2018 IL App (1st) 160172-U

FOURTH DIVISION
November 8, 2018

No. 1-16-0172

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 32348
	)	
SAM WILLIAMS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Reyes and Burke 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* because (1) defendant could not show prejudice from the failure to raise such an issue because he was not sentenced to a *de facto* life sentence, and (2) defendant forfeited his challenge of the Illinois proportionate penalties clause by failing to raise the claim in his successive postconviction petition.

¶ 2 Defendant Sam Williams appeals the trial court's denial of leave to file a successive postconviction petition arguing that he has met the cause and prejudice test to file a successive postconviction petition because his sentence of 70 years violates the eighth amendment of the United States Constitution pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and the Illinois

proportionate penalties clause. Defendant also asserts that if this court remands for a new sentencing hearing, then the new juvenile sentencing law should apply. See 730 ILCS 5/5-4.5-105 (West 2016).

¶ 3 Defendant, who was 16 years old at the time of the commission of the offenses, was convicted as an adult following a jury trial of the first degree murder of Albert Mullen and the attempted murders of Tyree Collins and Aaron Suttle. Since the facts leading to defendant's conviction are not relevant to the sentencing issues raised on appeal, we limit our discussion to the facts as necessary to our analysis. A more detailed discussion of the evidence presented at trial can be found in his direct appeal. See *People v. Williams*, No. 1-98-4182 (May 29, 2001) (unpublished order under Supreme Court Rule 23).

¶ 4 At approximately 4:10 p.m. on October 21, 1996, Mullen, Collins, and Suttle were standing on the corner of Ohio Street and Christiana Avenue in Chicago. The three men were members of the Gangster Disciples gang and were on the corner with several other members of the gang. Collins had his back to the street and was talking to Mullen when he observed a beige four-door car driving on Christiana. The car slowed and Collins saw two guns "hanging out" of the passenger side. When the car was within three to four feet of Collins, Collins observed defendant in the back seat with a gun pointed at the individuals on the street. He had seen defendant in the neighborhood. The passenger side occupants fired the guns. Collins was struck in his upper arm and stomach. He heard a total of 15 or 20 shots. Collins, Suttle, and Mullen were driven to the hospital in a truck by a fellow Gangster Disciple. At the hospital, Collins learned that Mullen had died as a result of his injuries sustained in the shooting.

¶ 5 When Collins first spoke to the police, he did not provide his correct location at the time of the shooting. However, later he admitted the actual location. Collins subsequently viewed a

photo array and identified defendant, stating that he was 85 to 90% sure that defendant was the person he had seen in the backseat of the car. Later, Collins viewed a lineup and identified defendant, again stating he was 85 to 90% sure defendant was one of the shooters.

¶ 6 Suttle testified substantially similar to Collins regarding the shooting, but did not get a good look at the individuals in the car. He was shot in the hand and laid down on the ground. Suttle was unable to identify defendant in either a photo array or a lineup.

¶ 7 Defendant was arrested in November 1996. After receiving his *Miranda* rights, defendant initially denied involvement and said he was home with his mother and girlfriend. When defendant was informed that he had been identified in a lineup, defendant then stated that he wanted to tell the truth and gave an account of the shooting. He admitted to shooting a .380 automatic firearm from the back seat of a car towards a group of Gangster Disciples. The detective contacted an assistant state's attorney (ASA). The ASA and a youth officer arrived to interview defendant. Defendant agreed to give a statement taken by a court reporter.

¶ 8 In his statement, defendant admitted that he had been associated with the Traveling Vice Lords for approximately a year, but was not yet a member of the gang. Defendant discussed the ongoing feud between the Traveling Vice Lords and the Gangster Disciples. He admitted that he fired a gun twice while another individual fired 17 times.

¶ 9 Defendant presented the testimony of his sister and her boyfriend that defendant was home with them and defendant's girlfriend and mother at the time of the shooting.

¶ 10 The jury convicted defendant of the first degree murder of Mullen and attempted murders of Collins and Suttle. At sentencing, the trial court heard evidence in aggravation and mitigation. The court then imposed a term of 45 years for the first degree murder conviction and 12 years

and six months' imprisonment for each of the attempted murder convictions, to run consecutively. The total sentence was 70 years.

¶ 11 On direct appeal, defendant argued that: (1) his statements to the police were not voluntary and should have been suppressed; (2) the prosecutor made improper remarks during closing argument that violated his due process rights; (3) the trial court erred in admitting autopsy photographs of Mullen into evidence and in allowing those photographs to be shown to the jury; and (4) the State failed to prove him guilty beyond a reasonable doubt where the identification was not credible and was insufficient to support a conviction. This court affirmed defendant's conviction and sentence. See *Williams*, No. 1-98-4182 (May 29, 2001) (unpublished order under Supreme Court Rule 23).

¶ 12 In August 2001, defendant filed his initial *pro se* postconviction petition in the trial court. In his petition, defendant contended that his transfer to adult court was void because the statute governing his transfer was found unconstitutional and thus, he was entitled to a new transfer hearing. The trial court summarily dismissed defendant's petition, finding that defendant was never transferred from juvenile to adult court, but rather he was originally charged as an adult as statutorily required. On appeal, this court affirmed the trial court's dismissal of defendant's postconviction petition. *People v. Williams*, No. 1-01-3873 (December 31, 2002) (unpublished order under Supreme Court Rule 23).

¶ 13 In April 2015, defendant filed a *pro se* motion seeking leave to file his successive postconviction petition in the trial court. In his successive petition, defendant again argued that his transfer from juvenile to adult court was void *ab initio*. In November 2015, the trial court denied defendant leave to file his successive postconviction petition because the claim was barred by *res judicata*.

¶ 14 This appeal followed.

¶ 15 On appeal, defendant has abandoned the claim raised in his successive postconviction petition and raises two new claims before this court. Specifically, defendant argues that he has satisfied the cause and prejudice test for filing his successive postconviction petition because his sentence of 70 years violates the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution.

¶ 16 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).

¶ 17 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.

¶ 18 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.

¶ 19 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.

¶ 20 Here, defendant raises a claim for the first time on appeal 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 (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 for a life sentence to be imposed for a juvenile offender, the court must consider his or her "youth and attendant characteristics" (*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).

¶ 21 Generally, Illinois courts have held that a claim not raised in the postconviction petition cannot be raised for the first time on appeal. See *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006); *People v. Jones*, 213 Ill. 2d 498, 505 (2004). However, the Illinois Supreme Court recognized "a very narrow exception to that rule for an as-applied *Miller* claim for which the record is sufficiently developed for appellate review." *Holman*, 2017 IL 120655, ¶ 32. Thus, we may reach defendant's as-applied eighth amendment challenge under *Miller*.

¶ 22 We first consider whether defendant has satisfied the cause portion of the test. Defendant alleges that he established cause because he could not have raised his claim based on *Miller* in his initial petition, when *Miller* was not decided until 2012. The State responds that *Miller* is "qualitatively distinct" from defendant's challenge and cannot provide cause for his petition because he is projected to be released from prison at age 51 and therefore is not serving a *de*

facto life sentence. 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

¶ 23 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.). Moreover, the Illinois Supreme Court recently has extended the holding in *Miller* to *de facto* natural life sentences imposed on juvenile defendants. See *Reyes*, 2016 IL 119271; *Holman*, 2017 IL 120655. In *Reyes*, the supreme court relied on *Miller* to conclude that consecutive mandatory minimum sentences with a mandatory firearm enhancement, amounting to an aggregate sentence of 97 years' imprisonment, violated the eighth amendment when applied to juveniles. *Reyes*, 2016 IL 119271, ¶ 9. As the *Reyes* court reasoned:

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

> prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation." *Id.*

¶ 24 In *Holman*, the court applied *Miller*'s reasoning to conclude that a court could not constitutionally exercise its discretion to impose a life sentence without parole for a juvenile unless it took into consideration the defendant's "youth and attendant characteristics." *Holman*, 2017 IL 120655, ¶ 46. Accordingly, we conclude that defendant has established cause for failing to raise his *Miller* claim earlier.

¶ 25 Nevertheless, 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.

¶ 26 We next turn to the question of whether defendant established prejudice such that he may file a successive postconviction petition raising a *Miller* issue. Defendant contends that he has established prejudice, because, under *Miller* and its progeny, the eighth amendment to the United States constitution prohibits mandatory life and *de facto* life sentences.

¶ 27 Defendant acknowledges 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 in 2031, when he will be 51 years old. However, defendant, quoting *People v. Buffer*, 2017 IL App (1st) 142931, ¶ 62, asserts that "a 35-year aggregate sentence will deprive him of 'a meaningful opportunity for release.' " Defendant maintains that his sentence constitutes a *de facto* life sentence in violation of *Miller* because the trial court did not meaningfully consider his mitigating qualities of his youth.

¶ 28 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.

¶ 29 We point out 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 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)). 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.

¶ 30 Defendant did not receive the minimum sentence. The trial court, in its discretion, sentenced him to a prison term near the median between the minimum and maximum: 70 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. Defendant also asserts that the "mere availability of good-conduct credit does not alleviate the severity of the sentence for purposes" of the eighth amendment.

¶ 31 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; *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 70-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.

¶ 32 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, based on his birth-year, sex, and race, but this statistic does not account for the impact a lengthy prison term has on life expectancy. Defendant contends that various factors contribute to accelerated aging for individuals who are incarcerated. This court in *People v. Evans*, 2017 IL App (1st) 143562, ¶ 15, observed, "[p]rison life is undoubtedly harsh. But [defendant] invites us into the weeds of actuarial tables, asking us to make a legal determination of his likely lifespan. We are in a poor position to make this prediction and decline to do so." We similarly decline to speculate about defendant's potential lifespan, though we again point out that he would be 51 years old at the time of his projected release from prison, significantly less than the average life expectancy cited by defendant.

¶ 33 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.

¶ 34 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 51 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. Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 7 (50-year sentence was not *de facto* life when the defendant was eligible for release at 65); *People v. Perez*, 2018 IL App (1st) 153629, ¶ 38 (53-year sentence for 17-year-old defendant, eligible for release at age 70, was not a *de facto* life sentence); *Evans*, 2017 IL App (1st) 143562, ¶¶ 15-16 (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. Hoy*, 2017 IL App (1st) 142596, ¶ 46 (52-year sentence for a 16-year-old defendant with release at age 68 was not a *de facto* life sentence); *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 16 (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, ¶ 58 (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); *Gipson*, 2015 IL App (1st) 122451, ¶¶ 66-67 (finding a defendant eligible for release at age 60 did not receive a *de facto* life sentence).

¶ 35 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, *appeal allowed*, No. 122327 (Nov. 22, 2017) (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.")

¶ 36 Defendant relies on *Buffer* to support his argument, but as cited above, we find *Buffer* to be distinguishable from the instant case. The defendant in *Buffer* would be 66 when released from prison, 15 years older than defendant will be in this case. Based on that significant different circumstance, we decline to adopt the reasoning of the court in *Buffer*. We also note that the decision in *Buffer* is currently pending before the Illinois Supreme Court. See *Buffer*, No. 122327 (Nov. 22, 2017).

¶ 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 51 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 Next, defendant asserts that his sentence also violates that proportionate penalties clause of the Illinois Constitution. The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I,

§ 11. "While courts of review are generally reluctant to override the judgment of the General Assembly with respect to criminal penalties [citation], it is also true that when defining crimes and their penalties, the legislature must consider the constitutional goals of restoring an offender to useful citizenship and of providing a penalty according to the seriousness of the offense [citation]." (Internal quotation marks omitted.) *People v. Leon Miller*, 202 Ill. 2d 328, 338 (2002). "With regard to the statute at issue, we have recognized that the legislature considered the possible rehabilitation of an offender who commits multiple murder[s], and the seriousness of that offense, in determining that a mandatory minimum sentence of natural life imprisonment is appropriate for the offense of multiple murders." *Id.*

¶ 39 Defendant did not raise this claim in his *pro se* successive postconviction petition and the State responds that the argument had been forfeited. In his reply brief, defendant maintains that he could not have raised this claim in his initial postconviction petition because the Illinois Supreme Court decision in *Leon Miller* had not yet been decided. He also contends that recent case law and studies regarding brain development in juveniles had not been released at the time his successive petition was filed and, thus, he could not have raised the claim in his petition. We agree with the State. As this court recently held,

> "However, his successive petition did not raise such a claim, which, contrary to his reply-brief contention, cannot be raised at any time. *People v. Thompson*, 2015 IL 118151, ¶ 32 (facial constitutional challenges to statutes cannot be forfeited, but as-applied challenges are forfeited by not raising them in the circuit court); *Holman*, 2017 IL 120655, ¶ 32 ('*Davis* creates a very narrow exception to [the *Thompson*] rule for an as-applied *Miller*

> claim for which the record is sufficiently developed for appellate review.')." *People v. Johnson*, 2018 IL App (1st) 153266, ¶ 27.

¶ 40 In his reply brief, defendant offers no argument in response to the State's argument, citing *Johnson*, that defendant's proportionate penalties argument does not fall within the exception in *Holman*. We agree with *Johnson* and find defendant's proportionate penalties claim does not fit within the narrow exception allowed by the supreme court in *Holman* as the court explicitly limited the exception to as-applied constitutional challenges under *Miller*, which defendant's claim is not. Accordingly, defendant could not raise it for the first time on appeal and we find the claim has been forfeited.

¶ 41 Since we are not remanding defendant's case for a new sentencing hearing, we need not consider whether the new juvenile sentencing laws are applicable.

¶ 42 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 43 Affirmed.