



(MSR); neither did the court's written sentencing order mention MSR.

¶ 5 Defendant filed a direct appeal, arguing that (1) the trial court failed to inquire into his *pro se* ineffective-assistance-of-counsel claim, and (2) he was entitled to an additional day of sentencing credit. This court affirmed. *People v. McChriston*, No. 4-04-0770 (Dec. 7, 2006) (unpublished order under Supreme Court Rule 23).

¶ 6 In July 2007, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2006)), alleging that he received ineffective assistance of trial counsel. We rejected defendant's argument and affirmed. *People v. McChriston*, No. 4-07-0720 (Jan. 27, 2009) (unpublished order under Supreme Court Rule 23).

¶ 7 In January 2011, defendant filed the instant *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). Relevant to this appeal, defendant's petition alleged that his sentence should be reduced by three years because the Illinois Department of Corrections (DOC) impermissibly added a three-year MSR term to his sentence. The trial court provided the State leave to file a response, but the State elected not to do so. In March 2011, the court entered an order dismissing defendant's petition for failure to state a cause of action. 735 ILCS 5/2-615 (West 2010). Defendant appealed, and the office of the State Appellate Defendant (OSAD) was appointed to represent him.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues that the trial court erred in dismissing his section 2-1401 petition. Defendant contends his petition sets forth a meritorious claim that DOC violated both separation of powers and due process principles by adding a three-year MSR term to defendant's sentence, thereby increasing the 25-year sentence that the trial court imposed. In support of his

contention, defendant points to his DOC inmate status report, which currently lists a "parole" date of August 3, 2017, and a "discharge" date of August 3, 2020. The State responds that DOC did not impose the MSR term, but rather, the term attached by operation of law. We agree with the State.

¶ 10 This court reviews *de novo* a trial court's summary dismissal of a section 2-1401 petition where the petition has been dismissed without a response by the State. *People v. Davis*, 2012 IL App (4th) 110305, ¶ 12, 966 N.E.2d 570, 574.

¶ 11 The Illinois Constitution provides that the legislative, executive, and judicial branches are separate and each branch shall not exercise a power properly belonging to another branch. Ill. Const. 1970, art. II, § 1. "[T]he power to impose sentence is exclusively a function of the judiciary." *People v. Phillips*, 66 Ill. 2d 412, 415 (1977).

¶ 12 The language of section 5-8-1(d) of the Unified Code of Corrections (Unified Code) states that "[e]xcept where a term of natural life is imposed, every sentence *shall include as though written therein* a term *in addition* to the term of imprisonment." (Emphases added.) 730 ILCS 5/5-8-1(d) (West 2004). The statute further states that, subject to earlier termination, the MSR term for a Class X felony is three years. 730 ILCS 5/5-8-1(d)(1) (West 2004). A defendant sentenced as a Class X offender is required to serve the Class X MSR term. *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000).

¶ 13 This court has long interpreted the language of section 5-8-1 of the Unified Code to mean that MSR is mandatory and attaches by operation of law. See *People v. Morgan*, 128 Ill. App. 3d 298, 300 (1984) ("[m]andatory supervised release is indeed mandatory and its imposition cannot be affected by the defendant, the State, or the courts"); see also *People v. Rinehart*, 406 Ill. App. 3d 272, 280 (2010), *abrogated on other grounds by People v. Rinehart*, 2012 IL 111719, ¶ 30, 962

N.E.2d 444, 454 (noting that, under all but one subsection of section 5-8-1(d), "a trial court could fail to include MSR as part of sentencing and have the error remedied by operation of law."); *People v. Coultas*, 75 Ill. App. 3d 137, 138 (1979) ("[W]e believe that the mandatory supervised release term is part of the original sentence by operation of law.").

¶ 14 Courts of this state interpreting mandatory parole, MSR's predecessor, have reached the same conclusion. See *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194 (1977) (stating, in the context of revocation of parole and reincarceration, "[t]he judge imposes the sentence. The sentence to a mandatory parole is a part of the original sentence by operation of law. \*\*\* We hold the mandatory parole within the powers of the Illinois General Assembly, and that this enactment does not violate the separation of powers clause of the Illinois Constitution."); *People v. Miller*, 36 Ill. App. 3d 943, 945 (1976) (First District concluding, in context of postconviction petition dismissed after guilty plea, "[t]he mandatory period of parole relates to a term of imprisonment by statutory requirement without regard to whether the period of parole is expressly attached by the sentencing court to the term of imprisonment"); *People v. Reese*, 66 Ill. App. 3d 199, 203 (1978) (Fifth District stating, in the context of release order in collateral attack proceedings after revocation of parole and reincarceration on a guilty plea, "the mandatory parole term is a constant which cannot be affected by the defendant, the State or the trial court. [Citation.] It attaches by operation of law to sentences imposed upon a trial verdict as well as upon a guilty plea."). Because MSR is analogous to parole, the foregoing cases support a conclusion that MSR likewise attaches by operation of law. *Coultas*, 75 Ill. App. 3d at 138.

¶ 15 Defendant contends that, despite the mandatory language of section 5-8-1, this court should conclude that DOC unconstitutionally added a three-year MSR term that the trial court judge

did not authorize. In support of his argument, defendant cites the nonbinding authority of *United States ex. rel. Carroll v. Hathaway*, No. 10 C 3862, 2012 WL 171322 (N.D. Ill. Jan. 19, 2012), and *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006). In *Carroll*, the petitioner challenged his three-year MSR term, arguing that DOC unconstitutionally added the term to his sentence where the trial court judge did not impose the term during resentencing. *Carroll*, No. 10 C 3862, slip op. at 9, 2012 WL 171322, at \*9. In evaluating the petitioner's claim, the *Carroll* court cited *Earley*, wherein the Second Circuit Court of Appeals considered "an almost identical question under New York law." *Carroll*, No. 10 C 3862, slip op. at 10, 2012 WL 171322, at \*10. Like Illinois, New York's statutory scheme mandated that every sentence include a term of supervision. *Id.* Nevertheless, the *Earley* court concluded that the Department of Corrections "administratively added" the petitioner's supervision term to the trial court's sentence. *Earley*, 451 F.3d at 76. The *Earley* court concluded that the petitioner's imprisonment could not exceed that imposed by the judge; thus, the court deemed the supervision term invalid. *Carroll*, No. 10 C 3862, slip op. at 10, 2012 WL 171322, at \*10, *Earley*, 451 F.3d at 77. Finding the *Earley* court's reasoning "persuasive," the *Carroll* court likewise concluded that DOC could not constitutionally impose an MSR term required by state law but not imposed by the sentencing judge. *Carroll*, No. 10 C 3862, slip op. at 10, 2012 WL 171322, at \*10.

¶ 16 Prior to *Carroll*, in 1987 the Northern District of Illinois addressed a similar fact pattern but reached a contrary conclusion. In *Nance*, the plaintiff filed a section 1983 action (42 U.S.C. § 1983), alleging that employees of DOC violated his constitutional rights by forcing him to serve an MSR term that the trial judge did not include in the plaintiff's sentencing order. *Nance v. Lane*, 663 F. Supp. 33, 35 (N.D. Ill. 1987). Citing the mandatory language of Illinois' MSR statute

(then Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-8-1(d)) as well as *Morgan* and *Reese*, the *Nance* court concluded that the plaintiff's sentencing order "included a three-year MSR term as though it was written therein." *Id.* Specifically, the court concluded that "[t]he term attached to plaintiff's sentence by operation of law. Defendants were merely complying with the sentencing order, ¶ 1005-8-1(d) and cases interpreting that section when they imposed the MSR term upon plaintiff." *Id.*

¶ 17 We find the *Nance* court's reasoning persuasive, particularly in light of the First District's recent decision in *People v. Hunter*, 2011 IL App (1st) 093023, 957 N.E.2d 523. There, as here, the defendant argued that DOC violated his due process rights and the separation of powers clause by imposing an MSR term. *Hunter*, 2011 IL App (1st) 093023, ¶ 1, 957 N.E.2d at 525. The trial court had mentioned an MSR term to the defendant during the plea hearing (the judge specifically asked defendant "if he understood that 'Any period of incarceration would be followed by a period of [MSR] of two years following your discharge from [DOC].' "), but the court did not mention MSR again when imposing the defendant's sentence. *Hunter*, 2011 IL App (1st) 093023, ¶¶ 4-5, 957 N.E.2d at 525-26. Contrary to the defendant's argument that he was entitled to a reduction in his sentence under *People v. Whitfield*, 217 Ill. 2d 177 (2005), the *Hunter* court concluded that the defendant's MSR sentence was imposed by the trial court, not added by DOC. *Hunter*, 2011 IL App (1st) 093023, ¶ 23, 957 N.E.2d at 530-31. In reaching its conclusion, the court noted the plain language of section 5-8-1(d) made evident that "the MSR term [was] a mandatory component of [the] defendant's sentence." *Hunter*, 2011 IL App (1st) 093023, ¶ 23, 957 N.E.2d at 530. Accordingly, the court reasoned that "when defendant was sentenced by the trial court to 6 1/2 years' imprisonment, his sentence included a two-year MSR term." *Hunter*, 2011 IL App (1st) 093023, ¶ 23, 957 N.E.2d at 531.

¶ 18 Although here the trial court did not mention MSR to defendant, we find the First District's analysis instructive. Section 5-8-1(d) specifically states that "every sentence *shall* include *as though written therein* a term *in addition* to the term of imprisonment." (Emphases added.) 730 ILCS 5/5-8-1(d) (West 2004). Based on the plain language of section 5-8-1(d), we conclude that, contrary to defendant's assertion, DOC did not impose the MSR term; rather, defendant's three-year MSR term attached by operation of law as soon as the trial court imposed the sentence, rendering judgment complete. *Rinehart*, 406 Ill. App. 3d at 280; *Morgan*, 128 Ill. App. 3d at 300.

¶ 19 III. CONCLUSION

¶ 20 Accordingly, we affirm the trial court's judgment because defendant's section 2-1401 petition fails to state a cause of action. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 21 Affirmed.