2016 IL App (1st) 151124-U

FOURTH DIVISION
November 2, 2017

No. 1-15-1124

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 21035
	)	
DERRELL DORSEY,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant leave to file a successive postconvicition petition challenging his sentence based on *Miller v. Alabama*. Defendant could not show prejudice from the failure to raise such an issue because he was not sentenced to a *de facto* life sentence.

¶ 2 Defendant, Derrell Dorsey, appeals the trial court's denial of leave to file a successive post-conviction petition based on alleged violations of the Eighth Amendment to the U.S. Constitution pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

¶ 3 Defendant, who was 14 years old at the time of the underlying offense, was convicted as an adult of the first-degree murder of Tyran Snow and the attempted first-degree murders of

Calvin Sims and Irene Williams. At trial, Williams testified that around 7 p.m. on March 11, 1996, she was standing in a carry-out restaurant in Chicago, when she saw defendant "kick the door in" and "start [] firing" a silver gun. Defendant fired two gunshots which struck and fatally wounded Snow. Defendant then fired two more gunshots, one hitting Sims, and the other striking Williams in the right upper thigh. Both before and after Williams was transported to the hospital, she told the police that defendant, whom she knew from school, was the shooter.

¶ 4 Sims also testified that he was at the restaurant when the shooting occurred, and that he was struck by a gunshot three inches above his hip. Sims was taken to the hospital and immediately went into surgery. The night that he was released from the hospital, detectives came to his house and showed him a class photo that included defendant and 16 other students. Sims identified defendant as the offender, and told them that he recognized him from when Sims used to pick up his cousin at defendant's school.

¶ 5 Defendant was convicted by a jury of first-degree murder and two counts of attempted first-degree murder. At the subsequent sentencing hearing, in aggravation, the State presented victim impact statements from the surviving victims, and from Bessie Snow, grandmother of the deceased Tyran Snow. The trial court also heard testimony from Adrian Bowman, who was in custody with defendant at the juvenile detention center, and who testified that defendant had struck him in the face with a chair during a card game. The State further advised the court that defendant was on probation at the time of the murder for a prior juvenile robbery offense.

¶ 6 In mitigation, defendant presented letters from various individuals on his behalf. Defendant also presented the testimony of Sheila Teague, defendant's aunt, who testified that she lived with defendant most of his life, that he was "always a good kid[,]" and that he "always

respected all adults." Seana Tegue, defendant's cousin, also testified that defendant was "a good boy" and that he "always had good grades in school."

¶ 7 At the conclusion of the sentencing hearing, the trial court stated:

> "I have taken into consideration the nature and character of this offense. I have taken into consideration history and character of the defendant.
>
> As you know I presided over this trial and I'm very familiar with the facts with regard to this matter. I've considered the pre-sentence investigation. All the evidence and arguments that were presented here today. In aggravation and mitigation. And I have reviewed and considered the statutory factors and aggravation in the statutory factors in mitigation."
>
> In reviewing the statutory factors in aggravation and mitigation, the court does note that the defendant's conduct in this matter caused and threatened serious harm to others. Obviously the charges to which the defendant has been convicted inherently recognize harm to certain individuals.
>
> However I do know that outside of Tyran Snow, Irene Williams and Calvin Simms [*sic*], the defendant's conduct threatened serious harm to other individuals that were in that restaurant, including the other individual who was named to be inside the waiting area and the individual[s] that were in working in the restaurant. Their safety was certainly put in jeopardy by this attack by the defendant. So I find that factor in aggravation certainly is applies [*sic*].
>
> I have also taken into consideration the fact that the defendant has a history of prior delinquency. He has had the benefit as a result of his wardship, of the juvenile probation authorities and apparently that was *** unsuccessful.

In mitigation, obviously I recognize the youth of [defendant]. In some respects, I would say that [defendant] might count himself to be a fortunate person. Because those of us that are intimately familiar with the facts of this incident, know that it was certainly just a fortuitous happening that [defendant] only killed one person. And injured two others. Because from the nature of this attack that he launched on that restaurant, that evening, it would be very possible that [defendant] would be sitting here charged with four murders. And facing a life sentence in prison.

So one might say that he is fortunate. That he's in a situation where he's not facing life in prison.

We all know from the facts of this case that defendant simply kicked open that door, walked in and started indiscriminately shooting. And everybody dove for cover and three people were hit, one person wasn't. All those people could be dead today. It certainly wasn't as a result of lack of trying of [defendant] that they are not.

It was a very small space that those people were running around in trying to dodge those bullets. So when I reviewed the facts of this case and I tried to come up come to a description as to what I thought would be the term that would characterize [defendant's] actions, I came up with indiscriminate ruthlessness.

Now it's clear from the pre-sentence investigation, also from the facts of this case, that [defendant] was a gang member. *** [T]he real inherent evil of gang crime is the fact that time and time again, we see that the result, the end result of gang crime is the fact that so often the people that get hurt are in addition

> to the targets, the innocent bystanders. *** And in this case, it's not clear from the evidence or at least it's not—we can't say with 100% certainty which of those four people inside the waiting area of the restaurant was the intended target.
>
> But the fact of the matter is, three people were shot. And that's what happens. Because when you have indiscriminate gang violence everybody in the area gets hit. So it's not just the death of or the wounding of an intended target who may or may not be a gang member, it's everybody else that's affected by gang crime. And that's particularly aggravating."

¶ 8 The trial court then sentenced defendant to consecutive terms of 40 years for the first-degree murder of Snow, 18 years for the attempted first-degree murder of Williams, and 18 years for the attempted first-degree murder of Sims.

¶ 9 On direct appeal, defendant contended that the trial court had improperly allowed gang-related testimony, and relied on evidence of his gang membership when imposing his sentence. He also contended that the trial court failed to consider his youth when imposing his sentence. This court affirmed defendant's convictions and sentences, finding that "[d]efense counsel mentioned defendant's age, and the trial court specifically affirmed that it was considering defendant's 'youth' as a mitigating factor." *People v. Dorsey*, No. 1–98–3979, 11 (2000) (unpublished order pursuant to Supreme Court Rule 23).

¶ 10 On June 21, 2001, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)), challenging the consecutive nature of his sentences based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The petition was denied, and defendant did not appeal.

¶ 11 On April 1, 2005, defendant filed a *pro se* post conviction petition based on alleged ineffective assistance of counsel for failing to investigate certain alibi witnesses. This court reversed the summary dismissal of defendant's petition and remanded for further proceedings, finding that, when considering the evidence in defendant's supporting affidavits as true, he had raised the gist of a constitutional claim of ineffective assistance. *People v. Dorsey*, No. 1–05–2480, 7-8 (2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 12 On April 20, 2007, defendant filed a second petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2000)), alleging that his conviction was void because it was based on a non-existent statute. The trial court denied defendant's petition, and this court affirmed. *People v. Dorsey*, No. 1–07–2307 (2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 13 Defendant filed a third petition for relief from judgment on October 22, 2012, alleging that his consecutive sentences were improperly imposed, rendering his sentence void. The trial court dismissed the petition, and defendant appealed. The State Appellate Defender filed a motion for leave to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The court allowed appellate counsel's motion, and affirmed the judgment of the trial court. *People v. Dorsey*, 2014 IL App (1st) 130875-U (2007).

¶ 14 On December 17, 2014, defendant filed a Petition for Leave to File a Successive Petition for Post Conviction Relief, and the petition itself, which are the subject of this appeal. Defendant raised two issues. The first, entitled "Cruel and Unusual Punishment 8th Amendment Violation[,]" "sought "relief pursuant to the new Supreme Court ruling in *Miller v. Alabama,"* 567 U.S. 460 (2012). Defendant asserted that "although his 76 year sentence is not technically a Natural Life sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger

Miller type protections." Defendant alleged that the trial court in his case "did not consider the special circumstances that often make lengthy sentences particularly inappropriate for youthful offender[]s." (emphasis in original). Defendant stated that he could establish cause and prejudice for the filing of a successive post conviction petition because *Miller*, 567 U.S. 460 (2012), was decided after he filed his initial post conviction petition, and, because he "would have attained a lesser sentence" if the trial court had considered the ideas espoused in *Miller*. Defendant's second issue concerned the "deni[al of] his constitutional right to a fair trial under the Fifth and Fourteenth Amendments" based on "the giving of an erroneous jury instruction on the factors to be considered in assessing identification testimony."

¶ 15 On February 20, 2015, the trial court entered an order on defendant's petition for leave to file a successive postconviction petition, finding both of defendant's claims to be frivolous. Regarding defendant's juvenile sentencing claim, the trial court stated, "Although petitioner may be able to show cause for his failure to raise his claim in an earlier petition, he is entirely unable to show prejudice had petitioner asserted this claim in the initial petition. *** Although petitioner was under the age of 18 when he committed first degree murder, he was not sentenced to mandatory life without the possibility of parole in violation of the Supreme Court's holding in *Miller*." Defendant appealed.

¶ 16 In this court, defendant claims that the trial court erred in denying his motion for leave to file a successive postconviction petition. As an initial matter, we note that defendant focuses his argument on the first issue contained in his successive postconviction petition, namely that his sentence violates the Eighth Amendment to the U.S. Constitution pursuant to *Miller v. Alabama,"* 567 U.S. 460 (2012). Defendant raises no argument regarding the second issue raised in his successive petition regarding an allegedly erroneous jury instruction, and, as such,

defendant has abandoned that issue and forfeited it for review. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 17 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1, *et seq*. (West 2014)) provides a tool by which any person imprisoned in the penitentiary can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2014); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999).

¶ 18 Only one postconviction proceeding is contemplated under the Act (*People v. Edwards*, 2012 IL 111711, ¶ 22) and a defendant seeking to file a successive postconviction petition must first obtain leave of court (*People v. Tidwell*, 236 Ill. 2d 150, 157 (2010)). The bar against successive postconviction proceedings should not be relaxed unless: (1) a defendant can establish "cause and prejudice" for the failure to raise the claim earlier; or (2) he can show actual innocence under the "fundamental miscarriage of justice" exception. *Edwards*, 2012 IL 111711, ¶¶ 22, 23; *People v. Smith*, 2014 IL 115946, ¶ 34. Defendant has alleged only the first basis in the instant appeal.

¶ 19 The cause and prejudice standard is higher than the normal first-stage "frivolous or patently without merit" standard applied to initial petitions. *Edwards*, 2012 IL 111711, ¶¶ 25–29; *Smith*, 2014 IL 115946, ¶ 34 ("the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122–2.1(a)(2) of the Act"). Under the cause-and-prejudice test, a defendant must establish both: (1) cause for his or her failure to raise the claim earlier; and (2) prejudice

stemming from his or her failure to do so. *Edwards,* 2012 IL 111711, ¶ 22 (citing *People v. Pitsonbarger,* 205 Ill. 2d 444, 459 (2002)). "A defendant shows cause 'by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings.' " *People v. Wrice,* 2012 IL 111860, ¶ 48 (quoting 725 ILCS 5/122–1(f) (West 2014)). In other words, to establish "cause" a defendant must articulate why he could not have discovered the claim earlier through the exercise of due diligence. *People v. Wideman,* 2016 IL App (1st) 123092, ¶ 72. A defendant shows prejudice by demonstrating that the claim so infected the trial that the resulting conviction or sentence violated due process. *Wrice,* 2012 IL 111860, ¶ 48.

¶ 20 Whether abuse of discretion or *de novo* review applies to decisions granting or denying leave to file successive postconviction petitions is currently unclear. See *Edwards,* 2012 IL 111711, ¶ 30 (pointing out that decisions granting or denying leave of court are generally reviewed for abuse of discretion, but that the requirement that a successive postconviction petition based on a claim of actual innocence must state a colorable claim, as a matter of law, suggests *de novo* review). Although our supreme court has not resolved this question, we need not address it here because defendant's claim fails under either standard. See *Edwards,* 2012 IL 111711, ¶ 30; *People v. Calhoun*, 2016 IL App (1st) 141021, ¶ 32.

¶ 21 In defendant's successive post conviction petition, he raised a claim based on the Supreme Court's decision in *Miller,* which held that mandatory life sentences for juveniles violate the Eighth Amendment's prohibition on cruel and unusual punishment, and that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller v. Alabama*, 567 U.S. 460, 489, 132 S. Ct. 2455, 2475 (2012). *Miller* has since been held to apply retroactively (see *Montgomery v. Louisiana,*

136 S.Ct. 718, 735-36 (2016); *People v. Davis*, 2014 IL 115595, ¶ 42), and not only to minors sentenced to mandatory life imprisonment, but also those having discretionary life sentences (*People v. Holman*, 2017 IL 120655, ¶ 40), and those whose sentences are so long that they "amount[] to the functional equivalent of life" (*People v. Reyes*, 2016 IL 119271, ¶¶ 9-10).

¶ 22 In this appeal, defendant contends that the trial court erred in denying him leave to file a post-conviction petition based on *Miller*. Defendant recognizes that he is eligible for day-for-day credit since he was sentenced before the truth-in-sentencing statute was enacted in 1998, and thus he is "scheduled to be released from prison on September 20, 2034, when he will be 53 years old." However, defendant contends that his sentence constitutes a *de facto* life sentence in violation of *Miller*.

¶ 23 Defendant alleges that he established cause, because he could not have raised his claim based on *Miller* in his initial *pro se* petition, when *Miller* was not decided until 2012. The State responds that defendant "cannot use *Miller* as a basis to satisfy 'cause' " because he will be "released at the age of 53." Defendant replies that the State's argument goes to defendant's ability to establish prejudice, not cause, for filing his successive petition. We agree with defendant. Because defendant is raising a challenge to his sentence based on *Miller*, which was not available at the time of his original petition, he may be excused from failing to raise that claim previously. See *People v. Davis*, 2014 IL 115595, ¶ 42 ("*Miller*'s new substantive rule constitutes 'cause' because it was not available earlier."); *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 39 ("Illinois procedural rules regarding forfeiture cannot be applied to juvenile defendants raising claims under *Miller*"); *People v. Warren*, 2016 IL App (1st) 090884–C, ¶ 48 (defendant was not barred from raising his challenge on appeal from the denial of leave to file a successive petition, where "*Miller* was not available for earlier postconviction proceedings");

People v. Sanders, 2016 IL App (1st) 121732–B, ¶ 19 (*Miller* "changed the law and gave postconviction petitioners cause for failing to raise the issue in proceedings that preceded" it.). However, whether defendant can establish that *Miller* applies to his situation, and accordingly that he suffered prejudice from his inability to raise the issue previously, is a different question, and relevant to the second prong of the cause and prejudice test.

¶ 24 We thus turn to the question of whether defendant established prejudice such that he may file a successive post-conviction petition raising a *Miller* issue. Defendant contends that he has established prejudice, because, under *Miller* and its progeny, the Eighth Amendment to the U.S. constitution prohibits mandatory life and *de facto* life sentences. Defendant further contends that the Eight Amendment prohibits sentencing schemes that subject juvenile offenders to "a 'state's 'most severe penalties' without consideration of the mitigating qualities of youth."

¶ 25 Although *Miller* and its progeny have prohibited mandatory life and *de facto* life sentences that are imposed on juveniles without consideration of the defendant's "youth and its attendant characteristics" (see *Montgomery*, 136 S. Ct. at 735), we are aware of no case that has categorically prohibited life sentences, or *de facto* life sentences for juvenile offenders. Indeed, our supreme court has stated that *Miller* does not prohibit a natural life sentence without the possibility of parole, but "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." *Davis*, 2014 IL 115595, ¶ 43.

¶ 26 As an initial matter, we note that when defendant was sentenced, he was subject to sentencing ranges with a minimum of 20 years and a maximum of 60 years for first-degree murder (730 ILCS 5/5-8-1(a)(1) (West 1996)), and a minimum of 6 years and a maximum of 30 years for attempted first-degree murder (720 ILCS 5/8-4(c)(1) (West 1996); 730 ILCS 5/5-8-

1(a)(3) (West 1996)). Defendant's sentences were required to run consecutively, based on the severe bodily injury that defendant inflicted on each of the attempted murder victims. 730 ILCS 5/5-8-4(a) (West 1996)). Defendant was thus subject to a mandatory minimum aggregate sentence of 32 years' imprisonment. As previously stated, defendant is eligible for day-for-day credit, and thus, the trial court had the discretion to sentence him to as little as 32 years, which would have made him eligible for release in only 16 years. This cannot be said to be a sentencing scheme subjecting defendant to a mandatory *de facto* life sentence.

¶ 27 Defendant, however, did not receive the minimum sentence. The trial court, in its discretion, sentenced him to a prison term exactly halfway between the minimum and maximum: 76 years. Defendant contends that his sentence is a *de facto* life sentence, and that it was imposed in violation of *Miller*'s requirement to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480, 132 S. Ct. at 2469.

¶ 28 Defendant initially appears to argue that his 76-year aggregate sentence should be considered a *de facto* life sentence *per se*, because sentences of a lesser number of years have been held to constitute *de facto* life sentences. Defendant compares his sentence to those at issue in out-of-state cases, in which courts in Iowa and Wyoming have found 35-year and 45-year sentences to amount to *de facto* life sentences (see *State v. Pearson*, 836 N.W.2d 88, 97 (Iowa 2013); *Bear Cloud v. State*, 334 P.3d 132, ¶ 37 (Wyo. 2014)). Defendant acknowledges that "because the underlying offense was committed in 1996 before the truth-sentencing statute was enacted in 1998, he might actually serve only 38 years of his aggregate 76-year sentence," thus making him eligible for release at the age of 53. Defendant, however, asks us to find that his

sentence is a *de facto* life sentence because "there is no guarantee that [he] will receive day-for-day credit."

¶ 29 The great weight of authority on this issue indicates that a court looks, not only to the total sentence imposed, but to the availability and amount of sentence credit applicable to a given sentence before determining whether it actually amounts to a *de facto* life sentence without the possibility of parole. See, e.g., *Reyes*, 2016 IL 119271, ¶ 10; *People v. Patterson*, 2014 IL 115102, ¶ 108; *Nieto*, 2016 IL App (1st) 121604, ¶ 13; *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66, *appeal allowed*, 65 N.E.3d 844 (2016); *People v. Harris*, 2016 IL App (1st) 141744, ¶ 54; *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 24; *People v. Morris*, 2017 IL App (1st) 141117 ¶ 30. This authority informs us that any sentencing credit that is available to the defendant is relevant to the analysis, and should be accounted for in making the decision as to whether a sentence constitutes a *de facto* life sentence. We join that authority, and decline to look to defendant's total 76-year sentence in a vacuum, without consideration of his scheduled release date or the fact that he will likely receive the day-for-day credit for which he is eligible.

¶ 30 The cases cited by defendant in support of his claim that his sentence is "functionally equivalent to life without parole,"—namely *Pearson*, 836 N.W.2d 88 (Iowa 2013) and *Bear Cloud*, 334 P.3d 132, ¶ 37 (Wyo. 2014)—are from out of state authorities, and therefore are not binding on this court. See *People v. Reese*, 2015 IL App (1st) 120654, ¶ 70, *appeal allowed*, 48 N.E.3d 1096 (2016). Nonetheless, we do not find them to be persuasive.

¶ 31 The juvenile defendant in *Pearson* was convicted of two counts of first-degree robbery and two counts of first-degree burglary, based on a "crime spree" that the defendant committed with her boyfriend, which culminated in the boyfriend pushing one victim into a doorframe and fracturing her shoulder during a robbery. The defendant was sentenced to fifty years in prison

with a seventy-percent mandatory minimum, making her ineligible for parole until she served thirty-five years. *Pearson*, 836 N.W.2d at 89 (Iowa 2013). Although the defendant in *Pearson*'s sentence was similar to defendant's here in that they are both eligible for release in their "early fifties" (see *Pearson*, 836 N.W.2d at 102 (Iowa 2013), (Mansfield, J., dissenting)), the convictions that support those respective sentences are very different. As stated, the defendant in *Pearson* was convicted of robbery and burglary; here, by contrast, defendant was convicted of first-degree murder and two counts of attempted first-degree murder. Even more importantly, however, the *Pearson* court was interpreting Article I, section 17 of the Iowa Constitution, and, as such, its analysis is of little value to this court. Moreover, *Pearson* was a highly contested 4–3 decision by the Iowa Supreme Court, and is an outlier in its analysis of *Miller*. As the *Pearson* dissent states, "[N]o other appellate court has adopted the majority's reading of [*Miller*]. The Iowa Supreme Court stands alone." *Pearson*, 836 N.W.2d at 103 (Mansfield, J., dissenting).

¶ 32 We also find *Bear Cloud* to be unsupportive of defendant's position. In *Bear Cloud*, the Supreme Court of Wyoming determined that a juvenile defendant's aggregate sentence of life with the possibility of parole after 45 years, constituted a *de facto* life sentence with no meaningful opportunity for release, when he would not be eligible for parole until he was 61 years old. *Bear Cloud*, 334 P.3d 132, ¶ 37 (Wyo. 2014). However, the defendant in *Bear Cloud* received a longer sentence—life with the possibility of parole at age 61—than defendant did here. Additionally, in *Sen v. State*, the Supreme Court of Wyoming rejected a similar challenge from Bear Cloud's codefendant, where the codefendant would be eligible for parole at 50 years old, finding that the sentence was "not a *de facto* life sentence and does not violate the Eighth Amendment." *Sen v. State*, 390 P.3d 769, 777 (Wyo. 2014). Defendant's challenge, based a

sentence which provides him the opportunity for release at age 53, is more similar to the sentence at issue in *Sen*, than the one in *Bear Cloud*.

¶ 33 Defendant next contends that, even if he receives day-for-day credit, his sentence amounts to a *de facto* life sentence, based on his projected release date at 53 years old. Defendant asks us to find his sentence to be a *de facto* life sentence, citing a number of statistics to contend that his life expectancy is 63.8 years or less, based on his birth-year, sex, and race. Defendant also contends that various factors contribute to accelerated aging for individuals who are incarcerated. Defendant asserts that these statistics show that "there is no guarantee that [he] will live long enough to be released from prison."

¶ 34 We note, however, that none of the evidence was presented at any point before the circuit court, and we believe that this court needs guidance from either our State's highest court, or the legislature as to what qualifies as a *de facto* life sentence, and what are appropriate considerations in making that determination, before we may consider such evidence. As another panel of this court has thoughtfully opined:

> "[i]f an Illinois court was going to hold that a *de facto* life sentence qualifies for consideration under Miller, then we would need a consistent and uniform policy on what constitutes a de facto life sentence. Is it simply a certain age upon release? If so, is it age 65 *** or 90? Should the age vary by ethnicity, race or gender? If we are going to consider more than age, what societal factors or health concerns should impact our assessment of a *de facto* life sentence. These are policy considerations that are better handled in a different forum." *People v. Jackson*, 2016 IL App (1st) 143025, ¶¶ 57.

¶ 35 Nevertheless, this court has found no Illinois case, nor has defendant pointed us to any Illinois case, which has concluded that a defendant, projected to be released at the age of 53 or younger, received a *de facto* life sentence. In fact, this court has rejected similar challenges, in circumstances where the defendants would be even older at the time of their scheduled release than defendant will be in this case. See *People v. Evans*, 2017 IL App (1st) 143562 (finding that a 90-year sentence imposed on a 17-year-old defendant, who was eligible for day for day credit and could be released at age 62, was not a *de facto* life sentence); *People v. Applewhite*, 2016 IL App (1st) 142330 (17-year-old defendant's 45-year sentence was not a *de facto* life sentence when he would be eligible for release at the age of 62); *Jackson*, 2016 IL App (1st) 143025 (rejecting the defendant's claim that his 50–year sentence was a *de facto* life sentence unconstitutional under *Miller* when defendant was 16 years old at the time of the offense).

¶ 36 Moreover, the instances that the Illinois courts have found *de facto* life sentences, all concern defendants who would be significantly older than this defendant at their respective release dates. See *People v. Reyes*, 2016 IL 119271, ¶¶ 10, 12 (where the juvenile defendant's sentence ensured that he would remain in prison "until at least the age of 105," the sentence was a "*de facto* life-without-parole sentence."); *People v. Buffer*, 2017 IL App (1st) 142931 (the defendant's 50–year sentence was a *de facto* life sentence in violation of *Miller* where he would be 66 years old on his projected parole date, and 69 years old on his projected discharge date); *People v. Morris*, 2017 IL App (1st) 141117 (a 16–year–old defendant's 100–year sentence was a *de facto* life sentence in violation of *Miller* when he would be eligible for release, at the earliest, at age 109); *People v. Ortiz*, 2016 IL App (1st) 133294 (a 15–year–old defendant's 60–year sentence was "effectively a life sentence without parole" because the defendant would "not be eligible for release until he is 75 years old[.]"); *People v. Nieto*, 2016 IL App (1st) 121604 ¶ 42

(finding juvenile defendant's sentence 78 year sentence to be a *de facto* life sentence, "[g]iven that defendant will not be released from prison until he is 94 years old[.]"); *People v. Sanders*, 2016 IL App (1st) 121732–B, ¶¶ 1–2 (reversing the denial of leave to file a successive petition under *Miller* where the 17–year–old juvenile defendant received a 100–year sentence); *People v. Harris*, 2016 IL App (1st) 141744, ¶ 54 (finding a 76-year sentence to be a *de facto* life sentence, when, "at best, [the defendant] would be released at age 89.")

¶ 37 In light of the foregoing authority, and without any additional guidance from our legislature or higher courts, this court cannot find defendant's sentence, under which he will be eligible for release at 53-years-old, to constitute a *de facto* life sentence. Therefore, the requirements of *Miller* are inapplicable to this matter, and the trial court properly denied defendant leave of court to file a successive postconviction petition because "it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law." *People v. Smith*, 2014 IL 115946, ¶ 35; see also *Evans*, 2017 IL App (1st) 143562, ¶ 18 ("Since [the defendant] is not serving a *de facto* life sentence, the new protections elucidated by *Miller* and its progeny do not apply to him. So the trial court correctly ruled that [the defendant] had not shown 'prejudice' to justify filing a successive postconviction petition.").

¶ 38 Defendant next contends that, even if his sentence does not constitute a *de facto* life sentence, his lengthy sentence "still undermines the Supreme Court's reasoning in *Miller*" and is "unconstitutionally disproportionate under *Miller* and its progeny." We disagree.

¶ 39 As the above authorities make clear, the rationale of *Miller* applies "only in the context of the most severe of all criminal penalties," namely capital punishment, natural life imprisonment, or *de facto* life imprisonment. *Patterson*, 2014 IL 115102, ¶ 110; *People v. Thomas*, 2017 IL

App (1st) 142557, ¶ 26 (noting that our supreme court has held that the reasoning of *Miller*, *Graham* and *Roper* apply only in the context of the most severe of all criminal penalties); *Reyes*, 2016 IL 119271, ¶ 9. In the present case by contrast, the defendant did not receive the "most severe of all criminal penalties." *Patterson*, 2014 IL 115102, ¶ 110. He did not receive natural life imprisonment without parole, and, as we have previously concluded, he did not receive a *de facto* life sentence. As such, the rationale of *Miller* does not extend to his sentence.

¶ 40 Finally, defendant contends that his sentence is also unconstitutional under *Miller*, because "he was subject to a sentencing scheme that required the imposition of consecutive sentences, and thus a mandatory minimum adult sentence of 32 years." Defendant cites the Iowa Supreme Court in *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014), which held that "mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause." Defendant acknowledges that other courts have "adopt[ed] a contrary viewpoint[,]" but contends that, "[b]ecause [his] sentence is, at minimum, a long term-of-years sentence based on a mandatory minimum sentencing scheme designed for adults, the principles of *Miller* apply here."

¶ 41 Similar constitutional challenges to mandatory minimum sentencing schemes have been rejected by Illinois courts, (see *Applewhite*, 2016 IL App (1st) 142330, ¶ 23; *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 58 ("The Supreme Court did not hold in *Roper, Graham,* or *Miller* the eighth amendment prohibits a juvenile defendant from being subject to the same mandatory minimum sentence as an adult, unless the mandatory minimum sentence was death or life in prison without the possibility of parole")), and we are unpersuaded by defendant's reliance on out of state authority (see *Lyle*, 854 N.W.2d at 400 (Iowa 2014)). As stated previously, the decisions of foreign courts are not binding on Illinois courts (see *Reese*,

2015 IL App (1st) 120654, ¶ 70, *appeal allowed*, 48 N.E.3d 1096 (2016)), especially where, like in *Lyle*, the decision was based on an interpretation of the foreign court's own state's constitution. As another panel of this court has noted, the Iowa Supreme Court has interpreted *Miller* more broadly than our courts (*People v. Wilson*, 2016 IL App (1st) 141500, ¶ 44), and we decline to follow it here.

¶ 42 Based on the foregoing, we find no error in the summary dismissal of defendant's postconviction petition. Accordingly, the judgment of the circuit court is affirmed.

¶ 43 Affirmed.