and held steady employment before his incarceration, all of which evidenced his ability to return to useful citizenship. He asserted his membership in the Latin Kings was "directly related to his youth," he was susceptible to becoming involved in the gang because he grew up in a "semi crime infested area" which was dominated by the gang, and that he was susceptible to peer pressure by reason of his involvement in the gang. He also asserted his substance-abuse issues made him more vulnerable to the pressures of his gang. He next contended the fact he committed the offense with 17-year-old Edwin, with whom he spent most of his time, and not with other members of his gang showed he "was not a fully mature young adult, but was 'juvenile minded,' he had a lack of maturity and an underdeveloped sense of responsibility which led to recklessness, impulsivity, and heedless risk-taking." He further alleged that he was a "soldier" for the Latin Kings and had been subjected to intimidation, fear, and pressure to carry out orders from older gang members since he joined the gang in middle school, which further evidenced his susceptibility to peer pressure, recklessness, and impulsivity. He contended he should have been afforded the protection given to juvenile offenders under *Miller v. Alabama*, 567 U.S. 460 (2012), before being sentenced to what was, in effect, a life sentence. In addition, he

noted "[t]rial counsel attempted to reason with the trial court in regards to getting [him] a sentence that would facilitate his rehabilitative potential and restore him to useful citizenship."

¶ 23 As to the requirements of cause and prejudice for filing successive petitions under the Act (see 725 ILCS 5/122-1(f) (West 2018)), defendant asserted he had cause because *House I* and *Harris I* were not decided until after his conviction, direct appeal, and initial postconviction proceedings. He also asserted *House I* and *Harris I* were "based on newly discovered evidence in neuroscience which also came after [his] conviction" and that, prior to those decisions, he was disqualified from seeking relief because *Miller* applied only to juveniles who faced life in prison. With respect to prejudice, defendant contended his mandatory, 84-year, *de facto* life sentence violated the eighth amendment and proportionate-penalties clause because the circuit court "was precluded from consideration of mitigating factors that could have provided [him] with a lesser sentence."

¶ 24 He attached to his proposed petition a copy of the PSI and select portions of the transcript.

¶ 25 The circuit court denied defendant leave to file the proposed petition. This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant contends the circuit court erred by denying him leave to file his successive postconviction petition. Specifically, he argues he established cause because the cases on which he bases his claims, *House I* and *Harris I*, were not decided until after he filed his initial postconviction petition. He argues he established prejudice because his petition stated a viable as-applied challenge to his 84-year sentence under both the eighth amendment to the United States Constitution and the proportionate-penalties clause of the Illinois Constitution.

¶ 28 A. The Post-Conviction Hearing Act and Applicable Standards

¶ 29 The Act sets forth a procedure under which a criminal defendant can assert his or her conviction was the result of a substantial denial of his or her rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A defendant commences proceedings under the Act by filing a petition. *Id.*; 725 ILCS 5/122-1(b) (West 2018). The Act, however, contemplates the filing of only one petition without leave of court, and any claim not presented in the original or amended petition is waived. *People v. Carrion*, 2020 IL App (1st) 171001, ¶ 24; 725 ILCS 5/122-1(f) (West 2018). Accordingly, "successive postconviction petitions are highly disfavored, and the statutory bar will be relaxed only when fundamental fairness requires it." *Carrion*, 2020 IL App (2d) 171001, ¶ 24.

¶ 30 Section 122-(f) of the Act sets forth the showing a defendant must make before being given leave to file a successive petition, which has been deemed the cause-and-prejudice test. It states as follows:

> "Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2018).

We review *de novo* the circuit court's denial of leave to file a successive petition. *People v. LaPointe*, 2018 IL App (2d) 160903, ¶ 33.

¶ 31 In *Miller*, 567 U.S. at 489, the United States Supreme Court held mandatory life sentences for juveniles who commit murder violate the eighth amendment's prohibition against cruel and unusual punishment. Since *Miller* was decided, our supreme court has held *Miller* applies retroactively to cases on collateral review (*People v. Davis*, 2014 IL 115595, ¶¶ 39, 42), and has expanded the scope of its holding to include both mandatory and discretionary sentences which are either natural or *de facto* (meaning in excess of 40 years) (*People v. Buffer*, 2019 IL 122327, ¶¶ 27, 41). Under *Miller*, a trial court may sentence a juvenile defendant to life imprisonment without parole only if the trial court determines the defendant's conduct displayed "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation," but must first consider the defendant's youth and its attendant characteristics. *People v. Holman*, 2017 IL 120655, ¶ 46.

¶ 32 The proportionate-penalties clause of the Illinois Constitution provides "[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. "A sentence violates the proportionate[-]penalties clause if 'the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.' " *Carrion*, 2020 IL App (1st) 171001, ¶ 29 (quoting *People v. Leon Miller*, 202 Ill. 2d 328, 338 (2002)). A young-adult offender may raise in successive postconviction proceedings a claim that his sentence, as applied to him, violates the proportionate-penalties clause, provided he or she meets the cause-and-prejudice test. *People v. Harris*, 2018 IL 121932, ¶ 48 (a nonjuvenile offender's as-applied proportionate-penalties claim is viable in postconviction proceedings).

¶ 33 B. Defendant's Eighth-Amendment Claim

¶ 34 Defendant first contends his eighth amendment claim under *Miller* was valid even though he was 20 years old at the time of the offense. Relying on *People v. House*, 2019 IL App (1st) 110580-B (*House II*), *appeal allowed*, No. 125124 (Jan. 29, 2020), and *Cruz v. United States*, 2018 WL 1541898 (D. Conn. 2018), he contends *Miller* left open the possibility a defendant could raise an as-applied eighth-amendment challenge to his sentence. He further contends *Harris*, 2018 IL 121932 (*Harris II*), provides further support, albeit by implication, that he may properly raise his eighth-amendment claim under the Act.

¶ 35 This court has consistently rejected defendant's argument, explaining *Miller*, *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005) " 'explicitly limit their scope to the sentencing of those who were under 18 years old at the time of their crimes.' " *LaPointe*, 2018 IL App (2d) 160903, ¶ 35 (quoting *People v. Horta*, 2016 IL App (2d) 140714, ¶ 84); accord *People v. Pittman*, 2018 IL App (1st) 152030, ¶¶ 30-31, and *People v. Thomas*, 2017 IL App (1st) 142557, ¶ 28. Indeed, we have recognized "it is clear that the categorical findings made by *Miller* and its progeny under the federal eighth amendment apply only to juveniles." *Carrion*, 2020 IL App (1st) 171001, ¶ 28. Since defendant was 20 years old at the time of the offense, he cannot challenge his sentence under the eighth amendment. See *id.* Rather, the only viable constitutional claim he could potentially assert is under the proportionate-penalties clause of the Illinois Constitution. *Id.* ¶ 29.

¶ 36 In reaching our conclusion, we note *House II*, *Cruz*, and *Harris II* do not support defendant's position that he may raise an as-applied eighth-amendment challenge to his sentence. While it is true, as defendant asserts, *House II* observed the line by the Supreme Court at 18 years old was "somewhat arbitrary" and did not appear to be a bright-line rule, *House II* did not address the defendant's eighth-amendment claim but, rather, granted him relief under the proportionate-

penalties clause of the Illinois Constitution. *House*, 2019 IL App (1st) 110580-B, ¶ 66. In any event, this district has consistently rejected the *House* court's reasoning, explaining the Supreme Court could not have been any clearer in demarcating the line at which eighth-amendment protection and the principles of *Miller* apply: it applies only to those who are juveniles at the time of the offense. See *People v. LaPointe*, 2018 IL App (2d) 160903, ¶¶ 35-37, 44, 47; *People v. Horta*, 2016 IL App (2d) 140714, ¶ 84.

¶ 37 *Cruz* is no longer good law—it was later vacated by the appellate court.[1] See *Cruz v. United States*, 826 Fed. Appx. 49 (2d Cir. 2020) (vacating the district court's decision, finding it was inconsistent with Second Circuit and Supreme Court precedent).

¶ 38 And, this court has consistently rejected the position that the eighth amendment and *Miller* provide a basis for nonjuvenile offenders to challenge their sentences, even after *Harris II* was decided and despite its purported implication a nonjuvenile offender can raise an as-applied eighth-amendment challenge under the Act. See *People v. Handy*, 2019 IL App (1st) 170213, ¶ 37. We now turn to defendant's as-applied proportionate-penalties challenge.

¶ 39 C. Defendant's Proportionate-Penalties Claim

¶ 40 With respect to his proportionate-penalties claim, defendant argues, in light of the evolving standards surrounding the sentencing of young people, "Illinois courts have and should recognize that imposing lengthy sentences on young adults aged 18 and older can violate the proportionate penalties clause as applied to them, under the principles outlined in *Miller*." He contends he

[1] Defendant's citation in his reply brief to the district court's decision in *Cruz* is perplexing given the decision was vacated by the appellate court more than four months before defendant filed the reply.

showed cause for his failure to bring this claim earlier because the appellate decisions on which it is based—*House I* and *Harris I*—were not decided until after he filed his initial postconviction petition. He contends he showed prejudice where his proposed successive petition stated a viable claim under the proportionate-penalties clause because the record demonstrates his behavior at the time of the offense exhibited many of the hallmarks of immaturity and impetuosity, including the failure to appreciate risks and consequences; his upbringing and alcohol use contributed significantly to his actions; he is not incorrigible but rather has rehabilitated while in prison; and his family support, employment history, and insignificant, nonviolent criminal history showed rehabilitative potential.

¶ 41 The State argues this court, in *LaPointe*, 2018 IL App (2d) 160903, and *People v. Hoover*, 2019 IL App (2d) 170070, rejected the argument advanced here by defendant. It asks us to follow those cases and find defendant has failed to establish cause for his failure to earlier raise the claim. With respect to prejudice, the State argues the circuit court, in fact, considered defendant's youth and his rehabilitative potential when it sentenced him and defendant's challenge here is nothing more than a contention the court abused its discretion in imposing his sentence. The State also argues that, because defendant's sentence was discretionary, not mandatory, the circuit court was "afforded the opportunity to fully consider all the circumstances, including mitigation and aggravation, prior to sentencing defendant," and, in fact, did so.

¶ 42 We agree with the State.[2] *LaPointe* and *Hoover* control the resolution of this case. In *LaPointe*, the defendant, who had turned 18 years old just prior to the offense, was convicted of

[2] For purposes of our analysis, we will assume defendant's proportionate-penalties claim is not automatically defeated by the failure of his eighth-amendment claim. See *LaPointe*, 2018 IL

first degree murder and sentenced to life imprisonment based on the fact the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. *LaPointe*, 2018 IL App (2d) 160903, ¶¶ 10-11. In August 2016, after unsuccessfully seeking collateral relief in 2002 and 2011, the defendant sought leave to file a successive petition under the Act, and his proposed petition raised, in relevant part, an as-applied challenge to his sentence under the proportionate-penalties clause and *Miller*. *Id.* ¶¶ 19, 25. As to the cause requirement, the defendant asserted he had cause to excuse his failure to include the claim in earlier proceedings because *Miller* was decided in 2012, after he filed his initial postconviction petition. *Id.* ¶ 19. As to prejudice, he contended the sentencing court failed to consider several of the mitigating factors required under *Miller*, including his youth, family situation and home environment, emotional- and mental-health history, and potential for rehabilitation. *Id.* ¶ 20. The defendant's proposed petition then set forth with specificity how the trial court purportedly failed to consider the factors that *Miller* required and how it purportedly failed to consider his potential for rehabilitation. *Id.* ¶¶ 24-25. The trial court denied defendant leave to file the proposed petition. *Id.* ¶ 29.

¶ 43 On appeal, after finding the defendant's eighth-amendment claim failed because he was not a juvenile at the time of the offense, we addressed his proportionate-penalties claim. We first considered the cause requirement and concluded defendant could have raised the claim in his initial petition because the clause was "very much in existence then" and the proposition that a defendant's youth is pertinent to sentencing was well established. *Id.* ¶ 55. In doing so, we rejected the defendant's argument the unavailability of *Miller* in his earlier postconviction proceedings meant his claim was unavailable, explaining his argument was not based on the substantive rule

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App (2d) 160903, ¶ 54 (declining to resolve the "coextensive conundrum" in this context).

of law created by *Miller* but rather some of the support the *Miller* Court found for the new rule. *Id.* ¶ 58. We further explained *Miller*'s nonexistence did not prevent the defendant from arguing the trial court's purported failure to consider his youth as a factor in mitigation violated the proportionate-penalties clause. *Id.* ¶ 59. Rather, it "merely deprived defendant of some helpful support for that claim." *Id.*

¶ 44 In *Hoover*, 2019 IL App (2d) 170070, ¶¶ 37-43, we straightforwardly applied *LaPointe* and found the defendant, who was 22 years old at the time of the offense, failed to show cause and prejudice to excuse his failure to raise his as-applied proportionate-penalties claim in his initial postconviction petition.

¶ 45 Here, like in *LaPointe* and *Hoover*, defendant has failed to establish cause as required by section 122-1(f) of the Act. Defendant could have raised his proportionate-penalties claim in his initial petition under the Act, which he filed in June 2013. The clause existed then, and the principle that a defendant's youth is relevant to sentencing was well-established at that time. *LaPointe*, 2018 IL App (2d) 160903, ¶ 55; *Hoover*, 2019 IL App (2d) 170070, ¶ 37. Further, *Miller* was decided almost a full year before defendant filed his initial petition and defendant certainly could have asked the circuit court to apply its rationale and holding to him at that time. Therefore, the materials defendant needed to assemble an argument his sentence was unconstitutionally severe in light of his relative youth were available when he filed his initial petition.

¶ 46 The fact the cases defendant relied upon in his proposed petition—*House I* and *Harris I*—were not decided until after defendant filed his initial petition does not establish cause under section 122-1(f) or change our conclusion. Those cases did not create a new substantive legal rule but rather merely relied on a substantive rule which was already in existence—the proportionate penalties clause—to grant the defendants relief. See *House I*, 2015 IL App (1st) 110580 (finding

the defendant's mandatory life sentence violated the proportionate-penalties clause as applied to him), and *Harris I*, 2016 IL App (1st) 141744 (same). Those cases' nonexistence merely deprived defendant of *support* for his claim, but their nonexistence *did not prevent* him from asserting the trial court's purported failure to consider his youth and related circumstances as factors in mitigation violated the proportionate-penalties clause in his initial petition. *LaPointe*, 2018 IL App (2d) 160903, ¶ 59.

¶ 47 Defendant asks this court to reconsider the rationale we used to come to our conclusions in *LaPointe* and *Hoover*. He notes "at least eight published appellate court decisions have held, contrary to *LaPointe* and *Hoover*, that the availability of more recent Illinois decisions newly applying the teaching of *Miller*" establishes cause to excuse the failure to earlier raise the claim. However, none of the cases cited by defendant in support of this argument address our rationale in *LaPointe* and *Hoover* or explain why it is wrong. Moreover, as we explained in *LaPointe*, if the acquisition of new support for an already viable claim were all a defendant needed to show cause to raise the claim late, then the cause requirement "would be a weak threshold indeed." *LaPointe*, 2018 IL App (2d) 160903, ¶ 59. In light of the foregoing, we conclude defendant failed to establish cause for his failure to earlier raise his proportionate-penalties claim, and, therefore, the circuit court correctly denied defendant leave to file his proposed successive petition. See *People v. Guererro*, 2012 IL 112020, ¶ 15 (failure to establish both cause and prejudice precludes leave to file successive petition).

¶ 48 Though we need not go any further with our analysis (see *People v. Brown*, 225 Ill. 2d 188, 207 (2007)), we note the record casts serious doubt on, if not fully forecloses, defendant's claim the circuit court failed to consider his youth and rehabilitative potential in fashioning his sentence and, therefore, failed to comply with *Miller*. See *Holman*, 2017 IL 120655, ¶¶ 47-50 (holding, on

appeal from the denial of leave to file a successive postconviction petition, the juvenile defendant's sentencing hearing, which took place more than 30 years before *Miller*, "passe[d] constitutional muster under *Miller*"); *Carrion*, 2020 IL App (1st) 171001, ¶¶ 32-34 (finding, on appeal from the denial of leave to file a successive postconviction petition, the record showed the 19-year-old defendant's sentencing hearing was *Miller*-compliant).

¶ 49 In *Holman*, our supreme court set forth a nonexhaustive list of factors to be considered in this context, which include the juvenile defendant's (1) chronological age at the time of the offense and any evidence of his or her particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) family and home environment; (3) degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) prospects for rehabilitation. *Holman*, 2017 IL 120655, ¶ 46. In the context of proceedings under the Act, the inquiry into these so-called *Miller* factors is backwards-looking to the original sentencing hearing, and a court revisiting a life sentence "must look at the cold record to determine if the trial court considered such evidence at the defendant's original sentencing hearing." *Id.* ¶ 47.

¶ 50 The record here shows the circuit court had before it and considered the mitigating evidence defendant set forth in his petition, including defendant's relative youth at the time of the offense, family environment, alcohol use, gang involvement, and the circumstances surrounding the "smash on sight" order. The PSI set forth defendant's chronological age at the time of the offense but did not indicate defendant was particularly immature, impetuous, or failed to appreciate risks

or consequences.[3] Counsel extensively argued defendant's youth, noting the frontal lobe of the brain, which controls common sense, was not fully formed until a person reaches the age of 25, and that young people such as defendant often do not fully understand the consequences of their actions. The court explicitly stated it found defendant was a "young" man at the time of the offense. Further, the court considered defendant's family support and home life, stating the way he acted at home was different than how he acted in other contexts. The court also noted it had considered defendant's degree of participation in the offense and how peer pressure may have affected him, finding as mitigating the fact he was induced to act by another member of the gang but he nevertheless chose to carry out the "smash on sight" order and was accountable for the offense. The court also viewed defendant's videotaped confession, during which he showed no evidence of incompetence or inability to deal with police officers. Finally, the court explicitly stated it had considered our constitution's mandate to consider defendant's rehabilitative potential and found it lacking. It stated defendant's circumstances were the result of a pattern of choices he had made "for years" and that his pattern of reoffending after receiving noncustodial sentences and his conduct in jail, including placing gang-related graffiti on his wall and participating in a fight

[3] A defendant is certainly not required to participate in the preparation of a PSI. *People v. Ashford*, 121 Ill. 2d 55, 80 (1988). But, while we do not go so far as to hold defendant waived the claim in his petition, defendant's choice not to participate in the preparation of the PSI certainly frustrates the argument in his petition that the trial court was precluded from considering certain mitigating evidence. See *People v. Gomez*, 141 Ill. App. 3d 935, 942 (1986) (the defendant, who fled the jurisdiction, waived his argument that the trial court was unable to consider appropriate mitigating factors).

because the gang had placed a hit on another inmate, demonstrated defendant was "going to do worse when [he was] out." Given the record before us, it would be very difficult to conclude defendant's sentencing hearing did not pass constitutional muster under *Miller*, and, as a result, he cannot demonstrate the claim raised in his proposed successive petition so infected the trial that his resulting conviction or sentence violated due process. See *Carrion*, 2020 IL App (1st) 171001, ¶ 34.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 53 Affirmed.

¶ 54 Justice McLaren specially concurring.

¶ 55 I specially concur because I wish to disassociate myself from the majority's analysis commencing at paragraph 48. I fail to comprehend how the *de novo* analysis achieves a meaningful determination on the merits of a forfeited issue on appeal.

¶ 56 The majority opines at paragraph 48:

> "Though we need not go any further with our analysis (see *People v. Brown*, 225 Ill. 2d 188, 207 (2007)), *we note the record casts serious doubt on, if not fully forecloses, defendant's claim the circuit court failed to consider his youth and rehabilitative potential in fashioning his sentence* and, therefore, failed to comply with *Miller*. (Emphasis added.) *Supra* ¶ 48.

The majority already found the claim to be forfeited. Nevertheless, it proceeds to further comment on the merits of the claim. I submit that, contrary to the majority's equivocation, the analysis contained in paragraphs 48 through 50 demonstrates that the record fully forecloses defendant's

forfeited claim. Considering that this is *de novo* review, the majority should have declared yea or nay despite the forfeiture instead of reaching an irresolute denouement.