2021 IL App (4th) 190687

NO. 4-19-0687

FILED
August 11, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JOSHUA W. KRUGER,	)	No. 99CF357
Defendant-Appellant.	)	
	)	Honorable
	)	Mark S. Goodwin,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court, with opinion.

Presiding Justice Knecht and Justice Harris concurred in the judgment and opinion.

OPINION

¶ 1 In July 2019, defendant, Joshua W. Kruger, filed his third motion for leave to file a successive postconviction petition. In the proposed postconviction petition, defendant asserted his natural life sentence was unconstitutional as applied to him based on his young age at the time of the offense. In September 2019, the Vermilion County circuit court entered a written order denying defendant's motion. Defendant appeals, asserting he set forth a *prima facie* case of both cause and prejudice. We affirm.

¶ 2 I. BACKGROUND

¶ 3 In August 1999, a grand jury indicted defendant on seven counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(3) (West 1998)) based on acts alleged to have occurred on July 14 and 15, 1999, resulting in the death of Peter Godels; two counts of home invasion (720 ILCS 5/12-11(a)(2) (West 1998)); two counts of residential burglary (720 ILCS 5/19-3(a) (West 1998));

and one count of attempt (robbery) (720 ILCS 5/8-4(a), 18-1(a) (West 1998)). Defendant had turned 21 years old on June 13, 1999. In investigating Godels's murder, the police had obtained a search warrant for defendant's vehicle and the seizure of certain items in the car. In October 1999, an Illinois State Police forensic scientist tested blood from a stain on a chrome casing removed from the vehicle, and the deoxyribonucleic acid (DNA) from the bloodstain matched Godels's DNA profile.

¶ 4 In July 2000, defendant filed a motion to suppress evidence seized as beyond the scope of the warrant, including the following: (1) the swabbing of the stain on the bottom of the steering column, (2) the chrome casing removed from the passenger front door, (3) the door strap removed from the right rear passenger door, (4) the ashtray removed from the right rear passenger door, and (5) the tapings taken from various areas inside the vehicle. On August 28, 2000, the circuit court entered a written order granting in part defendant's motion to suppress. The court excluded the tapings and fingerprint evidence. However, it found bloodstains obtained from the swab were admissible, as well as "any items taken from the vehicle which were in plain view." Defense counsel orally requested the court to clarify whether it had suppressed the items "physically removed from the vehicle," namely, the steering wheel cover, chrome casing, door strap, and ashtray. The court responded, "Right. Not plain view." The State did not appeal the court's August 28, 2000, order.

¶ 5 On October 31, 2000, defendant filed a sixth motion *in limine*, seeking to bar the State from mentioning or eliciting any testimony regarding the DNA test that matched blood found on the chrome casing with Godels's DNA. Defendant's motion contended the blood evidence was inadmissible for the same reason the chrome casing was inadmissible and was "nothing more than 'Fruits of the poisonous tree' (evidence found from anything illegally seized)." On November 1,

2000, the circuit court called the case for trial and held a hearing on pretrial motions in the morning. In arguing defendant's sixth motion *in limine,* the prosecutor stated he did not understand the court was suppressing the chrome casing and requested the court to reconsider its ruling. He explained the crime scene technician had to remove the chrome casing because it could not be swabbed for blood. The State argued the chrome casing was within the scope of the warrant and the police had probable cause to search without a warrant. The court denied the State's oral motion to reconsider and granted defendant's sixth motion *in limine*. It scheduled jury selection for that afternoon and recessed.

¶ 6 When the circuit court reconvened, the State tendered a notice of appeal "[i]nstanter in open court." The State also filed a certificate of impairment that day. The notice of appeal stated that the State was appealing orders "[s]uppressing evidence and denying a motion to reconsider the suppression and allowing Defendant's 6th Motion *in Limine*." The circuit court found the State's notice of appeal was untimely with respect to the August 28, 2000, suppression order and stated it would proceed to trial. The prosecutor notified the court that the State would not be participating in the trial. Thereafter, defendant waived his right to a jury. The court called the case for a bench trial and granted defendant's motion for a directed verdict of not guilty without receiving any evidence. The court entered judgment of not guilty on all charges.

¶ 7 On appeal, this court found it had jurisdiction of the circuit court's November 1, 2000, order under Illinois Supreme Court Rule 604(a)(1) (eff. Nov. 1, 2000), which allowed the State to appeal from an order the substantive effect of which results in suppressing evidence. *People v. Kruger*, 327 Ill. App. 3d 839, 843, 764 N.E.2d 138, 141 (2002). We then addressed the merits of the State's argument and concluded the circuit court erred in suppressing the blood and DNA evidence. *Kruger*, 327 Ill. App. 3d at 845. Thus, this court (1) vacated the circuit court's

judgment finding defendant not guilty, (2) reversed the circuit court's November 1, 2000, orders denying the State's motion to reconsider the suppression of the chrome casing and granting defendant's sixth motion *in limine*, and (3) remanded the case for a new trial. *Kruger*, 327 Ill. App. 3d at 845. Defendant filed a petition for leave to appeal to the Illinois Supreme Court. The supreme court denied defendant's petition. *People v. Kruger*, 201 Ill. 2d 595, 786 N.E.2d 193 (2002) (table).

¶ 8 While the State's appeal was pending, the State filed a new indictment that restated the charges from the original indictment and added four counts that raised aggravating factors. After a June 2003 trial, a jury found defendant guilty of felony murder, home invasion, residential burglary, and attempt (robbery). The jury found him not guilty of intentional murder. In August 2003, the circuit court sentenced defendant to concurrent prison terms of natural life for felony murder, 30 years for home invasion, 15 years for residential burglary, and 5 years for attempt (robbery). Defendant filed a direct appeal and raised eight issues. *People v. Kruger*, 363 Ill. App. 3d 1113, 1119, 845 N.E.2d 96, 101 (2006). In March 2006, this court affirmed defendant's convictions but remanded the cause with directions to correct the written sentencing judgment to reflect defendant was convicted of felony murder, not intentional murder. *Kruger*, 363 Ill. App. 3d at 1124. Defendant filed a petition for leave to appeal to the Illinois Supreme Court, which the supreme court denied. *People v. Kruger*, 219 Ill. 2d 582, 852 N.E.2d 244 (2006) (table).

¶ 9 Defendant has filed numerous collateral challenges to his convictions and sentences. In November 2006, defendant filed a *pro se* postconviction petition raising 12 grounds for relief. He later filed an amended *pro se* postconviction petition, which the circuit court dismissed at the second stage of the proceedings. Defendant appealed, and this court affirmed the dismissal but vacated defendant's conviction and sentence for residential burglary and corrected defendant's murder conviction to show conviction for felony murder predicated on residential

burglary. *People v. Kruger*, 2012 IL App (4th) 100866-U, ¶ 21. We remanded the cause with directions to issue an amended sentencing order consistent with our judgment. *Kruger*, 2012 IL App (4th) 100866-U, ¶ 21.

¶ 10 In October 2011, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). Defendant's section 2-1401 petition requested vacatur of the Vermilion County circuit court's October 25, 2010, judgment denying defendant's request for a search of the DNA database. On November 4, 2011, the circuit court *sua sponte* denied defendant's section 2-1401 petition on the merits. Defendant appealed the court's denial. In a March 1, 2013, summary order, this court reversed the circuit court's denial because (1) defendant had not properly served the State and (2) the court's denial occurred prior to the expiration of the 30-day period for which the State had to respond to the petition. *People v. Kruger*, No. 4-11-1033 (Mar. 1, 2013) (unpublished summary order under Illinois Supreme Court Rule 23(c)). In October 2013, the circuit court entered a written order, in which it made findings defendant's section 2-1401 petition should be dismissed for want of prosecution and denied on the merits. Defendant again appealed. This court first denied the Office of the State Appellate Defender's motion to withdraw as counsel (*People v. Kruger*, 2015 IL App (4th) 131080, 45 N.E.3d 1103, *appeal denied*, No. 120765, 60 N.E.3d 878 (Ill. Sept. 28, 2016)) and later affirmed the circuit court's denial of defendant's section 2-1401 petition on the merits (*People v. Kruger*, No. 4-13-1080 (Mar. 24, 2016) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 11 In August 2013, defendant filed a *pro se* motion for leave to file a successive postconviction petition, which the circuit court denied in October 2013. Defendant appealed, and this court affirmed the denial. *People v. Kruger*, 2015 IL App (4th) 130995-U. Defendant filed a

petition for leave to appeal to the Illinois Supreme Court, which the supreme court denied. *People v. Kruger*, No. 119864 (Ill. Nov. 25, 2015).

¶ 12 In January 2017, defendant filed his second motion for leave to file a successive postconviction petition, contending this court's January 2002 opinion, which vacated the not guilty findings, reversed the circuit court's suppression of the DNA evidence from the blood on the chrome casing, and remanded for a new trial, is void because this court lacked jurisdiction to enter it. In his proposed successive postconviction petition, defendant asserted a double jeopardy violation based on his retrial after the circuit court had found him not guilty. On March 28, 2017, the circuit court entered a written order denying defendant's motion for leave to file a successive postconviction petition. Defendant appealed, and this court affirmed the denial. *People v. Kruger*, 2018 IL App (4th) 170306-U. He then filed a petition for leave to appeal to the Illinois Supreme Court, which the supreme court denied. *People v. Kruger*, No. 123383 (Ill. May 30, 2018).

¶ 13 In July 2019, defendant filed a third motion for leave to file a successive postconviction petition and the proposed postconviction petition. In his petition, defendant raised an as-applied constitutional challenge to his natural life sentence based in part on *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny. Defendant also noted the decriminalization of marijuana in Illinois and asserted the trial court used improper factors in sentencing him. Defendant does not raise the latter issue on appeal. On September 20, 2019, the circuit court entered a written order denying defendant's motion. The court found defendant had failed to show both cause and prejudice.

¶ 14 On October 7, 2019, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017). Thus, this court has jurisdiction of defendant's appeal under Illinois Supreme Court Rule 651(a) (eff. July 1, 2017).

¶ 15 II. ANALYSIS

¶ 16 Defendant argues he set forth the requisite *prima facie* showings for his claim his natural life sentence violated the proportionate penalties clause of the Illinois Constitution based in part on *Miller* and its progeny. The State only addresses prejudice and disagrees with defendant's argument. When the circuit court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 17 Section 122-1(f) of the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1(f) (West 2018)) provides the following:

> "[O]nly one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner 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; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *People v. Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909.

¶ 18 A. *Miller* and Its Progeny in Illinois

¶ 19 In *Miller*, 567 U.S. at 489, the United States Supreme Court found unconstitutional a sentencing scheme that mandated life in prison without the possibility of parole for juvenile offenders (those under the age of 18), including those convicted of homicide. The *Miller* Court did not foreclose sentencing a juvenile convicted of homicide to life in prison, but it emphasized the judge or jury must have the opportunity to consider mitigating factors before imposing the harshest possible penalty on a juvenile. *Miller*, 567 U.S. at 489. In reaching its holding, the *Miller* Court explained a sentencing court must consider how children are different from adult offenders for purposes of sentencing and how those differences counsel against irrevocably sentencing juveniles to a lifetime in prison. *Miller*, 567 U.S. at 480. Further, the juvenile offender's youth and attendant characteristics must be considered before imposing life imprisonment without the possibility of parole. *Miller*, 567 U.S. at 483. Thereafter, in *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016), the Supreme Court found the *Miller* decision announced a new substantive rule of constitutional law that was retroactive on state collateral review. It also reiterated what the *Miller* Court declared must be considered before imposing life imprisonment without the possibility of parole on a juvenile. *Montgomery*, 577 U.S. at 208. The *Montgomery* Court further explained *Miller* barred life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at 209. Recently, in *Jones v. Mississippi*, 593 U.S. ____, ____, 141 S. Ct. 1307, 1318 (2021), the Supreme Court explained the *Montgomery* decision did not require the sentencing court to make a separate factual finding of permanent incorrigibility.

¶ 20 Before *Montgomery*, the Illinois Supreme Court in *People v. Davis*, 2014 IL 115595, ¶ 39, 6 N.E.3d 709, held *Miller* stated a new substantive rule of law applicable

retroactively to cases on collateral review. As to the cause-and-prejudice test of section 122-1(f) of the Postconviction Act, the *Davis* court found "*Miller*'s new substantive rule constitutes 'cause' because it was not available earlier to counsel [citation], and constitutes prejudice because it retroactively applies to defendant's sentencing hearing." *Davis*, 2014 IL 115595, ¶ 42. The *Davis* case involved a defendant who was 14 years old at the time of the offense and had received a mandatory sentence of natural life imprisonment. *Davis*, 2014 IL 115595, ¶¶ 4-5. Later, in *People v. Holman*, 2017 IL 120655, ¶ 40, 91 N.E.3d 849, the Illinois Supreme Court further held "*Miller* applies to discretionary sentences of life without parole for juvenile defendants." There, the circuit court had exercised its discretion and imposed a sentence of life without parole for a murder the defendant committed at age 17. *Holman*, 2017 IL 120655, ¶¶ 1, 17.

¶ 21 In *People v. Reyes*, 2016 IL 119271, ¶¶ 9-10, 63 N.E.3d 884 (*per curiam*), our supreme court extended *Miller* to include a mandatory term of years that was the functional equivalent of life without the possibility of parole (*de facto* life sentence). The *Reyes* court found the defendant in that case had received a "*de facto* life-without-parole sentence," when he at 16 years old committed "offenses in a single course of conduct that subjected him to a legislatively mandated sentence of 97 years, with the earliest opportunity for release after 89 years." *Reyes*, 2016 IL 119271, ¶ 10. More recently in *People v. Buffer*, 2019 IL 122327, ¶ 41, 137 N.E.3d 763, our supreme court defined a *de facto* life sentence by declaring "a prison sentence of 40 years or less imposed on a juvenile offender does not constitute a *de facto* life sentence in violation of the eighth amendment."

¶ 22 As to young adults, in *People v. Thompson*, 2015 IL 118151, ¶ 1, 43 N.E.3d 984, the Illinois Supreme Court addressed whether a defendant may raise an as-applied constitutional challenge to his mandatory natural life sentence for the first time on appeal from the circuit court's

dismissal of a petition seeking relief under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). Citing *Miller*, the defendant argued his mandatory life sentence 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). *Thompson*, 2015 IL 118151, ¶ 17. Specifically, he asserted "the sentencing statute was unconstitutional as applied to him because he was 19 years old at the time of the shooting, had no criminal history, and impulsively committed the offense after years of abuse by his father." *Thompson*, 2015 IL 118151, ¶ 17. The supreme court agreed with the appellate court the defendant's argument was forfeited because it was not the type of challenge recognized as being exempt from section 2-1401's typical rules of forfeiture. *Thompson*, 2015 IL 118151, ¶ 39.

¶ 23 While the supreme court determined the defendant could not raise his as-applied constitutional challenge to his sentence under *Miller* for the first time on appeal from dismissal of a section 2-1401 petition, the *Thompson* court explained the defendant was not necessarily foreclosed from renewing his as-applied challenge in the circuit court. *Thompson*, 2015 IL 118151, ¶ 44. It noted the following:

> "[T]he Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) is expressly designed to resolve constitutional issues, including those raised in a successive petition. [Citation.] Similarly, section 2-1401 of the Code permits either a legal or factual challenge to a final judgment if certain procedural and statutory requirements are satisfied." *Thompson*, 2015 IL 118151, ¶ 44.

¶ 24 In *People v. Harris*, 2018 IL 121932, ¶ 1, 120 N.E.3d 900, the supreme court was presented with both facial and as-applied constitutional challenges to the statutory sentencing scheme which resulted in a mandatory minimum aggregate term of 76 years' imprisonment for the

defendant who was 18 years, 3 months of age at the time of the offenses. The defendant had asserted on direct appeal his aggregate 76-year prison sentence violated both the eighth amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution. *Harris*, 2018 IL 121932, ¶ 17. The *Harris* court addressed defendant's facial challenge based on the eighth amendment and concluded it failed. *Harris*, 2018 IL 121932, ¶ 61. In reaching that conclusion, it noted the Supreme Court had drawn "the line at age 18 because that 'is the point where society draws the line for many purposes between childhood and adulthood.' " *Harris*, 2018 IL 121932, ¶ 60 (quoting *Roper v. Simmons*, 543 U.S. 551, 574 (2005)). The *Harris* court pointed out "[n]ew research findings do not necessarily alter that traditional line between adults and juveniles." *Harris*, 2018 IL 121932, ¶ 60. Moreover, it noted "claims for extending *Miller* to offenders 18 years of age or older have been repeatedly rejected." *Harris*, 2018 IL 121932, ¶ 61 (citing a collection of cases). The *Harris* court agreed with those decisions and the appellate court and declared, "for sentencing purposes, the age of 18 marks the present line between juveniles and adults." *Harris*, 2018 IL 121932, ¶ 61.

¶ 25 On the other hand, the *Harris* court declined to address the defendant's as-applied constitutional challenge based on the Illinois Constitution's proportionate penalties clause because it was premature. *Harris*, 2018 IL 121932, ¶ 46. The supreme court noted the following:

> "[A] court is not capable of making an as applied determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact. [Citation.] Without an evidentiary record, any finding that a statute is unconstitutional as applied is premature." (Internal quotation marks omitted.) *Harris*, 2018 IL 121932, ¶ 39 (quoting *People v. Rizzo*, 2016 IL 118599, ¶ 26, 61 N.E.3d 92).

In *Harris*, 2018 IL 121932, ¶ 40, the defendant raised the issue for the first time on direct appeal. "Thus, an evidentiary hearing was not held on his constitutional claim, and the trial court did not make any findings of fact on defendant's specific circumstances." *Harris*, 2018 IL 121932, ¶ 40. The court further noted *Miller* did not directly apply to the circumstances of the defendant, who committed the offense as a young adult, and thus the record had to be sufficiently developed to address the claim *Miller* applied to the defendant's particular circumstances. *Harris*, 2018 IL 121932, ¶ 45.

¶ 26 The *Harris* court concluded the defendant's as-applied challenge was more appropriate for another proceeding. *Harris*, 2018 IL 121932, ¶ 48. As in *Thompson*, the supreme court noted the defendant could raise his as-applied challenge under the Postconviction Act, which allows for raising "constitutional questions which, by their nature, depend[ ] upon facts not found in the record." (Internal quotations marks omitted.) *Harris*, 2018 IL 121932, ¶ 48 (quoting *People v. Cherry*, 2016 IL 118728, ¶ 33, 63 N.E.3d 871). Such a challenge "could also potentially be raised in a petition seeking relief from a final judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016))." *Harris*, 2018 IL 121932, ¶ 48.

¶ 27 Additionally, as defendant notes, the First District has found the mandatory natural life sentence of a defendant who was 19 years and 2 months old when he committed the offense violated the proportionate penalties clause of the Illinois Constitution as applied to him based on the circumstances of his case, the reasoning behind the *Miller* decision, and other recent changes in statutory and case law. *People v. House*, 2019 IL App (1st) 110580-B, ¶¶ 63-64, 142 N.E.3d 756. There, the defendant raised the issue in an amended postconviction petition, which was dismissed by the circuit court at the second stage of the proceedings. *House*, 2019 IL App (1st) 110580-B, ¶ 23. The *House* court concluded the defendant's claim was before it in the posture

suggested by the supreme court's decision in *Harris*. Thus, it found the defendant's challenge was not premature, as it was in *Harris*. *House*, 2019 IL App (1st) 110580-B, ¶ 32. The *House* court concluded the defendant's mandatory sentence of natural life shocked the moral sense of the community based on the 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. *House*, 2019 IL App (1st) 110580-B, ¶ 64.

¶ 28 B. Prejudice

¶ 29 Since we agree with the State defendant did not make a *prima facie* showing of prejudice, we chose to address that prong of the cause-and-prejudice test. Citing the aforementioned case law, defendant notes Illinois courts have recognized the viability of young adult claims based on the reasoning behind *Miller*. He further acknowledges some cases have required the defendant to set forth facts particular to his or her case that support a proportionate penalties claim. See *People v. Lenoir*, 2021 IL App (1st) 180269, ¶ 57. The State contends claims based on *Miller* are limited to those under 18 years old, and the cases recognizing *Miller*-based claims for those 18 to 20 years old are outliers. Moreover, it notes defendant was 21 years old when he committed the offense in this case, and *Miller*-based claims are not available to those past the age of 21.

¶ 30 In support of his claim, defendant cites *People v. Savage*, 2020 IL App (1st) 173135, ¶ 80, where the appellate court reversed the circuit court's summary dismissal of defendant's postconviction petition and remanded the case for second-stage postconviction proceedings. In his *pro se* postconviction petition, the defendant alleged "his 85-year sentence violated the provision of the Illinois Constitution requiring 'penalties' to have 'the objective of restoring the offender to useful citizenship.' Ill. Const. 1970, art. I, § 11." *Savage*, 2020 IL App

(1st) 173135, ¶ 7. The defendant asserted, at the time of the offense, he was 22 years old and his mind was " 'soaked in drugs since childhood.' " *Savage*, 2020 IL App (1st) 173135, ¶ 7. He further contended his long-term addiction and his young age left him " 'more susceptible to peer pressure' and 'more volatile in emotionally charged settings.' " *Savage*, 2020 IL App (1st) 173135, ¶ 7. The defendant argued he could not have brought his claim until the *House* and *Harris* decisions. *Savage*, 2020 IL App (1st) 173135, ¶ 7. The reviewing court found the defendant's argument was supported by both the filed record and recent case law and thus was not frivolous and patently without merit. *Savage*, 2020 IL App (1st) 173135, ¶ 76. While the court recognized recent and traditional legislative enactments support the view young-adult offenders are those under the age of 21, it found the defendant's claim mental health issues may lower a defendant's functional age was supported by recent case law. *Savage*, 2020 IL App (1st) 173135, ¶¶ 68-70 (citing *House*, 2019 IL App (1st) 110580-B, ¶ 59; *People v. Ramos*, 353 Ill. App. 3d 133, 137, 817 N.E.2d 1110, 1115 (2004); *People v. Quintana*, 332 Ill. App. 3d 96, 109, 772 N.E.2d 833, 845 (2002)).

¶ 31 The *Savage* decision fails to address a prior decision by the First District in *People v. Humphrey*, 2020 IL App (1st) 172837, ¶ 33, which held individuals who are 21 years or older when they commit an offense are adults for purposes of a *Miller*-based claim. There, the court noted the defendant had failed to identify a case in which an Illinois court recognized a life sentence imposed on an individual 21 or older was unconstitutional as applied to that offender under the proportionate penalties clause or the eighth amendment under the reasoning of *Miller*. *Humphrey*, 2020 IL App (1st) 172837, ¶ 33. The court explained the age of 21 as follows:

> "While 21 is undoubtedly somewhat arbitrary, drawing a line there is in keeping with other aspects of criminal law and society's current general recognition that 21 is considered the beginning of adulthood. In Illinois, a person under the age

> of 21 when he or she commits first degree murder is now eligible for parole review after serving 20 or more years of his or her sentence. 730 ILCS 5/5-4.5-115 (West Supp. 2019). The Illinois legislature has also prohibited the sale of nicotine and tobacco products to persons under 21 (720 ILCS 675/1 (West Supp. 2019)), prohibited the sale of alcohol products to persons under 21 (235 ILCS 5/6-16 (West 2016)), and made possession of a firearm by those under the age of 21 an aggravating factor for aggravated unlawful use of a weapon. (720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2016)).” *Humphrey*, 2020 IL App (1st) 172837, ¶ 34.

The *Humphrey* court did recognize evolving science on brain development may support claims for individuals 21 years or older at some time in the future. *Humphrey*, 2020 IL App (1st) 172837, ¶ 33.

¶ 32 We agree with the *Humphrey* court’s limiting *Miller*-based claims to those young adults aged 18 to 20. The United States Supreme Court cases, *Miller*, *Montgomery*, and *Jones*, have emphasized their holdings only apply to offenders under 18. See *Harris*, 2018 IL 121932, ¶ 58 (“[T]he Supreme Court has clearly and consistently drawn the line between juveniles and adults for the purpose of sentencing at the age of 18.”). Thus, our supreme court’s suggestion defendants who were 18 to 20 years old at the time of the offense may raise as-applied challenges under the Illinois proportionate penalties clause based on the reasoning in *Miller* is already a significant extension of *Miller*. As the *Humphrey* court notes, other aspects of criminal law and society recognize 21 as the beginning of adulthood. *Humphrey*, 2020 IL App (1st) 172837, ¶ 34. If further extension of *Miller* is warranted, then the legislature or highest court should make the extension. See *People v. Rivera*, 2020 IL App (1st) 171430, ¶ 27. We find defendant failed to make a *prima facie* showing of prejudice and the circuit court properly denied his third motion for leave

to file a successive postconviction petition.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the Vermilion County circuit court's judgment.

¶ 35 Affirmed.

No. 4-19-0687

Cite as:	*People v. Kruger*, 2021 IL App (4th) 190687
Decision Under Review:	Appeal from the Circuit Court of Vermilion County, No. 99-CF-357; the Hon. Mark S. Goodwin, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Jonathan Krieger, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Jacqueline M. Lacy, State's Attorney, of Danville (Patrick Delfino, David J. Robinson, and Luke McNeill, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.