

No. 1-11-2572

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93CR20392-02
	)	
	)	
MARCOS GRAY,	)	The Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court, with opinion.  
Justices Fitzgerald Smith and Pucinski concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Marcos Gray appeals from the dismissal of his petition filed under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). Following a jury trial, defendant was convicted via accountability theory of the 1993 first degree murder and attempted armed robbery of Sheila Doyle committed when defendant was age 16. Having previously been convicted of first degree murder, defendant was sentenced to a mandatory term of life imprisonment on his murder conviction and 15 years' imprisonment on his attempted armed robbery conviction. On appeal from his section 2-1401 petition, and relying on *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S. Ct. 2455 (2012), defendant contends his mandatory life sentence is void because it violates the federal constitution's prohibition against cruel and unusual

punishment (U.S. Const. amend VIII). The State responds that *Miller* does not render defendant's sentence void.

¶ 2 In an opinion issued April 11, 2013, we agreed with the State, holding defendant's sentence was not void and thus defendant was not entitled to the relief he sought under *Miller v. Alabama*. See *People v. Gray*, 2013 IL App (1st) 112572, *vacated*. We nonetheless noted that our holding did not preclude defendant from pursuing the matter through the Post-Conviction Hearing Act (Act) (see 725 ILCS 5/122-1 *et seq.* (West 2010)), which permits a defendant to challenge his conviction based on a deprivation of constitutional rights. The supreme court subsequently denied defendant's petition for leave to appeal, but issued a supervisory order directing this court to vacate our judgment in *Gray*, 2013 IL App (1st) 112572, and reconsider it in light of *People v. Davis*, 2014 IL 115595, to determine if a different result was warranted. The parties have not filed supplemental briefs but rest on those previously filed. For the reasons to follow, we affirm. As before, however, we note that defendant may raise this issue in postconviction proceedings under the Act.

¶ 3 BACKGROUND

¶ 4 Via various procedural peregrinations, defendant's case has resolutely moved through the interstices of the justice system. Following defendant's first jury trial, this court reversed and remanded the cause for a new trial after concluding the trial court had erred in denying defendant's motion to suppress. See *People v. Gray*, No. 1-96-0278 (1998) (unpublished order under Supreme Court Rule 23). Evidence at retrial showed that defendant and two friends followed the victim, Doyle, in their car until she parked in her garage on the south side of Chicago. Defendant and codefendant Antwon Tyler entered the garage, a gunshot issued, and when they reemerged, Tyler informed the third cohort that he had shot Doyle, whose body was

later discovered in the trunk of her car. Fingerprints and palm prints from codefendant and defendant were also found on the trunk lid. As stated, the jury found defendant guilty via accountability of first degree murder and attempted armed robbery. Because defendant already had been convicted in a separate case of first degree murder, which he committed as a principal mere months before Doyle's murder, in 2000 the trial court sentenced defendant to a mandatory life term, as well as 15 years for attempted armed robbery to run concurrently. See 730 ILCS 5/5-8-1(a)(1)(c)(i) (West 1992); *People v. Gray*, No. 1-95-2932 (1998) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's convictions on direct appeal. See *People v. Gray*, No. 1-00-4122 (2002) (unpublished order under Supreme Court Rule 23).

¶ 5 In December 2001, defendant filed a *pro se* petition under the Act alleging that his appellate counsel was ineffective for failing to raise certain issues on appeal and trial counsel was ineffective for failing to file pretrial motions. The petition reached second-stage proceedings and lingered in the system for some eight years before the circuit court dismissed the petition in April 2010. Defendant appealed from that dismissal arguing that the circuit court violated his right to represent himself *pro se* in postconviction proceedings when it denied his requests to proceed *pro se* and struck his *pro se* amendments to his petition. This court very recently agreed, concluding the circuit court abused its discretion by failing to properly consider defendant's request to proceed *pro se*. *People v. Gray*, 2013 IL App (1st) 101064, ¶ 27. We remanded the case for further consideration consistent with our opinion. *Id.* ¶ 28.

¶ 6 Meanwhile, in the midst of his postconviction appeal, in December 2010, defendant, acting *pro se*, filed this section 2-1401 petition in which he asserted his conviction and sentence were void. Defendant argued the trial court lacked subject matter jurisdiction over his case because the indictment cited the Illinois Revised Statutes rather than the Illinois Compiled

Statutes in reference to the murder charge. The State filed a motion to dismiss, arguing defendant's conviction and sentence were not void and the petition was not otherwise filed in a timely manner, thus effecting waiver and barring any relief. The circuit court granted the State's motion, and this appeal followed.

¶ 7

#### ANALYSIS

¶ 8 Section 2-1401 establishes a comprehensive statutory procedure allowing for vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2010); *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). To obtain relief, the defendant must show proof of a defense or claim that would have precluded entry of the judgment in the original action and diligence in discovering that defense or claim and presenting the petition. *Id.* at 7-8. The statute ordinarily is used to correct errors of fact (*People v. Lawton*, 212 Ill. 2d 285, 297 (2004)), and with certain exceptions not applicable here, the statute provides that petitions must be filed not later than two years after entry of the order or judgment. *Id.* The two-year limitation, however, does not apply to petitions brought on voidness grounds. *People v. Moran*, 2012 IL App (1st) 111165, ¶ 13. Our review of the dismissal in this case is *de novo*. See *Vincent*, 226 Ill. 2d at 18.

¶ 9 Here, for the purposes of analyzing defendant's claim under section 2-1401, defendant's conviction became final in 2000, when he was sentenced pursuant to section 5-8-1(a)(1)(c)(i) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(i) (West 1992)), which provides that if a defendant is facing his second murder conviction, "the court shall sentence the defendant to a term of natural life imprisonment." Ten years later, in 2010, defendant filed the instant section 2-1401 petition. In his petition, defendant acknowledged the two-year statutory limitation, but essentially maintained it did not apply because he was challenging his conviction and sentence as void on the basis of a miscited statute in the indictment. On appeal, defendant admittedly has

abandoned that specific reasoning, and now argues his sentence is void under *Miller v. Alabama*. Defendant reasons that a sentence which exceeds statutory maximums or violates the constitution is void from its inception and may be challenged at any time.

¶ 10 In *Miller v. Alabama*, the United States Supreme Court held that mandatory life without parole for those under 18 at the time of their crimes violates the eighth amendment's prohibition against cruel and unusual punishments. *Miller v. Alabama*, 567 U.S. at \_\_\_, 132 S. Ct. at 2460. In so holding, the court did not foreclose a sentencer's ability to impose life without parole on juvenile offenders, although it expected "this harshest possible penalty will be uncommon." *Id.* at \_\_\_, 132 S. Ct. at 2469. Rather, the court stated a sentencing judge must take into account how children are different from adults before imposing a lifetime of incarceration. *Id.* at \_\_\_, 132 S. Ct. at 2469. Consistent with *Miller v. Alabama*, in *People v. Miller*, 202 Ill. 2d 328 (2002), our supreme court had already held that imposing a mandatory sentence of life without parole on a juvenile offender convicted of murdering more than one victim under a theory of accountability, and without considering the facts of the crime, including the defendant's age, offended the Illinois Constitution's proportionate penalties clause (Ill. Const. 1970, art. I, § 11) and thus was unconstitutional as applied. As in the federal *Miller v. Alabama* opinion, our court emphasized the decision "does not imply that a sentence of life imprisonment for a juvenile offender convicted under a theory of accountability is never appropriate." *Id.* at 341.

¶ 11 While the State acknowledges the holding in *Miller v. Alabama*, the State contends that case does not render defendant's sentence void. We agree. A judgment is void, as opposed to voidable, only if the court that entered it lacked jurisdiction. *People v. Mescall*, 379 Ill. App. 3d 670, 673 (2008). Jurisdictional failure can result from a court's lack of personal or subject matter jurisdiction or, relevant to this case, the court's lack of power to render the particular

judgment. *Id.* Jurisdiction or the power to render a particular judgment does not necessarily mean that the judgment rendered must be one that should have been rendered; indeed, the power to decide carries with it the power to decide wrong, as well as right, and a court will not lose jurisdiction merely because it makes a mistake in the law, the facts, or both. *Moran*, 2012 IL App (1st) 111165, ¶ 17 (quoting *People v. Davis*, 156 Ill. 2d 149, 156 (1993)). The principle follows: that which is unconstitutional is not necessarily void. *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 31; see also *Davis*, 156 Ill. 2d at 157. A statute that is unconstitutional on its face – that is, where no set of circumstances exists under which it would be valid – is void *ab initio*, while a statute that is merely unconstitutional as applied is not. *Id.*

¶ 12 As the Illinois Supreme Court in *Davis* declared, *Miller v. Alabama* does not affect the validity of the natural life imprisonment statute as to adult defendants, so that the statute is not unconstitutional on its face or void *ab initio*. *Davis*, 2014 IL 115595, ¶¶ 29-30; see also *Morfin*, 2012 IL App (1st) 103568, ¶ 40 (same). Moreover, *Miller v. Alabama* does not deprive or divest any state or court of the authority to sentence a defendant who was a minor at the time of his offense to natural life imprisonment for committing homicide after already having obtained a murder conviction. See *Davis*, 2014 IL 115595, ¶ 43; *Morfin*, 2012 IL App (1st) 103568, ¶ 40. Here, there is a legal predicate to support defendant’s current conviction, and the trial court’s inability through no fault of its own to consider discretionary factors at sentencing does not render the sentence unauthorized or wholly invalid as a matter of law. See *People v. Brown*, 225 Ill. 2d 188, 203-05 (2007); see also *People v. Taylor*, 102 Ill. 2d 201, 208 (1984) (the legislature defines crimes and fixes punishments and may limit a court’s discretion in imposing a sentence). Thus, although the mandatory imposition of a life sentence might have violated defendant’s constitutional rights, making the sentence “invalid” due to a mistake of law or fact and defendant

entitled to a new sentencing hearing, that violation did not divest the trial court of jurisdiction over him or render his sentence void. See *Davis*, 2014 IL 115595, ¶ 43; *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 22; *Mescall*, 379 Ill. App. 3d at 674; see also *Brown*, 225 Ill. 2d at 205 (where a court imposes an excessive sentence due to mistake of law or fact, the sentence is merely voidable); *Davis*, 156 Ill. 2d at 157 (noting that there are many rights belonging to litigants which a court may not properly deny and, yet, if denied, do not oust the court of jurisdiction or render the proceedings null and void); cf. *People v. Santana*, 401 Ill. App. 3d 663, 666 (2010) (affirming dismissal of untimely section 2-1401 petition in spite of potential *Whitfield* violation because the “trial court clearly had the power to impose the sentences” and, thus, the defendant’s sentence was not void (citing *People v. Whitfield*, 217 Ill. 2d 177 (2005))). As such, defendant’s sentence is merely voidable if challenged in a timely manner. See *Brown*, 225 Ill. 2d at 205; *Mescall*, 379 Ill. App. 3d at 673-74.

¶ 13 Therein lies the procedural rub. Defendant did not challenge his conviction under section 2-1401 in a timely manner. The State argued this below and, in his petition, defendant essentially conceded this point, instead contending the viability of his petition rested on defendant’s assertion of voidness. Because we have concluded that defendant’s sentence is not void and because defendant did not file his section 2-1401 petition within the two-year statutory limitation, we cannot grant defendant the relief he seeks. See *People v. Caballero*, 179 Ill. 2d 205, 210-11 (1997) (where a section 2-1401 petition is filed beyond two years after the judgment, it cannot be considered absent a clear showing that the exceptions apply); see also *People v. Muniz*, 386 Ill. App. 3d 890, 893-94 (2008) (where defendant filed a section 2-1401 petition alleging a seemingly meritorious *Whitfield* violation 24 years after his conviction, and the State argued petition's untimeliness, the *Whitfield* claim was procedurally defaulted). We

would add that the original claim set forth in defendant's section 2-1401 petition is different from the sentencing claim before us on appeal and, had the State argued forfeiture now, it would be another basis for affirming the dismissal of defendant's section 2-1401 petition. See *People v. Bramlett*, 347 Ill. App. 3d 468, 475 (2004) (finding that the defendant failed to raise the issue in his petition, thus forfeiting it for consideration on appeal); see also *Brown*, 225 Ill. 2d at 205 (a voidable sentence error can be waived).

¶ 14 The remainder of the supreme court's decision in *Davis* does not change our conclusion. The court held *Miller v. Alabama* declared a new "substantive rule" and thus applies retroactively to cases on collateral review. In *Davis*, however, the defendant, who was a juvenile when he murdered multiple victims, had filed a successive postconviction petition contending his resulting mandatory life-without-parole sentence violated the eighth amendment (although he did not cite *Miller v. Alabama* because it issued during the pendency of his appeal). The supreme court held *Miller v. Alabama* satisfied the requisite cause and prejudice for filing a successive postconviction petition because it was not available earlier to counsel and it retroactively applies to invalidate a defendant's sentence. Thus, although *Davis* appears to broadly announce *Miller v. Alabama*'s retroactive application to all cases on collateral review, the supreme court ultimately identified how *Miller v. Alabama* fit within the procedural framework of the Act, demonstrating that how and when one challenges a conviction matters.

¶ 15 Unlike in *Davis*, defendant now challenges his sentence under *Miller v. Alabama* within the procedural framework of section 2-1401(f) (735 ILCS 5/2-1401(f) (West 2010)) on voidness grounds, rather than in a more appropriate postconviction petition, and does so for the first time on appeal. The principal argument he advances is that *Miller v. Alabama* renders his sentence void. As stated, while his sentence may be constitutionally infirm, it is not void.

¶ 16 In that sense, we disagree with *People v. Luciano*, 2013 IL App (2d) 110792, ¶ 48, which determined that the defendant relying on *Miller v. Alabama* had raised “a proper voidness challenge to his sentence,” because “a sentence that contravenes the Constitution may be challenged at any time.” The *Luciano* court reached its conclusion even though the defendant had not raised that argument previously or in his postconviction petition. We believe *Luciano* improperly conflates constitutional violations with voidness. To support its legal pronouncement, *Luciano* cited *People v. Strawbridge*, 404 Ill. App. 3d 460, 470 (2010), but *Strawbridge* was a direct appeal addressing only whether the trial court’s imposition of a harsher sentence on a defendant, after vacatur of an earlier guilty plea, contravened a statute generally prohibiting an increased sentence and thus made the sentence void as unauthorized. See, e.g., *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004) (a sentence that does not conform to a statutory requirement is void).

¶ 17 As stated, the sentence in this case was authorized by statute and was in fact required at the time of defendant's sentencing. Even now, life imprisonment still remains a viable albeit unlikely sentence; it simply cannot be mandatorily imposed. In addition, while it might be true that generally a constitutional challenge to a criminal statute or unconstitutional sentence can be raised for the first time on appeal (see *In re J.W.*, 204 Ill. 2d 50, 61 (2003); *People v. Wagener*, 196 Ill. 2d 269, 279-80 (2001)), defendant has not cited, nor has our research disclosed, application of that principle to the situation before us, where the defendant filed an untimely section 2-1401 petition, failed to establish an exception to the untimeliness, and also failed to establish a claim of voidness. Stated differently, the principle that a defendant can challenge an unconstitutional statute or sentence as-applied at any time presents a separate and distinct issue from whether a conviction is void, and the principle does not otherwise permit a defendant to

ignore the requirements of procedural mechanisms which brought him to this court in the first place, namely section 2-1401. We note that while the factual record certainly supports a conclusion that defendant was impermissibly subject to a mandatory life sentence for a crime he committed when under 18, which would entitle him to a new sentencing hearing under *Miller v. Alabama* and *Davis*, we do not possess the supervisory authority of the supreme court to simply address a voidable issue not properly before us. See *People v. Jones*, 213 Ill. 2d 498, 507-08 (2004). Moreover, defendant does not advance any argument as to whether an appeal from an untimely section 2-1401 petition is the appropriate venue to address for the first time whether a sentence is unconstitutional as-applied. Ill. S. Ct. R. 341(h)(7) (Feb. 6, 2013) (points not argued are waived).

¶ 18 We emphasize that our disposition does not mean defendant is without recourse. *Davis* makes clear that defendant may raise the present sentencing issue before the circuit court through the Act, again which permits a defendant to challenge his conviction based on a deprivation of constitutional rights. In fact, defendant already argued in his *pro se* amendment to his initial postconviction petition, an amendment filed in January 2010, that his natural life sentence was improper because he did not kill Doyle and was unaware of any plan to rob Doyle. See *Gray*, 2013 IL App (1st) 101064, ¶ 17. As stated, this court remanded that case to the circuit court to reconsider defendant's petition in light of his request to proceed *pro se*. Should defendant argue the impropriety of his sentence in the context of *Miller v. Alabama*, it would behoove the circuit court to consider the precedent surrounding that decision in light of the direct appeal record, which demonstrates for all intents and purposes that defendant received a sentencing hearing, including argument in mitigation and aggravation, as well as the presentation of victim impact statements and defendant's own elocution. Although the trial court declared defendant deserving

of a life sentence at the conclusion of the sentencing hearing, on denying defendant's motion to reduce his sentence, the court stated: "I do not have any discretion, that with the prior conviction, the murder, and the Defendant, after being found guilty by the jury on this case, that is the only sentence I could impose, and that is the sentence I did impose." We lastly observe that if defendant raises this issue in postconviction proceedings and if that court determines the trial court sentenced defendant solely based on the mandatory nature of the statute, a sentencing hearing in which the trial court believes a life sentence is mandatory differs markedly from a sentencing hearing in which the court knowingly exercises discretion between imposing natural life and a term of years.

¶ 19

#### CONCLUSION

¶ 20 For the reasons stated, we affirm the dismissal of defendant's section 2-1401 petition.

¶ 21 Affirmed.