DATE FILED: February 17, 2022
CASE NUMBER: 2019CA754

SUMMARY
February 17, 2022

2022COA20

No. 19CA0754, *People v. Castillo* — Criminal Law — Sentencing; Constitutional Law — Fourteenth Amendment — Equal Protection; Crimes — Murder in the First Degree — Extreme Indifference

In this appeal from the denial of a postconviction motion, the defendant claims that his sentence to life without the possibility of parole (LWOP) violates his right to equal protection. The defendant, who was then eighteen and a half years old, was the driver in a drive-by shooting. His passenger, who was then two days shy of his eighteenth birthday, was the shooter. Both were convicted as adults of first degree extreme indifference murder. Because he was over eighteen at the time of the offense, the defendant was sentenced to LWOP, but because the shooter was under eighteen at the time of the offense, he was sentenced to life with the possibility

of parole after forty years. The defendant claims that his sentence violates his right to equal protection because he and the shooter — just six months apart in age — were similarly situated, yet he was required to be sentenced more harshly for the same conduct.

Although the division concludes that the defendant was similarly situated to the shooter, it also concludes that his sentence does not violate his right to equal protection. Because the division also rejects the defendant's other appellate contentions, it affirms the court's denial of the postconviction motion.

COLORADO COURT OF APPEALS **2022COA20**

Court of Appeals No. 19CA0754
Arapahoe County District Court No. 05CR3826
Honorable Ben L. Leutwyler III, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Hector Manuel Castillo,

Defendant-Appellant.

ORDER AFFIRMED

Division II
Opinion by JUDGE BROWN
Román, C.J., and Welling, J., concur

Announced February 17, 2022

Philip J. Weiser, Attorney General, Patrick A. Withers, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Robin M. Lerg, Alternate Defense Counsel, Montrose, Colorado, for Defendant-Appellant

¶ 1 On November 30, 2005, Hector Manuel Castillo, who was then eighteen and a half years old, drove a car in a gang-related drive-by shooting. Castillo's passenger, Alberto Valles, who was then two days shy of his eighteenth birthday, fired several shots from a rifle at another car, killing one of the passengers.

¶ 2 Castillo and Valles were both convicted of first degree extreme indifference murder. Because he was eighteen at the time of the offense, Castillo was sentenced to the statutory minimum of life without the possibility of parole (LWOP). Because Valles was under eighteen at the time of the offense, however, he was sentenced to life with the possibility of parole (LWPP) after forty years.

¶ 3 In a postconviction motion, Castillo raised several challenges to his conviction and sentence, including a claim that his sentence violated his right to equal protection because he and Valles — just six months apart in age — were similarly situated and yet he was required to be sentenced more harshly for the same conduct. The postconviction court denied the motion and Castillo appeals.

¶ 4 Although we conclude that Castillo and Valles were similarly situated for equal protection purposes, we also conclude that

Castillo's sentence does not violate his right to equal protection. Because we reject his other appellate contentions as well, we affirm.

I. Background

A. Castillo's Conviction, Appeal, and First Postconviction Motion

¶ 5 A jury found Castillo guilty of first degree extreme indifference murder, five counts of attempted first degree extreme indifference murder, and one count each of accessory to attempted extreme indifference murder and reckless endangerment. The court sentenced Castillo to LWOP, which was the statutorily mandated minimum sentence for a class 1 felony at the time under section 18-1.3-401, C.R.S. 2006. At sentencing, the court explained that its "hands . . . are pretty well tied" because "the legislature . . . has deemed it appropriate to take from the [c]ourt all discretion in regards to sentencing when an individual is found guilty by a jury of murder in the first degree."

¶ 6 In 2007, Castillo appealed his conviction, contending, among other things, that the trial court gave an erroneous complicity instruction and violated his due process rights by referring the jury to the erroneous complicity instruction in response to a jury inquiry. A division of this court affirmed Castillo's conviction. *See*

People v. Castillo, (Colo. App. No. 07CA1884, Aug. 6, 2009) (not published pursuant to C.A.R. 35(f)) (*Castillo I*).

¶ 7 In 2011, Castillo filed his first postconviction motion under Crim. P. 35(c). As relevant here, Castillo asserted that his trial counsel rendered ineffective assistance by failing to explain the plea bargaining process to him and by failing to object to the complicity jury instruction at trial. He also asserted that the trial court gave an erroneous complicity jury instruction. The district court denied the petition without a hearing, concluding that Castillo failed to state a claim for relief. A division of this court affirmed. *See People v. Castillo*, (Colo. App. No. 11CA2284, Apr. 3, 2014) (not published pursuant to C.A.R. 35(f)) (*Castillo II*).

B. Proceedings Involving the Shooter

¶ 8 Meanwhile, although Valles was a juvenile at the time of the offense, he was tried and convicted as an adult of one count of first degree extreme indifference murder and four counts of attempted extreme indifference murder. He was also sentenced to mandatory LWOP. *People v. Valles*, 2013 COA 84, ¶ 4, *cert. granted, judgment vacated, and case remanded*, No. 13SC551, 2015 WL 4999239 (Colo. Aug. 24, 2015) (unpublished order).

¶ 9 While Valles' case was pending on direct appeal, however, the United States Supreme Court announced *Miller v. Alabama*, 567 U.S. 460, 465 (2012), which held that sentencing a juvenile to mandatory LWOP violates the Eighth Amendment's prohibition on cruel and unusual punishment. On appeal, Valles argued that his sentence was unconstitutional under *Miller*. *Valles*, ¶ 68. A division of this court agreed and remanded the case for resentencing. *Id.* at ¶¶ 74-75. In May 2018, Valles was resentenced to LWPP after forty years.

C. Castillo's Most Recent Postconviction Motion

¶ 10 On December 4, 2018, Castillo filed a second motion for postconviction relief, purportedly pursuant to Crim. P. 35(a), which is the subject of this appeal. Prompted by Valles' resentencing, Castillo contended that (1) because he was a less culpable complicitor who was subjected to a harsher penalty than the more culpable principal, the statutory sentencing scheme violates his rights to equal protection; and (2) his sentence to LWOP violates his rights to equal protection because there is no meaningful difference between an offender who is eighteen years and six months old and an offender who is two days shy of his eighteenth birthday. Due to

the "complexity of the issues raised," Castillo requested appointment of counsel.

¶ 11 The postconviction court declined to appoint Castillo counsel and denied his motion without a hearing. It first determined, given the nature of the claims raised, that the motion was cognizable under Crim. P. 35(c). It then concluded that Castillo failed to demonstrate that he was similarly situated to Valles, thus failing to meet the threshold requirement for an equal protection claim.

II. Analysis

¶ 12 In his opening brief on appeal, Castillo contended that the postconviction court erred by (1) failing to conduct a proportionality review of his sentence; (2) not liberally construing his postconviction motion as asserting claims of ineffective assistance of counsel; and (3) not reversing his conviction based on the complicity jury instruction given by the trial court. Although Castillo framed his first claim as challenging the postconviction court's denial of his request for a proportionality review, the substance of his argument challenged the postconviction court's ruling on his equal protection claim. Because Castillo filed his appeal pro se, and because the People did not address the equal

protection issue in their answer brief, we appointed Castillo counsel and ordered supplemental briefing from both sides on a single issue: Did the postconviction court err by denying Castillo's claim that his sentence violates his right to equal protection under the United States and Colorado Constitutions?

¶ 13 Having reviewed the supplemental briefs, we first conclude that Castillo's equal protection claim fails as a matter of law. We then address and reject each of his remaining appellate contentions. Consequently, we affirm the postconviction court's denial of his postconviction motion.

A. General Standard of Review

¶ 14 A court may deny a Crim. P. 35(c) motion without a hearing if (1) "the motion, files, and record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief," *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003); (2) "the claims raise only an issue of law, or if the allegations, even if true, do not provide a basis for relief," *People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005); or (3) the allegations are "merely conclusory, vague, or lacking in detail," *People v. Osorio*, 170 P.3d 796, 799 (Colo. App. 2007).

¶ 15 We review a postconviction court's summary denial of a motion for postconviction relief de novo. *People v. Gardner*, 250 P.3d 1262, 1266 (Colo. App. 2010).

B. Equal Protection Claim

1. Applicable Law and Standard of Review

¶ 16 We must first determine whether, as applied, the sentencing statute requiring that Castillo be sentenced to LWOP, section 18-1.3-401, violates his constitutional right to equal protection. We review the constitutionality of a statute de novo. *Dean v. People*, 2016 CO 14, ¶ 11. "A statute is presumed to be constitutional; the challenging party bears the burden of proving its unconstitutionality beyond a reasonable doubt." *Id.* at ¶ 8.

¶ 17 The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although the Colorado Constitution does not contain an identical provision, the due process clause of the Colorado Constitution implies a similar guarantee. *Dean*, ¶ 11.

¶ 18 "When a statute is challenged as violating equal protection because it treats two groups differently, the threshold question is

whether those two groups are similarly situated. Unless they are similarly situated, the equal protection guarantee is not implicated." *Buckley Powder Co. v. State*, 70 P.3d 547, 562 (Colo. App. 2002).

¶ 19 Where a party raises an equal protection challenge, the level of judicial scrutiny depends on the type of classification used and the nature of the right affected. *Dean*, ¶ 12. We apply rational basis review when the challenged law does not impact a traditionally suspect class or implicate a fundamental right. *Id.* Under rational basis review, "the challenging party must prove that the statute's classification bears no rational relationship to a legitimate legislative purpose or government objective, or that the classification is otherwise unreasonable, arbitrary, or capricious." *Id.*

¶ 20 Castillo contends that his sentence violates equal protection because he is similarly situated to Valles but has been punished more harshly (by being denied eligibility for parole after forty years) simply because he was roughly six months past his eighteenth birthday on the date of the offense. Thus, Castillo contends he has been treated differently because of his age. Age is not a suspect classification under the Equal Protection Clause. *Kimel v. Fla. Bd.*

of Regents, 528 U.S. 62, 83 (2000). An adult offender has no fundamental liberty interest in freedom from incarceration. *People v. Dash*, 104 P.3d 286, 290 (Colo. App. 2004) (citing *People v. Young*, 859 P.2d 814, 818 (Colo. 1993)). And even a juvenile offender has no fundamental right to be treated as a juvenile in a criminal case. *People v. Dalton*, 70 P.3d 517, 520 (Colo. App. 2002). Thus, we apply rational basis review to Castillo's equal protection claim.

2. Castillo and Valles Are Similarly Situated

¶ 21 The postconviction court rejected Castillo's equal protection claim based on his failure to demonstrate that he was similarly situated to Valles. It explained that Castillo and Valles were convicted of the same crime, even if Castillo was convicted as a complicitor. *See Grissom v. People*, 115 P.3d 1280, 1283 (Colo. 2005); *Reed v. People*, 171 Colo. 421, 428, 467 P.2d 809, 812 (1970). So the postconviction court reasoned that the difference between Castillo's sentence and Valles' sentence was based on their respective classifications as adult and juvenile. Quoting *Miller*, 567 U.S. at 471, it explained that "[c]hildren are constitutionally different from adults for purposes of sentencing." Consequently,

the postconviction court found that Castillo and Valles were not similarly situated, a finding that was fatal to Castillo's equal protection claim.

¶ 22 The postconviction court accurately quoted *Miller*. But the threshold inquiry of whether persons are similarly situated "does not end by merely acknowledging obvious superficial differences between persons or groups, but instead focuses on whether 'reasonable differences' between the two can justify a law's differential treatment." *Dallman v. Ritter*, 225 P.3d 610, 634 (Colo. 2010) (quoting *Bushnell v. Sapp*, 194 Colo. 273, 280, 571 P.2d 1100, 1105 (1977)).

¶ 23 *Miller*'s conclusion that juveniles are different from adults for purposes of sentencing rested on "three significant gaps between juveniles and adults," 567 U.S. at 471, that apply equally to a juvenile two days shy of his eighteenth birthday and a young man six months past his eighteenth birthday. *Miller* explained that (1) children have a lack of maturity and an underdeveloped sense of responsibility "leading to recklessness, impulsivity, and heedless risk-taking"; (2) children are more vulnerable to negative influences and outside pressure, have limited control over their own

environment, and "lack the ability to extricate themselves from horrific, crime-producing settings"; and (3) a child's character is not as well formed as an adult's, his traits are less fixed, and his actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

¶ 24 As the Supreme Court noted in *Roper*, however, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]. By the same token, some under [eighteen] have already attained a level of maturity some adults will never reach." 543 U.S. at 574. Emerging scientific consensus appears to align with the sentiment expressed in *Roper* — there is little difference between the minds of seventeen-year-olds and eighteen-year-olds. *See, e.g.*, *In re Pers. Restraint of Monschke*, 482 P.3d 276, 285 (Wash. 2021) ("[T]here is no distinctive scientific difference, in general, between the brains of a [seventeen]-year-old and an [eighteen]-year-old."); *see also* § 16-11.3-103(2.9)(b)(II), C.R.S. 2020 (repealed 2021) (requiring the Colorado commission on criminal and juvenile justice to "[s]tudy the established brain research, which shows that young adults who are at least eighteen years of age but younger than twenty-five years of age are similar to

juveniles in that their brains are still developing and have difficulty with qualitative decision-making, and they are susceptible to peer influence, risk-takers, and less future-oriented than older adults").

¶ 25 In addition, in the context of an equal protection challenge to sanctions imposed for criminal conduct, our supreme court previously determined that persons eighteen years of age or older at the time a penalty is imposed for an offense committed prior to their eighteenth birthdays are similarly situated to persons eighteen years of age or older at the time a penalty is imposed for the same offense committed after their eighteenth birthdays. *People in Interest of M.C.*, 774 P.2d 857, 861-62 (Colo. 1989). The court reasoned that "the fact that some eighteen year old persons are defined as children and, consequently, are granted special treatment does not render that class dissimilar to the class of other eighteen year olds not so defined." *Id.* at 861.

¶ 26 Valles was eighteen years of age or older at the time his sentence was imposed for an offense committed before his eighteenth birthday, while Castillo was eighteen years of age or older at the time his sentence was imposed for the same offense committed six months after his eighteenth birthday. We conclude

that, under the circumstances presented, Castillo and Valles are similarly situated.

3. Castillo's Sentence Does Not Violate Equal Protection

¶ 27 For the same reasons he argues he is similarly situated to Valles, Castillo contends that his disparate sentence violates equal protection. Although we have concluded that Castillo and Valles are similarly situated for equal protection purposes, we also conclude that there is a rational basis for treating them differently.

¶ 28 Under rational basis review, "[o]ur inquiry is limited to whether the scheme as constituted furthers a legitimate state purpose in a rational manner." *Dean*, ¶ 13. Thus, when the legislature defines criminal offenses and establishes corresponding penalties, equal protection is not violated so long as the legislative classification is not arbitrary or unreasonable, and the differences in the provisions bear a reasonable relationship to the public policy to be achieved. *Id.* at ¶ 16; *see also People v. Goodale*, 78 P.3d 1103, 1107 (Colo. 2003) (rejecting an equal protection challenge to a statute treating users of controlled substances other than marijuana differently, reasoning that there are legitimate differences between marijuana and other more dangerous drugs); *People v.*

Fuller, 791 P.2d 702, 705 (Colo. 1990) (concluding that the mandatory consecutive sentencing provision in section 16-11-309, C.R.S. 1986, did not violate equal protection because "[t]he General Assembly could have rationally decided that violent crimes committed as part of the same incident pose a greater threat to society than the same criminal conduct committed separately in different violent criminal episodes"); *M.C.*, 774 P.2d at 863 (determining that a seventeen-year-old juvenile who received a two-year sentence in the department of institutions under the children's code rather than a maximum $100 fine under the adult criminal code was not denied equal protection).

¶ 29 The state has legitimate interests in preventing and deterring crime, punishing criminal conduct, and rehabilitating defendants. *See* § 18-1-102.5, C.R.S. 2021; *People v. Torrez*, 2013 COA 37, ¶¶ 72-73. And we conclude that the legislative classification established by the General Assembly — providing a harsher penalty for a person who commits murder after he turns eighteen — is reasonably related to these legitimate interests and not arbitrary or unreasonable.

¶ 30 "To determine the age at which the diminished culpability of a youthful offender should no longer result in a categorically different sentence, a line must be drawn somewhere." *In re Jones*, 255 Cal. Rptr. 3d 571, 574-75 (Ct. App. 2019). And while "[d]rawing the line at [eighteen] years of age is subject, of course, to the objections always raised against categorical rules," *Roper*, 543 U.S. at 574, it is the point at which society draws the line for many purposes between childhood and adulthood. *See Jones*, 255 Cal. Rptr. 3d at 575. Although we recognize that there may be little cognitive difference between a seventeen-year-old juvenile and an eighteen-year-old adult, upon turning eighteen, "individuals receive all of these rights of adulthood, regardless of whether their brains are fully developed. At [eighteen], the court will no longer interfere with the exercise of these rights on the basis of age. Additionally, these rights are accompanied by the responsibilities and consequences of adulthood." *Monschke*, 482 P.3d at 289-90 (Owens, J. dissenting).

¶ 31 Although setting the age of majority at eighteen is not based "on scientific exactitude," it is based on "society's judgments about maturity and responsibility." *Id.* at 290 (citation omitted). Setting the line at which a person convicted of murder is subject to a

harsher penalty at age eighteen is rationally based on the same societally drawn line. The line may not be anchored in neuroscientific differences between juveniles and young adults, but that does not make it arbitrary or unreasonable. *See Kimel*, 528 U.S. at 83 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision."); *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 507 (Colo. 1997) ("[A] statute creating a classification is not deemed unconstitutional simply because distinctions created by the statute are not made with mathematical nicety. Rather, the problems of government being practical ones, equal protection will tolerate 'a rough accommodation of variant interests.'" (citing and quoting *Dawson v. Pub. Emps.' Ret. Ass'n*, 664 P.2d 702, 708 (Colo. 1983))).

¶ 32 Given the privileges and responsibilities associated with adulthood, there are real differences between seventeen-year-olds and eighteen-year-olds. The legislature's recognition of these

differences in establishing criminal penalties furthers a legitimate state interest in a rational manner.

¶ 33 And, although Castillo's sentence is more severe than Valles' sentence, that does not make it unconstitutional. *Dean*, ¶ 13 ("[S]imply because a statutory classification creates a harsh result in one instance does not mean that the statute fails to meet constitutionality requirements under the rational basis standard." (quoting *People v. Diaz*, 2015 CO 28, ¶ 25)); *Pace Membership Warehouse*, 938 P.2d at 507 (same); *see also People v. Bruebaker*, 189 Colo. 219, 222, 539 P.2d 1277, 1279 (1975) ("Due to the individualized nature of sentencing, there is no rule that confederates in crime must receive equal sentences, nor that failure to impose equal sentences violates equal protection of the law under the Colorado or United States Constitutions."); *People v. Hayes*, 923 P.2d 221, 230 (Colo. App. 1995) ("By its nature, sentencing is individualized, and there is no rule that co-defendants must receive equal sentences. The failure to impose equal sentences on co-defendants is not a violation of the equal protection clause.").

¶ 34 Notably, in applying rational basis review, "we do not decide whether the legislature has chosen the best route to accomplish its

objectives." *Dean*, ¶ 13. "That we might believe the decision [the legislature] reached was not the best policy, or that we might have reached a different decision, does not entitle us to overrule the legislature's decision absent a firm conviction that the decision is irrational." *HealthONE v. Rodriguez*, 50 P.3d 879, 894 (Colo. 2002).

¶ 35 We perceive no equal protection violation.

C. Issues Raised in Castillo's Opening Brief

1. Proportionality Review

¶ 36 Castillo contends that the postconviction court erred by failing to conduct a proportionality review of his sentence considering *Miller* and the fact that Valles was resentenced to LWPP after forty years. As noted above, Castillo's substantive argument in the "proportionality" section of his opening brief appears to be a claim that his sentence violates his right to equal protection. Still, Castillo argued for the court to implement a "new proportionate sentence," and the postconviction court was required to liberally construe his pro se motion. *See Jones v. Williams*, 2019 CO 61, ¶ 5 ("Pleadings by pro se litigants must be broadly construed to ensure that they are not denied review of important issues because of their inability to articulate their argument like a lawyer."). So, to the

extent that Castillo claims he was entitled to but denied a proportionality review of his sentence, we address that claim. Because Castillo's argument relates only to his LWOP sentence, so does our analysis.

¶ 37 The Eighth Amendment to the United States Constitution and article II, section 20 of the Colorado Constitution prohibit cruel and unusual punishments. *Wells-Yates v. People*, 2019 CO 90M, ¶¶ 5, 10. Those provisions generally require a sentence to be proportionate to the crime. *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Alvarez v. People*, 797 P.2d 37, 38 (Colo. 1990), *abrogated on other grounds by Melton v. People*, 2019 CO 89, ¶ 18.

¶ 38 A request for a proportionality review is a challenge to the constitutionality of a sentence under the Eighth Amendment and is properly cognizable under Crim. P. 35(c). *People v. Moore-El*, 160 P.3d 393, 395 (Colo. App. 2007). We review proportionality determinations de novo. *People v. Session*, 2020 COA 158, ¶ 36. But because the postconviction court did not conduct a proportionality review, we have no decision to review. Even so, "[i]n the absence of a need for a refined analysis inquiring into the details of the specific offenses . . . , an appellate court is as well

positioned as a trial court to conduct a proportionality review." *People v. Gaskins*, 825 P.2d 30, 37-38 (Colo. 1992), *abrogated on other grounds by Wells-Yates*, ¶ 55.

¶ 39 The initial proportionality review is a two-step abbreviated review. At step one, the court must consider the gravity or seriousness of the offense, which includes consideration of the harm caused or threatened to the victim or society and the culpability of the offender. *Wells-Yates*, ¶¶ 11-12. If a crime is considered per se grave or serious, however, the court may skip the first step of the abbreviated proportionality review. *Id.* at ¶ 13 (citing *Close v. People*, 48 P.3d 528, 538 (Colo. 2002)).

¶ 40 At step two, the court must consider the harshness of the penalty. *Id.* at ¶ 11. The harshness of the penalty includes a consideration of the length of the sentence as well as parole eligibility. *Id.* at ¶ 14.

¶ 41 If the initial two-step analysis does not give rise to an inference of gross disproportionality, no further analysis is required, and the proportionality challenge fails. *Id.* at ¶¶ 8, 18. If the analysis gives rise to an inference of gross disproportionality, however, the court

must conduct intrajurisdictional and interjurisdictional comparisons. *Id.*

¶ 42 Castillo was convicted of first degree extreme indifference murder, a per se grave or serious offense. *People v. Terry*, 2019 COA 9, ¶ 42; *see also* § 18-3-102(1)(d), C.R.S. 2021; *cf. People v. Smith*, 848 P.2d 365, 374 (Colo. 1993) (First degree murder is "a crime of the utmost gravity."). It is of no consequence that Castillo was convicted as a complicitor; complicity is a theory of principal liability. *Grissom*, 115 P.3d at 1283 (explaining that complicity is not a separate crime but rather a theory by which a defendant becomes legally accountable as principal for the behavior of another); *Reed*, 171 Colo. at 428, 467 P.2d at 812 ("Where two or more are involved in the commission of a criminal offense and one helps the other, though not actually performing all the acts necessary to the commission of the offense, all are, nevertheless, principal offenders and are punishable as though all have committed the necessary acts."); *see also People v. Sosa*, 2019 COA 182, ¶ 33 (distinguishing a complicitor from an accessory to a crime).

¶ 43 At the time Castillo was sentenced, a class 1 felony committed on the date of Castillo's offense was subject to a minimum sentence of LWOP and a maximum sentence of death. § 18-1.3-401(1)(a)(V)(A), (4)(a). Castillo was sentenced to the statutory minimum.

¶ 44 Given the gravity of the crime, and keeping in mind that "[i]t is 'exceedingly rare' for a sentence to be deemed so extreme that it is grossly disproportionate to the crime," *Wells-Yates*, ¶ 5 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)), we conclude that Castillo's sentence does not give rise to an inference of gross disproportionality. Accordingly, his proportionality challenge fails.

2. Ineffective Assistance of Counsel

¶ 45 Castillo contends that the postconviction court erred by not liberally construing his postconviction motion as asserting claims that postconviction counsel was ineffective for "failing to raise a proportionality challenge" to his LWOP sentence. We have conducted our own abbreviated proportionality review, however, and concluded that Castillo is not entitled to relief. Because Castillo has received on appeal what he contends postconviction

counsel failed to seek, he is unable to demonstrate that he suffered prejudice as a result of the alleged ineffective assistance of counsel. *See People v. Washington*, 2014 COA 41, ¶¶ 22-23 (placing the burden on the defendant to prove prejudice, which requires the defendant to demonstrate "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different").

3. Complicity Instruction

¶ 46 Castillo contends that the postconviction court erred by not reversing his conviction based on the complicity jury instruction given by the trial court. He contends that changes in the law regarding what is required to convict under a theory of complicity, as explained in *People v. Childress*, 2015 CO 65M, demonstrate that the evidence was insufficient to sustain his conviction, rendering his conviction unconstitutional.[1] Specifically, he argues that "had

[1] Castillo further contends that postconviction counsel was ineffective for failing to raise this issue. *People v. Childress*, 2015 CO 65M, was announced in 2015 and Castillo filed his first postconviction motion in 2011. We do not see how postconviction counsel could have been ineffective for failing to raise an argument based on law that would not be announced for approximately four more years.

the jury been properly instructed as to the necessity of Mr. Castillo possessing the mens rea to commit first-degree extreme indifference murder, he would not have been convicted."

¶ 47 Even granting Castillo liberal construction of his postconviction motion, we fail to see where he raised this issue for the postconviction court's consideration. In his motion, Castillo quoted the complicity jury instruction given at trial, but he did not argue that changes in the law regarding the mens rea requirement for complicitor liability render his conviction constitutionally unsound. We will not review unpreserved postconviction claims of this nature. *See People v. Huggins*, 2019 COA 116, ¶ 17 ("When a defendant does not raise an issue in a postconviction motion or during the hearing on that motion, and the postconviction court therefore does not have an opportunity to rule on the issue, as a general rule, the issue is not properly preserved for appeal and we will not consider it.").

¶ 48 In addition, we note that Castillo raised claims regarding the complicity jury instruction both on direct appeal and in his first postconviction motion. In resolving Castillo's direct appeal claim, a division of this court explained that complicity requires a "dual

mental state," which requires the complicitor to possess both "the mens rea required for the underlying crime committed by the principal" and "the intent to promote or facilitate the commission of the crime." *Castillo I*, No. 07CA1884, slip op. at 8. It further explained that the complicity instruction given at trial tracked the pattern jury instruction, which incorporated both requirements. *Id.* at 9; *cf. Childress*, ¶ 29 ("[T]he 'dual mental state requirement' of complicitor liability . . . [requires] that the complicitor have: (1) the intent, in the commonly understood sense of desiring or having a purpose or design, to aid, abet, advise, or encourage the principal in his criminal act or conduct, and (2) an awareness of those circumstances attending the act or conduct he seeks to further that are necessary for commission of the offense in question . . . , including a required mental state, if any . . . .").

¶ 49 Crim. P. 35(c)(3)(VI) provides as follows:

> The court shall deny any claim that was raised and resolved in a prior appeal or postconviction proceeding on behalf of the same defendant, except the following:
>
> (a) Any claim based on evidence that could not have been discovered previously through the exercise of due diligence;

> (b) Any claim based on a new rule of constitutional law that was previously unavailable, if that rule has been applied retroactively by the United States Supreme Court or Colorado appellate courts.

¶ 50 Castillo does not explain how his claim meets either of these exceptions. Because Castillo raised this claim in his direct appeal, the postconviction court would have been required to deny it as successive had it been raised in his postconviction motion.

III. Conclusion

¶ 51 We affirm the order denying Castillo's postconviction motion.

CHIEF JUDGE ROMÁN and JUDGE WELLING concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at* ***http://www.cobar.org/appellate-pro-bono