2018 IL App (2d) 160823-U
No. 2-16-0823
Order filed September 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SEAN HELGESEN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 93-CF-795 Honorable George J. Bakalis, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court misconstrued the applicable sentencing guidelines, it nonetheless considered the appropriate factors and entered an extended-term sentence that fell within the applicable statutory limits; affirmed.

¶ 2 Following a jury trial in 1995, defendant, Sean Helgesen, was convicted on 10 counts of first-degree murder for the stabbing deaths of Peter and Diana Robles. Defendant was 17 years old when he committed the crimes. His juvenile status notwithstanding, because he was found guilty of murdering more than one victim, section 5-8-1(a)(1)(c) of the Unified Code of

Corrections (Code) mandated that he be sentenced to a term of natural life imprisonment. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1992).

¶ 3 In *Miller v. Alabama*, 567 U.S. 460, 479 (2012), the United States Supreme Court held that the eighth amendment to the United States Constitution "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In *People v. Davis*, 2014 IL 115595, ¶ 42, our supreme court held that *Miller* applied retroactively, as it announced a new substantive rule of constitutional law. Accord *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (holding that *Miller* applies retroactively to cases on collateral review). Pursuant to *Miller* and *Davis*, the trial court granted defendant's successive post-conviction petition and conducted a new sentencing hearing. Thereafter, the court sentenced defendant to serve two concurrent 90-year prison terms.

¶ 4 Because defendant committed his crimes before our current "truth-in-sentencing" laws were in effect, he is eligible for day-for-day credit, meaning that his minimum term of imprisonment has been reduced to 45 years. Defendant appeals his sentence, arguing that the maximum term authorized by statute is 60 years, which would amount to a minimum sentence of 30 years. In the alternative, defendant argues that his concurrent 90-year sentences are unconstitutional. He asks that we remand the matter for resentencing or impose a new sentence using our authority under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967). For the following reasons, we affirm the sentence imposed by the trial court.

¶ 5 I. BACKGROUND

¶ 6 Peter and Diana Robles were murdered in their Bartlett home on the night of April 17, 1993. Peter was stabbed 22 times in the face, neck, chest, and arms. Diana, who suffered from polio and required crutches to walk, was stabbed 29 times in the face, neck, chest, and arms.

Defendant made statements to police and prosecutors which were later introduced at his trial. He admitted killing Peter and Diana, but maintained that he had done so under duress from their son, Eric Robles. Defendant claimed that Eric hired him to kill his parents for $700. He said he tried to back out of the agreement by returning Eric's $100 down payment, but Eric refused and further threatened to kill defendant if he did not follow through with the murders. According to defendant, Eric accompanied him into the Robles' home and helped hold his parents down as defendant stabbed them to death.

¶ 7 Defendant pleaded not guilty by reason of insanity. After the jury found him guilty on each of the first-degree murder counts, the trial court found that the counts merged to one for each victim and the case proceeded to sentencing. At the time defendant committed his crimes, the relevant sentencing statute provided in pertinent part:

> "(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:
>
> (1) for first degree murder,
>
> (a) a term shall not be less than 20 years and not more than 60 years, or
>
> (b) if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty *** the court may sentence the defendant to a term of natural life imprisonment, or
>
> (c) if the defendant,
>
> (i) has previously been convicted of first degree murder under any state or federal law, or
>
> (ii) is found guilty of murdering more than one victim, or

> * * *
>
> the court *shall* sentence the defendant to a term of natural life imprisonment." [Emphasis added.] 730 ILCS 5/5-8-1 (West 1992).

The State noted that, but for the fact that defendant was found guilty of murdering more than one victim, the trial court would have had discretion under subsection (a)(1)(b) to impose a sentence of natural life imprisonment upon a finding that the murder was "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." However, because defendant was found guilty of murdering two victims, subsection (a)(1)(c)(ii) mandated that he be sentenced to natural life imprisonment.

¶ 8 In announcing defendant's sentence, the trial court (Judge John J. Nelligan) stated in relevant part:

> "The defendant is convicted, has been convicted by a jury of not one but two of the most gruesome and grisly murders in this town, or, perhaps, anywhere. The viciousness that was employed by this defendant is really incomprehensible, each of the victims having been slashed and stabbed over twenty times, the results of this defendant's actions leaving two innocent unsuspecting people literally, and I hate to use that terminology, looking like raw bloody chopped meat, and accompanied by what must have been the most excrutiating (sic) pain and agony imaginable, and all for the promise of a few hundred dollars.
>
> I have no doubt in my mind that the defendant's conduct possibly fits the definition of exceptionally brutal and heinous behavior indicative of wanton cruelty, and his conduct certainly is deserving of the most severe punishment available under the law,

> and but for the happenstance that the defendant was born three months too late, he would be looking at the death penalty in this case.
>
> * * *
>
> I have given consideration to everything that has been presented to the court, all of the evidence in the case *** and noting that in sentencing the Court is mandated to consider factors in aggravation and mitigation. *** The law is clear, however, that in a case of first degree murder where a defendant is found guilty of murdering more than one victim, the Court shall sentence the defendant to a term of nature life imprisonment."

¶ 9 On direct appeal, defendant contended that the trial court committed reversible error in several instances, none of which are relevant to this appeal. We affirmed defendant's convictions in *People v. Helgesen*, 2-95-0735 (1997) (unpublished order under Supreme Court Rule 23).

¶ 10 In August 2001, defendant filed his first petition for postconviction relief, arguing that he received an "extended term" sentence based on the trial court's finding that his crimes were "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." He argued that, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), these facts were required to be submitted to the jury and proved beyond a reasonable doubt. The trial court summarily dismissed the petition as frivolous and patently without merit, finding that defendant's sentence was based on his being found guilty of murdering more than one person, rather than a finding of brutal or heinous behavior. Defendant did not appeal this ruling.

¶ 11 In May 2002, defendant filed a "Motion to Vacate Void Judgment." He argued that the State's indictment was invalid because it failed to adequately set forth the charges and it failed to allege facts which would authorize his "extraordinary penalty." The trial court recharacterized

the motion as a second postconviction petition and then summarily dismissed it as frivolous and patently without merit. Defendant appealed, and we affirmed. *People v. Helgesen*, 347 Ill. App. 3d 672, 673 (2004).

¶ 12 In March 2004, defendant filed his third postconviction petition, this time claiming actual innocence. In support, he attached an affidavit from an inmate who claimed to have had discussions with Eric in prison. According to the affiant, Eric said, among other things, that he had "placed a drug he referred to as a 'Mickey' in [defendant's] beer before the murder[s] so that [defendant] would have more courage." The trial court summarily dismissed the petition and defendant appealed. We affirmed, noting that defendant's claim of being drugged was contradicted by statements he made to prosecutors that the beer he drank on the night of the murders did not affect him. *People v. Helgesen*, 2-04-0606 (2006) (unpublished order under Supreme Court Rule 23).

¶ 13 On June 17, 2013, defendant filed a motion for leave to file a successive postconviction petition, arguing that his mandatory life sentence was unconstitutional pursuant to *Miller*. This set the stage for the dispute at the center of the instant appeal. The trial court granted defendant's motion and appointed a public defender who assisted defendant in filing an amended postconviction petition. The court later granted the amended petition, ordered a new presentence investigation, and scheduled the matter for a new sentencing hearing.

¶ 14 Prior to defendant's sentencing hearing, he filed a memorandum seeking to clarify the appropriate sentencing range. He began by arguing that he was not eligible for consecutive sentences because his offenses occurred in a single course of conduct. See 730 ILCS 5/5-8-4(a) (West 1992); *People v. Harizol*, 222 Ill. App. 3d 631, 649 (1991). Next, defendant cited *Miller* and *Davis* for the proposition that the mandatory life sentencing provision (subsection 5-8-

1(a)(1)(c)(ii)) was unconstitutional as applied to juveniles. Finally, defendant argued that the discretionary life sentencing provision (section 5-8-1(a)(1)(b)) was not applicable because the trial court (Judge Nelligan) did not make a finding that the murders were accompanied by exceptionally brutal behavior indicative of wanton cruelty. Defendant argued, therefore, that the applicable sentencing range under section 5-8-1 of the Code was 20-60 years imprisonment. Notably, defendant did not address section 5-8-2 of the Code (730 ILCS 5/5-8-2 (West 1992)), which authorized the trial court to impose an extended-term sentence between 60 and 100 years upon finding the presence of the extended-term factors set forth in section 5-5-3.2(b) of the Code (730 ILCS 5/5-5-3.2(b) (West 1992)).[1]

¶ 15 The State responded by arguing that consecutive sentences could indeed be imposed upon a finding that the murders were not committed in a single course of conduct, or upon a finding that "such a term is required to protect the public from further criminal conduct by the defendant." 730 ILCS 5/5-8-4(b) (West 1992). The State next argued that, because defendant was proved guilty beyond a reasonable doubt of murdering more than one victim, he was still eligible for sentencing under subsection 5-8-1(a)(1)(c)(ii), so long as the trial court made the requisite findings under *Miller*. The State further argued that, pursuant to *People v. Ford*, 198 Ill. 2d 68 (2001), because defendant qualified for natural life imprisonment, his sentencing range was a term of imprisonment anywhere between 20 years and natural life, and the trial court was

[1] Defendant had the choice of being sentenced under either the law in effect at the time the offenses were committed (1993) or the law in effect at the time of sentencing. See *People v. Hollins*, 51 Ill. 2d 68, 71 (1972). Although the record does not contain any specific election by defendant, the State notes that defense counsel relied on the 1993 statute during defendant's sentencing hearing. We will conduct our analysis accordingly.

authorized to impose a sentence beyond 60 years' imprisonment without the need for any extended-term findings.

¶ 16 In ruling on the applicable sentencing range, the trial court (Judge George J. Bakalis) agreed with the State that it had discretion to impose consecutive sentences. The court also agreed with the State's arguments pertaining to subsection 5-8-1(a)(1)(c)(ii) and the application of *Ford*. Accordingly, the court ruled that defendant could be sentenced to a term of imprisonment anywhere from 20 years to natural life, and that a prison term beyond 60 years could be imposed absent any extended-term findings.

¶ 17 Several witnesses testified at defendant's new sentencing hearing, which was conducted over the course of two days in January 2016. Bartlett police detective Joseph Leonas and former assistant State's attorney Richard Kayne were called to summarize the investigation and prosecution that led to defendant's convictions. Joel Starkey, William Woods, Audrey Donley, and Kristina Skeens, each officers with the Illinois Department of Corrections, were called to describe their interactions with defendant during his time of incarceration. Victim impact statements were presented on behalf of the Robles family. Finally, defendant's parents testified on his behalf, and defendant made a statement in allocution.

¶ 18 The trial court delivered its ruling in a 14-page sentencing memorandum. After discussing the United States Supreme Court's holdings in *Roper v. Simmons,* 543 U.S. 551 (2005) (prohibiting the death penalty for juvenile offenders), *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting life sentences for juvenile non-homicide offenders), and *Miller* (prohibiting mandatory life sentences for juvenile homicide offenders), the court stated:

> "These cases held that juveniles are vulnerable to negative impulses, outside pressures and lack ability to extricate themselves from horrific, crime producing

> situations. Juvenile characteristics have not yet been fixed, juvenile actions are less likely to be evidence of irretrievable depravity.
>
> With these principles in mind, the court must examine both defendant's actions in committing this terrible crime as well as his potential for rehabilitation as it existed at the time of the crime and his actions since being incarcerated for the last 23 years."

The court proceeded to discuss *People v. House,* 2015 IL App (1st) 110580, which set forth a list of factors taken from *Miller* for consideration in sentencing juveniles. These factors include: (1) the character and history of the juvenile offender and the specific circumstances of the crime; (2) the background and emotional and mental development of the juvenile offender; (3) the offender's age and characteristics that go along with it including immaturity and ability to appreciate risks; (4) the juvenile's family and home environment; (5) the circumstances of the crime, the extent to which the juvenile was involved, and the extent to which peer or familial pressure may have factored into the juvenile's participation; (6) the juvenile's relative inability to deal with police and prosecutors or to assist his own attorney; and (7) the offender's potential for rehabilitation." *House*, 2015 IL App (1st) 110580, ¶ 98 (citing *Bear Cloud v. State,* 2013 WY 18, ¶ 42, 294 P. 3d 36, 47 (Wyo. 2013)).

¶ 19 The trial court went through the above-described *Miller* factors one-by-one, finding certain factors particularly significant. Although defendant had no prior criminal history, the court found that the circumstances of the murders were "brutal" and "horrific." The court also concluded that evidence of defendant's mental and emotional status at the time of the offense was "subject to debate," observing that, although defendant came from a supportive family, he was evaluated in one instance as having low self-esteem and being vulnerable to negative influences. Regarding the extent to which Eric's participation in the murders may have

influenced defendant's participation, the court discussed Eric's role in planning and assisting with the murders, as well as defendant's missed opportunities to stop them. The court determined that, although defendant was reluctant to carry out the crimes, he and Eric were "equally culpable." Regarding defendant's potential for rehabilitation, the court discussed the evidence of defendant's behavior since his incarceration. Although defendant had faced several disciplinary actions for minor infractions, there was testimony that he had shown no signs of aggression and that he was respectful toward prison staff members.

¶ 20 In addition to the *Miller* factors outlined in *House*, the trial court discussed Eric's convictions and sentence. A jury found Eric guilty but mentally ill on two counts of first-degree murder and two counts of solicitation for murder. He was sentenced to mandatory life imprisonment. However, his convictions were reversed by this court due to the trial court's decision regarding certain rebuttable testimony. *People v. Robles*, 314 Ill. App. 3d 931, 939 (2000). Thereafter, Eric reached an agreement with the State, whereby he pleaded guilty but mentally ill to one count of first-degree murder and accepted a sentence of 100 years' imprisonment with day-for-day credit to apply. With this in mind, the trial court stated that it "face[d] a situation where two defendants equally culpable for their horrible crimes have different sentences, one which may allow [Eric] to eventually see freedom and one that requires [defendant] to be imprisoned until death."

¶ 21 The trial court found that, although defendant "was the one who actually stabbed the victims," he would not pose a danger to others if he was eventually released from prison. After concluding that "a sentence similar to that of [Eric] is the most appropriate disposition," the court imposed a 100-year prison sentence with day-for-day credit to apply.

¶ 22 Defendant filed a motion to reconsider his sentence. He later retained private counsel and filed a supplemental motion. Therein, he argued that the trial court had improperly imposed an extended-term sentence without finding any of the factors set forth in section 5-5-3.2(b) of the Code. Defendant also argued that it was improper for the court to consider Eric's sentence, and that his 100-year prison term was an unconstitutional *de facto* life sentence.

¶ 23 Following arguments on defendant's motion to reconsider, the trial court stood by its ruling that, because defendant was found guilty of murdering more than one victim, the mandatory life sentencing provision (subsection 5-8-1(a)(1)(c)(ii)) was still applicable, so long as it was accompanied by the requisite findings under *Miller*. In rejecting defendant's argument that he received an extended-term sentence, the court restated its agreement with the State's reliance on *Ford*. The court explained, "[o]ne of the State's cases talk[ed] about the death penalty and certainly—or they said if it's a death penalty case, anything below death is acceptable; and I think this is the same situation here. If the maximum sentence is natural life, anything that the court decides is appropriate beneath that is acceptable and an appropriate sentence." The court proceeded to reject defendant's constitutional arguments pertaining to the length of his sentence. However, the court agreed with defendant that it had placed too much weight on the length of Eric's sentence. Accordingly, the court reduced defendant's sentence to 90 years in prison, noting that he would serve a minimum of 45 years with day-for-day credit.

¶ 24 Defendant timely appeals.

¶ 25 II. ANALYSIS

¶ 26 Defendant contends that the trial court committed reversible error by (1) applying incorrect sentencing guidelines and (2) imposing an extended term of imprisonment without finding any of the extended-term factors listed in section 5-5-3.2(b) of the Code. In the

alternative, he contends for various reasons that his 90-year prison sentence is unconstitutional. Because defendant raises issues of statutory interpretation and challenges the constitutionality of his sentence, our review is *de novo*. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005); *People v. Roberson*, 212 Ill. 2d 430, 437 (2004).

¶ 27 The first issue in dispute is whether the trial court applied the proper sentencing guidelines. As we discussed above, the court ruled that subsection 5-8-1(a)(1)(c)(ii) remained applicable despite *Miller's* prohibition against mandatory life sentences for juveniles. The court next ruled that defendant's sentencing range was a prison term anywhere between 20 years and natural life, and that a prison term beyond 60 years could be imposed without the need for any extended-term findings. The latter ruling was based on the reasoning in *Ford* and the fact that defendant was found guilty beyond a reasonable doubt of murdering two victims.

¶ 28 Defendant argues that *Miller* "effectively disposed of subsection (a)(1)(c)(ii) as applied to juveniles," and therefore the statute's application was entirely prohibited. The State responds by arguing that defendant "misconstrues the effect of *Miller*." In support, the State cites our holding in *People v. Luciano*, 2013 IL App (2d) 110792, and our supreme court's holding in *Davis*.

¶ 29 The juvenile defendant in *Luciano* was originally sentenced to mandatory life imprisonment under subsection 5-8-1(a)(1)(c)(i) based on a prior conviction for first-degree murder. *Luciano*, 2013 IL App (2d) 110792, ¶ 47. This court held that, because defendant was sentenced to a mandatory prison term of natural life without parole, his sentence was invalid and he was entitled to a new sentencing hearing. *Id.* ¶ 62. However, we rejected the defendant's argument that he was no longer subject to a term of natural life imprisonment, holding in pertinent part:

> "*Miller* did not invalidate the penalty of natural life without parole for a second murder conviction, only its mandatory character as applied to a minor defendant. Thus, the penalty is still on the table even though, as *Miller* states, its imposition should be uncommon because it will be the "rare juvenile offender whose crime reflects irreparable corruption." [Citation.] Accordingly, upon resentencing, we direct the trial court to consider all permissible sentences consistent with our decision here." *Id*. ¶ 63.

¶ 30 The juvenile defendant in *Davis* was originally sentenced to mandatory life imprisonment under subsection 5-8-1(a)(1)(c)(ii) after being found guilty of murdering more than one person. *Davis*, 2014 IL 115595, ¶ 5. Our supreme court rejected the defendant's argument that *Miller* rendered section 5-8-1(a)(1)(c) facially unconstitutional, observing that the statute could still be validly applied to adults. *Davis*, 2014 IL 115595, ¶ 30. However, with respect to the statute's application to juveniles, the court cited our holding in *Luciano* with approval and concluded in relevant part:

> "*Miller* holds that a *mandatory* life sentence for a juvenile violates the eighth amendment prohibition against cruel and unusual punishment. In the case at bar, defendant, a juvenile, was sentenced to a mandatory term of natural life without parole. Therefore, his sentence is invalid, and we uphold the appellate court's vacatur thereof. We observe that *Miller* does not invalidate the penalty of natural life without parole for multiple murderers, only its *mandatory* imposition on juveniles. [Citation.] A minor may still be sentenced to natural life imprisonment without parole so long as the sentence is at the trial court's discretion rather than mandatory." [Emphasis in original.] *Id.* ¶ 43.

¶ 31 According to the State, the trial court in this case "properly observed that it could sentence [defendant] to natural life imprisonment based on multiple murders so long as it

conducted an individualized sentencing hearing at which it considered the factors unique to juvenile offenders." In his reply brief, defendant argues that the trial court impermissibly modified section 5-8-1(a)(1)(c), substituting the word "may" for the word "shall" in the phrase "the court shall sentence the defendant to a term of natural life imprisonment." 730 ILCS 5/5-8-1(a)(1)(c) (West 1992). Defendant asserts that the State has failed to provide any authority for the proposition "that a statute, once declared unconstitutional as applied [to juveniles], may then be manipulated in a way to substitute an outcome to [the State's] liking."

¶ 32 While the parties have identified a compelling issue, we need not resolve it for purposes of this appeal. Even assuming, *arguendo*, that section 5-8-1(a)(1)(c) remained on the table, we would still agree with defendant that the trial court was mistaken in its application of *Ford*. See *People v. Campa*, 217 Ill. 2d 243, 269 (2005) ("As a general rule, a court of review will not decide moot or abstract questions or render advisory opinions."). Stated differently, even if section 5-8-1(a)(1)(c) established the maximum sentence prescribed by statute, defendant's sentencing range was *not* anywhere between 20 years and natural life imprisonment, and the trial court was *not* authorized to impose a prison term beyond 60 years without the need for any extended-term findings.

¶ 33 The defendant in *Ford* was convicted of first-degree murder and found eligible for the death penalty upon the trial court's findings that (1) the murder was committed in the course of another felony and (2) it was intentional and involving the infliction of torture. *Ford*, 198 Ill. 2d at 71. However, the trial court declined to impose the death penalty and instead imposed an extended-term sentence of 100 years' imprisonment based on its finding of an extended-term factor: that the murder "was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." *Id.* (See 730 ILCS 5/5-5-3.2(b)(2) (West 1998). The defendant appealed,

arguing that the extended-term factor was not proved beyond a reasonable doubt, and that his sentence was therefore unconstitutional under *Apprendi*. In affirming the defendant's sentence, our supreme court noted that he already faced a prescribed statutory maximum sentence of death based on facts that were proved beyond a reasonable doubt. Because the trial court's extended-term finding did nothing to increase the penalty that the defendant was already facing, our supreme court held there was no violation of *Apprendi*. *Id*. at 74-75.

¶ 34 The State argues that the reasoning from *Ford* supports the trial court's ruling here. According to the State, defendant was eligible for the prescribed statutory maximum sentence, natural life imprisonment, because he was found guilty beyond a reasonable doubt of murdering more than one victim. The State reads *Ford* to stand for the proposition that, under these circumstances, the guidelines and requirements with respect to extended-term sentences are no longer applicable. The State is incorrect for two reasons.

¶ 35 First, *Ford* applies only to *Apprendi* cases, and the State overlooks the fact that this is not an *Apprendi* case. In *People v. De La Paz*, 204 Ill. 2d 426, 433-439 (2003), our supreme court held that *Apprendi* does not apply retroactively to criminal cases in which direct appeals were exhausted before *Apprendi* was decided. Here, we affirmed defendant's direct appeal in 1997, three years before *Apprendi* was decided. However, *Ford* was on direct review when *Apprendi* was decided, so any fact that increased the defendant's penalty beyond the prescribed statutory maximum needed to be proved beyond a reasonable doubt. *Ford*, 198 Ill. 2d at 72-73.

¶ 36 Second, *Ford* establishes only that there are circumstances in *Apprendi* cases where an extended-term factor that was not proved beyond a reasonable doubt can be used to justify an extended-term sentence; namely, where the extended-term finding does nothing to increase the length of the sentence that the defendant was already facing. *Ford*, 198 Ill. 2d at 74-75.

Contrary to the position taken by the State, and adopted by the trial court, *Ford* does not establish that there are circumstances where the statutory sentencing guidelines are redefined and a sentence that would otherwise be considered "extended-term" can be imposed absent any extended-term findings. *Cf. People v. Peacock*, 324 Ill. App. 3d 749, 759 (2001) (noting that "[a] number of Illinois cases" have rejected the argument that the sentencing range for first-degree murder is a term of imprisonment anywhere between 20 years and natural life).

¶ 37 The appropriate sentencing guidelines under these circumstances were articulated in *People v. Morfin*, 2012 IL App (1st) 103568, another case involving a juvenile who was originally sentenced to mandatory life imprisonment under subsection 5-8-1(a)(1)(c)(ii) after being found guilty of murdering more than one victim. The *Morfin* court held in relevant part:

> "Pursuant to *Miller v. Alabama,* defendant is entitled to a new sentencing hearing where natural life imprisonment is not the only available sentence. Under our statutes now and at the time of defendant's offenses, the circuit court may sentence a defendant convicted of first degree murder committed as a minor to a prison term of 20 to 60 years, *up to 100 years where an appropriate extended-term finding has been made,* or to natural life imprisonment." [Emphasis added.] *Morfin*, 2012 IL App (1st) 103568, ¶ 59.

¶ 38 Accordingly, we hold that defendant's concurrent 90-year sentences in this case amount to extended-term sentences. The question left unanswered is whether defendant's extended-term sentences are justified by the presence of any extended-term factors. Although the trial court mistakenly believed that it did not need to make any extended-term findings, it nonetheless imposed a sentence within the appropriate statutory limits based on its consideration of numerous factors. We note that "[a] trial court need find only a single statutory factor in aggravation to impose an extended sentence." *People v. Hopkins,* 201 Ill. 2d 26, 39 (2002).

Moreover, "if the sentence is justified by the record, the absence of specific findings is not fatal." *People v. Pugh*, 325 Ill. App. 3d 336, 347 (2001).

¶ 39 Here, the State notes that a finding of "exceptionally brutal and heinous behavior indicative of wanton cruelty" would have justified the imposition of a discretionary life sentence (730 ILCS 5/5-8-1(b) (1992)), or an extended-term sentence (730 ILCS 5/5-5-3.2(b)(2) (West 1992)). At defendant's original sentencing hearing in 1995, Judge Nelligan stated, "I have no doubt in my mind that the defendant's conduct possibly fits the definition of exceptionally brutal and heinous behavior indicative of wanton cruelty, and his conduct certainly is deserving of the most severe punishment available under the law ***." The State observes these statements were admitted into evidence at defendant's 2016 sentencing hearing before Judge Bakalis. The State further notes that, in his written sentencing memorandum, Judge Bakalis made several comments about the "brutal" and "horrific" nature of defendant's crimes. For instance, after stating that the "nature of the killings" was "quite brutal," Judge Bakalis commented: "[t]he crime scene photos, autopsy reports and autopsy photographs show the horrific nature of the stabbings of both parties with numerous stab wounds being inflicted as well as numerous defense wounds." The State argues that the statements from Judges Nelligan and Bakalis combine to form an adequate extended-term finding of "exceptionally brutal and heinous behavior indicative of wanton cruelty" under subsection 5-5-3.2(b)(2).

¶ 40 We note that brutal or heinous behavior "generally involves prolonged pain, torture, or premeditation." *People v. Nitz*, 219 Ill. 2d 400, 418 (2006). Here, it was undisputed that defendant's crimes were premeditated, that Peter and Diana were both stabbed more than 20 times in the face, neck, chest, and arms, and that Diana Robles was still alive—grasping at her throat—when police arrived at the Robles' home on the night of the murders. Given the

undisputed evidence and the findings by Judges Nelligan and Bakalis, the record clearly demonstrates that defendant's "exceptionally brutal and heinous behavior indicative of wanton cruelty" was factored into the determination of his sentence.

¶ 41 However, we note that an extended-term sentence may also be imposed upon an offender convicted of any felony committed against "a person physically handicapped at the time of the offense." 730 ILCS 5/5-5-3.2(b)(4)(iii) (West 1992). It is undisputed that Diana Robles was handicapped—she suffered from polio and required crutches to walk. This fact was discussed repeatedly during the course of defendant's trial, both during the testimony and closing arguments. In modifying defendant's sentence to a 90-year prison term, Judge Bakalis stated:

> "In my mind, in this case the overriding consideration in my mind was the offense itself, the seriousness of [the] offense, the nature of the offense. [Defendant] was paid a minimal amount, I think, but technically compensated to commit these murders. *One of the individuals murdered was a handicapped polio victim*. [Defendant] in my mind had numerous opportunities to not have to do these things, and he didn't do that. I understand he was a juvenile. He was 17. He wasn't 13 or 14. He was close to adulthood. *These are all factors*. And the overwhelming consideration, again, is the nature of this crime, the double murder and the manner in which it was committed." [Emphasis added.]

Although Judge Bakalis did not reference section 5-5-3.2(b), it remains that he specifically relied on Diana's handicap as a factor in determining defendant's sentence. We hold that defendant's extended-term sentence was justified on that basis.

¶ 42 Defendant argues that he was entitled to written notice of any factor that would be used to increase his sentence. He points to section 111-3(c-5) of the Criminal Code of Procedure of

1963 (725 5/111-3(c-5) (West 2012)), which codified the requirement announced in *Apprendi*. The statute provides in pertinent part:

> "Notwithstanding any other provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, *the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt*." [Emphasis added.] 725 ILCS 5/111-3(c-5) (West 2012).

¶ 43 Defendant's argument has no merit. As we explained *supra*, this is not an *Apprendi* case. We are aware of no authority that would impose the written notice requirement of section 111-3(c-5) under these circumstances. However, even if this was an *Apprendi* case, *Apprendi* errors are subject to harmless-error review, and they are considered harmless if the evidence in support of the missing element is uncontested and overwhelming. *People v. Thurow*, 203 Ill. 2d 352, 368 (2003); *People v. Walker*, 2015 IL App (1st) 130500, ¶ 27. Here, there was uncontested and overwhelming evidence that defendant exhibited "exceptionally brutal and heinous behavior indicative of wanton cruelty," and that Diana was handicapped. Defendant cannot show that he was prejudiced by Judge Bakalis's consideration of those extended-term factors.

¶ 44 Defendant next contends that his 90-year prison sentence is unconstitutional, but his arguments in support are unavailing. To wit, defendant first argues that he received a *de facto* life sentence in violation of the eighth amendment's bar against cruel and unusual punishment. As we have noted, defendant was 17 years old at the time of his crimes. Because he is eligible

for day-for-day credit, his minimum term of imprisonment is 45 years, meaning he will be eligible for release at the age of 62.

¶ 45 Defendant notes our supreme court's holding in *People v. Reyes*, 2016 IL 119271, which established that *Miller* bars mandatory *de facto* life sentences, in addition to mandatory *de jure* life sentences, from being imposed on juveniles. The *Reyes* court reasoned that "[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." *Reyes*, 2016 IL 119271, ¶ 9. Because the sentencing scheme in *Reyes* mandated that the defendant remain in prison until at least the age of 105, his mandatory *de facto* life sentence was deemed unconstitutional. *Id.* ¶ 10.

¶ 46 *Reyes* provides little support to defendant here, as defendant was not subject to a mandatory minimum sentencing scheme, and his minimum 45-year sentence can hardly be compared to the minimum 89-year sentence at issue in *Reyes*. However, defendant notes a recent First District case that focused on a report indicating that a person held in a general prison population has a life expectancy of approximately 64 years. *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶ 26. Because the juvenile defendant in *Sanders* was not eligible for release until he reached the age of 68, the appellate court held that the "extreme sentence, in excess of his life expectancy as a prison inmate, implicates the eighth amendment concerns set forth in *Graham, Roper* and *Miller*." *Id.* ¶ 27.

¶ 47 Here, defendant asks us to lower the bar established in *Sanders* from 64 to 62. He argues that he is not likely to survive until the age of 64 if he is forced to serve out the entirety of his sentence. We note, however, that another First District case (with two of the same judges from the panel in *Sanders*) rejected a similar argument under similar circumstances. In *People v.*

Evans, 2017 IL App (1st) 143562, ¶ 3, the 17-year-old defendant was sentenced to an aggregate 90-year prison term for two non-homicide offenses. Because he was eligible for day-for-day credit, his minimum age of release was 62. *Id.* ¶ 14. The defendant argued that, even if he survived until his mid-sixties, his sentence ran afoul of the eighth amendment because he would " 'have little hope for a productive life.' " *Id.* ¶ 17. In holding that the defendant was not serving a *de facto* life sentence, the *Evans* court noted that there is nothing unconstitutional about a sentence which requires a juvenile "to spend his most meaningful, productive years in prison after committing a truly horrific crime." *Id.*; accord *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 16 (holding that the juvenile defendant's minimum 45-year sentence did not amount to a *de facto* life sentence, as he was be eligible for release at the age of 62).

¶ 48 Our district has not yet endeavored to define what constitutes *de facto* life, and we are not inclined to do so here. We express no opinion as to the propriety of *Sanders*. However, insofar as *Evans* and *Applewhite* found nothing unconstitutional about sentences that required juveniles to remain incarcerated until the age of 62, we agree that the same holds true with respect to defendant's sentence in this case.

¶ 49 Defendant next argues that the trial court relied on improper factors in determining his sentence, thereby violating *Miller*. Defendant argues that the court placed too much weight on the "brutal" and "horrific" nature of the crimes, as well as the length of Eric's sentence and degree of loss suffered by the victims. According to defendant, more weight should have been placed on his immaturity at the time of his crimes and his potential for rehabilitation.

¶ 50 Having determined that defendant did not receive a *de facto* life sentence, we have no need to consider whether the trial court complied with *Miller*. That point notwithstanding, we acknowledge that juvenile defendants are entitled to individualized sentences which include

consideration of compassionate or mitigating factors (*Miller*, 567 U.S. at 475), and that retribution and deterrence should not be the overriding factors in determining a juvenile's sentence (*Montgomery*, 136 S. Ct. at 733). However, we cannot say that defendant's sentence here was formulated in violation of these principles.

¶ 51 In his 14-page sentencing memorandum, Judge Bakalis considered the fact that defendant had no prior criminal history, that there was evidence of defendant having low self-esteem and being vulnerable to negative influences, that Eric influenced defendant's decision to commit the crimes, and that defendant had shown potential for rehabilitation since being incarcerated. These considerations led Judge Bakalis to find that, "if released at some point in time [defendant] will not pose a danger to others." This reasoning does not reflect an unwarranted consideration of the seriousness of the crimes or the loss suffered by the victims, but rather reflects a thoughtful consideration of defendant's "youth and attendant characteristics." See *Miller*, 567 U.S. at 483. To the extent that Judge Bakalis may have improperly weighed the length of Eric's sentence, any such error was rectified when he granted defendant's motion to reconsider and reduced defendant's sentence from 100 years' imprisonment to 90 years' imprisonment. We therefore reject defendant's argument that his sentence was based on improper factors.

¶ 52 Defendant's next argument with respect to the length of his sentence is that it violates our constitution's proportionate penalties clause, which provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. "To succeed on a proportionate penalties claim, a defendant must show either that the penalty imposed is cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community; or that it differs from the penalty imposed for an offense containing the same elements." *People v.*

Klepper, 234 Ill. 2d 337, 348 (2009). Here, defendant relies on *People v. Gipson*, 2015 IL App (1st) 122451, and *People v. Harris*, 2016 IL App (1st) 141744, to argue that, because he has shown potential for rehabilitation since being sentenced to prison, his 90-year prison term is so wholly disproportionate to the offense that it shocks the moral sense of community. We disagree.

¶ 53 The defendant in *Gipson* was 15 years old when he committed his crimes, which included attempted first-degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm. *Gipson*, 2015 IL App (1st) 122451, ¶ 4. In holding that the defendant's penalty was "so wholly disproportionate that it shocks the moral sense of the community," the appellate court discussed evidence that the defendant had a mental illness and was prone to impulsive behavior. *Id*. ¶ 73. The court commented that the defendant "may yet be rehabilitated and restored to useful citizenship," but concluded that his 52-year sentence "seems more consistent with eliminating his utility as a citizen." *Id*. ¶ 74.

¶ 54 The defendant in *Harris* turned 18 years' old just a few months before he committed his crimes, which included murder and attempted murder. *Harris*, 2016 IL App (1st) 141744, ¶ 2. He was sentenced at the bottom of the applicable ranges, receiving an aggregate total of 76 years' imprisonment, of which he was required to serve at least 71 years. *Id*. ¶ 32. After discussing the defendant's potential for rehabilitation at length, the appellate court held, "[w]hile we do not minimize the seriousness of [the defendant's] crimes, we believe that it shocks the moral sense of the community to send this young adult to prison for the remainder of his life, with no chance to rehabilitate himself into a useful member of society." *Id*. ¶ 69.

¶ 55 This case is easily be distinguished from *Gipson* and *Harris* based on the severity of defendant's crimes and his potential for a meaningful life after prison. Whereas the defendant in

Gipson was convicted of *attempted* first-degree murder, defendant here was convicted of "two of the most gruesome and grisly murders" that Judge Nelligan had ever seen. Moreover, defendant will be eligible for release from prison here at the age of 62, whereas the defendant in *Harris* was not eligible for release until the age of 89. Not only do these factors differentiate this case from *Gipson* and *Harris*, they further alleviate any concerns that defendant's sentence violates the proportionate penalties clause.

¶ 56 Defendant's final argument is that his sentence is excessive in light of the cost associated with his imprisonment and Judge Bakalis's finding that, "if released at some point in time [defendant] will not pose a danger to others." This argument is based on section 5-4-1 of the Code, which requires sentencing courts to "consider the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections." 730 ILCS 5/5-4-1(a)(3) (West 2016). The State notes, however, that "absent evidence to the contrary, the trial court is presumed to have performed its obligations and considered the financial impact statement before sentencing a defendant." *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 22. Here, defendant cites nothing in the record to rebut the presumption that Judge Bakalis considered the financial impact of incarceration.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 59 Affirmed.