2014 IL App (1st) 12-1799-U

FOURTH DIVISION
August 28, 2014

No. 1-12-1799

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 04 CR 30062
WILLIAM COTY,	)	
	)	The Honorable
Petitioner-Appellant.	)	Nicholas Ford,
	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order dismissing the defendant's section 2-1401 petition is vacated. The circuit court improperly dismissed the defendant's petition, *sua sponte*, on the basis of timeliness. The circuit court also improperly dismissed the defendant's petition on the merits. While the court was correct that the defendant had failed to properly state a facial challenge to the mandatory sentencing scheme under which he was sentenced to natural life in prison without the possibility of parole, it erred in finding that the defendant had also failed to state an as-applied challenge to that sentencing scheme on the basis of the Illinois Constitution's proportionate penalties clause.

¶ 2 After a jury trial, the defendant, William Coty, who is mentally retarded[1], was convicted of one count of predatory criminal sexual assault of a child, one count of criminal sexual assault and one count of aggravated criminal sexual abuse against the six-year-old victim, K.W. Because the defendant had a prior conviction for aggravated criminal sexual assault, pursuant to section 12.14.1(b)(2) of the Criminal Code of 1968 (Criminal Code) (720 ILCS 5/12-14.1(b)(2) (West 2004)),[2] the circuit court had no discretion but to sentence him to mandatory natural life in prison without the possibility of parole. After his conviction and sentence were affirmed on appeal, the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/2-1401 (West 2004)), alleging that his mandatory natural life sentence was unconstitutional both under the Eight Amendment to the United States constitution (U.S. Const., amend. VIII) and the Illinois constitution (Ill. Const. 1970, art. I, § 11). The defendant asserted that the statutory scheme under which he was sentenced was facially unconstitutional because it categorically forbade the sentencing judge from considering his mental retardation and the circumstances of his offense. In the alternative, the defendant asserted that, in the very least, this statutory scheme, as applied to him violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970,

[1] We acknowledge that the term "mentally retarded" is not the politically correct term for describing a person, such as the defendant here, who is impaired by an intellectual handicap. Nevertheless, because both the trial court and the relevant case-law rely on this term, we too will use it for purposes of consistency.

[2] We note that section 12-14.1(b)(2) was recodified as 720 ILCS 5/11-1.40(b)(2) (West 2011) and became effective July 1, 2011.

art. I, § 11). The circuit court dismissed the defendant's petition, and the defendant now appeals. For the reasons that follow, we affirm in part and reverse in part.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. The defendant was arrested on November 21, 2004, and charged with, *inter alia*, predatory criminal sexual assault of a child, criminal sexual assault and aggravated criminal sexual abuse.

¶ 5 A. Pretrial Proceedings

¶ 6 Prior to trial, the State filed a motion to admit other crime's evidence, and following a hearing, the trial court granted that motion.[3] This evidence was not presented at trial for the jury; rather it was used only by the trial judge for sentencing purposes.

¶ 7 Prior to trial, the trial court also conducted a fitness hearing. The State called Dr. Debra Ferguson, a forensic clinical services psychologist who admitted that the defendant's full scale IQ was 65, but who testified that the defendant was fit to stand trial. The defendant called Dr. Sandra Dawkins who testified that the defendant's full scale IQ was 55 and that he was unfit to stand trial. After hearing evidence and arguments by both parties, the circuit court found that although it was undisputed that the defendant was "mentally retarded," he was nevertheless fit to stand trial.

¶ 8 The defendant then filed a motion to suppress his inculpatory statements to police. At the

[3] The other crimes evidence consisted of the defendant's 1988 conviction for aggravated criminal sexual assault in case No. 88 CR 12137, involving a 9-year-old victim, for which the defendant was sentenced to six years' imprisonment.

hearing on the motion to suppress, the State called Sergeant Charles Battaglia who testified that he and his partner Detective Eileen O'Donnell, interviewed the defendant on November 22, 2004 at the police station. Sergeant Battaglia averred that he read the defendant the *Miranda* warnings, after which, the defendant agreed to answer their questions. Sergeant Battaglia also testified that after this interview, Cook County Assistant State's Attorney (ASA) Dean Fugate re-*Mirandized* the defendant and thereafter took the defendant's handwritten statement.

¶ 9 The State also called their expert forensic psychologist, Dr. Ferguson, who was tasked with determining whether the defendant was capable of understanding his *Miranda* rights. Dr. Ferguson averred that she interviewed the defendant and performed one part of the "Grisso scales" test--the "Function of Rights in Interrogation"-- to assess the defendant's capacity to understand his *Miranda* rights.[4] According to Dr. Ferguson, the defendant successfully applied the *Miranda* warnings he had received to a hypothetical situation, and therefore passed this portion of the "Grisso scales" test. Dr. Ferguson also averred that during her interview with the defendant, the defendant exhibited an understanding of his *Miranda* rights. In particular, Dr. Ferguson explained that the defendant had acknowledged to her that the police read him his *Miranda* rights. When asked to explain what those rights entailed, the defendant told Dr. Ferguson that "yeah I know they (*sic*) supposed to read you your rights *** I'm slow but I ain't

[4] The "Grisso scales" test, otherwise knowing as the *Comprehension of Miranda Rights: Manual for Administration and Scoring* provides four instruments by which mental health professionals may asses the capacity of individuals to appreciate and understand the significance of their Miranda rights. These include: (1) the comprehension of *Miranda* rights; (2) the comprehension of *Miranda* rights recognition; (3) the comprehension of *Miranda* vocabulary and (4) the function of rights in interrogation.

that slow. They have to read you your rights. They can't just lock you up like that without reading you your rights."

¶ 10 In opposition to the State's testimony, at the motion to suppress hearing, the defendant called his own expert, Dr. Michael Fields, who testified that he administered the full Grisso-scales test to the defendant to determine his understanding of the *Miranda* warnings. Dr. Fields testified that the defendant scored poorly on all four parts of the Grisso-scales test. In addition, he stated that during his interview with the defendant, the defendant could not name his *Miranda* rights. Based on the above, Dr. Fields opined that "there were significant doubts about [the defendant's] ability to understand *Miranda*." However, when questioned further, Dr. Fields acknowledged that he could not state with certainty that the defendant was categorically unable to understand his *Miranda* rights.

¶ 11 After hearing the testimony and argument by the parties, the circuit court denied the defendant's motion to suppress his statements to police. In doing so, the court noted that Dr. Ferguson's interview provided the stronger and better evidence of the defendant's capacity. The court stated that Dr. Fields articulated an equivocal opinion that lacked certainty, and that his opinion was based more on testing rather than on a clinical interview of the defendant.

¶ 12 B. Jury Trial

¶ 13 At trial, the victim K.W., testified that she was six years old in November 2004 and that the defendant, whom she knew as "Shakey," lived as a boarder in her grandparents' house. The victim lived with her grandparents, her parents, her siblings, her cousin and "Shakey." The defendant lived in the basement, as did K.W.'s parents and siblings, and K.W. was allowed to sleep in the basement or upstairs with her grandparents. K.W. testified that on November 18, 2004, she was watching TV alone in the defendant's room in the basement, while her parents and

cousin were asleep. She stated that she was wearing a T-shirt, skirt and underwear. K.W. averred that the defendant came into the room and sat down on the couch with her. He then started to "scooch" toward her and every time she moved away, he moved closer until she could no longer move. K.W. stated that the defendant then touched her arm, her shoulder, her leg, and then "started messing with me down there." She identified that part of her body as the "part that [she] use[s] to go to the bathroom with." K.W. then explained that the defendant had "not [touched her] with his hand, but with his tongue" and indicated that she was on the floor when he pushed her underwear to the side of her leg and did so. The defendant then told K.W., "you won't tell anyone." K.W. immediately went and woke her mother, and told her that the defendant had "messed with her down there."

¶ 14 On cross-examination, K.W. denied telling the police that the defendant touched her vagina with his hand, and insisted that she told them he had used his tongue. She similarly admitted that she did not tell the emergency room physician that the defendant had used his tongue. When asked to explain why she did not tell the emergency doctor that the defendant had licked her instead of touched her, K.W. stated that she forgot.

¶ 15 K.W.'s mother, Keafa W., testified that on the night in question at about 11 p.m., K.W. came into her room. K.W. told Keafa, "Shakey touched me" and then patted her vaginal area to show her mother where she had been touched. Keafa woke her husband up and they went upstairs with K.W. to talk to K.W.'s grandparents. While they were upstairs, Keafa heard the front door close and her husband observed the defendant leaving.

¶ 16 On cross-examination, Keafa admitted that K.W. never told her that the defendant licked her, and that she only accused him of "touching her." Keafa also acknowledged that she did not call the police until the next afternoon, November 19, 2004. She explained, however, that she waited

until the next afternoon because she was under the misapprehension that K.W.'s grandparents were going to call the police.

¶ 17 Pediatric emergency physician Dr. Gail Allen testified that she examined K.W. on November 21, 2004. Dr. Allen stated that on that date K.W. was six years old and weighed 53 pounds. According to Dr. Allen, K.W. pointed at her vagina, and told her that the defendant had "touched her." Dr. Allen stated that she conducted a physical examination of K.W. but that the exam was normal and that she found no signs of penetration, trauma, or "touching." She explained, however, that in her experience this was common in abuse cases because evidence of trauma is usually seen if the child is examined immediately after the traumatic event or if there was "repeated, repetitive trauma over a chronic period" of time.

¶ 18 On cross-examination, Dr. Allen acknowledged that K.W. did not tell her that the defendant had touched her with his tongue. She also admitted that K.W.'s chart from the emergency room visit revealed that K.W. had told a resident that she was wearing shorts, and not a skirt on the night of the incident. On redirect examination, however, Dr. Allen testified that accorindg to the resident's notes K.W. had stated that the defendant looked "down there," that he had touched her "down there," and that he had "put his finger in the hole and moved it around in circles."

¶ 19 Chicago police officer Donald Story testified that at about midnight on November 21, 2004, he and his partner, Officer Elkins, arrested the defendant at his sister's home. Once in the police car, Officer Elkins gave the defendant his *Miranda* rights, and asked him if he wanted to answer the police officers' questions. According to Officer Story, the defendant agreed and asked what the arrest was about. Upon being told of the allegations, the defendant told the officers that K.W. "came into [his] room, sat on [his] lap, [and] rubbed around a little bit and." Once at the station, Officer Story contacted Area 1 police.

¶ 20 Detective Eileen O'Donnell next testified that she and her partner, Detective Battaglia were assigned to investigated K.W.'s case on November 21, 2004. The next day, after hearing K.W.'s victim sensitive interview, they proceeded to interview the defendant. According to Detective O'Donnell, Detective Battaglia read the defendant the *Miranda* warnings and the defendant agreed to speak with the detectives. After the interview, Detective O'Donnell contacted felony review.

¶ 21 ASA Dean Fugate next testified that he arrived at the police station on November 22, 2004, and spoke to the defendant in an interview room in the presence of the two detectives. Fugate averred that he gave the defendant his *Miranda* warnings from memory and explained to him who he was, and that the defendant indicated that he understood his rights and was willing to speak to him. Fugate and the defendant then had a 15-minute conversation, at the end of which the defendant agreed to memorialize his statement in writing. After Fugate asked the defendant to read the *Miranda* warnings on the form for the handwritten statement, he learned that he defendant was illiterate. Fugate therefore read the *Miranda* rights to the defendant from that printed form and had him sign his name on the form. According to Fugate, the defendant was able to sign his name. Fugate then took down a handwritten statement, after which the defendant, Fugate and the two detectives signed each page.

¶ 22 The defendant's handwritten statement was then published to the jury. In that statement, the defendant stated that he was 46 years old and that in November 2004, he rented a room in the basement of 7036 South Aberdeen Avenue in Chicago, where he shared the basement with K.W. and her family. The defendant stated that on November 18, 2004, he was changing his clothes in his bedroom with his door open when K.W. walked into the room. The defendant told K.W. to leave but she would not. The defendant stated that he finished changing his clothes behind a

curtain and then sat on his couch. He averred that K.W. then sat on his lap and "began grinding her butt on his lap." The defendant stated that "his penis was hard" but claimed that he and K.W. were both clothed.[5] He stated that he then placed his right hand underneath K.W.'s clothes and touched her vagina. He admitted that the "inserted his finger into [K.W.'s] vagina up to the first joint. The defendant stated that he did not move his finger inside of K.W.'s vagina and that he kept it inside only for "one minute." The defendant averred that K.W. said "that feels good."

¶ 23 In his handwritten statement, the defendant further stated that K.W. pulled her shorts and panties down to her knees before sitting on his lap. He then stated that she was not wearing pants when she was seated on his lap. The defendant also stated that after K.W. got off his lap and pulled her pants up, she left the room and he saw her go upstairs with her parents into her grandparents' room. The defendant then left the house out of the front door and went to his sister's house. He also stated that he "felt bad that he touched the little girl" and that he was aware that she was six years old.

¶ 24 In his statement, the defendant also indicated that he understands and writes English, but that he cannot read it, and that he was treated well by the police officers.

¶ 25 After the defendant's statement was read into the record, the State rested. The defense presented no witnesses and the parties proceeded to closing arguments. After arguments were heard, the jury deliberated and returned a verdict of guilty on all three counts. The defendant's motion for a new trial was denied.

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[5] Fugate testified that during his interview with the defendant, the defendant initially told him that the victim's pants were on throughout the incident, but that afterwards, while Fugate was taking down the handwritten statement, he indicated that the victim removed her pants during the incident.

¶ 26 On November 17, 2006, the court held a sentencing hearing, wherein the defendant's sister, Irma Coty testified regarding his mental disabilities, Irma testified that the defendant has been mentally retarded since he was born, and that he does "not understand what is going on," and needs psychiatric treatment. The presentence investigation report, which was admitted into the record, revealed that the defendant attended special education classes in the Chicago Public School system up until the eighth grade, and that he receives social security disability from the State of Illinois because of his mental health. The report further revealed that the defendant's sister Irma, "takes care of him, handles his finances and helps him with his daily routine." Despite this evidence, based upon the defendant's prior conviction for aggravated criminal sexual assault in case No. 88 CR 12137, the court sentenced the defendant to natural life in prison, pursuant to the mandates of section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)). In doing so, the trial judge noted that he would not have sentenced the defendant to life, but that he was bound by statute to do so. As the court explained:

> "[T]he parties recognize that the court's hands are tied because of the prior conviction for aggravated criminal sexual assault, which makes this conviction one for which he must receive a sentence of life imprisonment without parole. The facts of the cause certainly warrant a substantial sentence here. It would not be the sentence that the court is required to give, had I any discretion, but I must follow the law nonetheless. The legislature has determined a second aggravated criminal sexual assault in one's lifetime means what they say it means."

¶ 27 C. Direct Appeal

¶ 28 The defendant subsequently appealed his conviction, arguing that: (1) he was convicted of

an "uncharged form of predatory criminal sexual assault, specifically 'oral genital contact' "; (2) the testimony of Dr. Allen was inadmissible hearsay and violated the defendant's right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004) because the physician relied on a resident's findings in forming her medical opinion; (3) he was denied his right to a fair trial because of improper prosecutorial comments; and (4) he was denied his right to effective representation of counsel where counsel failed to object to the prosecutor's comments and failed to impeached K.W.'s trial testimony with her prior inconsistent statements. See *People v. Williams*, No. 1-06-3530 (unpublished order pursuant to Supreme Court Rule 23). On March 27, 2009, this court rejected the defendant's claims and affirmed his conviction and sentence. *People v. Williams*, No. 1-06-3530 (unpublished order pursuant to Supreme Court Rule 23) (2009). The defendant's petition for leave to appeal to the Illinois Supreme Court was denied on September 30, 2009. See *People v. Williams*, 233 Ill. 2d 571 (2009).

¶ 29 D. Petition for Relief from Judgment

¶ 30 On March 8, 2012, the defendant filed the instant *pro se* section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)), alleging that his mandatory natural life sentence was unconstitutional because the trial court was prohibited from considering his individual characteristics (namely his mental retardation) and the seriousness of the offense in ordering that sentence. The defendant acknowledged that his petition was untimely under the statute (735 ILCS 5/2-1401 (West 2012)), but claimed that his sentence was void and that therefore he could challenge it at any time. The defendant asked that the circuit court vacate his sentence and remand for resentencing in the 6 to 30 year range. The State did not file any response to the defendant's petition.

¶ 31 On May 10, 2012, the circuit court *sua sponte* denied the defendant's petition. In its written

order, the court first held that the petition was untimely because it was filed over five years after the defendant's conviction, on October 11, 2006, which was contrary to the mandate of the statute that it be filed within two years after the entry of final judgment. See 735 ILCS 5/2-1401 (West 2012). The court also found that the defendant's constitutional argument did not fall within the purview of a section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)) because it addressed errors of law, rather than errors of fact. The court explained that the petition merely argued mitigating factors, which had already been addressed at trial, and did not address any new issues of fact. The court then nonetheless considered the merits of the defendant's argument and found that the defendant failed to establish that the sentencing scheme under which he was sentenced to life imprisonment was either facially unconstitutional or unconstitutional as applied to him.[6] The defendant now appeals the dismissal of his section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)).

¶ 32 II. ANALYSIS

¶ 33 We begin by setting forth the well-established principles regarding such petitions. Section 2-1401 of the Civil Procedure Code (735 ILCS 5/2-1401 (West 2008)) provides a comprehensive statutory procedure by which final orders, judgments, and decrees may be

[6] In doing so, the circuit court noted that the defendant had incorrectly stated in his petition that he was sentenced pursuant to 730 ILCS 5/5-5-3(c)(8) (West 2004), when in fact he was sentenced pursuant to 720 ILCS 5/12-14.1(b)(2) (West 2004). The court then analyzed the constitutionality of 720 ILCS 5/12-14.1(b)(2) (West 2004), the actual sentencing scheme under which the defendant was sanctioned to natural life imprisonment. On appeal, both parties proceed to argue the merits of the constitutionality of the proper section under which the defendant was sentenced, and we will do the same.

vacated after 30 days from their entry. *In re Dar. C.*, 2011 IL 111083, ¶ 104; *People v. Vincent*, 226 Ill. 2d 1, 7 (2007); *People v. Haynes*, 192 Ill. 2d 437, 460 (2000); see also *Mills v. McDuffa*, 393 Ill. App. 3d 940, 945 (2009). To obtain relief under section 2-1401, a defendant must establish "proof, by a preponderance of the evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8; see also *People v. Pinkolsky*, 207 Ill. 2d 555, 566 (2003). Although the statute is ordinarily used to correct errors of fact, our supreme court has repeatedly held that it may also be used to challenge judgment claimed to be defective for legal reasons. See *e.g.*, *People v. Lawton*, 212 Ill. 2d 285, 297 (2004) (holding that section 2-1401 petition could be used by the defendant to make a constitutional challenge that he was denied effective assistance of counsel); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002) (holding that the Chicago Board of Education could use a section 2-1401 petition to challenge the prior judgment against it on the grounds that the manner in which it had been served did not comply with statutory requirements). In particular, our supreme court has held that a defendant may use a section 2-1401 to make an argument alleging that his sentence is void. See *People v. Harvey*, 196 Ill. 2d 444, 447 (2001) (holding that a defendant may proceed under a section 2-1401 in raising an unsuccessful challenge to an extended-term sentence based on a claim that it did not meet the requirements of the sentencing statute).

¶ 34 Where the claims in a section 2-1401 petition are insufficient to warrant relief as a matter of law, the circuit court may *sua sponte* dismiss the petition with prejudice or deny relief, even where the State has not filed any responsive pleading to such a petition. *Vincent*, 226 Ill. 2d at 12. We review a circuit court's order dismissing a section 2-1401 petition *de novo*. *Vincent*, 226

Ill. 2d at 18. In doing so, we are mindful that we are not bound by the reasons relied upon by the circuit court and may affirm on any basis supported by the record. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008)).

¶ 35 A. Timeliness

¶ 36 The State initially contends that the circuit court properly dismissed the defendant's petition as untimely. It is well-established that a section 2-1401 petition must be filed within two years after entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (West 2008); see also *Vincent*, 226 Ill. 2d at 7; *People v. Pinkolsky*, 207 Ill. 2d 555, 566 (2003). The two-year filing period, however, will be excused where a clear showing has been made that the person seeking relief is: (1) under legal disability or duress or (2) the grounds for relief are fraudulently concealed. *Pinkolsky*, 207 Ill. 2d at 566; see also *Mahaffey*, 194 Ill. 2d at 181-82. In addition, the two-year limitations period does not apply to petitions brought on voidness grounds. *Sarkissian*, 201 Ill. 2d at 104; see also *People v. Morfin*, 2012 IL App (1st) 103568 ¶ 30 ("A petition challenging a judgment as void is not subject to the limitations period ***."); see also 735 ILCS 5/2-1401(f) (West 2004) ("[n]othing contained in this Section affects any existing right to relief from a void order or judgment ***.")

¶ 37 The State contends that the circuit court properly dismissed the defendant's petition as untimely because the defendant's sentence was not void but rather only voidable. In support the State cites to *People v. Gray*, 2013 IL App (1st) 112572. In that case, this appellate court addressed the issue of what constitutes voidness for purposes of a section 2-1401 petition. See *Gray*, 2013 IL App (1st) 112572. There, a juvenile defendant was found guilty of first degree murder through accountability and because he had a prior murder conviction, by statute he received a mandatory life sentence. See *Gray*, 2013 IL App (1st) 112572, ¶ 3 (citing 730 ILCS

5/5-8-1(a)(1)(c)(i) (West 2004)). The *Gray* defendant filed a section 2-1401 petition about ten years after his sentencing, arguing that the two-year limitation period should not apply to his petition because the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), had rendered his mandatory life sentence void.[7] *Gray*, 2013 IL App (1st) 112572, ¶ 8. The State filed a motion to dismiss the defendant's petition, arguing, *inter alia*, that it was not filed in a timely manner. *Gray*, 2013 IL App (1st) 112572, ¶ 5. The circuit court granted the State's motion and the defendant appealed. *Gray*, 2013 IL App (1st) 112572, ¶ 5.

¶ 38 On appeal, the defendant in *Gray* argued that "a sentence which *** violates the constitution is void from its inception and may be challenged at any time." *Gray*, 2013 IL App (1st) 112572, ¶ 8. We disagreed. In addressing the voidness issue, we initially explained that our supreme court has repeatedly held that a judgment is void, rather than voidable, only if the court that entered it lacked jurisdiction, *i.e.,* lacked personal or subject matter jurisdiction or, the power to render a particular judgment. *Gray*, 2013 IL App (1st) 112572, ¶ 10. We explained that "the power to render a particular judgment" does not necessarily mean that the judgment rendered is one that should have been rendered. *Gray*, 2013 IL App (1st) 112572, ¶ 10. Rather, as we noted "the power to decide carries with it the power to decide wrong, as well as right, and a court [does] not lose jurisdiction merely because it make a mistake in the law, the facts or both." *Gray*, 2013 IL App (1st) 112572, ¶ 10.

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[7] As shall be more fully discussed below, in *Miller*, the United States Supreme Court held that a statutory scheme that imposed a mandatory natural-life sentence on a minor violated the eighth amendment's prohibition against cruel and unusual punishment. See *Miller*, 567 U.S. __, 132 S. Ct. 2455.

¶ 39 Based on the aforementioned principles, we next distinguished between a facially unconstitutional sentencing statue and one that could be either constitutionally or unconstitutionally applied. *Gray*, 2013 IL App (1st) 112572, ¶¶ 10-12. We explained that "[a] statue that is unconstitutional on its face--that is, where no set of circumstances exists under which it would be valid—is void *ab initio*, while a statute that is merely unconstitutional as applied is not." *Gray*, 2013 IL App (1st) 112572, ¶ 10. We then held that notwithstanding *Miller*'s prohibition of mandatory life sentences for minors, the challenged sentencing statute was not void, because it could be constitutionally applied to adult defendants. *Gray*, 2013 IL App (1st) 112572, ¶ 11. Accordingly, we concluded that because the defendant's sentence was not void, but merely voidable, he could bring a challenge to his sentence by way of a section 2-1401 only if he did so in a timely manner, *i.e.*, within the statutorily prescribed two-year limitation period. *Gray*, 2013 IL App (1st) 112572, ¶ 12.

¶ 40 The defendant acknowledges the holding in *Gray*, but asserts that it is inapplicable since in that case the State filed a motion to dismiss on the basis of timeliness, whereas here, the circuit court improperly *sua sponte* dismissed the defendant's petition on that basis. For the reasons that follow, we agree.

¶ 41 The record below reveals that unlike in *Gray*, the State here never challenged the defendant's petition on the basis of timeliness. In fact, the State filed *no* responsive pleading to the defendant's *pro se* petition with the circuit court. Rather, the court *sua sponte* dismissed the petition, *inter alia*, on the basis of timeliness. The court, however, was without authority to do so.

¶ 42 It is well-settled that while a trial court may *sua sponte* dismiss a section 2-1401 petition

when that petition is without merit (*People v. Berrios*, 387 Ill. App. 3d 1061, 1063 (2009) (citing *Vincent*, 226 Ill. 2d at 8-12); *People v. Malloy*, 374 Ill. App. 3d 820, 823-24 (2007)), it may not do so on the basis of timeliness. See *Malloy*, 374 Ill. App. 3d at 823-24. The reason is that the two-year period contained in section 2-1401 is a statute of limitations rather than a jurisdictional prerequisite. *Berrios*, 387 Ill. App. 3d at 1063; see also *Malloy*, 374 Ill. App. 3d at 823-24. As such, the State must assert the time limitation as an affirmative defense and the trial court may not, *sua sponte*, dismiss the petition on the basis of timeliness. *Berrios*, 387 Ill. App. 3d at 1063; see also *Malloy*, 374 Ill. App. 3d at 823-24 (holding that because the two-year limitation period for filing petitions for relief from judgment pursuant to section 2-1401 of the Civil Procedure Code is a statue of limitations, it "must be asserted as an affirmative defense by the State" and the trial court "may not dismiss [such] a petition *** on its own motion, on the basis of timeliness."); see also *People v. Ross*, 191 Ill.App.3d 1046, 1053 (1989) (holding that the section 2-1401 time period is a procedural limitation that may be waived by the State if not asserted); see also *People v. Smith*, 386 Ill.App.3d 473, 476 (2008) (holding that a trial court may dismiss a section 2-1401 petition *sua sponte* on any basis, *except* for timeliness); see also *People v. Harvey*, 196 Ill.2d at 447 (referring to the two-year time period in section 2-1401 as a "limitations period" and implying that it can be waived). Under the aforementioned principles we conclude that the circuit court's dismissal of the defendant's section 2-1401 petition on the basis of timeliness was improper. Accordingly, we proceed to address the merits of the defendant's petition.

¶ 43 B. Facial Unconstitutionality

¶ 44 On appeal, the defendant first contends that the trial court erred when it dismissed his section

2-1401 because he made a well-founded claim that the mandatory sentencing scheme under which he was sentenced to natural life imprisonment, without the circuit court being permitted to consider any of his personal characteristics, namely his mental retardation, violates the eight amendment of the United States Constitution. In support of his contention, the defendant cites to the recent decisions by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), *Roper v. Simmons*, 543 U.S. 551, 560 (2005), *Miller*, 567 U.S. at __, 132 S. Ct. at 2463, and *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

¶ 45 *Roper*, *Graham*, and *Miller* form a line of United States Supreme Court decisions that address how the eighth amendment's ban on "cruel and unusual punishments" applies to sentencing juveniles. In those cases, the Court recognized three general differences between juveniles under 18 and adults, which render their irresponsible conduct less morally reprehensible than that of adults. See *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70. These are: (1) that juveniles have a lack of maturity and underdeveloped sense of responsibility; (2) that they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and (3) that their character is not as well formed as that of an adult. See *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70.

¶ 46 On the basis of the aforementioned principles, in *Roper*, 543 U.S. at 578, the Court specifically held that the eight amendment forbids the imposition of the death penalty "on offenders who [are] under the age of 18 when their crimes [are] committed." Subsequently, in *Graham*, 560 U.S. at 74, the Court held that the eighth amendment prohibits the sentence of natural life without the possibility of parole "for a juvenile offender who did not commit homicide." The Court further held that the "State need not guarantee the offender eventual

release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 560 U. S. at 82.

¶ 47 Most recently, in *Miller*, the Court considered appeals by two 14-year-olds, convicted of murder and sentenced to life imprisonment without the possibility of parole, under sentencing schemes that did not permit the sentencing authority to have any discretion in imposing different punishment. *Miller*, 567 U.S. at __, 132 S. Ct. at 2460. Relying on its earlier decisions in *Roper* and *Graham*, the Court in *Miller* recognized that "children are constitutionally different from adults for purposes of sentencing" (*Miller*, 567 U.S. at __, 132 S. Ct. at 2464), and that "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Miller*, 567 U.S. at __, 132 S. Ct. at 2468. The Court explained that a mandatory sentence precludes consideration of mitigating factors, such as: the juvenile's age and its attendant characteristics; the juvenile's family and home environment and the circumstances of the offense, including the extent of the juvenile's participation therein and the effect of any familial or peer pressure; the juvenile's possible inability to interact with police officers or prosecutors, or incapacity to assist his or her own attorneys; and "the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 567 U.S. at __, 132 S. Ct. at 2468.

¶ 48 Based on the above, the Court found that "[a] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at __, 132 S. Ct. at 2475. The court then held that "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes," the mandatory sentencing schemes before it "violated the principle of proportionality," and thereby

the eighth amendment's prohibition against cruel and unusual punishment. *Miller*, 567 U.S. at __, 132 S. Ct. at 2475.

¶ 49 In its decision in *Miller*, the Court refused to hold categorically that a juvenile can never receive life imprisonment without parole for a homicide offense. *Miller*, 567 U.S. at __, 132 S. Ct. at 2469. Nevertheless, the Court stated that "given all we have said in *Roper*, *Graham*, and this decision ***, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 567 U.S. at __, 132 S. Ct. at 2469.

¶ 50 On appeal, the defendant contends that under the principles of *Miller*, *Roper* and *Graham* we must find that the statutory scheme under which he was sentenced to mandatory life imprisonment is also facially unconstitutional. The defendant was sentenced to natural life imprisonment pursuant to section 12-14.1(b)(2) of the Criminal Code. 720 ILCS 5/12-14.1(b)(2) (West 2004). That section provides in pertinent part:

> "A person who *** is convicted of the offense of predatory criminal sexual assault of a child after having previously been convicted of the offense *** of aggravated sexual assault *** shall be sentenced to a term of natural life imprisonment." 720 ILCS 5/12-14.1(b)(2) (West 2004).

¶ 51 The defendant asserts that because under the aforementioned statutory scheme the trial court had no discretion to consider his personal characteristics, most importantly his mental retardation, but also the particular circumstances of this offense, the statutory scheme itself is unconstitutional. The defendant acknowledges that *Miller*, *Roper* and *Graham*, apply to juveniles, but asserts that the principles articulated in those cases apply with full force to mentally retarded individuals. In support, he relies on *Atkins*, 536 U.S. at 318.

¶ 52 In *Atkins*, the United States Supreme Court held that the death penalty "is not a suitable

punishment for a mentally retarded criminal." *Atkins*, 536 U.S. at 321. In doing so, the Court recognized that although mentally retarded individuals "frequently know the difference between right and wrong and are competent to stand trial," because of their impairments, they nevertheless, have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." *Atkins*, 536 U.S. at 305. The Court further noted that "[t]here is no evidence that [mentally retarded individuals] are more likely to engage in criminal conduct than others, but [that] there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Atkins*, 536 U.S. at 305. Accordingly, the Court in *Atkins* held that while mentally retarded individual's deficiencies "do not warrant an exemption from criminal sanctions, *** they do diminish their personal culpability." *Atkins*, 536 U.S. at 305.

¶ 53 The defendant argues that while he does not face the death penalty, like the defendant in *Atkins* did, the concerns outlined in *Atkins* remain relevant in light of the evidence of his mental deficiencies and his resulting diminished personal culpability. He asserts that section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)) is facially unconstitutional because it does not permit the trial court, under any circumstances to consider mental retardation and its relevant mitigating factors in sentencing a defendant. While we agree with the defendant that pursuant to *Atkins* the United States Supreme Court has made it clear that mentally retarded individuals should not be held to the same level of culpability as other adults, for the reasons that follow, we nevertheless must reject the defendant's facial challenge to the

constitutionality of section 12-14.1(b)(2) of the Criminal Code. 720 ILCS 5/12-14.1(b)(2) (West 2004).

¶ 54 A facial challenge to the constitutionality of a statute "is the most difficult challenge to mount." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008); *People v. Greco*, 204 Ill. 2d 400, 407 (2003). A statute is facially unconstitutional only if there are no circumstances in which the statute could be validly applied. *Napleton*, 229 Ill. 2d at 306. The fact that the statute could be found unconstitutional under some set of circumstances does not establish the facial invalidity of the statute. *In re Parentage of John M.,* 212 Ill. 2d 253, 269 (2004). Thus, a facial challenge must fail if any situation exists where the statute could be validly applied. *In re M.T.*, 221 Ill. 2d 517, 533 (2006) (and cases cited therein).

¶ 55 In the present case, there is nothing in section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)), which would lead us to conclude that it cannot or should not validly be applied to adults who are not mentally retarded. The legislature has found it fit to mandate a sentence of natural life without the possibility of parole to defendants who have committed the offense of predatory criminal sexual assault of a child after already having previously been convicted of the offense of aggravated sexual assault. 720 ILCS 5/12-14.1(b)(2) (West 2004). The purpose of the statute is clear, to prevent recidivism. Accordingly, because there are situations where the statue can be validly applied to adults with full mental capacity, we cannot find that the statute itself is facially unconstitutional. See *People v. Davis,* 2014 IL 115595, ¶ 30.

¶ 56 In coming to this conclusion, we find our supreme court's recent decision in *Davis*, 2014 IL 115595, instructive. In that case, a juvenile defendant, *inter alia*, challenged section 5-8-1(a)(1)(c) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c) (West 1992), which

provided that the trial court "shall" sentence a defendant convicted of murder of more than one person to a term of natural life in prison. The defendant argued that this sentencing statute was facially unconstitutional, and violated the eighth amendment's prohibition against cruel and unusual punishments because it not permit the sentencer under any circumstances to consider the defendant's age and its relevant mitigating factors. *Davis*, 2014 IL 115595, ¶ 28. In mounting his constitutional challenge to the aforementioned statute, the defendant in *Davis*, just as the defendant, here, relied on the recent decision of the United States Supreme Court in *Miller*, 567 U.S. at __, 132 S. Ct. at 2470.

¶ 57 In rejecting the defendant's argument, our supreme court in *Davis*, recognized the holding in *Miller*, but noted that its prohibition of mandatory sentence of life without parole was limited to juveniles. *Davis*, 2014 IL 115595, ¶ 29. The court explained that, even under *Miller*, the sentencing statute challenged by the defendant, could still be validly applied to adults. *Davis*, 2014 IL 115595, ¶ 30. Accordingly, the court refused to find the statute facially unconstitutional. *Davis*, 2014 IL 115595, ¶ 30.

¶ 58 Applying the aforementioned rationale of *Davis* to the cause at bar, we too are compelled to reject the defendant's facial challenge to section 12-14.1(b)(2) of the Criminal Code. 720 ILCS 5/12-14.1(b)(2) (West 2004). *Davis*, 2014 IL 115595, ¶ 30. Because section 12-14.1(b)(2) can and, as shall be more fully discussed below, has been found to properly apply to adults (see *e.g.*, *People v. Huddleston*, 212 Ill. 2d 107 (2004); *People v. Peters*, 2011 IL (1st) 092830), we find that the statute is facially constitutional.

¶ 59 In coming to this decision, we also find relevant that as of now, there is no Illinois or United States Supreme Court decision that stands for the proposition that a sentencing statute mandating life imprisonment without the possibility of parole for mentally retarded individuals, without

permitting the sentencer to take into account the defendant's mental capacity, is facially unconstitutional. In fact, the few Illinois cases that have previously addressed this issue, albeit before the United States Supreme Court decided *Miller*, have upheld such statutes. See *e.g., People v. Brown*, 2012 IL App (1st) 091940 (rejecting the defendant's attempt to facially challenge his statutorily mandated sentence of natural life in prison without the possibility of parole for a mentally retarded defendant convicted of two first-degree murders under a theory of accountability); *People v. Rice*, 257 Ill. App. 3d 220, 228-29 (1993) (holding that the multiple-murder sentencing statute as applied to a mentally retarded juvenile offender does not violate the eighth amendment of the United States Constitution). What is more, even *Miller*, upon which the defendant relies, rejected a categorical ban on mandatory life sentences for juveniles. *Miller*, 567 U.S. at __, 132 S. Ct. at 2469. Accordingly, for all of the aforementioned reasons we reject the defendant's argument.

¶ 60 C. As Applied Challenge--Proportionate Penalties Clause

¶ 61 The defendant next asserts that section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)), under which he was sentenced to natural life in prison, as applied to him, violates the Illinois Constitution's proportionate penalties clause (Ill. Const. 1970, art. I, § 11). The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective or restoring the offender to useful citizenship." Ill. Const. 1970, art I., § 11. A sentence violates the proportionate penalties clause if: (1) the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; or (2) similar offenses are compared and the conduct that creates a less serious threat to the public health and safety is punished more harshly. *People v. Sharpe*, 216 Ill. 2d 481, 519 (2005);

People v. Huddleston, 212 Ill. 2d 107, 120 (2004); see also *People v. Miller*, 202 Ill. 2d 328, 338 (2002); *People v. Farmer*, 165 Ill. 2d 194, 209-10 (1995); *People v. Steppan*, 105 Ill. 2d 310, 320 (1985). In the instant case, the defendant contends that section 12-14.1(b)(2) (720 ILCS 5/12-14.1(b)(2) (West 2004)) fails under the first test. For the reasons that follow, we agree.

¶ 62 In determining whether a statute is unconstitutional as applied to a defendant because it shocks to the moral sense of the community, our supreme court has explained:

> "When the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual, or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment not known to the common law, or is a degrading punishment which had become obsolete in the State prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community." *Miller*, 202 Ill. 2d at 339 (citing *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 421–22, 36 N.E. 76 (1894)).

In this context, however, our supreme court has refused to define what kind of punishment constitutes "cruel," "degrading," or "so wholly disproportionate to the offense as to shock the moral sense of the community." *Miller*, 202 Ill. 2d at 339. Its rationale has been that "as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Miller*, 202 Ill. 2d at 339 (citing *Trop*, 356 U. S. at 101) (whether a punishment shocks the moral sense of the community is based upon an "evolving standard[ ] of decency that mark[s] the progress of a maturing society")).

¶ 63 We therefore review the gravity of the defendant's offense in connection with the severity of

the statutorily mandated sentence within our community's evolving standard of decency. *Miller*, 202 Ill. 2d at 339 (citing *Trop*, 356 U. S. at 101). Thus far, that standard has evolved to prohibit the imposition of the death penalty on juveniles and mentally retarded offenders. *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70; *Atkins*, 536 U.S. at 321. More recently, it has also evolved to condemn, albeit in a very particular set of circumstances, the imposition of mandatory life imprisonment on juveniles, where the trial court is not given an opportunity, in the very least, to consider mitigating factors before imposing such a penalty. See *Miller*, 567 U.S. at __, 132 S. Ct. at 2475 ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

¶ 64 In *Miller*, our supreme court held that imposing mandatory sentence of life without the possibility of parole on a juvenile offender convicted of murdering more than one victim under a theory of accountability and without considering the facts of the crime, including the defendant's age, offended the Illinois Constitution's proportionate penalties clause and was unconstitutional as applied to the defendants. See *Miller*, 202 Ill. 2d at 339-42. Our supreme court held the mandatory life sentence for the 15-year-old look out was "particularly harsh and unconstitutionally disproportionate," because it "grossly distort[ed] the factual realities of the case and [did not] accurately represent[] [the] defendant's personal culpability." *Miller*, 202 Ill. 2d at 341. In coming to this decision, the court, *inter alia*, noted the longstanding distinction between the culpability of adults and juveniles, and held that a sentencing statute, which entirely

eliminated the court's ability to consider any mitigating factors, including the defendant's age, and by extension his or her culpability, violated the proportionate penalties clause of the Illinois constitution. See *Miller*, 202 Ill. 2d at 341-42.

¶ 65 In the present case, the defendant was sentenced pursuant to section 12-14.1(b) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)). Just as in *Miller*, under this statutory provision, in doling out the harshest penalty in our state, the trial court was not permitted to consider the actual facts of the crime, or the defendant's level of culpability for the offense. Accordingly, for the reasons that follow, and applying the rationale of *Miller* to the cause at bar, we find that this statutory scheme was disproportionate as applied to the defendant, so as to shock the moral sense of our community. See *Miller*, 202 Ill. 2d at 341.

¶ 66 We begin by noting that it is undisputed that at the time of the offense, the defendant was mentally retarded with an IQ score somewhere between 55 and 65. As such, under our prevailing social norms, we must recognize that his culpability was lesser than that of a person with normal cognitive capacity. See *Atkins*, 536 U.S. at 305. As the United States Supreme Court in *Atkins* aptly explained:

> "Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability." *Atkins*, 536 U.S. at 305.

The Court further noted these additional concerns with mentally retarded individuals: "the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 305.

¶ 67 In addition, while we in no way diminish the seriousness of the offense with which the defendant was charged and convicted, it cannot be ignored that the offense here included a single, brief act of penetration that did not result in any physical injury to the victim. The record below reveals that the defendant lived in the residence with the victim and her family for two or three years before the incident. Prior to the evening of the assault the family "never had problems with him." The defendant made a single contact with the victim's vagina, either with his tongue, hand or finger, and the entire encounter lasted a minute. What is more, the encounter was not pre-planned or orchestrated, but rather was seemingly impulsive, and the defendant expressed remorse over what he had done.

¶ 68 The sentencing judge himself noted that under these particular circumstances, while the offense warranted a severe penalty, it did not warrant a sentence of life without the possibility of parole. The judge nevertheless explained that he was bound to follow the statute and therefore had to sentence the defendant to life.

¶ 69 Despite the defendant's cognitive impairments and the brief and limited, albeit serious nature, of his offense, the defendant here was sentenced to the harshest penalty prescribed by our laws, which our jurisprudence dictates should be reserved for the most severe offense—*i.e.,* murder. See *Brown*, 2012 IL App (1st) 091940, ¶ 68 (noting that "[Illinois] has long recognized that the murder of another human is 'the highest crime known to the law.' [Citation.] Because of the

moral depravity involved in such an offense, murders are deserving of the 'most serious forms of punishment.' [Citation.]"); see also *Kennedy v. Louisiana*, 554 U.S. 407 438 (2008) (noting that "there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other," and concluding that "[t]he latter crimes may be devastating in their harm *** but [that] 'in terms of moral depravity and of the injury to the person and to the public', they cannot be compared to murder in their 'severity and irrevocability.' ") (citing *Coker v. Georgia*, 433 U. S. 584, 598 (1977) (plurality opinion)). Applying the rationale of *Miller* to the very unique facts of this case, namely the defendant's diminished culpability arising from his mental retardation, and the particular circumstances of this offense, we find that the defendant's mandatory natural life sentence pursuant to section 12-14.1(b) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)), was disproportionate so as to violate the moral sense of our community. See *Miller*, 202 Ill 2d at 341-42. Accordingly, we find that the sentence, as it applies to the defendant, violates the Illinois Constitution's proportionate penalties clause. See *Miller*, 202 Ill 2d at 341-42; see also *Miller*, 567 U.S. at __, 132 S. Ct. at 2475.

¶ 70 In coming to this decision we have considered the cases of *Huddleston*, 212 Ill. 2d at 129 and *Peters*, 2011 IL App (1st) 092830, relied upon by the State. We acknowledge that in *Huddleston* and *Peters* both our supreme court and the Illinois appellate court rejected as-applied challenges to the instant or similar provisions of the Criminal Code. We nevertheless find those cases readily distinguishable from the cause at bar.

¶ 71 First and foremost, neither *Huddleston*, nor *Peters* involved mentally retarded defendants

making as-applied challenges on the basis of their mental incapacity. Rather, both decisions involved adult defendants with full mental faculties and in position of authority or trust. See Huddleston, 212 Ill. 2d at 129; *Peters*, 2011 IL (1st) 092830.

¶ 72 In addition, the circumstances of the crimes committed in those cases, are far more heinous than the ones with which we are presented here. In *Huddleston*, the defendant was a teacher, who placed his penis, which was covered with various food items, in the mouths of three of his students, each approximately 10 years old, within a two to three month period. *Huddleston*, 212 Ill. 2d at 325. The Illinois Supreme Court held that the mandatory life sentence, as applied to the defendant pursuant to section 12-14.1(b)(1.2) of the Criminal Code (720 ILCS 5/12-14.1(b)(1.2) (West 2002))[8] did not shock the moral sense of the community because: (1) the defendant had committed assaults against three victims, one more than the minimum required under the statutory provision for a mandatory life sentence; (2) the multiple assaults over a three month span revealed that there was a period of time during which the defendant could have reflected upon the gross impropriety of his actions and refrained from further violation of children under his supervision, but failed to do so; and (3) the offense was "the result of planning and well-orchestrated execution." *Huddleston*, 212 Ill. 2d at 141-43.

¶ 73 Similarly, in *Peters*, the defendant, who was the victim's step-father, inserted his penis into the victim's vagina two or three times a week for three years, starting when she was 10 years old and threatened to hurt her mother if she ever told anyone what he had done. *Peters*, 2011 IL App

[8] That section mandates a sentence of natural life imprisonment for when a person is "convicted of predatory criminal sexual assault of a child committed against 2 or more persons regardless of whether the offenses occurred as the result of the same at or of several related or unrelated acts." 720 ILCS 5/12-14.1(b)(1.2) (West 2002).

(1st) 092839, ¶ 54. The victim's sisters testified that the defendant had similarly assaulted them for two years. *Peters*, 2011 IL App (1st) 092839, ¶ 54. Under these circumstances, the appellate court found that the mandatory life sentence without the possibility of parole imposed pursuant to section 12-14.1(b)(2) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2008)) was not disproportionate in a way that shocked the moral sense of the community. *Peters*, 2011 IL App (1st) 092839, ¶ 54.

¶ 74 As already discussed above, unlike in *Huddleston* and *Peters*, in the present case, the defendant's conduct was neither repeated, nor orchestrated and planned. Rather, it involved a single and brief act, and was by all accounts done on impulse. What is more, unlike in *Peters* and *Huddleston* the defendant here did not have any supervisory authority (either by way of a family connection or by way of his status as a teacher) over the victim. Accordingly, we find *Huddleston* and *Peters* completely factually distinguishable, and reject their applicability to to the cause at bar. See *Hill v. Cowan*, 202 Ill. 2d 151, 158 (2002) (noting that a holding that a statute is unconstitutional as applied does not broadly declare a statue unconstitutional but narrowly finds the statute unconstitutional under the specific facts of the case).

¶ 75 In doing so, we by no means diminish the seriousness of the offense for which the defendant was convicted, nor the legislature's attempt to protect children from sexual predators. In fact we fully recognize and agree with our supreme court that "aside from any physical injury a child may suffer in a sexual assault, children who are sexually assaulted are subject to chronic psychological problems that may be even more pernicious." *Huddleston*, 212 Ill. 2d at 135. Indeed, sexual assault "is without doubt deserving of serious punishment." *Coker*, 344 U.S. at 598. All we hold today, is that under the very unique circumstances of this case, the defendant, who is mentally retarded, should not have been sentenced to mandatory natural life

imprisonment, without the trial court having had an opportunity to consider his mental capacity and the facts surrounding the commission of the offense.

¶ 76 III. CONCLUSION

¶ 77 Accordingly, for all of the aforementioned reasons, we find section 12-14.1(b) of the Criminal Code (720 ILCS 5/12-14.1(b)(2) (West 2004)) as applied to the defendant, a mentally retarded offender, whose crime comprised of a single, brief and limited encounter with the victim, and who confessed to and expressed remorse for his conduct, violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). We therefore vacate the defendant's sentence and remand for resentencing before a court that has discretion to impose a term-of-years sentence.

¶ 78 Affirmed in part and reversed in part; sentence vacated and cause remanded for resentencing.