2020 IL App (1st) 181568-U

SECOND DIVISION
November 24, 2020

No. 1-18-1568

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 02-CR-16189
	)	
DAMIEN BRABOY,	)	The Honorable
	)	Mary Margaret Brosnahan,
Petitioner-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justice Cobbs concurred in the judgment.
Justice Pucinski dissented.

ORDER

¶ 1 *Held:* Trial court's denial of leave to petitioner to file successive post-conviction petition alleging his discretionary 70-year aggregate sentence was unconstitutional under the eighth amendment and proportionate penalties clause of Illinois constitution, based on his age and intellectual disability at the time of offenses, is affirmed.

¶ 2 Petitioner Damien Braboy was convicted in a jury trial of first degree murder and home invasion, arising out of an incident that occurred on May 12, 2002. He is serving a sentence of 40 years imprisonment for the murder conviction and 30 years for the home invasion conviction, running consecutively, for an aggregate sentence of 70 years. In 2017, he sought leave from the

circuit court to file a successive petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). He contended that, in light of the fact that he was only 18 years and 2 months old at the time of the offense and had an extensive history of mental illness and intellectual disabilities, the 70-year sentence imposed on him violated the Eighth Amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). The circuit court found that the petitioner had failed to establish the cause and prejudice necessary to justify the filing of a successive petition for postconviction relief, and therefore it denied petitioner leave to do so. Petitioner now appeals that order of the trial court. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Prior to petitioner's trial, a hearing was held on his motion to suppress the statement petitioner made to police. In that hearing, petitioner presented the testimony of Dr. Donna Gutzmann, a psychiatrist who had evaluated him, that petitioner's intellectual capacity was "significantly below average" and he had a full-scale IQ of only 66. She testified also that he had "chronic psychiatric illness," with diagnoses of major depressive disorder and impulse control disorder. He had required multiple hospitalizations for mental health treatment. She expressed the opinion that because of this, petitioner had not understood his *Miranda* warnings or the consequences of relinquishing his rights. The State presented the testimony of Dr. Susan Messina, a psychologist who expressed the opinion that petitioner did comprehend his *Miranda* warnings at the time of his arrest. At the conclusion of the evidence, the trial court stated that it found Dr. Gutzmann's testimony to be unbelievable, and it denied the motion to suppress.

¶ 5 Petitioner was then tried in a simultaneous but separate jury trial with co-defendant Hananiah Dukes. The evidence at trial was that as of May 12, 2002, the victim, Leon Brewer, lived with his

wife Dorita and their two sons, 10-year-old Robert and 9-year-old Ulyses, in several rooms of a house on South Artesian Avenue in Chicago. They rented the rooms from Francisco Camacho, who also lived in the house. That evening, Leon and Dorita had gone to the store. Camacho and the two boys were at home in their respective bedrooms at about 9:00 p.m., when three men wearing masks and carrying guns entered the house from the basement. One of the men told the two boys to get on the floor.

¶ 6 The men then went into Camacho's bedroom, pushed him onto the floor, and held him face-down at gunpoint. One of the men demanded that Camacho give them $10,000 and the marijuana that he kept in the house. Camacho recognized that man's voice as being that of petitioner, who was the brother of Camacho's girlfriend. Camacho explained that earlier that day, his girlfriend had asked him to help petitioner by selling him some marijuana at a discounted price, which Camacho had done on three prior occasions that week. That day, however, Camacho had refused to sell marijuana to petitioner at a discount because he could not afford to do so. He testified that petitioner had left angry about the fact that Camacho would not give him another deal.

¶ 7 As Camacho was laying face-down, he heard the men searching his bedroom and told them that the drugs were in the attic. He denied having money in the house. The men blindfolded Camacho, tied his hands with tape, and took him and the two boys to the attic. In the attic, the men found the marijuana, but they continued demanding that Camacho give them $10,000 cash. Camacho said to them that he would have to go to the bank. He testified that petitioner then said, " 'Let's pop him right now,' " but one of the other men stated that they should hold him until the following day so they could take him to the bank.

¶ 8 Dorita testified that when she and Leon returned home at about 9:30 p.m., they could see that the house had been ransacked. Leon told Dorita to stay by the door while he went into the house.

Dorita then heard people coming from the attic and saw Leon running toward her while being chased by an armed man wearing a mask. Leon ran outside the house, at which time the man shot him in the back. The man then raised his gun to her head, but one of the other men called that they should get out of the house. The men then fled out the back door. Leon died from the gunshot wound later that night.

¶ 9 Camacho testified that he jumped out of the attic window and ran into the alley. From there, he observed three men emerge from the back of his house carrying the black bag that contained his marijuana. The men ran to the house where petitioner lived with his grandmother.

¶ 10 Petitioner was arrested later that night, and the next day, after receiving his *Miranda* rights, he gave a statement to police implicating himself in the offense. Assistant State's Attorney Denise Ambroziak was contacted, and petitioner agreed to speak with her and memorialize his statement in a videotaped recording. The statement was published at trial. In it, petitioner stated that on the afternoon of the day at issue, Dukes and Larry Williams, whom petitioner had known from the neighborhood since he was young, had told him that they were going to rob Camacho that night of marijuana and $10,000. At about 8:00 p.m., the men met and, while carrying guns and wearing face-coverings, they entered Camacho's house through an unlocked basement door. They waited about 30 minutes until they heard the boys' parents leave, at which point they went upstairs. Petitioner stated that he told the two boys to get under the bed so they would not get hurt. He then went into Camacho's bedroom, where he saw Williams holding a gun to Camacho's head and Dukes searching the room. Camacho said to Williams that he had a quarter pound of marijuana and $1,000 in the attic. Williams led Camacho at gunpoint as all of them went to the attic, where Camacho directed them to a duffle bag containing a quarter pound of marijuana and some money. The men then heard the boys' parents return home and heard a woman scream. Williams, Dukes,

and petitioner left Camacho in the attic and ran down the stairs. As they got to the front door, petitioner heard the woman crying and screaming for her husband to get help. The husband was trying to get out the front door when Williams pointed his gun at the man and told him not to open it. The man continued going out the front door, and Williams shot him in the back. Petitioner and Dukes then ran back downstairs and out the basement door. Petitioner then ran back to his house until his sister came home and told him that Camacho had been robbed. Petitioner walked back to Camacho's house with his sister, where he was arrested.

¶ 11 The defense rested without presenting any evidence. The jury found defendant guilty of first degree murder and three counts of home invasion. It also found in a special interrogatory that two of the counts of home invasion were committed against victims under the age of 12.

¶ 12 On the date set for sentencing, petitioner's attorney reported that petitioner had attempted suicide and requested the court order an examination of petitioner's fitness for sentencing. At the ensuing fitness hearing, Dr. Gutzmann expressed an opinion that petitioner was fit for sentencing even if he was not on medication. She again explained that petitioner had symptoms of a chronic, recurring psychiatric illness that benefited from psychotropic medication, but she had evaluated him at times when he was not on this medication and had not noticed any significant difference in his mental state whether he was on his medications or not. She also testified that she believed he had malingered in her past evaluations of him. At the conclusion of the hearing, the trial court found defendant was fit for sentencing with or without medication.

¶ 13 The matter proceeded immediately to sentencing. The State called Chicago Police Detective Kevin Eberle, who testified that on April 20, 1996, he investigated an incident in which a 14-year-old victim reported that she had been forced to perform sex acts upon petitioner, who was then 12 years old, after he had threatened that the pit bull dog with him would attack her if she did not

comply. The State presented evidence that petitioner had pled guilty to aggravated criminal sexual assault and been adjudicated delinquent. He received probation which was terminated unsatisfactorily. The State also presented evidence that petitioner had been adjudicated delinquent in 1998 for the possession of a controlled substance, and he was on bond on drug charges from 2002 at the time of the offense at issue.

¶ 14 In aggravation, the prosecutor argued to the trial court that, in the case against co-defendant Dukes, evidence had been presented that Dukes had told the police that petitioner said to Dukes that he " 'didn't mean to shoot him,' " and this implied that petitioner had been the shooter in this case. The prosecutor argued this contradicted petitioner's statement that Williams had been the shooter, and the court should find Dukes' statement believable. The prosecutor argued that petitioner could be given a sentence of 20 to 60 years on the first degree murder conviction, that petitioner was eligible for an extended-term sentence of up to 60 years on the home invasion conviction because the offense had been committed against children under the age of 12, and that the sentences should run consecutively. The prosecutor argued the case justified "a very-high sentence" based on the factors in aggravation and absence of factors in mitigation, including the fact that the victim in this case had been killed.

¶ 15 In mitigation, petitioner's attorney argued that petitioner was then 21 years of age and never had parental guidance or supervision in his life. Petitioner's attorney further argued:

> "Judge, we know that Damien has a history of psychiatric conditions. You know, whether he's malingering or he's trying to embellish, there is a history of psychiatric care in his background. And we do know that during the course of this proceeding, he has been prescribed antidepressants as well as antipsychotic medication, and that's because he does have symptoms and he does have those conditions.

> Judge, throughout his education, he has been diagnosed as having learning disabilities as well as behavioral disabilities. He was sent to a Walusin *** Academy, in Wisconsin, because of the behavioral and psychiatric problems he was having while attending schools in the Chicago Public School system. *** And he attended that from sixth to eighth grade.
>
> He only made it to the ninth grade at Ada McKinley High School. He was a special needs kid there, where he dropped out.
>
> Again, Judge, he was raised by his maternal grandmother. He also received Social Security income because of his psychiatric condition and because his parents were not in the home *** throughout his life while he was living and being raised by his grandmother."

Petitioner's attorney further argued that petitioner had "digressed since he has been convicted in this case," and imprisonment would endanger his medical condition. The trial court offered petitioner the opportunity to make a statement in allocution, but he declined to do so.

¶ 16 The trial court stated that it had considered all of the statutory factors in aggravation and mitigation, all of the trial testimony, and the arguments of the attorneys. The court found that, pursuant to statute, the sentence for home invasion must run consecutive to the sentence for first degree murder. See 730 ILCS 5/5-8-4(a)(i) (West 2006). For each of the three counts of home invasion, the court sentenced defendant to 30 years to run concurrent with one another. For the offense of first degree murder, the court sentenced defendant to a term of 40 years.

¶ 17 On direct appeal to this court, petitioner argued for reversal on the grounds that: (1) he was denied the effective assistance of trial counsel where counsel failed to request separate verdict forms for the various theories of first degree murder under which he was charged; (2) the trial court erred in addressing the venire; and (3) the trial court erred where it entered three convictions for a single act of home invasion. *People v. Braboy*, 393 Ill. App. 3d 100, 101 (2009). This court agreed

on the third point and held that under the one-act, one-crime rule, two of petitioner's home invasion convictions must be vacated. *Id.* at 113. This court rejected petitioner's remaining arguments and affirmed the first degree murder conviction and the remaining home invasion conviction. *Id.* Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied. *People v. Braboy*, 234 Ill. 2d 528 (2009).

¶ 18 In 2010, petitioner filed a *pro se* postconviction petition. In it, he raised multiple claims that he had been denied his constitutional right to effective assistance of both trial counsel and appellate counsel. The trial court summarily dismissed the petition, and this court affirmed that dismissal in a summary order.

¶ 19 In 2013, petitioner filed his first motion for leave to file a successive postconviction petition. The trial court denied this motion, and petitioner did not appeal. Neither the motion nor the trial court's order denying it are included in the record on appeal in this case.

¶ 20 In 2017, petitioner filed his second motion for leave to file a successive postconviction petition, which is the subject of the instant appeal. In it, he asserted that in 2016 he acquired new evidence of mental health records from his childhood, which included a variety of psychological and learning evaluations from 1990 through 1994 indicating that he "was functioning at a mildly retarded range of intelligence." His first claim was that, if these records had been available for review by Dr. Gutzmann or Dr. Messina, the outcome of his suppression hearing would have been different. His second claim was that the 70-year sentence imposed on him violated the prohibition on cruel and unusual punishment under the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) as well as the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). With respect to his eighth amendment claim, he contended that his newly-available evidence showing his extensive history of mental illness would have precluded

the trial court from imposing a 70 year sentence. He cited *People v. Brown*, 2015 IL App (1st) 130048, ¶ 46, for its recognition that neuroscience research suggested that the human brain's ability to govern risk and reward is not fully developed until the age of 25, and research had shown that most criminals, including violent ones, mature out of lawbreaking before reaching middle age. He also cited the statement in *Brown* that a "lengthy sentence does not take into account defendant' youth or the constitutional objective of restoring him to useful citizenship." See *id.* He cited other cases for this principle, including the seminal case of *Miller v. Alabama*, 567 U.S. 460 (2012). He made similar arguments with respect to the proportionate penalties clause, arguing that his 70-year sentence was a *de facto* life sentence that, being imposed on him for offenses he committed when he was only 18 years and 2 months old, met the standard of being " 'so wholly disproportionate to the offense that it shocks the moral sense of the community.' " See *People v. Klepper*, 234 Ill. 2d 337, 348 (2009). Finally, his third claim was that he was deprived of his constitutional right to effective assistance of counsel based on his trial counsel's failure to adequately investigate his social history.

¶ 21 On February 16, 2018, the trial court entered an order denying petitioner's motion for leave to file his successive postconviction petition. With respect to the second claim, which is the only claim that petitioner appeals, the trial court reasoned that the principles that petitioner was relying upon applied only in cases involving juvenile offenders, and there was no basis for the court to extend these principles to petitioner where he was 18 years old at the time he committed his offenses. This court allowed petitioner's late notice of appeal, and this appeal now follows.

¶ 22 II. ANALYSIS

¶ 23 On appeal, petitioner contends that he has shown the cause and prejudice necessary to be granted leave to file a successive postconviction petition. He contends that the law and community

standards pertaining to sentencing for "emerging adults" and intellectually-disabled individuals have changed since the time of his sentencing in 2006, and the court that imposed his sentence did not adequately consider his young age and intellectual disability in mitigation or find that he was irreparably corrupt or incapable of rehabilitation. Because of the trial court's failure to do so, he contends that the 70-year aggregate sentence imposed on him for offenses he committed when he was 18 years old and intellectually disabled violates the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11).

¶ 24 Through the Post-Conviction Hearing Act, an individual under criminal sentence may challenge his conviction or sentence by showing that, in the proceedings that resulted in that conviction there was a substantial denial of his federal or state constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2016). A postconviction proceeding is not a substitute for appeal, but rather it offers a mechanism for a person under sentence to assert a collateral attack on a final judgment. *People v. Robinson*, 2020 IL 123849, ¶ 42. Its purpose is to permit inquiry into constitutional issues involved in the original trial or sentencing hearing that have not and could not have been adjudicated previously on direct appeal. *People v. Young*, 2018 IL 122598, ¶ 16.

¶ 25 A petitioner is limited to one postconviction petition unless the petitioner obtains leave of court to file a successive petition. 725 ILCS 5/122-1(f) (West 2016). Leave of court to file a successive petition may be granted only if a petitioner demonstrates cause for the failure to bring the claim in the initial postconviction proceeding and prejudice resulting from that failure. *Id.* A petitioner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial postconviction proceedings. *Id.* § 122-1(f)(1). A petitioner shows prejudice by demonstrating that the claim not raised during his or her initial postconviction

proceeding so infected the trial that the resulting conviction or sentence violated due process. *Id.* § 122-1(f)(2). Leave of court to file a successive postconviction petition should be denied when 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 or where the successive petition with supporting documentation is insufficient to justify further proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35. The allowing of successive postconviction petitions is disfavored. *People v. Bailey*, 2017 IL 121450, ¶ 39. This court undertakes *de novo* review of the denial of a petition for leave to file a successive postconviction petition. *Id.* ¶ 13.

¶ 26 As petitioner points out, his constitutional claims are rooted in developments in the law governing the sentencing of juveniles that has occurred since the time of his sentencing in 2006. Defendant contends that these legal developments extend not only to juveniles but to "emerging adults," which he asserts are "those who are more than 18 years old but who, based on recent developments in neuroscience, are now known to share more salient characteristics with juveniles than adults." He asserts that the recent evolution of the law has been grounded in this science and has led to substantive changes regarding the sentencing of emerging adults in Illinois, based on the eighth amendment and the proportionate penalties clause. Additionally, petitioner contends that these developments in the law have been extended also to individuals with intellectual disabilities.

¶ 27 It is by now well established that the law governing the sentencing of juvenile offenders has developed considerably in the years since petitioner was sentenced. In the seminal case of *Miller*, the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Miller*, 567 U.S. at 465. The Supreme Court held that minors are constitutionally different than adults for sentencing purposes, being less mature and responsible, more impulsive,

and more vulnerable to negative influences and peer pressure than adults, and not having the fully-formed character of adults so that their actions to not necessarily indicate irreversible depravity. *Id.* at 471-74. "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 479. While opining that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," the Court stated that "we do not foreclose a sentencer's ability to make that judgment in homicide cases" but "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 479, 480, 489.

¶ 28 In 2014, the Illinois Supreme Court held that *Miller* applied retroactively to cases on collateral review. *People v. Davis*, 2014 IL 115595, ¶¶ 39, 42. Later, the United States Supreme Court also held that *Miller* was a substantive constitutional rule that applies retroactively. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). It further explained its holding in *Miller* that life imprisonment without parole is unconstitutional for "juvenile offenders whose crimes reflect the transient immaturity of youth," except for " ' "the rare juvenile offender whose crime reflects irreparable corruption." ' " *Id.* at 734 (quoting *Miller*, 567 U.S. at 479-80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). Thus, to separate those juveniles who may be sentenced to life without parole from those who may not, a hearing is required at which the sentencing court must "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.* at 734-35.

¶ 29 In *People v. Reyes*, 2016 IL 119271, ¶ 9, the Illinois Supreme Court held that *Miller* applies not only to actual sentences of mandatory life imprisonment without parole, but it extends also to *de facto* life sentences imposed on juveniles. In *People v. Buffer*, 2019 IL 122327, ¶¶ 40-41, the supreme court held that a sentence imposed on a juvenile offender will not constitute a *de facto*

life sentence in violation of the eighth amendment if the sentence is 40 years or less.

¶ 30 In *People v. Holman*, 2017 IL 120655, ¶ 40, the supreme court held that *Miller* also applied to discretionary sentences of life without parole for juveniles, holding that "[l]ife sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." It held that a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the juvenile defendant's conduct showed "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id.* at ¶ 46. The trial court may make such a determination only if it first considers the juvenile defendant's youth and its attendant characteristics, which include but are not limited to: (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation. *Id.* (citing *Miller*, 567 U.S. at 477-78).

¶ 31 As the supreme court later summarized in *Buffer*: "Therefore, to prevail on a claim based on *Miller* and its progeny, a defendant sentenced for an offense committed while a juvenile must show that (1) the defendant was subject to a life sentence, mandatory or discretionary, natural or *de facto*, and (2) the sentencing court failed to consider youth and its attendant characteristics in imposing the sentence." *Buffer*, 2019 IL 122327, ¶ 27 (citing *Holman*, 2017 IL 120655, ¶ 40; *Reyes*, 2016 IL 119271, ¶ 9).

¶ 32 In *People v. Thompson*, 2015 IL 118151, ¶ 39, the supreme court declined to allow a defendant who committed murders at age 19 to assert on appeal an as-applied eighth amendment challenge under *Miller* to his mandatory life sentence, because the defendant had not asserted this claim in the trial court. In doing so, the supreme court stated that a successive postconviction petition was an avenue by which the defendant could attempt to assert his constitutional claim in the trial court, although it declined to express an opinion on the merits of such a claim. *Id.* ¶ 44.

¶ 33 In *People v. Harris*, 2018 IL 121932, ¶¶ 1, 22, the supreme court was confronted with a direct appeal by a defendant who had been 18 years and 3 months old at the time of the offenses giving rise to his convictions for first degree murder, attempted first degree murder, and aggravated battery with a firearm, and he argued that his mandatory aggregate sentence of 76 years violated the proportionate penalties clause and the eighth amendment as applied to him. The appellate court had held that the defendant's sentence violated the proportionate penalties clause, but the supreme court reversed. *Id.* ¶¶ 34-48. It noted that the defendant was presenting an "as-applied" constitutional challenge to his sentence rather than a "facial" challenge (*id.* ¶¶ 37-39), but his failure to raise this challenge in the trial court meant that the trial court had neither held an evidentiary hearing nor made findings "on the critical facts needed to determine whether *Miller* applies to defendant as an adult." *Id.* ¶ 46. The supreme court noted that "the record here does not contain evidence about how the evolving science on juvenile maturity and brain development that helped form the basis for the *Miller* decision applies to defendant's specific facts and circumstances." *Id.* Thus, the supreme court held that the defendant's as-applied challenge under the proportional penalties clause was premature. *Id.* It further stated that the defendant's claim was one that would be more appropriately raised in postconviction proceedings. *Id.* ¶ 48.

¶ 34 Also, the supreme court addressed the defendant's facial challenge that, based on scientific

developments that the brains of young adults continue to develop into their mid-twenties, sentencing individual under the age of 21 to mandatory life imprisonment violates the eighth amendment. *Id.* ¶¶ 49-61. Recognizing that other courts had "repeatedly rejected" arguments to extend *Miller* to offenders who were 18 years or older, the supreme court held that, for sentencing purposes, the age of 18 marks the present line drawn by the law separating juveniles from adults for purposes of the eighth amendment. *Id.* ¶ 61. Thus, because the defendant fell on "the adult side of that line," his claim that his 76-year sentence violated the eighth amendment failed. *Id.*

¶ 35 In *People v. House*, 2019 IL App (1st) 110580-B, ¶ 65, *appeal docketed*, No. 125124 (Ill. Jan. 29, 2020), which was issued after the supreme court directed this court to reconsider an earlier opinion in light of *Harris*, this court held that a 19-year-old offender's mandatory life sentence was unconstitutional under the proportionate penalties clause as applied to him, vacated the sentence, and remanded the case for a new sentencing hearing. The court reasoned that, although the defendant was not a juvenile when he committed the offense, his young age of 19 was relevant under the circumstances of the case. *Id.* ¶ 46, 63. Also relevant were the facts that the defendant had served only as a lookout during the shooting at issue and had been found guilty of murder on a theory of accountability. *Id.* ¶ 46. He also received the same sentence of mandatory natural life in prison as the actual shooter, whereas another co-defendant with culpability similar to that of the defendant had already been released from prison because the co-defendant had been only 17 years old at the time of the offense. *Id.* This court further reasoned:

> "The trial court's ability to take any [mitigating] factors into consideration was negated by the mandatory nature of defendant's sentence. The trial court was also precluded from considering the goal of rehabilitation in imposing the life sentence, which is especially relevant in defendant's case. Given defendant's age, his family background, his actions as

a lookout as opposed to being the actual shooter, and lack of any prior violent convictions, we find that defendant's mandatory life sentence of natural life shocks the moral sense of the community." *Id.* ¶ 64.

¶ 36 However, since *House*, this court and other districts of the appellate court have on multiple occasions rejected attempts by petitioners who were age 18 or older at the time of their offenses to file successive postconviction petitions raising as-applied challenges under the proportionate penalties clause, where the offenders were active participants in the offenses at issue, the sentences imposed on them were discretionary, the offenders essentially received sentencing hearings in which their youth and rehabilitative potential were considered as mitigating factors, or their successive petitions failed to allege facts showing how their individual circumstances caused their brains to be more similar to those of juveniles than to mature adults. See, *e.g.*, *People v. Carrion*, 2020 IL App (1st) 171001, ¶¶ 30-33; *People v. Gomez*, 2020 IL App (1st) 173016, ¶¶ 37-38; *People v. McClurkin*, 2020 IL App (1st) 171274, ¶¶ 20-23; *People v. Handy*, 2019 IL App (1st) 170213, ¶¶ 40-41; *People v. Moore*, 2020 IL App (4th) 190528, ¶¶ 38-41; *People v. White*, 2020 IL App (5th) 170345, ¶¶ 31; see also *People v. Ramsey*, 2019 IL App (3d) 160759, ¶¶ 22-23. In other cases, however, panels of this court and other districts of the appellate court have held that successive postconviction petitions by adult offenders under the proportionate penalties clause should have been allowed, notwithstanding the petitioner's level of involvement in the offense, the discretionary nature of the petitioner's sentence, or what evidence was actually presented or considered at the sentencing hearing. See, *e.g.*, *People v. Franklin*, 2020 IL App (1st) 171628, ¶¶ 68-69; *People v. Daniels*, 2020 IL App (1st) 171738, ¶¶ 2, 34; *People v. Ruiz*, 2020 IL App (1st) 163145, ¶¶ 1, 38-40; *People v. Johnson*, 2020 IL App (1st) 171362, ¶¶ 1-2, 15-16; *People v. Carrasquillo*, 2020 IL App (1st) 180534, ¶ 109; *People v. Minniefield*, 2020 IL App (1st) 170541,

¶ 47; *People v. Bland*, 2020 IL App (3d) 170705, ¶ 14. We note that several of these cases were issued over strong dissents. *Franklin*, 2020 IL App (1st) 171628, ¶¶ 75-98 (Burke, J. dissenting); *Ruiz*, 2020 IL App (1st) 163145, ¶¶ 74-92 (Pierce, J. dissenting); *Johnson*, 2020 IL App (1st) 171362, ¶¶ 37-52 (Pierce, J. dissenting).[1]

¶ 37 For a time, this court's decision in *People v. Coty*, 2018 IL App (1st) 162383, *rev'd*, 2020 IL 123972, provided authority for the proposition that the proportionate penalties clause also extended the procedural protections of *Miller* and its progeny to adult defendants who were intellectually disabled. In our decision, we reasoned that the *Miller* line of cases originated as an extension of *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the eighth amendment barred the execution of mentally-disabled defendants based on the fact that their disability diminished their culpability. *Coty*, 2018 IL App (1st) 162383, ¶ 69-77. However, the supreme court reversed this court's decision. *People v. Coty*, 2020 IL 123972, ¶ 44. The supreme court reasoned that, although *Miller* is based in part on the lesser culpability of youth, a characteristic that *Atkins* recognized was shared by the intellectually disabled, "the *Miller* Court's decision is founded, principally, upon the *transient* characteristics of youth, characteristics not shared by adults who are intellectually disabled." (Emphasis in original). *Id.* ¶ 39. It also noted that while intellectual disability may decrease an offender's culpability, it may also increase an offender's future dangerousness and diminish the prospect of rehabilitation, factors that could justify a longer prison sentence. *Id.* ¶¶ 34-38. Thus, the rehabilitative prospects of youth do not figure into the sentencing calculation for intellectually-disabled adult defendants, because the relatively static nature of their condition means that the prospect of deficiencies being reformed as time goes by and brain development

[1] Several of these decisions were issued during the course of briefing in this case, and several more were issued after briefing was complete. We have considered the parties' arguments pertaining to these decisions in their various motions for leave to cite them as additional authority and their responses thereto.

occurs does not apply to them. *Id.* ¶ 40.

¶ 38 The supreme court also addressed the defendant's argument his intellectual disability rendered his sentence of natural life in prison unconstitutional under the eighth amendment of the United States Constitution. *Id.* ¶ 45. The court noted that if a sentence passed muster under the proportionate penalties clause, it would seem also to comport with the eighth amendment. *Id.* The court noted that the defendant acknowledged that " '[c]ourts across the country that have addressed the issue *** have declined to extend *Atkins* to noncapital sentence or *Miller* to the intellectually disabled.' " *Id.* The court stated that it took this to mean that the "moral judgment" and "mores" of the nation were not inconsistent with that of Illinois on this issue, and it rejected defendant's argument that his sentence violated the eighth amendment. *Id.*

¶ 39 Having discussed the above developments in the law since the time of petitioner's sentencing in this case, we now turn to his arguments on appeal. First, petitioner argues that he has shown "cause" to file a successive postconviction petition because the law discussed above has substantively changed following his sentencing and previous postconviction filings. He further argues that in November 2016, he obtained hundreds of pages of records pertaining to his childhood mental health history and prenatal exposure to cocaine and heroin, which were previously unknown or unavailable to him. He contends that these documents shed new light on his immaturity, mental health struggles, and susceptibility to peer pressure at the time of his offenses at issue.

¶ 40 This court has previously held that a postconviction petitioner establishes "cause" for filing a postconviction petition relying on *Miller* and its progeny, where those cases had not been decided at the time the petitioner filed an earlier postconviction petition. *People v. Rivera*, 2020 IL App (1st) 171430, ¶ 20 (collecting cases); see also *Davis*, 2014 IL 115595, ¶ 42. In this case, although

petitioner first sought leave to file a successive postconviction petition in 2013, which was after *Miller* had been decided, it was not until a year later that the Illinois Supreme Court first held that *Miller* applied retroactively to cases on collateral review. See *Davis*, 2014 IL 115595, ¶ 39. It is also clear that there has been much development in this area of the law since 2013. Thus, consistent with the above precedent, we find that petitioner has established "cause" for filing a postconviction petition in this case.

¶ 41 Second, petitioner argues he has shown "prejudice" because it cannot be said at this stage that his constitutional claims fail as a matter of law. See *Smith*, 2014 IL 115946, ¶ 35. His first claim is that his 70-year aggregate sentence for offenses he committed as an intellectually-disabled 18-year-old violate the eighth amendment's prohibition on life sentences for young offenders without adequate consideration of their youth and its attendant circumstances. He argues that *Miller*'s protections should be applied to him because he was an "emerging adult" and because he was an intellectually disabled person, but the trial court failed to properly consider his youth or intellectual disability when sentencing him. Although the State argues that petitioner forfeited this claim by failing to raise it in his proposed postconviction petition, our review of that petition indicates that defendant adequately raised this claim. See *supra* ¶ 20.

¶ 42 In support of his position, petitioner cites statements by the supreme court suggesting that offenders who were age 18 or older could pursue as-applied constitutional challenges in postconviction proceedings. See *Thompson*, 2015 IL 118151, ¶ 44; *Harris*, 2018 IL 121932, ¶ 48. He provides citations to law review articles discussing the "broad consensus in the scientific community that the brain is not fully developed until approximately age 25, and this consensus is spreading to the legal community." He contends that if his successive petition could proceed, he could "marshal much more evidence of the latest scientific advances regarding emerging adults

and how they apply specifically to him." Regarding his argument that the *Miller* protections apply to intellectually disabled offenders, he relies almost exclusively on the analysis employed by this court in *Coty*, which recognizing that the *Miller* line of cases emerged from *Atkins*, which involved a concern for protecting intellectually-disabled offenders in sentencing. See *Coty*, 2018 IL App (1st) 162383, ¶¶ 69-77. He contends that he was found by a psychiatrist to have "significantly below average" intellectual capacity, a full-scale IQ of 66, and chronic psychiatric illness.

¶ 43 Although defendant purports to raise an as-applied eighth amendment challenge, we fail to see how defendant's eighth amendment argument is any different than the claim that has been repeatedly rejected by this and other courts. In *Harris*, the defendant, who was age 18 at the time of his offenses, mounted a facial challenge that his 76-year sentence violated the eighth amendment based on science showing that the brains of young adults continue to develop into their mid-twenties. *Harris*, 2018 IL 121932, ¶¶ 49-61. Nevertheless, the supreme court noted "that claims for extending *Miller* to offenders 18 years of age or older have been repeatedly rejected." *Id.* ¶ 61. Because the defendant there was 18 years old at the time of the offenses, the supreme court found that his eighth amendment claim "necessarily fails." *Id.* In *Handy*, this court rejected a similar attempt by a postconviction petitioner who was 18 years old at the time of his offense to mount an as-applied eighth amendment challenge to his 60-year sentence, based on the fact that the petitioner had been over the age of 18 at the time of the offense. *Handy*, 2019 IL App (1st) 170213, ¶ 37; see also *Ruiz*, 2020 IL App (1st) 163145, ¶¶ 31-32. Petitioner's age-based eighth amendment claim fails as a matter of law for the same reason.

¶ 44 Furthermore, our supreme court's decision in *Coty* forecloses any argument that the petitioner's intellectual disability required the protections of *Miller* be afforded to him in sentencing for his sentence to comport with the eighth amendment. *Coty*, 2020 IL 123972, ¶ 45.

In addressing the eighth amendment argument in that case, the supreme court noted there that the parties acknowledged that courts across the country that have addressed the issue have declined to extend *Atkins* to noncapital cases or *Miller* to the intellectually disabled. *Id.* For these reasons, we conclude that any claim by petitioner under the eighth amendment fails as a matter of law, and thus he has not shown the "prejudice" necessary to file a successive postconviction petition asserting such a claim.

¶ 45 Next, we address petitioner's claim that, for essentially the same reasons as those discussed above, his 70-year aggregate sentence violates the proportionate penalties clause of the Illinois Constitution. That clause provides, "All 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. Relevant to this case, " 'a penalty violates the proportionate penalties clause if it is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.' " *Coty*, 2020 IL 123972, ¶ 31 (quoting *People v. Huddleston*, 212 Ill. 2d 107, 130 (2004)). This clause provides a limitation on penalties beyond those afforded by the eighth amendment. *People v. Clemons*, 2012 IL 107821, ¶ 39.

¶ 46 As to petitioner's argument that the proportionate penalties clause prohibits a sentencing court from imposing a discretionary *de facto* life sentence on an intellectually disabled adult offender without employing the procedural safeguards of *Miller* and its progeny, petitioner relies exclusively on this court's decision in *Coty*. See *Coty*, 2018 IL App (1st) 162383, ¶ 75. However, as discussed above, that decision was reversed by the supreme court. *Coty*, 2020 IL 123972, ¶ 44. The supreme court's decision in *Coty* was issued between the time the petitioner filed his original brief in this court and the time the State filed its responsive brief. In his reply brief, petitioner argues that the supreme court's decision "was limited to the facts of that case," which specifically

involved a repeated sex offender. In light of the supreme court's decision in *Coty*, we find no support for the proposition that the law has developed in such a way that the proportionate penalties clause requires the protections of *Miller* to extend to intellectually disabled adult offenders. Thus, any claim under the proportionate penalties clause based on petitioner's intellectual disabilities must fail as a matter of law.

¶ 47 As to the aspect of his proportionate penalties clause argument based on petitioner's status as an "emerging adult" of between 18 and 21 years of age, we recognize that there is some support for the proposition that community standards regarding sentencing of young adults are changing, based on the fact that the Illinois General Assembly has, effective June 1, 2019, changed the law regarding parole review eligibility for offenders convicted of first degree murder who were under the age of 21 at the time of the offense. Section 5-4.5-115(b) of the Unified Code of Corrections now provides in pertinent part:

> "A person under 21 years of age at the time of the commission of first degree murder who is sentenced on or after June 1, 2019 (the effective date of Public Act 100-1182) shall be eligible for parole review by the Prisoner Review Board after serving 20 years or more of his or her sentence or sentences ***." 730 ILCS 5/5-4.5-115(b) (West Supp. 2019).

In enacting this statute, however, the General Assembly expressly determined that its application should be limited to offenders sentenced on or after June 1, 2019. Because the legislature made no provision for this statute to apply retroactively, we do not believe it is appropriate to order resentencing in this case merely to allow this petitioner to come within the ambit of this statute, where petitioner cannot otherwise show the prejudice necessary to permit the filing of a successive postconviction petition.

¶ 48 In determining that defendant has not shown such prejudice, we choose follow the analysis

used by this court in *Handy*, 2019 IL App (1st) 170213, ¶¶ 38-42. We find the analysis of *Handy* to be more appropriate than cases such as *Ruiz* and *Johnson*, which seem to hold that any successive postconviction petition by an offender over age 18 alleging an as-applied violation of the proportionate penalties clause for non-compliance with *Miller* should be allowed regardless the petitioner's level of involvement in the offense, the discretionary nature of the petitioner's sentence, or what was actually considered at the sentencing hearing. *Ruiz*, 2020 IL App (1st) 163145; *Johnson*, 2020 IL App (1st) 171362.

¶ 49 In *Handy*, the evidence showed that at age 18, the postconviction petitioner had been an active participant with three codefendants in invading a family's home, robbing several of the family members, hitting and threatening several family members at gunpoint, and kidnapping and sexually assaulting a 15-year-old girl. *Handy*, 2019 IL App (1st) 170213, ¶ 5. After considering various factors in aggravation and mitigation, the trial court had imposed a discretionary sentence of four consecutive prison terms of 30 years each on convictions for home invasion and three counts of aggravated criminal sexual assault, although this sentence was later converted to a 60-year term of imprisonment. *Id.* ¶ 20. The petitioner sought leave to file a successive postconviction petition, arguing in part that his sentence violated the proportionate penalties clause because a *de facto* life sentence had been imposed despite the fact that "his sentencing hearing did not comport with *Miller* because the trial court's sentencing order and comments did not indicate that the court considered the mitigating evidence before it and determined whether he was either a youthful offender whose crime reflected unfortunate yet transient immaturity or the rare juvenile offender whose crime reflected irreparable corruption." *Id.* ¶¶ 33, 38.

¶ 50 This court held that the petitioner did not show the necessary prejudice to file a successive postconviction petition. *Id.* ¶ 42. First, the court recognized that a young offender's level of

participation in the offense at issue had been a significant factor in determining whether to extend *Miller* principles to a young adult offender under the proportionate penalties clause, and the petitioner's active participation in the offenses at issue did not warrant doing so in that case. *Id.* ¶ 40. Second, the court reasoned that the petitioner's case had not been one in which the sentencing court was prohibiting from considering any mitigating factors because of the mandatory nature of the petitioner's sentence. *Id.* ¶ 41. Rather, his sentence had been discretionary, which allowed the sentencing court to consider many different factors in determining a sentence, including his age, family background, and education level. *Id.* This court held that because the petitioner "was an adult, an active participant in the crimes, and received a discretionary sentence, he is not entitled to a new hearing for a more in-depth consideration of his youth." *Id.*

¶ 51 The same result is warranted in this case. Here, the trial court had before it evidence that petitioner had been an active participant in the home invasion and murder of Leon Brewer. Defendant admitted in his statement to police that he, Williams, and Dukes had entered Camacho's house while armed and wearing masks, that he was present in Camacho's bedroom while Williams was holding him at gunpoint and Dukes was searching that room, and that he was involved in taking the two boys into the attic while Williams held Camacho at gunpoint. While petitioner attempted in his statement to place most of the responsibility and blame on Williams, the trial court heard Camacho's testimony that petitioner had been the one to demand $10,000 and the marijuana. Camacho also testified that petitioner had stated in the attic that the men should " 'pop him right now' " after he stated he did have the amount of money they were demanding. Further, the prosecutor argued at petitioner's sentencing hearing that the court should believe the evidence offered in the case against co-defendant Dukes that Dukes had told authorities that petitioner said he " 'didn't mean to shoot him,' " which implied that petitioner had been the actual shooter in this

case. On appeal, the State also points out that the court sentencing petitioner had also heard the evidence in Dukes' statement that the robbery of Camacho had been petitioner's idea and that petitioner was the one who "set up the robbery."

¶ 52 Also, as in *Handy*, it is significant in this case that petitioner's sentence was discretionary, and thus the trial court was able to consider many factors in aggravation and mitigation. As the State points out, the trial court had the discretion to impose a sentence as short as 26 years in this case. The trial court was aware from the presentencing investigation report that petitioner had no relationship with his mother and that his father was unknown, and he was one of eight children raised by his grandmother. He had a good childhood with no physical, mental, sexual, alcohol, or substance abuse. He was close to his grandmother and siblings. Further, the trial court was aware of petitioner's psychiatric conditions and history of psychiatric treatment from multiple fitness hearings that had been conducted in the case, including one conducted on the day of sentencing.

¶ 53 In aggravation, the prosecutor argued that petitioner had been involved in the "horrifying events" of this case by committing home invasion against young children and then chasing and shooting their father in the back for no reason as he attempted to exit the house. The prosecutor argued that while defendant tried to portray his involvement in the offense as being induced or facilitated by Williams, credible evidence showed that defendant was "a main player" and had actually been the one who shot the victim. The prosecutor also highlighted petitioner's history of delinquency and criminal activity, including his pleading guilty to aggravated criminal sexual assault and possession of controlled substance, as well as the fact that he was on bond for a narcotics offense when he committed the offenses at issue.

¶ 54 In mitigation, petitioner's attorney highlighted the fact that petitioner was then only 21 years old and never in his life had a strong role model, parental guidance, or parental supervision. He

was one of eight children raised by his elderly grandmother. Petitioner's attorney argued that he had a history of psychiatric conditions and had required antidepressants and antipsychotic medications throughout the proceedings. She argued that he had a history of learning disabilities and behavioral disabilities, and he had been sent to a special school because of behavioral and psychiatric problems. She argued that he had only completed the ninth grade when he dropped out of high school. Petitioner's attorney additionally argued that the evidence had shown that Williams had planned this crime and that petitioner had been especially susceptible to pressure by Williams to participate in it.

¶ 55 In light of what we have discussed above, it is evident that petitioner had a full opportunity to present the available mitigating evidence and argue that his relative youth and its attendant characteristics warranted the trial court exercising its discretion to give him a lesser sentence. We are unpersuaded that the law has presently developed such that a trial court is required to make specific findings that a non-juvenile offender is incapable of rehabilitation before imposing a discretionary sentence of 70 years. Taking into account the evidence of the offense and petitioner's involvement in it, along with the aggravating and mitigating factors discussed above including petitioner's criminal history, we conclude that the discretionary 70-year sentence imposed on petitioner for an offense he committed at age 18 was not "cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community." See *Coty*, 2020 IL 123972, ¶ 31. Therefore, any claim that petitioner's 70-year sentence violated the proportionate penalties clause as applied to him as an "emerging adult" fails as a matter of law.

¶ 56 For the reasons discussed above, we hold that petitioner has not shown the prejudice required to file a successive postconviction petition. We therefore affirm the judgment of the trial court denying petitioner's motion for leave to file a successive postconviction petition.

¶ 57 III. CONCLUSION

¶ 58 The judgment of the trial court denying petitioner's motion for leave to file a successive postconviction petition is affirmed.

¶ 59 Affirmed.

¶ 60 JUSTICE PUCINSKI, dissenting.

¶ 61 With the greatest respect, I dissent because while I agree with the majority that this defendant took an active role in the crimes committed, that the sentence was discretionary, and that the state of his mental health and any intellectual disabilities would not have changed the court's analysis because those considerations are different from the transient nature of youth, we must still account for all of the new research on emerging adults.

¶ 62 The majority has properly and comprehensively detailed the research on emerging adults, but I think we have to agree that it is still an area that is both complex and concerning in Illinois in terms of sentencing.

¶ 63 What is settled in Illinois is that the Legislature changed the law for persons who commit murder and who are under the age of 21 at the time of the crime.

¶ 64 Specifically, section 5-4.5-115(b) of the Unified Code of Corrections (Pub. Act 101-288, § 10, (eff. Jan. 1, 2020), located in the Code at 730 ILCS 5/5-4.5-115(b)) provides parole review for persons under 21 years of age at the time of the commission of first degree murder.

¶ 65 What is troubling is that this provision only applies to those sentenced on or after June 1, 2019, and therefore does not apply to defendant, since he was sentenced in 2006. *Id.* Therefore, this defendant will not receive parole review within the duration of his *de facto* life sentence.

¶ 66 He was not a juvenile under our current precedent. He cannot benefit from a proportionate penalties argument. And, because the Legislature did not make its amendment retroactive, this

defendant will likely never have a chance to show that he is rehabilitated.

¶ 67 Maybe he will never be rehabilitated; maybe he will. The point is that he will never be able to go before a parole board to make his case.

¶ 68 This is the fundamental flaw in our current system of justice for emerging adults.

¶ 69 This man committed a terrible crime. He was 18 years and 2 months old at the time, so he was within the age range considered in the amendment, which includes persons under the age of 21. He also falls outside the age range to receive *Miller* protections, which are afforded to juveniles under the age of 18. He is being punished for his terrible crime.

¶ 70 But he is also in the emerging adult bandwidth while still being in the legal limbo created by the Legislature. It has been estimated that there are about 170 juvenile homicide defendants who will not be able to present themselves for parole because of the way this Legislation was written. I do not know how many homicide defendants committed their crime between the ages of 18 and 21.

¶ 71 We would be acknowledging that this is a problem if we remanded for the trial court to grant leave to file the successive postconviction petition. Although the defendant did not raise the issue of re-sentencing in his brief or in oral argument, and in fact his attorney rejected my opportunity to open that discussion, sending this back would allow an attorney to provide a much needed analysis of this gap. The new petition attorney could consider the ramifications of the gap between *Miller* protections afforded to those under 18 years of age, and the non-retroactive legislative possibility to seek parole afforded to those under 21 years of age.

¶ 72 A successive postconviction petition seeking a new sentence is the only way to provide this defendant with the legislation's intent. That way after 20 years in accordance with the new statutory language, if he can demonstrate he is rehabilitated, he will have the opportunity to petition

for parole.

¶ 73 I would remand this for the trial court to grant leave for a successive postconviction petition.