No. 1-08-2458

FIFTH DIVISION
March 4, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 96 CR 14024
	)	
CHRISTOPHER NEAL,	)	Honorable
	)	James M. Schreier,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and Epstein concurred in the judgment.

O R D E R

HELD: Petitioner failed to make a substantial showing that he received ineffective assistance of counsel based on his trial counsel's failure to consult with or call an eyewitness identification expert during petitioner's trial. Thereafter, we affirm the trial court's judgment dismissing petitioner's post-conviction petitions at the second stage of review without granting an evidentiary hearing.

Following a bench trial, defendant Christopher Neal, a 16-year-old minor at the time of the offense, was convicted of two

counts of first degree murder and three counts of attempt first degree murder. He was sentenced to natural life in prison without parole. We affirmed defendant's conviction on direct appeal. *People v. Neal*, No. 1-98-3880 (1998) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a supplemental petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). On January 29, 2008, the trial court dismissed all but one of defendant's claims at the second stage of review without granting an evidentiary hearing. Following an evidentiary hearing, the trial court dismissed defendant's remaining claim.

Defendant appeals, contending: (1) the trial court erred in finding his ineffective assistance of trial counsel claim did not constitute a substantial showing of a constitutional deprivation; and (2) he made a substantial showing that his natural-life sentence constitutes a violation of both the Illinois and federal constitutions. For the reasons that follow, we affirm the trial court's judgment.

BACKGROUND

The evidence adduced at trial established between 4 and 5 a.m. on January 1, 1996, Jerry Rash, Stacy Porter and Tousha Scott pulled into a gas station located on 43rd street near the Dan Ryan expressway in Chicago in Rash's car. Shortly after,

Lucius Mackey and Lavelle Smith pulled into the station in Smith's car and stopped alongside Rash's car. Rash then got out of his car and began to pump gas. Mackey, who had been driving Smith's car, went to a nearby public telephone. Meanwhile, Scott, Porter and Smith began talking to Lisa Wallace, an off-duty Chicago police officer who was sitting in her car while her husband tried to repair the engine.

While the two cars were still parked near the gas station's fuel pumps, two males drove into the station in a stolen Oldsmobile. The driver of the Oldsmobile then aimed a rifle from the driver's window and fired at least a dozen gunshots at the two cars. Smith and Porter were killed, and Mackay was shot in the leg. Rash and Scott were not hit by the gunfire because they were able to dive for cover. Rash, Mackey and Scott identified defendant as the gunman at separate lineups conducted several months after the shooting and at defendant's trial. Officer Wallace testified she could not identify who the shooter was because her line of vision was blocked by the raised hood of her car.

All three eyewitnesses testified at trial that the shooter was wearing a black skullcap and black gloves. Scott said he told police the shooter was light-complected and between 18 to 23 years' old with long sideburns. Rash said he told police the

shooter had a small goatee and braids. Mackey described the shooter as light-complected with long hair and sideburns. The stolen Oldsmobile was recovered from a parking lot near where defendant lived.

On August 8, 2000, the trial court found defendant guilty of two counts of first degree murder and three counts of attempt first degree murder. On September 8, 2000, defendant was sentenced to natural life without parole based on a prior first-degree murder conviction.

On direct appeal, defendant contended the State failed to prove him guilty of the offenses beyond a reasonable doubt. Specifically, defendant contended the eyewitnesses identification of him as the shooter were insufficient to support his convictions because the witnesses only had a brief opportunity to view the gunman, and because the three eyewitnesses' description of the gunman to the police differed. We affirmed defendant's convictions and sentence in *People v. Neal*, No. 1-98-3880 (1998) (unpublished order under Supreme Court Rule 23).

Defendant signed and mailed a *pro se* post-conviction petition to the circuit court on August 20, 2003. On May 8, 2007, the circuit court appointed defendant post-conviction counsel. On May 8, 2007, post-conviction counsel filed a supplemental petition on defendant's behalf, alleging in

pertinent part that: (1) trial counsel was ineffective for failing to call Trina Morton as an alibi witness; (2) trial counsel was ineffective for failing to consult and call an expert witness on eyewitness identification testimony; and (3) defendant's natural-life sentence constitutes a violation of both the federal and Illinois constitutions.

In support of his ineffective assistance claim, defendant attached a report prepared by Professor Geoffrey R. Loftus, Ph.D., in which Professor Loftus provided a summary of the current research on eyewitness-identification testimony and detailed the weaknesses of the identification testimony in defendant's case. Defendant also attached an affidavit from his trial counsel, wherein counsel admitted he had never considered consulting or calling an eyewitness expert as part of defendant's case.

The circuit court granted the State's motion to dismiss both the *pro se* and supplemental post-conviction petition claims, except with regard to defendant's post-conviction claim regarding trial counsel's failure to call Morton as an alibi witness. Following an evidentiary hearing, the circuit court dismissed defendant's remaining claim. Defendant appeals.

ANALYSIS

A petition filed under the Act must "clearly set forth the

respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2002). The petition must have attached "affidavits, records, or other evidence" as required by section 122-2 of the Act "supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2002); *People v. Collins*, 202 Ill. 2d 59 (2002). Because post-conviction relief is a collateral proceeding, not an appeal from an underlying judgment, all issues decided on direct appeal are *res judicata*, and all issues that could have been raised in the original proceeding but were not are waived. *People v. Evans*, 186 Ill. 2d 83, 89 (1999).

At the second stage of proceedings under the Act, post-conviction counsel is appointed to the defendant, and the State is either required to answer the pleading or move to dismiss the petition. 725 ILCS 5/122-2.1, 122-5 (West 2002). The trial court must then rule on the legal sufficiency of the defendant's allegations, taking all well-pled facts not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. Childress*, 191 Ill. 2d 168, 174 (2000). The relevant question becomes whether the allegations in the petition, supported by the record and accompanying documents, demonstrate a substantial showing of a constitutional violation. *People v. Morris*, 335 Ill. App. 3d 70, 76 (2002), citing *People*

v. Edwards, 197 Ill. 2d 239, 245-46 (2001).

The inquiry into whether a post-conviction petition contains a sufficient allegation of a constitutional deprivation does not require the trial court to engage in any fact-finding or credibility determinations, however. *Childress*, 191 Ill. 2d at 174. Notwithstanding, throughout the second stage of review "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473. We review a trial court's dismissal of a post-conviction petition at the second stage of review *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998).

Initially, the State contends defendant's post-conviction petitions should be dismissed in their entirety as untimely under the Act. Although the circuit court did not ultimately rely on this basis in order to dismiss defendant's claims, the State notes we may affirm a dismissal on any basis supported by the record. See *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003).

The version of section 122-1(c) of the Act in effect when defendant filed his petition in this case provides:

> "No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed

> or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of the conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2002).

As the State notes, defendant was convicted on September 8, 2000. Three years from the date of conviction was September 8, 2003. Our supreme court denied defendant's petition for leave to appeal on February 3, 2003. People v. Neal, 202 Ill. 2d 689 (2003). Six months from the denial of a petition for leave to appeal was August 5, 2003, because August 3, 2003, was a Saturday. Accordingly, section 122-1(c) of the Act required defendant to file his petition no later than August 5, 2003, the "sooner" of the two dates under the Act's timeliness requirements. See 725 ILCS 5/122-1(c) (West 2002).

Defendant mailed his initial *pro se* post-conviction petition to the circuit court on August 20, 2003, 15 days after

the applicable limitation period expired. Therefore, the question then becomes whether defendant alleged sufficient facts to establish the delay was not due to his culpable negligence. See *People v. Mitchell*, 296 Ill. App. 3d 930, 933 (1998) ("A petitioner has the burden of establishing that a delay in filing his post-conviction petition was not due to his culpable negligence.") Because the circuit court made no factual findings regarding the timeliness issue, our review is *de novo*. *People v. Rissley*, 206 Ill. 2d 403, 420 (2002).

Our supreme court has recognized "culpable negligence" contemplates something greater than ordinary negligence and is more akin to recklessness. *Rissley*, 206 Ill. 2d at 420; *People v. Boclair*, 202 Ill. 2d 89, 106-08 (2002).

Defendant readily concedes his petition was filed outside of section 122-1(c)'s time limitation period. Although defendant recognizes a petitioner is charged with knowing the filing deadline for his petition (see *People v. Lander*, 215 Ill. 2d 577, 588-89 (2005)), defendant contends the delay in filing was not due to his culpable negligence.

Here, defendant contends he was not culpably negligent in filing his initial petition 15 days late because he was required to rely on a jailhouse lawyer, Michael Watson, to help him prepare the petition. Defendant contends he was unable to file

the petition on time because Watson was placed into segregation, preventing Watson from completing the petition and giving it to defendant in time for defendant to file it by August 5, 2003. Defendant also notes his petition was filed only 15 days after the expiration of the applicable limitation period, and within 3 years of his date of conviction.

In his supporting affidavit filed below, defendant said he met with Wilson sometime after his petition for leave to appeal was denied in February 2003. Defendant said he did not remember discussing any due dates for the petition with Watson. When Watson agreed to prepare the petition, defendant gave him all of the briefs and transcripts from the trial and direct appeal. Defendant said that in July 2003, however, Watson "went into segregation." Defendant said he asked the prison officers whether he could go to the law library and ask about his papers or have someone bring them back from Wilson, but the officers would not help. Defendant said that according to his recollection, a major lockdown began in late July or early August, which made it even harder to get to the law library. Defendant said he was called to the law library on August 20, 2003. A typewritten and notarized petition, which Watson had prepared, was waiting for defendant. Defendant immediately signed the petition before the notary and mailed it. Defendant

said that in 2003, he and many of the other inmates at Statesville believed post-conviction petitions were due three years after sentencing.

In support of his allegations, defendant also attached an affidavit from Michael Watson to his response motion to the State's motion to dismiss. In his affidavit, Watson said that in 2003 he was assigned as an inmate paralegal at the Statesville Correctional Center. Defendant approached Watson in July 2003 and requested Watson's help in preparing a post-conviction petition due to defendant's difficulty reading and comprehending the statute and relevant case law. Watson agreed to help defendant and had defendant turn over to him all of the trial transcripts and appeal documents in defendant's possession. One week after Watson agreed to help defendant, Watson was placed in segregation. Watson said he was not able to access his materials in the law library or begin preparing the petition until late July as a result of the facilities lockdown and his segregation. Watson said he was finally able to complete the petition in early August, and then gave it to another inmate paralegal to have notarized and returned to defendant. Watson said he remained in segregation from July 2003 until November 2003.

Two newspaper articles and a response to a Freedom of Information Act (FOIA) request were also attached to defendant's

response to the State's motion to dismiss based on untimeliness. The articles and FOIA request confirmed that part of the Stateville Correctional Center was on lockdown from July 10 through July 14, 2003, and the entire facility was on lockdown from August 14 through August 31, 2003.

In *Lander*, the defendant attempted to show he was not culpably negligent in filing his petition outside the time limitation period of the Act by alleging he received erroneous advice regarding the filing deadline from a prison law clerk and several "jailhouse lawyers." *Lander*, 215 Ill. 2d at 587. The court noted defendant failed to allege sufficient facts to show his reliance on the advice of jailhouse lawyers, a prison law clerk, and a law librarian or paralegal was reasonable where there were no facts to show the individuals had any specialized knowledge in post-conviction issues. *Lander*, 215 Ill. 2d at 587. Moreover, the defendant's allegations established he even questioned the advice he received because he continued to seek advice from others concerning the deadline for filing his petition. *Lander*, 215 Ill. 2d at 587. Our supreme court also noted it is well settled that all citizens are charged with knowledge of the law. *Lander*, 215 Ill. 2d at 587. Because the sole obligation of knowing the time requirements for filing a post-conviction petition ultimately remained with the defendant,

the court held the defendant's "entrustment of this responsibility to jailhouse lawyers, a prison law clerk, and a law librarian who had proven no specialized knowledge in post-conviction matters showed an indifference to the consequences likely to follow from his actions." *Lander*, 215 Ill. 2d at 858.

In *People v. Scullark*, 325 Ill. App. 3d 876 (2002), by contrast, the petitioner contended that because he was placed in segregation and his property including his in-progress petition was confiscated until after the petition was due, he was not culpably negligent in his late filing of that petition. This court held "it would seem that where a prisoner is prevented by the actions of prison authorities from filing his petition on the last timely day, he is not culpably negligent." *Scullark*, 325 Ill. App. 3d at 885. The court noted a petitioner's failure to file on time can hardly be considered to be "more than the failure to use ordinary care," or "negligence of a gross and flagrant character," where he is precluded from filing by the acts of his prison custodians. *Scullark,* 325 Ill. App. 3d at 885. The court also noted its holding was consistent with prior statements of the court that " 'in cases where the record contains evidence that the lock-down prevents a defendant from having a 'meaningful opportunity' to prepare a timely post-conviction petition, the delay is not the result of culpable

negligence.' " *Scullark*, 325 Ill. App. 3d at 885, quoting *People v. Van Hee*, 305 Ill. App. 3d 333, 337 (1999); accord *Mitchell*, 296 Ill. App. 3d at 933. Accordingly, the court held that "where a petitioner who has begun work on a post-conviction petition is placed in segregation through no foreseeable fault of his own or otherwise prevented from filing his petition for a period of time until and including the last day of the period in which he may file, his failure to file in a timely manner is not culpable negligence." *Scullark*, 325 Ill. App. 3d at 885.

In this case, unlike *Lander*, defendant is not alleging he simply relied on a prison law clerk's erroneous advice regarding the filing deadlines in order to establish his lack of culpable negligence. Instead, defendant alleged he reached out to Watson for assistance in preparing the petition because of his difficulty in reading and understanding the applicable statutes and case law. Defendant alleged that while Watson was in possession of all of defendant's copies of the briefs, transcripts and papers from his trial and appeal proceedings in order to prepare the petition, Watson was placed in segregation without access to the materials. Defendant also alleged that although he was worried Watson would be transferred from the prison along with all of defendant's papers, prison officials would not allow him access to the law library to retrieve the

materials.

Similar to *Scullark*, we note defendant's failure to file on time here can hardly be considered to be "more than the failure to use ordinary care," or "negligence of a gross and flagrant character," where he alleged he was at least partially precluded from filing the petition by the acts of his prison custodians. In support of our conclusion, we also note that defendant alleged he mailed the petition as soon as he was granted access by the prison officers to Watson and the prison law library, and that defendant only missed the filing deadline by a mere 15 days. In light of the record before us, we find defendant has alleged sufficient facts to demonstrate the delay in filing his initial petition was not the result of culpable negligence. See *Scullark*, 325 Ill. App. 3d at 885; *Van Hee*, 305 Ill. App. 3d at 337.

I. Ineffective Assistance

Defendant contends the circuit court erred in dismissing his petition because he made a substantial showing that he received ineffective assistance of trial counsel. Specifically, defendant contends his trial counsel was ineffective by failing to consult with or call an eyewitness identification expert during his trial.

To establish a claim of ineffective assistance, a defendant

must prove: (1) counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) the defendant suffered prejudice as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Ford*, 368 Ill. App. 3d 562, 571 (2006). "Prejudice is shown when there is 'a reasonable probability' that, but for counsel's ineffectiveness, the defendant's sentence or conviction would have been different." *Ford*, 368 Ill. App. 3d at 571, citing *People v. Mack*, 167 Ill. 2d 525, 532 (1995). A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694.

Initially, the State contends defendant's ineffective assistance of counsel claim is barred by the doctrine of *res judicata*. *Res judicata* aside, we find defendant has failed to make a substantial showing that his trial counsel's performance was deficient.

In assessing an ineffectiveness claim, the court must give deference to counsel's conduct within the context of the trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901, 913 (2000); *People v. Tate*, 305 Ill. App. 3d 607 (1999). Trial counsel generally has the right to make the ultimate decision with respect to matters of tactics and strategy

after consulting with his client, including what witnesses to call, how to conduct cross-examinations, and what defense to present at trial. *People v. Clendenin*, 238 Ill. 2d 302, 320 (2010). "As such, 'a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of *sound* trial strategy and not incompetence.' " (Emphasis in original.) *King*, 316 Ill. App. 3d at 913, quoting *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Moreover, this court has recognized counsel's "failure to call an expert witness is not *per se* ineffective assistance, even where doing so may have made the defendant's case stronger, because the State could always call its own witness to offer a contrasting opinion." *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005).

However, we note an attorney who fails to conduct a reasonable investigation, fails to interview witnesses and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy. *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005). "Whether defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented." *Makiel*, 358 Ill. App. 3d at 107.

In *People v. Davis*, 377 Ill. App. 735 (2007), the court considered whether the post-conviction court erred in holding

defense counsel's failure to investigate the possibility of retaining an expert witness to challenge the admission of the State's lip-print identification evidence completely undermined the defendant's alibi defense, rendering counsel's representation objectively unreasonable under professionally prevailing norms. The court noted the experts the defendant introduced at the post-conviction hearing rebutted the State's experts, who claimed that lip-print identification is reliable, readily accepted in the forensic community, and used by the FBI. *Davis*, 377 Ill. App. 3d at 747. The court held the post-conviction court's determination that if the defendant's post-conviction experts had testified at trial, the lip-print identification never would have been shown to the jury, and no physical evidence would have linked defendant to the crime, was not manifestly erroneous. *Davis*, 377 Ill. App. 3d at 747.

In *People v. Allen*, 376 Ill. App. 3d 511 (2007), the defendant contended the trial court's exclusion of an eyewitness identification expert's testimony deprived him of his right to due process and his right to present a defense. Because the trial court failed to conduct a meaningful inquiry into the expert's proposed testimony, under the specific circumstances of the case, this court reversed the defendant's convictions and remanded the cause for a new trial. *Allen*, 376 Ill. App. 3d at

526. In reaching its decision, the court expressed no opinion on whether the trial court on remand should allow any part of the expert's offer of proof to be heard by the jury. The court simply held the offer of proof must be given serious consideration. The court noted if any of the expert's testimony was admitted on retrial, the witness should not be allowed to directly comment on the eyewitness' credibility or on the weight that should be given to the eyewitness' testimony. *Allen*, 376 Ill. App. 3d at 526. "The expert might supply relevant data, but it is for the jury to decide what weight, if any, to give the research offered by the expert." *Allen*, 376 Ill. App. 3d at 526, citing *People v. Sargeant*, 292 Ill. App. 3d 508, 511 (1997) (the expert must not invade the province of the fact finder, while aiding the fact finder in reaching its decision).

While *Allen* clearly stands for the proposition that a trial court must conduct a meaningful inquiry into the relevancy of an eyewitness expert's proposed testimony, nothing in the case stands for the proposition that defense counsel renders ineffective assistance if he fails to call or consult with such an expert during a defendant's trial where the reliability of an identification is at issue.

We find defendant has failed to make a substantial showing that defense counsel failed to either adequately investigate

defendant's case or present a valid defense challenging the eyewitnesses' identifications.

In this case, unlike *Davis*, nothing in the record or in defendant's post-conviction allegations suggest defense counsel's representation was objectively unreasonable under prevailing professional norms. In fact, the record reflects defense counsel extensively cross-examined the State's eyewitnesses regarding the weaknesses in their identification of defendant as the shooter. Defense counsel also highlighted the eyewitnesses' prior convictions for possession of a controlled substance and their gang affiliations in an attempt to establish they were not credible witnesses.

Furthermore, defense counsel vigorously argued during closing argument and again in defendant's post-trial motion that the unreliability of the uncorroborated eyewitnesses' identification of defendant necessitated a finding of not guilty. Defense counsel also specifically cited two academic studies regarding eyewitness testimony in defendant's post-trial motion, which highlighted that: (1) eyewitnesses to violent acts are less likely to be able to recall specific details about those events; and (2) research shows the victims of violent crimes are not more accurate and are sometimes less accurate in their recollections than bystanders. Notwithstanding counsel's extensive argument

regarding the unreliability of the eyewitnesses' identification testimony during the post-trial hearing, the trial court determined:

> "I remain convinced that the three eyewitnesses were accurate of their identifications. The murder took place in a well lit area, a gas station, with the three eyewitnesses a few feet away from the defendant. And in terms of any cross-examination about gang affiliations or drug convictions, I find their testimony to be credible and compelling."

On direct appeal, we specifically rejected defendant's argument regarding the unreliability of the eyewitnesses' identifications and upheld the trial court's findings with regard to the sufficiency of the eyewitnesses' testimony in support of the conviction.

Although we recognize defendant's case might have been stronger if an identification expert had been consulted and called to testify at defendant's trial, we note nothing before us suggests defense counsel's strategy in choosing to attack the reliability of the eyewitnesses' identification testimony and credibility through cross-examination and closing argument was

deficient under *Strickland*. Because we must judge counsel's performance within the context of the whole trial and without the benefit of hindsight, we find the circuit court did not err in dismissing defendant's post-conviction claims alleging ineffective assistance of counsel. See *King*, 316 Ill. App. 3d at 913.

II. Sentencing

Defendant contends he made a substantial showing that because he was a juvenile at the time of the offense, his sentence of natural life in prison violates the cruel and unusual punishment clause found in the Eighth Amendment of the U.S. constitution and the proportionate penalties clause of the Illinois constitution.

Our review begins with the presumption that a statute is constitutional. *People v. Miller*, 202 Ill. 2d 328, 335 (2002). "Because of this presumption, the party challenging the statute bears the burden of showing its invalidity." *Miller*, 202 Ill. 2d at 335.

Defendant was sentenced under section 5-8-1(a)(1)(c) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c) (West 1996)), which provides:

> "The court shall sentence defendant to a term of natural life imprisonment when the death

> penalty is not imposed if the defendant *** is a person who, at the time of the commission of the murder, had attained the age of 17 or more and is found guilty of murdering an individual under 12 years of age; or, irrespective of the defendant's age at the time of the commission of the offense, is found guilty of murdering more than one victim."

Our supreme court has repeatedly recognized the legislature has discretion to prescribe penalties for defined offenses. *Miller*, 202 Ill. 2d at 336; *People v. Taylor*, 102 Ill. 2d 201, 208 (1984). However, the legislature's power to impose sentences is not without limitation; the penalty must satisfy constitutional constrictions. *Miller*, 202 Ill. 2d at 336; *People v. Morris*, 136 Ill. 2d 157, 161 (1990).

Defendant cites *Miller* and the United States Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 130 S. Ct. 2011 (2010), in support his contention that his natural life sentence, imposed under section 5-8-1(a)(1)(c) of the Code, is unconstitutionally disproportionate as applied to him.

In *Roper*, the Supreme Court held the Eighth Amendment

prohibited the execution of a defendant who was a juvenile at the time the crime was committed. *Roper*, 543 U.S. at 560. In *Graham*, the Supreme Court held the Eighth Amendment also prohibits juvenile offenders from being sentenced to life in prison without parole for nonhomicide crimes. *Graham*, 130 S. Ct. at 2027. In support of its holding, the Supreme Court recognized "defendant's who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 130 S. Ct. at 2027. However, neither of the Supreme Court cases defendant cites address the specific question presented here; whether it is unconstitutional to sentence a juvenile offender to life in prison without the possibility of parole for homicide crimes.

In *Miller*, our supreme court held the penalty of natural life without parole mandated under section 5-8-1(a)(1)(c) of the Code was particularly harsh and unconstitutionally disproportionate as applied to the juvenile defendant in that specific case. *Miller*, 202 Ill. 2d at 341. The court noted the defendant was a 15-year-old with "one minute to contemplate his decision to participate in the incident and stood as a lookout during the shooting, but never handled the gun." Finding the defendant the "least culpable offender imaginable," the court

agreed a mandatory sentence of natural life in prison with no possibility of parole grossly distorted the factual realities of the case and did not accurately represent the defendant's personal culpability such that it shocked the moral sense of community. *Miller*, 202 Ill. 2d at 341. In reaching its decision, however, the court was careful to note:

> "[o]ur decision does not imply that a sentence of life imprisonment for a juvenile offender convicted under a theory of accountability is never appropriate. It is certainly possible to contemplate a situation where a juvenile offender actively participated in the planning of a crime

resulting in the death of two or more individuals, such that a sentence of natural life imprisonment without parole is appropriate." *Miller*, 202 Ill. 2d at 341.

In *People v. Smolley*, 375 Ill. App. 3d 167, 171 (2007), by contrast, the court noted *Miller* simply emphasized the difference between a juvenile who " 'actively particapte[s]' in a crime that leads to the death of two or more individuals and one, like Miller, who is culpable for acts 'completed by other persons.' " *Smolley*, 375 Ill. App. 3d at 171, quoting *Miller*, 202 Ill. 2d at 341. The court noted that unlike *Miller*, the defendant in

Smolley was the principle and sole actor in the crime, and, therefore, was only held accountable for his own actions in committing the crime. *Smolley*, 375 Ill. App. 3d at 171. Despite the defendant's urging, the court declined to expand *Miller* to situations where a juvenile defendant is the principal and only party criminally liable. *Smolley*, 375 Ill. App. 3d at 171-72.

Here, similar to *Smolley*, defendant was the principle actor in the murder of Smith and Porter. The three eyewitnesses to the crime specifically identified defendant as the shooter. Because defendant was not convicted "solely by accountability," we find *Miller* does not apply to the facts of this case. See *Miller*, 202 Ill. 2d at 343; *Smolley*, 375 Ill. App. 3d at 172. Accordingly, we find defendant has failed to make a substantial showing that section 5-8-1(a)(1)(c) of the Code is unconstitutional as applied to him. See *Smolley*, 375 Ill. App. 3d at 173.

CONCLUSION

We affirm the trial court's judgment.

Affirmed.