2014 IL App (1st) 121732-U
No. 1-12-1732
September 23, 2014
Modified Upon Rehearing January 13, 2015

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Respondent-Appellee,	)	
	)	
v.	)	No. 85 C 2190
	)	
TERRY SANDERS,	)	
	)	The Honorable
Petitioner-Appellant.	)	Timothy Joseph Joyce,
	)	Judge presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: Under statutes in effect in 1985, if a murder and an attempted murder that did not involve severe bodily harm occurred in a single course of conduct, the sentences for the two crimes must run concurrently, not consecutively. A defendant may raise the issue of void consecutive sentencing in a successive postconviction petition. The defendant showed cause and prejudice for his failure to raise an eighth amendment issue in regard to his sentencing in prior proceedings, because recent United States Supreme Court cases changed the interpretation of the eighth amendment as it applies to lengthy sentences imposed on juvenile

offenders, and the trial court might have imposed a lesser sentence on the defendant if the court had correctly understood the eighth amendment.

¶ 2 A jury found Terry Sanders guilty of murder and two attempted murders committed in 1985, when Sanders was 17. The trial court sentenced Sanders to serve consecutively terms of 40 years for the murder and 30 years for each of the two attempted murders, for a total of 100 years. After the dismissal of his postconviction petition and a successive postconviction petition, Sanders filed a second successive postconviction petition, arguing that the sentencing statute did not permit the consecutive sentencing the court imposed, and that recent cases concerning cruel and unusual punishment for minors established that the trial court based the sentencing on improper considerations. The circuit court summarily dismissed the second successive postconviction petition.

¶ 3 In this appeal from the dismissal of the second successive postconviction petition, we find that the statutes in effect at the time of the crimes did not permit the sentence for the murder to run consecutively to the sentence for the attempted murder that did not involve severe bodily harm, because the murder and attempted murder occurred in a single course of conduct. We also agree with Sanders that recent authority concerning the imposition of lengthy sentences on minors calls into question the sentencing here. We reverse the dismissal of the second successive postconviction petition and remand for further proceedings in accord with this order.

¶ 4 BACKGROUND

¶ 5 In 1985, William Feuling managed a convenience store where Sanders worked as an assistant manager. On January 20, 1985, Arthur Kozak and Brian Walkowiak visited Feuling

at his home. Sanders also came over with Andrew Johnson and Mike Hill. That evening, Johnson and Hill drew guns and ordered Sanders to tie up Feuling, Kozak and Walkowiak. Johnson and Hill robbed Feuling, Kozak and Walkowiak. Johnson stabbed Feuling repeatedly, then handed the knife to Sanders and ordered him to kill Kozak. Sanders drew the knife across Kozak's stomach, head and neck, making superficial cuts. Sanders then hit Kozak's head with a hammer, and the hammer's head broke off. Walkowiak got free from the bindings and ran. Sanders hit Walkowiak's head with a poker, but Walkowiak got out and onto the street. A bullet ripped into Walkowiak's back. Walkowiak kept running until he found a car whose driver agreed to take him to the nearest hospital.

¶ 6 Sanders separated himself from Johnson and Hill as they ran from Feuling's home. Sanders found a police officer and told the officer that someone had been stabbed. Sanders gave the officer Feuling's address. Police found Feuling dead at the scene from multiple stab wounds. Police cut the cord binding Kozak. Kozak told police about the robbery and murder.

¶ 7 Pictures taken at the police station showed Kozak's cuts. The hammer blow to his head left no bruise marks. Doctors did not prescribe any medication for Kozak.

¶ 8 Police never caught Hill. Prosecutors charged Johnson and Sanders with armed robbery, murder, and the attempted murders of Kozak and Walkowiak. At the joint trial with Johnson before separate juries, Kozak testified that the hammer blow to his head made him dizzy for a second, but he never lost consciousness. He claimed no more serious injury from the attack. A jury found Sanders guilty of the murder and both attempted murders.

¶ 9 At the sentencing hearing, the judge emphasized prior findings that Sanders acted delinquently. When Sanders was 13, he cut a girl with a razor, and at age 16, he robbed someone. Teachers and other persons in the community thought highly of Sanders, and the judge treated their testimony as further reason to regard Sanders as treacherous. The judge said:

> "I have to make sure on behalf of the Feuling family, on behalf of all of society, that you are incarcerated for a sufficiently long period of time so that society will be protected against some violent act like this again.
>
> That society will not have to worry that Terry Sanders, the fellow that sits here meekly in front of me and speaks softly and has gotten so many people to like him and to help him out and speak up for him, that you will not turn again on those same people and on your friends and commit another horrible crime that nobody can figure out and nobody can understand why it happened.
>
> I have got to make sure that this does not happen for a considerable period of time.
>
> Insofar as your co-defendant, Mr. Johnson, was concerned, I found, and I find again, that the murder of William Feuling was an act separate and apart from because it ended prior to the time when you attempted to kill Art Kozak and the attempt murder of Brian Walkowiak and also was an event that was separate and apart from the murder of William Feuling and separate and apart from the attempted murder of Arthur Kozak. ***

> All of these events are separate and distinct and you should be punished individually for each because each of them are separate victims.
>
> I could sentence you to natural life ***, but because of your young age and because of your ability to get people to say that you have a potential for rehabilitation ***, I am not going to do that. But I am going to sentence you to a sufficient period of time that society, when you get out, will not have to worry about whether or not you're going to be able to commit crimes such as this again."

¶ 10 The appellate court affirmed the convictions and sentences, including the consecutive sentencing. *People v. Sanders*, 168 Ill. App. 3d 295 (1988). Sanders filed a postconviction petition, and the circuit court dismissed the petition without holding an evidentiary hearing. The appellate court affirmed the judgment. *People v. Sanders*, Nos. 1-92-0644 & 1-92-0708 (consolidated) (1993) (unpublished order under Supreme Court Rule 23). A successive postconviction petition resulted in another dismissal and affirmance. *People v. Sanders*, No. 1-01-4121 (2002) (unpublished order under Supreme Court Rule 23).

¶ 11 In 2004, Sanders filed a *habeas corpus* petition. The circuit court recharacterized the petition as a second successive postconviction petition and summarily dismissed it. The appellate court reversed the decision because the circuit court did not give Sanders the opportunity to withdraw or amend his petition when it recharacterized the petition as a postconviction petition. See *People v. Pearson*, 216 Ill. 2d 58 (2005). On remand, in 2011, Sanders amended the petition and moved for leave to file it as a second successive postconviction petition. He claimed that the Unified Code of Corrections (Code) (Ill. Rev.

Stat. 1985, ch. 38, pars. 1001-1-1 *et seq.*) did not authorize the consecutive sentences, making the sentencing order partially void. He also argued that the trial court had not properly taken into account in sentencing Sanders's youth. Sanders argued that he had cause for failing to raise the issue earlier, because a new decision from the United States Supreme Court, *Graham v. Florida*, 130 S. Ct. 2011 (2010), changed the law applicable to lengthy sentences for juveniles. In an order dated May 4, 2012, the circuit court denied Sanders's motion for leave to file the second successive postconviction petition. Sanders now appeals.

¶ 12 ANALYSIS

¶ 13 We review *de novo* the order denying Sanders leave to file the successive postconviction petition. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

¶ 14 Void Sentence

¶ 15 Sanders argues first that the Code did not authorize the trial court to make the 30 year sentence for the attempted murder of Kozak run consecutively to the 40 year sentence for the murder of Feuling. A defendant may use a successive postconviction petition to attack a void sentence. *People v. Waldron*, 375 Ill. App. 3d 159, 160 (2007). Sanders admits that the Code permits the sentence for the murder and the sentence for the attempted murder of Kozak to run consecutively to the sentence for the attempted murder of Walkowiak, because Walkowiak suffered severe bodily injury, but Sanders argues that the Code does not permit the sentence for the attempted murder of Kozak to run consecutively to the murder sentence.

¶ 16 The State argues that *res judicata* bars the issue, but the appellate court has held that *res judicata* does not protect void judgments. *People v. Harper*, 345 Ill. App. 3d 276, 285 (2003). Our supreme court has held that a sentence not authorized by the Code is void, and

subject to correction in any proceedings in the case. *People v. Arna*, 168 Ill. 2d 107, 113 (1995). Our supreme court has clarified that *Arna* remains binding authority. *People v. Thompson*, 209 Ill. 2d 19, 25-27 (2004); *People v. Donelson*, 2013 IL 113603, ¶15.

¶ 17 In 1985, when the offenses at issue occurred, the Code provided:

> "(a) *** The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, in which event the court may enter sentences to run consecutively. * * *
>
> (b) The court shall not impose a consecutive sentence unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." Ill. Rev. Stat. 1985, ch. 38, pars. 1005-8-4(a), (b).

¶ 18 Thus, at the time of the crimes, the Code permitted the court to impose consecutive sentences for multiple crimes in two circumstances. First, if the defendant committed the multiple crimes as part of a "single course of conduct during which there was no substantial change in the nature of the criminal objective," the court could make the sentences run consecutively only if one conviction was for "a Class X or Class 1 felony and the defendant inflicted severe bodily injury." Second, if the defendant committed multiple offenses not in a

single course of conduct, with a substantial change in the nature of the criminal objective, then the court could impose consecutive sentences only if the court found that the need to protect the public from further criminal conduct by the defendant required consecutive sentencing. See *People v. Bole*, 155 Ill. 2d 188, 195-96 (1993); Ill. Rev. Stat. 1985, ch. 38, pars. 1005-8-4(a), (b).

¶ 19 The trial court here did not clarify whether it intended to impose consecutive sentences under the first or the second set of criteria. Although the court expressly found the murder and the attempted murders formed three separate crimes, subject to separate punishments (see *People v. King*, 66 Ill. 2d 551, 565-66 (1977)), the court made no finding as to whether the three crimes formed a single course of conduct or whether a substantial change in criminal objective occurred between the crimes.

¶ 20 Sanders admits that the Code permitted the court to make the sentence for the attempted murder of Walkowiak run consecutively to the other sentences. Walkowiak suffered severe bodily injury from the gunshot wound to his back that occurred when Johnson, Hill and Sanders tried to kill him. Since attempted murder was a Class X felony, and the offenders caused severe bodily injury, the conviction for Walkowiak's attempted murder met the criteria for consecutive sentencing, even if it occurred with other crimes in a single course of conduct, without a substantial change in criminal objective. Sanders claims only that the Code did not permit the sentence for Feuling's murder to run consecutively to the sentence for the attempted murder of Kozak that did not involve severe bodily injury.

¶ 21 The murder of Feuling cannot trigger consecutive sentencing, because the murder was neither a Class X nor a Class 1 felony. *People v. Whitney*, 188 Ill. 2d 91, 100 (1999). The

attempted murder of Kozak also cannot trigger consecutive sentencing, because Kozak did not suffer severe bodily injury. *People v. Jones*, 323 Ill. App. 3d 451, 461 (2001). Thus, if the crimes occurred in a single course of conduct, the sentences for the murder and the attempted murder that did not involve severe bodily harm do not trigger consecutive sentencing and the sentences must run concurrently with each other, although those sentences may run consecutively to the sentence for the attempted murder that involved severe bodily harm. See *People ex rel. Senko v. Meersman*, 2012 IL 114163, ¶ 19.

¶ 22 The State claims that the record justifies the consecutive sentences for the three crimes because the crimes did not occur in a single course of conduct, and a substantial change in criminal objective occurred between the crimes. The trial court made no finding concerning a single course of conduct or any change in the objective of the crimes. The prosecution's case rested on evidence that Johnson, Hill and Sanders decided to rob the three victims, and then kill them to leave no witnesses to the robbery. Our supreme court addressed the issue of consecutive sentencing on these facts in its review of Johnson's convictions for murder, armed robbery and the two attempted murders. *People v. Johnson*, 149 Ill. 2d 118 (1992). The *Johnson* court noted that under section 1005-8-4(a) of the Code, the trial court could impose consecutive sentences for multiple crimes that occur in a single course of conduct if the triggering offense is a Class 1 or Class X felony accompanied by severe bodily injury. The *Johnson* court said, "Both attempted murders are subject to Class X sentences, and the record reveals severe bodily injury in the gunshot wound to Brian Walkowiak. These requirements having been met, the trial judge was not precluded from imposing consecutive 30-year sentences for the two attempted murder convictions." *Johnson*, 149 Ill. 2d at 159.

That is, the *Johnson* court found that the crimes occurred in a single course of conduct, and the attempted murder of Walkowiak met the criteria for consecutive sentencing under section 1005-8-4(a). Because the prosecutor's evidence showed no change in the criminal objective, the murder and the two attempted murders occurred in a single course of conduct. See *People v. Fieberg*, 108 Ill. App. 3d 665, 671-72 (1982); *People v. Willis*, 204 Ill. App. 3d 590 (1990). Thus, under *Johnson*, the sentence for the attempted murder of Walkowiak may run consecutively to the sentence for the attempted murder of Kozak, and the sentence for the attempted murder of Walkowiak may run consecutively to the sentence for the murder of Feuling, but because the three crimes all occurred in a single course of conduct, and neither the murder of Feuling (which was neither a class X or class 1 felony) nor the attempted murder of Kozak (which was a class X felony but did not involve the infliction of severe bodily injury) triggers consecutive sentencing, the sentences for those two crimes must run concurrently with each other. We agree with Sanders that the Code did not authorize the trial court to make the sentence for the attempted murder of Kozak to run consecutively to the sentence for Feuling's murder. We vacate the void portion of the sentencing order.

¶ 23 Cruel and Unusual Punishment of Juveniles

¶ 24 Next, Sanders asks this court to reverse the order denying his motion for leave to file a successive postconviction petition, based on the trial court's failure to take into account all of the considerations relevant to sentencing juveniles. We review *de novo* the court's decision to deny Sanders leave to file a successive postconviction petition. *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59. The Post-Conviction Hearing Act restricts the use of successive postconviction petitions. 725 ILCS 5/122-1(f) (West 2010). For the court to order an

evidentiary hearing on a successive postconviction petition, the petitioner must either meet the cause and prejudice test (725 ILCS 5/122-1(f) (West 2010)), or he must present new evidence of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). For the cause and prejudice test, the petitioner must show that an objective impediment precluded him from raising the issue in an earlier proceeding, and that the claimed errors resulted in actual prejudice. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 25 Sanders claims that United States Supreme Court decisions show that he had cause for failing to raise the issue in prior proceedings, and that he suffered prejudice from the trial court's error. After Sanders filed his earlier postconviction petitions, the Supreme Court decided *Graham v. Florida*, 130 S. Ct. 2011, and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Those two cases substantially changed the law concerning the imposition of lengthy sentences on children. See *People v. Davis*, 2014 IL 115595, ¶ 41. The *Davis* court held that *Miller* and *Graham* changed the law and gave postconviction petitioners cause for failing to raise the issue in proceedings that preceded those decisions. *Davis*, 2014 IL 115595, ¶ 42.

¶ 26 To show prejudice, Sanders must show a reasonable probability that he would have achieved a better result if the trial court had correctly applied the eighth amendment, as interpreted in the decisions in *Graham* and *Miller*. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 471 (2002); *People v. Mitchell*, 189 Ill. 2d 312, 333-34 (2000). In *Miller*, 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 *Graham* and *Roper v. Simmons*, 543 U.S. 551 (2005):

"*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., at 2026. 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, 125 S. Ct. 1183. 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, 125 S Ct. 1183.

Our decisions rested not only on common sense — on what 'any parent knows' — but on science and social science as well. *Id.,* at 569, 125 S. Ct. 1183. 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, 125 S. Ct. 1183 (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., at 2026. 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., at 2027 (quoting *Roper,* 543 U.S., at 570, 125 S. Ct. 1183).

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., at 2028 (quoting *Tison v. Arizona,* 481 U.S. 137, 149, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987); *Roper,* 543 U.S., at 571, 125 S. Ct. 1183). 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. at 2028 (quoting *Roper,* 543 U.S., at 571, 125 S. Ct. 1183). 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., at 2029 (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., at 2030. 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,* 132 S. Ct. at 2464-65.

¶ 27 The *Miller* 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, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (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, 102 S. Ct. 869. It is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.' *Johnson,* 509 U.S., at 368, 113 S. Ct. 2658. 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, 102 S. Ct. 869. And its 'signature qualities' are all 'transient.' *Johnson,* 509 U.S., at 368, 113 S. Ct. 2658. *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, 102 S. Ct. 869. 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, 102 S. Ct. 869." *Miller*, 132 S. Ct. at 2467.

¶ 28 The Supreme Court of Iowa addressed the effect of *Miller* on sentences shorter than life in prison for juvenile offenders. In *State v. Null*, 836 N.W.2d 41 (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*-type protections. ***
>
> *** In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper, Graham,* and *Miller* 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* 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,* 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. [Citation.]

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,* 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*, 836 N.W.2d at 71-75.

¶ 29 The court vacated the sentence and remanded for the trial court to reconsider the sentence in light of *Miller*. As the *Null* court pointed out, courts in other jurisdictions similarly remanded cases for resentencing in light of *Miller*. *See People v. Araujo,* Nos. B235844, B240501, 2013 WL 840995 at 5 (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*); *People v. Rosales*, No. F061036, 2012 WL 4749427, at *24 (Cal. Ct. App. Oct. 5, 2012) (unpublished opinion) ("*Miller* 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.

¶ 30 The trial court here did not consider the special circumstances of youth that often make lengthy sentences particularly inappropriate for youthful offenders. The court treated Sanders's evidence of rehabilitative potential as grounds for extending his sentence due to his treacherous nature. We find that Sanders has shown a reasonable probability that he would have received a shorter sentence if the trial court correctly understood the eighth amendment as it applies to the punishment of juvenile offenders. Sanders has presented sufficient

evidence of a violation of his constitutional rights to require further proceedings on his successive postconviction petition. We reverse the order denying Sanders's motion to file a successive postconviction petition and we remand for further proceedings in accord with this order.

¶ 31 Petition for Rehearing

¶ 32 In a petition for rehearing, the State raises two issues: first, the State points out that Sanders asked us to address the eighth amendment issue in the alternative, if we did not grant him relief on the issue of consecutive sentencing. We agree with the State that Sanders phrased his request for relief in the alternative, but we find that his phrasing of the request does not preclude this court from granting appropriate relief. See *People v. Horrell*, 235 Ill. 2d 235, 241 (2009); Ill. Sup. Ct. R. 366(a)(5) (eff. Feb. 1, 1994) ("In all appeals the reviewing court may, in its discretion, and on such terms as it deems just, *** enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, *** that the case may require").

¶ 33 Second, the State contends that our discussion of the eighth amendment issue conflicts with *People v. Davis*, 2014 IL 115595, ¶ 43, and *People v. Patterson*, 2014 IL 115102, ¶ 100. The *Davis* court noted that even after *Graham*, *Roper* and *Miller*, a trial court still has authority to impose a sentence of natural life in prison on a juvenile in an appropriate case. *Davis*, 2014 IL 115595, ¶ 43. We see no conflict between that holding and our application of the principles stated in *Graham*, *Roper* and *Miller* to this case.

¶ 34 In *Patterson*, our supreme court said that *Graham*, *Roper* and *Miller* did not apply to the sentence of almost 31 years imposed on the juvenile defendant in that case, because the

sentence, "[a]lthough lengthy, *** is not comparable to *** life in prison without parole." *Patterson*, 2014 IL 115102, ¶ 108. The trial court here imposed on Sanders consecutive sentences totaling 100 years, and according to the State, even with maximum good time credit, Sanders would need to serve at least 49 years before he could become eligible for parole.

¶ 35 The United States Sentencing Commission Preliminary Quarterly Data Report (through June 30, 2012) indicates that a person held in a general prison population has a life expectancy of about 64 years. This estimate probably overstates the average life expectancy for minors committed to prison for lengthy terms. One researcher concluded:

> "A person suffers a two-year decline in life expectancy for every year locked away in prison. Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State*, 1989-2003, 103 Am. J. of Pub. Health 523, 526 (2013). The high levels of violence and communicable diseases, poor diets, and shoddy health care all contribute to a significant reduction in life expectancy behind bars. See *United States v. Taveras*, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006) (finding "persistent problems in United States penitentiaries of prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases" that lead to a lower life expectancy in prisons in the United States), aff'd in part, vacated in part sub nom. *United States v. Pepin*, 514 F.3d 193 (2d Cir. 2008); John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement* 11 (2006). Entering prison at a young age is particularly dangerous. Youth incarcerated in adult prisons are five times more likely to be victims of sexual or

> physical assault than are adults. [Citation]; Deborah LaBelle, Michigan Life Expectancy Data for Youth Serving Natural Life Sentences, http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited Dec. 12, 2013)." Nick Straley, *Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 Wash. L. Rev. 963, 986 n. 142 (2014).

¶ 36 To become eligible for parole, Sanders will need to outlive his life expectancy. The sentence the trial court imposed effectively imprisons Sanders for the remainder of the lifetime he can expect to live. See also United States v. Nelson, 491 F. 3d 344, 349-50 (7th Cir 2007) (acknowledging the decreased life expectancy for incarcerated individuals based on United States Sentencing Commission data).

¶ 37 We particularly note that the State disagrees with out holding that the trial court lacked authority to make the sentence for the murder of Feuling run consecutively to the sentence for the attempted murder of Kozak. Because the State may challenge our ruling on a further appeal, Sanders still faces a very real possibility of consecutive sentences totaling 100 years. Even after *Patterson*, Sanders's extreme sentence, in excess of his life expectancy as a prison inmate, implicates the eighth amendment concerns set forth in *Graham*, *Roper* and *Miller*. Accordingly, we deny the State's petition for rehearing.

¶ 38 CONCLUSION

¶ 39 The trial court lacked authorization for making the sentence for the murder of Feuling and the sentence for the attempted murder of Kozak run consecutively, because the two crimes occurred in a single course of conduct without a change in the criminal objective, and

Kozak did not suffer severe bodily injury from the attempted murder. We vacate the provision in the sentencing order that makes those sentences run consecutively to each other. We also reverse the dismissal of Sanders's successive postconviction petition. Sanders has shown that recent United States Supreme Court decisions have changed sentencing laws in ways that could affect the constitutionality of his sentencing, sufficiently showing both cause for his failure to raise the issue in earlier proceedings, and prejudice due to that failure. We remand for further proceedings on Sanders's successive postconviction petition.

¶ 40 Sentence vacated in part; cause reversed and remanded.