FIRST DIVISION
June 4, 2018

No. 1-15-1517

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	12 CR 12487
	)	
KEON TOLLIVER,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justice Harris concurred in the judgment.
Justice Mikva dissented in part.

ORDER

¶ 1 *Held*: Trial counsel was not ineffective. Defendant is not entitled to a new sentencing hearing. Defendant did not receive an impermissible *de facto* life sentence and his sentence did not violate the proportionate penalties clause.

¶ 2 Following a jury trial, juvenile defendant Keon Tolliver was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2012)) and was sentenced to 27 years for first degree murder plus a 25-year enhancement for personally discharging a firearm in the commission of the murder for an aggregate of 52 years' imprisonment. On appeal defendant argues: (1) trial counsel was ineffective for failing to move to suppress the three witness lineup identifications made under an unduly suggestive procedure; (2) he is entitled to a new sentencing hearing at which the trial court is required to consider various characteristics of his youth and rehabilitative

potential and at which the court may decline to impose mandatory firearm enhancements; (3) he received an impermissible *de facto* life sentence that violates the eighth amendment and the proportionate penalties clause. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Defendant was indicted for the June 13, 2012, first degree murder of Roemello Golden. Defendant was 17-years-old at the time of the offense.

¶ 5 Prior to trial, defendant filed a motion to quash arrest and suppress evidence, claiming that he was arrested without probable cause or a warrant. After hearing all of the evidence, the trial court denied the motion.

¶ 6 At trial, Deshaundria Robinson, Allen Esther and Trishaun Coleman testified that they were together on the night of June 13, 2012. Robinson and her cousin Coleman went to Isaac and Isaiah Harris' house on 89th and Brandon at about 9:30 p.m. to meet some friends. When they arrived Golden and Esther came out to meet them and they chatted outside for a while. Robinson was dating Esther and Coleman was involved in an on-again-off-again relationship with Golden.

¶ 7 As the group was talking outside, Victor Short, a friend who was also at the Harris' house that night, came outside and walked toward the intersection of 90th and Brandon. Robinson watched as Short talked to a tall man and a short man who were both wearing hoodies with the hoods pulled over their heads. They were standing together on the corner. Robinson and Esther recalled that defendant was wearing a gray hoodie and his companion was wearing a black hoodie while Coleman recalled both of them wearing black hoodies. Coleman had seen defendant a few times prior but did not know his name. Short walked back to the Harris' house

and went inside. The two men who had been talking with Short approached Robinson, Esther, Coleman and Golden, and the shorter of the two men said "What's up?" to Golden and shook his hand. Several seconds later, gunfire erupted.

¶ 8 Coleman and Esther testified that they saw defendant shoot Golden. Robinson did not see a gun or who was shooting, but noticed that gunshots were coming from the direction where defendant was standing. She stated that it sounded as if two guns were being fired. Everyone ran in different directions. When Robinson, Esther and Coleman returned to the Harris house a short time later, they saw Golden on the ground in a pool of blood.

¶ 9 The day after the shooting, Robinson, Esther and Coleman went to the police station and each separately viewed a lineup and each positively identified defendant as the shooter. Esther also positively identified defendant from a photo array earlier. Robinson and Coleman also viewed the photo array but were unable to identify defendant. Detective Michelle Moore-Gross testified that the photo of defendant that was included in the photo array was taken two years prior.

¶ 10 Medical Examiner Nancy Jones reported that autopsy results showed that Golden died from multiple gunshots wounds and the manner of death was homicide. Golden suffered a total of 10 gunshot wounds to his body. A gunshot wound to Golden's face was a close range shot. Four bullets were recovered from Golden's body.

¶ 11 Evidence technician Paul Presnell recovered seven 9 mm shell casings and one fired bullet from the scene. The shell casings were found close together. Ballistic testing showed that the four bullets found inside the victim and at least two of the shell casing fragments were fired from the same weapon.

¶ 12 Officer Louis Garcia was on routine patrol at about 8 p.m. on June 13, 2012, in the area of 84th and Baltimore, 5 blocks north of the shooting. Officer Garcia knew that area to be Black P. Stone territory. Officer Garcia saw defendant, stopped him, interviewed him and patted him down. He filled out a contact card on defendant and learned that he was a Latin King. Defendant was wearing a gray and white striped hooded sweatshirt.

¶ 13 Defendant was arrested on June 14, 2012, at his godmother's apartment. No weapons were found on his person or in the apartment.

¶ 14 The defense called Nakia Fields. He testified that he lived a few doors down from the Harris home, and after hearing the gunshots at about 10 p.m., he called 911. He testified that the gunshots sounded like two different caliber guns being fired. Fields did not witness the shooting or see the guns.

¶ 15 After the shooting stopped, Fields went outside and saw two men go up to the victim's body and pick up items that Fields believed were shell casings. Fields recognized one of the men as Antonius Garth. Fields watched as Garth threw the items he had picked up into a nearby sewer. Fields again called 911 to report that people were tampering with the crime scene and removing evidence. Fields did not speak to the police when they arrived at the scene because he did not want anyone to know that he had called 911. He talked to the police in July 2012.

¶ 16 Detective Moore-Gross testified that she and her partner were assigned to the murder investigation and went to the scene on the night of the shooting. She was aware that an anonymous person had called 911 and reported seeing someone throw something into the sewer but due to the anonymous nature of the call, was unable to confirm which sewer. On July 2, 2012, Detective Moore-Gross listened to the 911 calls made on the night of the shooting and as a result interviewed Nakia Fields and Antonius Garth. Fields was able to direct the detective to the

sewer that he reported in his 911 call and a .40 caliber shell casing was recovered from it. Firearm expert Pomerance opined that this shell casing was not fired from the same gun as the shell casings found at the murder scene.

¶ 17 In rebuttal, Antonius Garth testified that on the night of the shooting, he did walk up to the victim's body but did not remove any evidence from the scene or throw anything into the sewer.

¶ 18 After hearing all of the evidence, the jury found defendant guilty of first degree murder and that defendant personally discharged a firearm during the murder. Defendant was subsequently sentenced to a total of 52 years' imprisonment. Defendant now appeals.

¶ 19 ANALYSIS

¶ 20 Defendant first argues that counsel was ineffective for failing to move to suppress the suggestive lineup. Defendant argues that the lineup was suggestive because defendant was far shorter than the other participants, was the only one wearing a gray sweatshirt like the shooter, was the only one wearing bright colored pajama pants, and was the only one who also appeared in the photo array viewed by the eyewitnesses. Defendant also claims that the lineup was suggestive because the police used photo arrays prior to the lineup and Robinson and Coleman were unable to make photo array identifications, but were able to make lineup identifications.

¶ 21 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) counsel's actions resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the first prong, a defendant must demonstrate that his attorney's performance fell below an objective standard of reasonableness. *Evans*, 209 Ill. 2d at 220. Under the second prong, prejudice is shown where there is a reasonable probability that the result would have been

different but for counsel's alleged deficiency. *Id*. Failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. In order to establish prejudice resulting from the failure to file a motion to suppress, a defendant must show that the motion would have been granted and that the trial outcome would have been different if the evidence had been suppressed. *People v. Patterson*, 217 Ill.2d 407, 438 (2005). The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile. *Id*.

¶ 22 A decision as to whether to file a motion to suppress is generally considered a matter of trial strategy which will "typically not support a claim of ineffective representation." *People v. Henderson*, 2012 IL App (1st) 101494, ¶ 8 (citing *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70)). "In order for a defendant to establish that he was prejudiced by counsel's failure to file a motion to suppress, he must show a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different if the evidence at issue had been suppressed." *Henderson*, 2012 IL App (1st) 101494, ¶ 8 (citing *People v. Patterson*, 217 Ill. 2d 407, 438 (2005)). If the motion would have been futile, a decision not to file a motion to suppress will not amount to incompetent representation. *Henderson*, 2012 IL App (1st) 101494, ¶ 8.

¶ 23 On a motion to suppress, the defendant bears the burden of establishing that, within the totality of the circumstances, the pretrial identification was so unnecessarily suggestive that it gave rise to a substantial likelihood of an unreliable identification. *People v. Denton*, 329 Ill. App. 3d 246, 250 (2002). Individuals selected for a lineup need not be physically identical. *Id*. "Differences in their appearance go to the weight of the identification, not to its admissibility." *Id*. " 'Only where a pretrial encounter resulting in an identification is 'unnecessarily suggestive'

or 'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identification excluded by law under the due process clause of the 14th Amendment.' " *People v. Love*, 377 Ill. App. 3d 306, 311 (2007) (quoting *People v. Moore*, 266 Ill. App. 3d 791, 796-97 (1994)). The law does not require the participants in a lineup to be nearly identical, nor to exactly match the descriptions given by eyewitnesses. *Love*, 377 Ill. App. 3d at 311. The suggestibility of a lineup depends on " 'the strength of the suggestion made to the witness' " and, whether, through " 'some specific activity on the part of the police, the witness is shown an individual who is more or less spotlighted by the authorities.' " *People v. Gabriel*, 398 Ill. App. 3d 332, 349 (quoting *People v. Johnson*, 149 Ill. 2d 118, 147 (1992)). Courts must examine the totality of the circumstances in determining whether a defendant has met the burden of showing the identification procedure was impermissibly suggestive. *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005). If a defendant satisfies this burden of proof, only then will the burden shift to the State to show, by clear and convincing evidence, an independent basis of reliability for a later identification. *Id.*

¶ 24 Defendant argues that the lineup was suggestive because he appeared substantially different from the other lineup participants where he was wearing brightly colored pajama pants that drew attention to him and the other lineup participants had either jeans or dark shorts on. In addition, defendant claims that he was the only person in the lineup wearing a grey t-shirt and the shooter was described by witnesses as wearing a grey hooded sweatshirt. Defendant cites section 725 ILCS 5/107A-5(c) (West 2014) (repealed by p.a. 98-1014, § 15, eff. Jan. 1, 2015), of the Code of Criminal Procedure of 1963, to support his argument that his lineup was suggestive. Section 107A-5 of the Code of Criminal Procedure provided:

"(c) Suspects in a lineup or photo spread should not appear to be substantially different

> from ‘fillers' or ‘distracters' in the lineup or photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.” 725 ILCS 5/107A-5(c) (West 2014) (repealed by P.A. 98-1014, § 15, eff. Jan. 1, 2015).

¶ 25 This court has held that a lineup is not suggestive merely because the defendant is the only person wearing a specific item of clothing, even where that piece of clothing was purportedly worn by the offender at the time of the offense. See, e.g., *Gabriel*, 398 Ill. App. 3d at 349 (lineup not overly suggestive where the defendant was the only one wearing a white T-shirt); *People v. Peterson*, 311 Ill. App. 3d 38, 49 (1999) (lineup not unduly suggestive when the defendant was the only one present wearing a gray sweatshirt); and *People v. Faber*, 2012 IL App (1st) 093273 (lineup not suggestive where the defendant was the only participant wearing a sleeveless t-shirt a witness described the offender as wearing). Defendant does not argue that the colorful pajama pants connected him to the crime in any way, nor is there any evidence here that the identification procedures were impermissibly suggestive. Our review of a photograph of the lineup participants shows that the five participants appear to be of the same age and skin tone. All five of the participants were of similar height and weight and all had longer hair and were wearing caps. The witnesses who viewed the lineup read and signed the lineup advisory forms which informed them that they were not required to make identification. Furthermore, defendant does not argue that the police forced him to wear colorful pajama pants or a grey t-shirt, nor engaged in any specific activity to emphasize defendant. See *Gabriel*, 398 Ill. App. 3d at 349. Defendant cannot claim improper influence here where he simply wore his own clothing in the lineup. *People v. Jonson*, 149 Ill. 2d 118, 147 (1992).

¶ 26 Defendant also argues that the police’s use of photo arrays contributed to the

suggestiveness of the lineup. Defendant argues that Robinson and Coleman were unable to make photo array identifications, but were able to make lineup identification, and that this process was improper in that it unfairly emphasized defendant. We disagree. The mere fact that defendant was the only person in both the photo array and the lineup does not render the lineup suggestive. *Id*. at 148; *People v. Ortiz*, 2017 IL App (1st) 142559, ¶ 26.

¶ 27 Based on the totality of the circumstances, we determine that a motion to suppress the lineup identification would have been unsuccessful in this case and therefore counsel was not ineffective for failing to file a suppression motion. Because defendant has not shown that the lineup was impermissibly suggestive, we need not address defendant's argument regarding the State's supposed inability to show an independent basis of reliability in the witnesses' in-court identification of defendant.

¶ 28 Next, defendant claims that his 52-year sentence should be vacated and the cause remanded for a new sentencing hearing that is in compliance with the provisions of section 5-4.5-105 of the Illinois Code of Corrections (Code) (730 ILCS 5/5-4.5-105 (West 2016)), because the legislature enacted this provision just two months after he was sentenced and established new guidelines for sentencing hearings for those who committed offenses when they were under the age of 18. Specifically, defendant contends that at the new sentencing hearing, the trial court should consider his youth and rehabilitative potential, and could decline to impose the mandatory firearm enhancements.

¶ 29 Section 5-4.5-1.5(a) states in relevant part:

> "(a) On or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under

> Section 5-4-1, shall consider the following additional factors [enumerated 1 through 9] in mitigation in determining the appropriate sentence[.]"

Those factors to be considered are defendant's : "age, impetuosity, and level of maturity at the time of the offense"; whether defendant "was subjected to outside pressure, including peer pressure, familial pressure, or negative influences"; and defendant's home environment, his rehabilitation potential, as well as the circumstances of the offense. 730 ILCS 5/5-4.5-105(a)(1)-(5) (West 2016). In addition, section 5-4.5-105(b) provides:

> "Except as provided in subsection (c), the court may sentence the defendant to any disposition authorized for the class of the offense of which he or she was found guilty as described in Article 4.5 of this Code, and may, in its discretion, decline to impose any otherwise applicable sentencing enhancement based upon firearm possession, possession with personal discharge, or possession with personal discharge that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person." 730 ILCS 5/5-4.5-105 (West 2016).

Section 5-4.5-1.5(a) became effective on January 1, 2016, almost one year after defendant was sentenced in this case, and while defendant's appeal was pending. 730 ILCS 5/5-4.5-105 (West 2016).

¶ 30 Our supreme court has expressly rejected the argument that section 5-4.5-105 applies retroactively in *People v. Hunter*, 2017 IL 121306. The court noted that the language of subsection (a) limited its temporal reach, and under that subsection, the trial court's obligation to consider additional factors in mitigation at sentencing is controlled by the limiting language of the same subsection. *Id.* ¶ 48. With respect to subsection (b), the supreme court stated "under section 4 [of the Statute on Statutes], subsection (b) of the new statute cannot apply to

[defendants], who were sentenced before the statute took effect." *Hunter*, 2017 IL 121306, ¶ 52. The court also noted that defendants made no claim that error occurred in the trial court that would require vacatur of their sentences and remand for resentencing, thus giving them the option to be sentenced under subsection (b). *Hunter*, 2017 IL 121306, ¶ 55.

¶ 31 There is no dispute that the defendant's commission of the offense of murder and his sentencing in this case took place prior to the effective date of January 1, 2016. Defendant makes no claim of error that would entitle him to a new sentencing hearing. Therefore, defendant is not entitled to a new sentencing hearing, and we affirm the judgment of the trial court.

¶ 32 Defendant also argues that his sentence of 52 years' imprisonment constitutes a *de facto* life sentence which violates his eighth amendment rights (U.S. Const., amend. VIII). Defendant also argues that the same sentence violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) both facially and as-applied to him because his sentence essentially is a sentence of "natural life" in prison and therefore "runs afoul of the constitutional principles" set forth in *Miller*.

¶ 33 Defendant, who was 17-years-old at the time he committed the offenses in this case, was sentenced to 52 years' imprisonment in aggregate for his convictions of first degree murder. The statutory minimum for first degree murder was 45 years: 20 years for the murder and 25 years for the firearm enhancement. (See 730 ILCS 5/5-4.5-20(a) (West 2016) (providing a range of 20 to 60 years); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2016) (providing for an add-on of 25 years to natural life)). Defendant asserts that he will have to serve 100% of the 52-year sentence and will be released at age 69.

¶ 34 Recently in *People v. Reyes*, 2016 IL 119271, our supreme court held that a *de facto* life sentence imposed on a juvenile constitutes cruel and unusual punishment in violation of the

eighth amendment if the sentence is imposed without considering the mitigating factors set forth in *Miller v. Alabama*, 567 U.S. 460 (2012). The court did not specifically address what length of sentence constitutes a *de facto* life sentence, but the State conceded that the defendant would not live long enough to become eligible for release (the defendant would be eligible for release after serving 89 years). *Reyes*, 2016 IL App (1st) 119271, ¶ 70. The court found:

> "A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation." *Id*.

¶ 35 There is no bright-line rule as to how long a sentence must be in order to qualify as a *de facto* life sentence. However, defendant's 52-year sentence is significantly less than prison terms found to be unconstitutional under *Miller*. See *People v. Reyes*, 2016 IL 11927, ¶ 10 (per curiam) (aggregate sentence of 97 years); *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 43 (78-year sentence). The length of defendant's prison sentence is within the range of other cases wherein we have found that the sentence imposed did not amount to a *de facto* life sentence. See *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 58 (45-year sentence, allowing release at age 62); *People v. Gipson*, 2015 IL App (1st) 122451, ¶¶ 65-67 (52-year sentence); Cf. *People v. Buffer*, 2017 IL App (1st) 142931. Even if defendant served 100% of his sentence, he would be released at the age of 69. Although defendant's age upon release would fall toward the end of his estimated lifespan, his sentence is survivable and thus cannot be considered the functional equivalent of life without the possibility of parole. We do not consider defendant's 52-year

sentence to be a *de facto* life sentence.

¶ 36 Even so, it is clear from the record that the court explicitly considered the factors that *Miller* mandated be considered at sentencing when sentencing a juvenile offender as an adult. The court clearly considered defendant's presentence investigation which detailed defendant's youth, educational and social history. The court heard arguments in aggravation and mitigation, and yet chose to impose a 52-year sentence, which is seven years more than the mandatory minimum sentence. It is readily apparent that the trial court considered the defendant's age, his rehabilitative potential and the nature of his offense in fashioning this sentence. The fact that defendant received a longer sentence than he would have liked does not alter the fact that defendant received a sentencing hearing that complied with *Miller*.

¶ 37 Defendant's final contention is that his sentence is unconstitutional under the proportionate penalties clause of the Illinois Constitution both facially and as-applied to him. A challenge under the proportionate penalties clause "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). A violation may be shown where the penalty imposed is " 'cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.' " *Id.* (quoting *People v. Moss*, 206 Ill. 2d 503, 522 (2003)). Our supreme court has "never defined what kind of punishment constitutes 'cruel', 'degrading,' or 'so wholly disproportioned to the offense as to shock the moral sense of the community' " because "as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *People v. Leon Miller*, 202 Ill. 2d 328, 338 (2002). "To determine whether a penalty shocks the moral sense of the community, we must consider objective evidence as well as the community's changing standard of moral decency." *People v. Hernandez*, 382 Ill. App. 3d

726 (2008).

¶ 38 To begin with, defendant claims that the proportionate penalties clause provides greater protection than the eighth amendment. The State responds that the Illinois proportionate penalties clause is co-extensive with the cruel and unusual punishment clause and for the same reason his eighth amendment challenge failed, defendant's proportionate penalties argument also cannot succeed. We agree with defendant that the proportionate penalties clause has been found to offer greater protection to defendants than the eighth amendment. See *People v. Thomas*, 2017 IL 142557, ¶ 23; *People v. Clemons*, 2012 IL 107821, ¶ 40; *People v. Wilson*, 2016 IL App (1st) 141500, ¶ 38.

¶ 39 Our General Assembly passed the firearm enhancement statute requiring the imposition of additional prison time for the use of a firearm during the commission of certain crimes. 730 ILCS 5/5-8-1(a)(1)(d)(i)-(iii) (West 2000). These mandatory firearm enhancements are intended "to promote public health and safety, and to impose severe penalties that will deter the use of firearms in the commission of felonies." *People v. Butler*, 2013 IL App (1st) 120923, ¶ 36. Our supreme court has consistently upheld the constitutionality of mandatory firearm enhancements under the proportionate penalties clause, finding that in fixing a penalty for an offense, the potential for rehabilitation need not be given greater weight or consideration than the seriousness of the offense. *Sharpe*, 216 Ill. 2d at 525. ¶ 49. We are cognizant that our General Assembly recently enacted a new statute that allows a trial court discretion in imposing these firearm enhancements on juveniles. 730 ILCS 5/5-4.5105(b) (West 2016). However, the General Assembly did not eliminate the enhancement's application completely and did not make the provision retroactive. *People v. Hunter*, 2017 IL 121306, ¶ 56. This clearly shows that the legislature intended the application of the firearm enhancements to be appropriate in certain

circumstances involving minors.

¶ 40 Here, the evidence showed that defendant shot Golden, a rival gang member, in cold blood. However, we must consider more than defendant's conduct when analyzing a sentence under the proportionate penalties clause. *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 72. Defendant argues that his youth and upbringing diminish his culpability. Defendant claims that he grew up in a crime and gang infested neighborhood, shuffled from one unstable household to another with little or no contact with his father for most of his life. As a result, he suffered from mental health and substance abuse issues from early on in his life. Defendant analogizes his characteristics to those of the defendants in *Gipson* and *Leon Miller*, whose sentences were found to be in violation of the proportionate penalties clause.

¶ 41 We find *Gipson* and *Leon Miller* factually distinguishable. In *Gipson*, the record contained evidence that the juvenile defendant had mental illness that made him prone to impulsive behavior. *Gipson*, 2015 IL App (1st) 122451, ¶ 73. Gipson's own counsel described defendant as a " 'disturbed retarded child' under his older brother's spell." *Id*. ¶ 17. The defendant had previously been found unfit to stand trial in a prior proceeding and the trial court acknowledged that the state system failed defendant by not providing mental health treatment. *Id*. ¶ 74. There is nothing in the record before us to indicate that defendant suffered from a similar severe mental illness or that he had somehow been deprived of needed mental health treatment.

¶ 42 In *Miller*, the juvenile defendant was tried as an adult and convicted of two counts of first degree murder on an accountability theory. *Miller*, 202 Ill. 2d at 330. The evidence at trial showed that two men approached the defendant while he was standing on a street corner and asked him to act as a lookout for them. *Id.* at 330-31. The defendant agreed and acted as a

lookout while the two men shot two other men. *Id*. The defendant was sentenced to 50 years' imprisonment. *Id*. at 332-33. Our supreme court held the multiple-murder sentencing statute, which mandated a sentence of natural life imprisonment, was unconstitutional as applied to the defendant, who was convicted under a theory of accountability. *Id*. at 341. The court reasoned that the convergence of the transfer statute, the accountability statute, and the multiple-murder sentencing statute in the defendant's case eliminated the court's discretion to consider mitigating factors like the defendant's age and degree of participation. *Id*. at 342. The fact that Miller had only been informed of the murders minutes before it happened and that he was convicted on a theory of accountability renders any factual comparison between our case and *Leon Miller* inappropriate.

¶ 43 As stated, defendant shot and killed Golden in cold blood. We find nothing about defendant's personal characteristics that would render his sentence unconstitutional under the proportionate penalties clause. As we have found that defendant's sentence did not violate the proportionate penalties clause as applied to him, we need not address his facial challenge. Where a statute or ordinance is constitutional as applied to a party, a facial challenge will also fail, since there is necessarily at least one circumstance in which the statute or ordinance is constitutional. *Horvath v. White*, 358 Ill. App .3d 844, 854 (2005); see also *Freed v. Ryan*, 301 Ill. App. 3d 952, 958 (1998).

¶ 44 CONCLUSION

¶ 45 For the following reasons, the judgment of the trial court is affirmed.

¶ 46 Affirmed.

¶ 47 JUSTICE MIKVA, dissenting in part:

¶ 48 For the reasons stated in my dissent in *People v. Rodriguez*, 2018 IL App (1st) 141379-

B, I dissent from the majority's holding that Keon Tolliver's 52-year sentence, pursuant to which he will be kept in prison until the age of 69, is not a *de facto* life sentence. As in *Rodriguez*, I also disagree with the majority's conclusion that we can determine from the record in this case that the circuit court judge considered the factors relating to youth set out in *Miller v. Alabama*, 567 U.S. 560 (2012).

¶ 49 As I discussed in *Rodriguez*, for our supreme court's holding in *Reyes* to have any meaning, there must be a bright-line rule regarding when a sentence is a *de facto* life sentence. *Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 96. I would join those who have adopted 64 years of age, a figure based on the average projected life expectancy for prisoners, as a benchmark for the age upon release that qualifies a sentence as a *de facto* life sentence. Because Keon's sentence exceeds even this conservative benchmark, and because Keon was under the age of 18 at the time of his crime, I conclude that his sentence is subject to our supreme court's holding in *Reyes*; it could only be imposed after a hearing in which the circuit court specifically considered the *Miller* factors. *Reyes*, 2016 IL 119271, ¶ 10.

¶ 50 And as I explained in *Rodriguez*, I also disagree with the majority that we can discern from this kind of record that the sentencing judge considered those factors. The statutory factors in mitigation that were in place when Keon was sentenced did not include the specific age-related considerations set out in *Miller*. And Keon was sentenced in March 2015, over a year before our supreme court held in *Reyes*, 2016 IL 119271, ¶ 10, that *Miller* even applies in cases where juvenile defendants have received *de facto* life sentences. Although our supreme court has held that, under certain limited circumstances, we may be able to conclude from a cold record that a sentencing court imposed a life sentence based on the *Miller* factors (*People v. Holman*, 2017 IL 120655, ¶¶ 48-50), as I said in *Rodriguez*, this should be the exception and not the rule

(*Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 105). The notion that we may routinely presume that sentencing judges considered a specific set of factors and made significant findings that, before *Reyes*, they had no reason to believe applied to the juvenile defendants standing before them is, in my view, a convenient legal fiction. As in *Rodriguez*, there is simply nothing in this case that reflects a consideration by the trial court of the necessary factors or a conclusion by that court that Mr. Tolliver is "beyond the possibility of rehabilitation." *Holman*, 2017 IL 120655, ¶ 17, 50.

¶ 51 I have no doubt that the sentencing judge in this case considered what were then the appropriate sentencing factors but I see no basis on which to presume that the court additionally considered the "multifaceted set of attributes [ ] carry[ing] constitutional significance" required for a determination that Keon's conduct "showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Holman*, 2017 IL 120655, ¶¶ 44-46. That is what the constitution requires before a *de facto* life sentence may be imposed on a juvenile.

¶ 52 I would hold that Keon's 52-year sentence for first degree murder, pursuant to which he will not be eligible for release until the age of 69, is a *de facto* life sentence. Because this sentence was imposed on a juvenile offender without consideration of the factors pertaining to youth set out in *Miller* and now made a part of the Illinois Code of Corrections (see 730 ILCS 5/5-4.5-105 (West 2016)), the sentence violates the eighth amendment. I would vacate Keon's sentence, affirm the judgment of the circuit court in all other respects, and remand this case for resentencing pursuant to section 5-4.5-105 of the Code of Corrections. I would not find it necessary to reach the issue of whether Keon's sentence also violates the proportionate penalties clause of the Illinois Constitution.