2013 IL App (1st) 102884-U

Third Division
September 30, 2013
Modified Upon Denial of Rehearing November 13, 2013

No. 1-10-2884 & 1-13-0174 (Cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	92 CR 8607
	)	
MARSHAN TERRELL ALLEN,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court mistakenly believed that statutes authorized it to impose a sentence of life in prison, and the mistaken belief arguably influenced the court's sentencing decision, the appellate court vacated the sentence and remanded for resentencing. Where a decision of the United States Supreme Court, handed down during the pendency of a direct appeal in a criminal case, announced a new constitutional rule that could affect the sentence imposed in the case on appeal to the appellate court, the appellate court vacated the sentence and remanded for resentencing in light of the United States Supreme Court's decision.

¶ 2 In 1994, a jury found Marshan Allen guilty as an accomplice to two murders, and the trial

court sentenced him to natural life in prison. The trial court later granted Marshan's postconviction petition in which Marshan sought resentencing. The trial court sentenced Marshan to 52 years in prison. On appeal, Marshan contends that the trial court imposed an excessive sentence because the court believed, incorrectly, that statutes permitted a sentence of life in prison, and because the court did not consider all of the appropriate factors for sentencing him as a juvenile offender. We find merit in both arguments. We vacate the sentence and remand for resentencing.

¶ 3 BACKGROUND

¶ 4 James Allen ran a drug business from his apartment on the south side of Chicago. James's younger brother, Marshan, sometimes spent the night at James's apartment. On March 11, 1992, Marshan, then 15 years old, brought Myron Gaston, James DeBerry and Chris Jones to James's apartment to buy cocaine for resale. After completing the cocaine purchase, Jones pulled out a gun and pointed it at Marshan. Myron, DeBerry and Jones took some drugs and about $4,000 in cash from the Allens.

¶ 5 Five days later, Myron came home to find blood pooling under the door of the apartment he shared with DeBerry and Myron's brother, Elroy Gaston. Inside he found the corpses of DeBerry and Elroy, both dead from multiple gunshot wounds.

¶ 6 A few weeks later, at Area 2 Police Headquarters, Detective Michael McDermott helped persuade Marshan to sign a statement in which he admitted that he and two of James's friends, Darnell Dixon and Eugene Langston, took a van over to the home of the Gastons and DeBerry on March 16, 1992. According to the written statement, Dixon and Langston fired guns at the door as Marshan returned to the van. Marshan heard four or five more gunshots, and then Dixon and

Langston returned to the van. Prosecutors charged Marshan for the murders of Gaston and DeBerry.

¶ 7 Trial

¶ 8 Marshan filed a motion to suppress his statement as the product of coercive interrogation. At the hearing on the motion, McDermott testified that he did nothing wrong to produce Marshan's signature on the statement. The trial court, relying in part on McDermott, denied the motion.

¶ 9 A jury found Marshan guilty on a theory of accountability for both murders. The trial court sentenced Marshan to two concurrent terms of natural life in prison, as the Unified Code of Corrections (Code) demanded. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1992). The appellate court affirmed the trial court's judgment. *People v. Allen*, No. 1-94-3443 (1997) (unpublished order under Supreme Court Rule 23).

¶ 10 Postconviction Proceedings

¶ 11 Marshan filed three postconviction petitions which the trial court dismissed. *People v. Allen*, No. 1-07-3472 (2009) (unpublished order under Supreme Court Rule 23). The appellate court affirmed all three dismissals. *Allen*, No. 1-07-3472. Marshan filed a fourth postconviction petition after the Illinois Supreme Court decided *People v. Miller*, 202 Ill. 2d 328 (2002). In *Miller*, our supreme court held that a mandatory sentence of life in prison without parole, imposed on a juvenile offender, violated the proportionate penalties clause of the Illinois constitution. *Miller*, 202 Ill. 2d at 341. On the basis of *Miller*, the trial court granted Marshan's postconviction petition and awarded him a new sentencing hearing. *Allen*, No. 1-07-3472. On the State's appeal from the order, the appellate court held that, as applied to Marshan, section 5-8-1(a)(1)(c)(ii) of the Code violated the proportionate penalties clause of the Illinois constitution, because the section mandated a natural life

sentence for any defendant convicted of multiple murders, even a juvenile found guilty as one accountable for the actions of others. *Allen*, No. 1-07-3472.

¶ 12 Resentencing

¶ 13 The trial court held the new sentencing hearing in 2010. Marshan relied primarily on extensive evidence of his behavior following sentencing. His record included no disciplinary actions in jail. He completed his GED and several college classes at Lake Land College, mostly in computer tech. Marshan had a grade point average of 3.918 in 24 classes according to his transcript. A teacher testified that Marshan worked as his teaching assistant for one of his classes. A dean at the college testified that the school, with the approval of the prison warden, gave Marshan special privileges as a teaching assistant. Marshan was the first prisoner sentenced to natural life in prison to gain the status of teaching assistant.

¶ 14 Marshan's mother testified that she abused drugs during Marshan's childhood. Marshan saw his father beat his mother several times before they separated. John Hill, Marshan's uncle, testified that he saw Marshan frequently in Marshan's youth, when Hill participated in a gang and abused drugs. In Hill's opinion, his example affected Marshan adversely.

¶ 15 Phyllis Huggins, a director of a prison ministry, testified that she contacted Marshan after she saw a television program that told the story of Marshan's life. She worked at a home for ex-offenders, and that home agreed to house Marshan if the prison released him. She corresponded with Marshan, and based on her experience with inmates, she believed Marshan would become a productive member of society if the prison released him.

¶ 16 Neil Bosanko, the executive director of the South Chicago Chamber of Commerce and a

prison mentor, testified that he, too, saw the televised interview with Marshan. Bosanko remembered Marshan from their neighborhood, so he decided to visit Marshan in prison. Marshan impressed Bosanko with his intelligence and the sincerity of his remorse. Bosanko believed that Marshan would do well if the prison released him.

¶ 17 The State presented no new evidence in aggravation. The trial court held:

> "[D]efendant could receive 20 years to life in prison. *** [S]ince Mr. Allen has been sentenced, the Illinois legislature has ruled *** that an individual that commits a murder, a first degree murder with a handgun, receives a minimum of 45 years ***.
>
> However, that does not apply in this situation because we don't have ex post facto laws in our country, but I do note that because one of the things I have to consider is the effect on the community o[f] a particular sentence. ***
>
> * * *
>
> *** In mitigation, I weigh the following factors: *** Mr. Allen has served more time in jail for this crime than he has walked the streets from the day he was born. He is different in chronological age and I believe he's different in his intelligence and his approach to life.
>
> * * *
>
> I do know that he has attempted to use the time in custody for

his betterment. I note that he attended school, I note that he earned the praise, the trust and the confidence of both teachers and administrators. ***

I take into consideration people that knew him way back when in 1992 as compared to 2010 tell me of how he has changed. I take into consideration those people that dealt with him in the penitentiary system when he was going to classes and serving as mentors.

I do not take into consideration the people that have met him while he was in prison as mentors. I do not take into consideration the people that might have befriended him when this case *** became a cause celebrity. *** [A]t least one of these people have never met him in person, just conversed in mail, obviously that does not enlighten me as to what type of person Mr. Allen is right now.

What I do note in aggravation are the following factors: There is no question in this mind that this was a cold-blooded planned retaliation as street justice for a drug rip-off. There is no doubt in my mind that the defendant and his two co-defendants shot[-]gunned their way into a house blowing holes through a door and chasing people down and shooting them in the back as they ran from their assailants.

***

There is no evidence whatsoever that I have that Marshan Allen was a shooter ***. He was 15 years old ***.

However, I have to step back from the chronological age of the defendant ***.

***

For me, just to say he's 15 years old, so I should excuse his behavior, I'm not going to do. *** I don't believe that Mr. Allen, at the time of the crime, was a cowering young individual similar to the facts in the Leon Miller case [*Miller*, 202 Ill. 2d 328], I believe he was an active participant and I believe that he was involved in the planning and the commission of *** this offense.

At the age of 15, Mr. Allen was actively involved in his brother's drug trade. At the age of 15, for what reason, I don't know, he left his mother's house and began to live with his brother James who was actively selling dope ***.

* * *

There was no doubt that Mr. Allen knew what was going to happen. Eugene Langston was in the car with him, Darnell Dixon was in the car with him, and it's clear to me that the defendant actually went up to the apartment at the time the shooting occurred. ***.

* * *

> Balancing the factors in aggravation and mitigation, I do not believe that a life sentence is mandated in this matter. *** And there will be a day when the defendant walks out of the penitentiary system. ***.
>
> Based on all the factors that I'm looking at today, I'm trying to craft a just sentence for the crime, for society and for the defendant. I'm going to sentence the defendant to 55 years in the Illinois Department of Corrections."

¶ 18 Marshan's attorney moved for reconsideration of the sentence because the trial judge had not considered Bosanko's testimony and Huggins's testimony. Counsel also pointed out that Miller, whose sentence led to the holding that courts could not constitutionally apply section 5-8-1(a)(1)(c)(ii) of the Code to juvenile offenders, eventually received a sentence of 30 years in prison for his role as one accountable for two murders.

¶ 19 The judge again emphasized Marshan's role in the murders and said he considered Bosanko's testimony, though he did not give it much weight. In an order dated July 29, 2010, the judge decided to reduce Marshan's sentence to 52 years in prison.

¶ 20 On August 19, 2010, Marshan filed a new motion for a further reduction of his sentence. He alleged that his counsel filed the prior motion without consulting Marshan about the issues Marshan wished to present as grounds for reducing the sentence. Marshan argued that (1) the trial court incorrectly held that it could sentence Marshan to natural life in prison; (2) the trial court

misremembered the evidence which showed that, although Marshan spent some nights in his brother's apartment, Marshan lived with his mother; and (3) the sentence did not reflect Marshan's rehabilitative potential.

¶ 21 On November 14, 2012, the trial court entered an order in which it held that Marshan's motion raised only procedurally barred and meritless claims. The court denied the motion for a further reduction of the sentence. Marshan cautiously filed a late notice of appeal from the order dated July 29, 2010, and a notice of appeal from the order dated November 14, 2012, denying his motion for a further reduction of his sentence. The appellate court granted Marshan's motion to consolidate the appeals.

¶ 22 ANALYSIS

¶ 23 Marshan raises several arguments on appeal, but this court will focus on two which warrant remand for resentencing. Marshan argues that the trial judge held, incorrectly, that he could sentence Marshan to life in prison, and Marshan argues that the trial court should reconsider the sentence in light of the United States Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

¶ 24 Maximum Sentence

¶ 25 A misapprehension of the proper sentencing limits requires a new sentencing hearing if the mistaken belief arguably influenced the sentencing decision. *People v. Eddington*, 77 Ill. 2d 41, 48 (1979). In *People v. Myrieckes*, 315 Ill. App. 3d 478 (2000), the trial court believed it could sentence the defendant to an extended term based on the age of the victim. But the trial court had misinterpreted the statute – the victim's age did not qualify the defendant under the statute for the extended term. *Myrieckes*, 315 Ill. App. 3d at 484. The trial court sentenced the defendant to a term

within the non-extended range, near the high end of that range. Because the court's misapprehension of the sentencing range arguably influenced the sentencing decision, the appellate court vacated the sentence and remanded for resentencing. *Myrieckes*, 315 Ill. App. 3d at 484.

¶ 26 The trial judge here held that the Code permitted him to sentence Marshan to a term of life in prison. As Marshan points out, the Code permits that sentence in only three kinds of cases: (1) the Code mandates a life sentence under the conditions listed in section 5-8-1(a)(1)(c); (2) the Code permits a life sentence if the trier of fact finds that the murderer acted with exceptional brutality or heinous behavior indicative of wanton cruelty (730 ILCS 5-8-1(a)(1)(b) (West 1992)); and (3) the Code permits a life sentence for murders that meet the criteria listed in section 9-1(b) of the Criminal Code. 720 ILCS 5/9-1(b) (West 1992); 730 ILCS 5-8-1(a)(1)(b) (West 1992).

¶ 27 Under *Miller*, the constitution does not permit the application of the mandatory life sentencing provisions to Marshan because Marshan had not reached 18 years of age when he participated in the murders here. The appellate court in the prior appeal held, unequivocally, that the constitution precluded the trial court from using section 5-8-1(a)(1)(c)(ii) for Marshan's sentence. The trier of fact made no finding of exceptional brutality or heinous behavior. Section 9-1(b) of the Criminal Code does not apply here because the section restricts its scope to "defendant[s] who at the time of the commission of the offense ha[d] attained the age of 18 or more." Thus, none of the sections permitting the imposition of a life sentence apply here. Although the trial judge held that he could impose a sentence of life in prison, and the State echoed that holding in its brief on appeal, neither the judge nor the State cited any statute that permits the imposition of that sentence. We find that the judge misunderstood the applicable sentencing range of 20 to 60 years. See 730 ILCS 5/5-8-

1(a)(1)(a) (West 1992).

¶ 28 We also find that the misunderstanding arguably influenced the sentencing decision. The judge imposed a sentence very near the longest available, apparently under the mistaken impression that he accommodated the extensive evidence of rehabilitative potential by not imposing a sentence of life in prison. Following *Eddington*,77 Ill. 2d at 48, and *Myrieckes*, 315 Ill. App. 3d at 484, we vacate the sentence.

¶ 29 Marshan argues that we should not remand the case for resentencing. Instead, he asks us to impose on him a sentence of 30 years in prison, to match the sentence the trial court eventually imposed on the defendant in *Miller*, 202 Ill. 2d 328. Marshan contends that the appellate court's order affirming the trial court's decision to order resentencing mandates the imposition on him of a sentence identical to the sentence imposed on Miller. In *Allen*, No. 1-07-3472, at 3, the appellate court said,

> "The facts in this case are sufficiently similar to the facts in *Miller* to render the mandatory life sentence imposed here a violation of the proportionate penalties clause. Like Miller, the defendant here was automatically tried as an adult, convicted of double murder under a theory of accountability, and sentenced to mandatory life without parole without consideration of his minimal participation or his young age. The defendant here, like Miller, was 15 years old at the time of the crime. The defendant here, like Miller, never handled or fired a gun. The defendant here, like Miller, retreated from the scene of the

offense when shooting began."

¶ 30 We find that the order does not demand the imposition on Marshan of a sentence identical to the sentence imposed on Miller. The Code requires individualized sentencing in which the sentencing judge takes into account all of the facts and circumstances of the case. *People v. Fern*, 189 Ill. 2d 48, 55-56 (1999). In the prior order in this case, the court held only that *Miller* showed that the sentencing court violated the constitution when it applied section 5-8-1(a)(1)(c)(ii) of the Code to Marshan, and therefore the trial court correctly granted Marshan's petition for a new sentencing hearing. Our analysis did not deny that differences between Miller and Marshan might justify a different sentence here. Accordingly, we remand this case for resentencing.

¶ 31 *Miller v. Alabama*

¶ 32 Next, Marshan argues that we must remand for a new sentencing hearing to comport with *Miller v. Alabama*, 132 S. Ct. 2455. The State argues that Marshan waived the argument by failing to raise it at his sentencing hearing, held in 2010. But the decision in *Miller v. Alabama*, which announced a new constitutional rule for criminal cases, applies retroactively to all cases pending on direct review at the time of the decision. *People v. Hudson*, 195 Ill. 2d 117, 126 (2001). Although the direct appeal from the conviction occurred in 1994 (*Allen*, No. 1-94-3443), the case now before this court is the direct appeal from the new sentence. See *People v. Edgecombe*, 2011 IL App (1st) 092690, ¶ 31. We address the argument as an alternate basis for remand, in case our supreme court disagrees with the conclusion that the trial court misunderstood the range of available sentences, or with the conclusion that the misunderstanding arguably influenced the sentencing.

¶ 33 In *Miller v. Alabama*, the United States Supreme Court explained at length the special

concerns that arise whenever a court sentences a juvenile offender. First, the Court interpreted the holdings of *Roper v. Simmons,* 543 U.S. 551 (2005) and *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 2034 (2010):

> "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.' *Graham,* 560 U.S., at ___, 130 S. Ct. 2011, [2026,] 176 L. Ed. 2d 825. Those cases relied on three significant gaps between juveniles and adults. First, children have a ' "lack of maturity and an underdeveloped sense of responsibility," ' leading to recklessness, impulsivity, and heedless risk-taking. *Roper,* 543 U.S., at 569 ***. Second, children 'are more vulnerable ... to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' *Id.,* at 570 ***.
>
> Our decisions rested not only on common sense — on what

'any parent knows' — but on science and social science as well. *Id.,* at 569 ***. In *Roper,* we cited studies showing that ' "[o]nly a relatively small proportion of adolescents" ' who engage in illegal activity ' "develop entrenched patterns of problem behavior." ' *Id.,* at 570 *** (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in *Graham,* we noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds' — for example, in 'parts of the brain involved in behavior control.' 560 U.S., at ___, 130 S. Ct. 2011, [2026,] 176 L. Ed. 2d 825. We reasoned that those findings — of transient rashness, proclivity for risk, and inability to assess consequences — both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his ' "deficiencies will be reformed." ' *Id.,* at ___, 130 S.Ct. 2011, [2027,] 176 L. Ed. 2d 825. (quoting *Roper,* 543 U.S., at 570 ***).

Roper and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the

harshest sentences on juvenile offenders, even when they commit terrible crimes. Because ' "[t]he heart of the retribution rationale" ' relates to an offender's blameworthiness, ' "the case for retribution is not as strong with a minor as with an adult." ' *Graham,* 560 U.S., at ___, 130 S.Ct. 2011, [2028,] 176 L. Ed. 2d 825 (quoting *Tison v. Arizona,* 481 U.S. 137, 149 *** (1987); *Roper,* 543 U.S., at 571 ***). Nor can deterrence do the work in this context, because ' "the same characteristics that render juveniles less culpable than adults" ' — their immaturity, recklessness, and impetuosity — make them less likely to consider potential punishment. *Graham,* 560 U.S., at ___, 130 S.Ct. 2011, [2028,] 176 L. Ed. 2d 825 (quoting *Roper,* 543 U.S., at 571 ***). Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible' — but ' "incorrigibility is inconsistent with youth." ' 560 U.S., at ___, 130 S.Ct. 2011, [2029,] 176 L. Ed. 2d 825 (quoting *Workman v. Commonwealth,* 429 S.W.2d 374, 378 (Ky. App. 1968)). And for the same reason, rehabilitation could not justify that sentence. Life without parole 'forswears altogether the rehabilitative ideal.' *Graham,* 560 U.S., at ___, 130 S. Ct. 2011, [2030,] 176 L. Ed. 2d 825. It reflects 'an irrevocable

> judgment about [an offender's] value and place in society,' at odds with a child's capacity for change. *Ibid.*" *Miller v. Alabama*, 132 S. Ct. at 2464-65.

¶ 34 The *Miller v. Alabama* court then applied its observations to the case on appeal:

> "Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.' *Johnson v. Texas,* 509 U.S. 350, 367 *** (1993). Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions. As we observed, 'youth is more than a chronological fact.' *Eddings,* 455 U.S., at 115 *** [(1982)]. It is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.' *Johnson,* 509 U.S., at 368 ***. It is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.' *Eddings,* 455 U.S., at 115 ***. And its 'signature qualities' are all 'transient.' *Johnson,* 509 U.S., at 368 ***. *Eddings* is especially on point. There, a 16-year-old shot a police officer point-blank and killed him. We invalidated his death sentence because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance. We found that

> evidence 'particularly relevant' — more so than it would have been in the case of an adult offender. 455 U.S., at 115 ***. We held: '[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability. *Id.,* at 116." *Miller v. Alabama*, 132 S. Ct. at 2467.

¶ 35 The Supreme Court of Iowa addressed the effect of *Miller v. Alabama* on sentences shorter than life in prison for juvenile offenders. In *State v. Null*, No. 11-1080, 2013 Iowa Sup. LEXIS 94 (2013), the trial court sentenced the juvenile offender to an aggregate term of 52.5 years in prison for second degree murder and first degree robbery. The court held:

> "[W]hile a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller* [*v. Alabama*]-type protections.
> ***
>
> *** In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper, Graham,* and *Miller* [*v. Alabama*] of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a 'meaningful

opportunity to obtain release based on demonstrated maturity and rehabilitation.' *Graham,* 560 U.S. at ___, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46. ***

* * *

*** [W]e conclude [the Iowa constitution] requires that a district court recognize and apply the core teachings of *Roper, Graham,* and *Miller* [*v. Alabama*] in making sentencing decisions for long prison terms involving juveniles. [Citations.]

First, the district court must recognize that because 'children are constitutionally different from adults,' they ordinarily cannot be held to the same standard of culpability as adults in criminal sentencing. *Miller* [*v. Alabama*]*,* 567 U.S. at ___, 132 S. Ct. at 2464, 183 L. Ed. 2d at 418; [citation.] The constitutional difference arises from a juvenile's lack of maturity, underdeveloped sense of responsibility, vulnerability to peer pressure, and the less fixed nature of the juvenile's character. [Citations.]

If a district court believes a case presents an exception to this generally applicable rule, the district court should make findings discussing why the general rule does not apply. [Citations.] In making such findings, the district court must go beyond a mere recitation of

the nature of the crime, which the Supreme Court has cautioned cannot overwhelm the analysis in the context of juvenile sentencing. [Citations.] Further, the typical characteristics of youth, which include immaturity, impetuosity, and poor risk assessment, are to be regarded as mitigating, not aggravating factors. [Citation.]

Second, the district court must recognize that '[j]uveniles are more capable of change than are adults' and that as a result, 'their actions are less likely to be evidence of "irretrievably depraved character." ' *Graham,* 560 U.S. at ___, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841 (quoting *Roper,* 543 U.S. at 570, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22); [citation.] While some juvenile offenders may be irreparably lost, it is very difficult to identify juvenile offenders that fall into this category. As the Supreme Court noted, even expert psychologists have difficulty making this type of prediction. [Citations.] Further, the district court must recognize that most juveniles who engage in criminal activity are not destined to become lifelong criminals. [Citations.] The ' "signature qualities" of youth are all "transient." ' *Miller [v. Alabama],* 567 U.S. at ___, 132 S. Ct. at 2467, 183 L. Ed. 2d at 422 (quoting *Johnson,* 509 U.S. at 368, 113 S. Ct. at 2669, 125 L. Ed 2d at 306). Because 'incorrigibility is

> inconsistent with youth,' care should be taken to avoid 'an irrevocable judgment about [an offender's] value and place in society.' *Miller,* 567 U.S. at ___, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419 (citation and internal quotation marks omitted).
>
> Finally, and related to the previous discussion, the district court should recognize that a lengthy prison sentence without the possibility of parole such as that involved in this case is appropriate, if at all, only in rare or uncommon cases. [Citations.]
>
> At the same time, it bears emphasis that while youth is a mitigating factor in sentencing, it is not an excuse. [Citations.] Nothing that the Supreme Court has said in these cases suggests trial courts are not to consider protecting public safety in appropriate cases through imposition of significant prison terms. Further, it bears emphasis that nothing in *Roper, Graham,* or *Miller* guarantees that youthful offenders will obtain eventual release. All that is required is a 'meaningful opportunity' to demonstrate rehabilitation and fitness to return to society. *Graham,* 560 U.S. at ___, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46." *Null*, No. 11-1080, *80-95.

¶ 36 The court vacated the sentence and remanded for the trial court to reconsider the sentence in light of *Miller v. Alabama*. As the *Null* court pointed out, courts in other jurisdictions similarly

remanded cases for resentencing in light of *Miller v. Alabama*. See *People v. Araujo,* Nos. B235844, B240501, 2013 Cal. App. Unpub. LEXIS 1709 (Cal. Ct. App. March 7, 2013) (unpublished opinion) (sentencing court's reference to the defendant's "tender age" does not eliminate need to remand for resentencing in light of *Miller* [*v. Alabama*]); *People v. Rosales,* No. F061036, 2012 Cal. App. Unpub. LEXIS 7280, at *75 (Cal. Ct. App. Oct. 5, 2012) (unpublished opinion) ("*Miller* [*v. Alabama*] changed the law on what factors are applicable by elaborating extensively on the ways in which a defendant's youth is relevant"); *State v. Fletcher,* 112 So. 3d 1031, 1036 (La. Ct. App. 2013); *Daugherty v. State*, 96 So. 3d 1076, 1079-80 (Fla. Dist. Ct. App. 2012). We find *Null* and the other cited authorities persuasive. Accordingly, we vacate the sentence and remand for reconsideration of the sentence in light of *Miller v. Alabama*.

¶ 37 New Judge on Remand

¶ 38 Finally, Marshan asks us to remand the case for resentencing by a different judge because the judge at resentencing relied on improper factors for aggravation and ignored some of the mitigating evidence, including evidence that Marshan's father beat his mother, his mother abused drugs, and close family members who influenced him led him to participate in crime. See *People v. Dameron*, 196 Ill. 2d 156, 179 (2001); *People v. Clemons*, 175 Ill. App. 3d 7, 13-14 (1988). The State does not answer this argument. We grant the request as unopposed, and direct the Chief Judge of the Circuit Court of Cook County to assign the case to a judge other than Judge Burns. See *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002); *People v. Buchanan*, 2013 IL App. (2d) 120447, ¶ 26.

¶ 39 CONCLUSION

¶ 40 At the sentencing hearing, the trial judge incorrectly held that he could sentence Marshan to natural life in prison. Because the error might arguably have influenced the judge's decision to impose a sentence at the high end of the properly available range, we vacate the sentence and remand for resentencing. We also vacate the sentence and remand for resentencing in light of *Miller v. Alabama*. Because the State has not opposed Marshan's request for a different judge to hear the case on remand, we direct the circuit court to designate a judge other than Judge Burns to resentence Marshan.

¶ 41 PETITION FOR REHEARING

¶ 42 In a petition for rehearing, the State's Attorney asks us to adopt the reasoning of *People v. Johnson*, 2013 IL App (5th) 110112. In *Johnson*, the trial court found the defendant, a juvenile, guilty of two murders and sentenced him, under section 5-8-1(a)(1)(c) of the Code, to natural life in prison. In the course of vacating the sentence and remanding for resentencing, as mandated by *Miller*, the *Johnson* court added that under *Miller*, the constitution did not forbid the imposition of life sentences on juveniles. *Johnson*, 2013 IL App (5th) 110112, ¶ 22-24. The *Johnson* court then said, "We note, however, that defendant may again be sentenced to natural life in prison, as there is nothing which prohibits a sentence of natural life in prison for a minor so long as the sentence is at the trial court's discretion and not mandatory." *Johnson*, 2013 IL App (5th) 110112, at ¶ 24.

¶ 43 The *Johnson* court did not identify any statute that permitted the court to impose a life sentence on Johnson. If the *Johnson* court intended to hold that section 5-8-1(a)(1)(c) of the Code

no longer mandates the imposition of life sentences on defendants subject to its terms, or that courts must read the section as mandating life sentences for adults and permitting life sentences for juveniles, the court engaged in judicial legislation. See *Gordon v. Department of Transportation*, 99 Ill. 2d 44, 47 (1983); *In re M.G.*, 301 Ill. App. 3d 401, 408 (1998). Section 5-8-1(a)(1)(c) unequivocally leaves the court no discretion over whether to impose a life sentence on a defendant who falls within the statute's ambit. 730 ILCS 5/5-8-1(a)(1)(c) (West 1992). The *Miller* court held that the constitution precludes the application of section 5-8-1(a)(1)(c), with its mandatory provision for life sentences, to juveniles. *Miller*, 202 Ill. 2d at 340-41. Although the *Miller* court observed that the constitution did not preclude the imposition of a life sentence on a juvenile, the *Miller* court did not rewrite the statute to empower courts to have discretion over whether to impose a life sentence on a juvenile under section 5-8-1(a)(1)(c) of the Code. "If the act ought to read as contended for by defendants, [the General Assembly] is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897).

¶ 44 The constitution does not forbid the imposition of a life sentence on a juvenile found guilty of multiple murders, as long as the court has discretion to consider lesser sentences and to take into account all of the factors especially relevant to juveniles, as the United States Supreme Court set out those factors in *Miller v. Alabama*, 132 S. Ct. 2455. See *Miller*, 202 Ill. 2d at 341. The Code, at the time of the crimes at issue here, included no provision permitting such a discretionary imposition of a life sentence for multiple murders. We will not rewrite section 5-8-1(a)(1)(c) of the Code to

permit the imposition of the life sentence the trial court believed possible here.

¶ 45 Also in the petition for rehearing, the State makes a new argument, contending that this court should not direct the trial court to assign a different judge to decide the sentencing issues on remand. Generally, parties may not argue new points in their petitions for rehearing. *People v. Wright*, 194 Ill. 2d 1, 23 (2000); Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Moreover, we find this case similar to *People v. Markiewicz*, 246 Ill. App. 3d 31, 56 (1993) and *Clemons*, 175 Ill. App. 3d at 13-14, in which the appellate court directed the circuit court to assign different judges to resentence the defendants. Accordingly, we deny the petition for rehearing.

¶ 46 Sentence vacated; cause remanded.