

No. 1-09-2995

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE APPELLATE  
COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03CR16589
	)	
LAWRENCE SCEEREY,	)	The Honorable
	)	John J. Scotillo,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Pucinski concur in the judgment.

*Held:* Summary dismissal of *pro se* postconviction petition affirmed where claim is barred by the principle of *res judicata* because same substantive argument was previously made on direct appeal.

¶ 1

ORDER

¶ 2 Defendant Lawrence Sceerey appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122 *et seq.* (West 2008)). On appeal, defendant asserts that this court should remand his postconviction petition for second-stage proceedings where his convictions and sentence violated the principles of double

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jeopardy. For the following reasons, we affirm.

¶ 3

### BACKGROUND

¶ 4 After a jury trial, defendant was found guilty of two counts each of home invasion, residential burglary, criminal sexual assault, and criminal sexual abuse. The trial court sentenced defendant to ten years' imprisonment for home invasion and ten years' imprisonment for criminal sexual assault, to be served consecutively. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23). Because the facts of the offense are fully set out in our order on direct appeal, we restate here only those facts necessary to an understanding of defendant's current appeal.

¶ 5 Evidence at trial showed that, in the early morning hours of September 26, 2001, 15-year-old Amanda C. awoke to find defendant lying on top of her with his palm pressed on the outside of her vagina and his fingers moving inside of her vagina. Her pants and underwear had been removed and her t-shirt and bra were pulled up. Amanda could clearly see defendant, recognized a scar on his face, and recognized him as her former stepfather with whom she had lived for five years. She began screaming, defendant shushed her, got off the bed, grabbed something from the floor, and left her room while holding onto his face.

¶ 6 As Amanda ran to her mother's room, she saw defendant flee through the back door. Amanda told her mother what had happened to her, including identifying defendant. Her mother's boyfriend, Emmanuel Garza, knew defendant from growing up in the same

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neighborhood. He left the house to find defendant. As he did so, he noticed that the motion sensor light did not activate. Earlier that evening when he arrived at the house, the motion sensor had illuminated the front porch light. At this time, however, the light did not turn on and Garza discovered that it had been unscrewed. When he screwed the lightbulb back in, the light came on. Garza then went to the back door and, although he had locked it earlier that night, saw that it was now unlocked and slightly open. Amanda's mother called the police.

¶ 7 When the police arrived, Amanda told them defendant had attacked her. She then went to the hospital. While she was at the hospital, she spoke with Detective Mercado. She told Detective Mercado that she had gone to bed around 11:30 p.m., and later felt her water bed move. She thought it was her cat, so she dismissed it. She told Detective Mercado that she remembered not being able to roll over and feeling claustrophobic. She woke up startled to see defendant on top of her. She said that when she woke up, her t-shirt and bra had been pulled up to her neck and she was not wearing her pants or underwear that she had gone to sleep wearing. Amanda stated that she could feel defendant's fingers in her vagina.

¶ 8 On December 26, 2001, Detective Mercado showed Amanda a photographic lineup. Amanda identified defendant's photograph out of the lineup. Police arrested defendant more than a year and a half later on July 11, 2003.

¶ 9 In addition to the evidence regarding the charged incident involving Amanda, the jury heard evidence pertaining to four prior criminal incidents. Three of these incidents involved accusations of sexual misconduct and were admitted into evidence pursuant to 725 ILCS 5/115-7.3 (West 2000). As proof of defendant's *modus operandi*, the State also introduced evidence of

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defendant's peculiar form of ingress regarding an incident where defendant had previously entered his ex-wife's home and hidden in the attic.

¶ 10 Defendant did not testify.

¶ 11 The jury found defendant guilty on all counts. Defendant filed a motion for a new trial which the court denied. The trial court sentenced defendant to consecutive terms of ten years' imprisonment for home invasion and ten years' imprisonment for criminal sexual assault.

Defendant filed a motion to reconsider sentence, arguing that criminal sexual assault was a lesser-included offense of home invasion, and that defendant's consecutive sentences violated both the one-act, one-crime doctrine and double jeopardy. The trial court denied his motion.

¶ 12 On direct appeal, defendant argued that the trial court erred by allowing testimony of other crimes into evidence and that his conviction of criminal sexual assault must be vacated as a lesser-included offense of home invasion as pled in the charging instrument. We affirmed the trial court's judgment. *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23).

¶ 13 Defendant then filed the instant *pro se* petition for postconviction relief in March 2009.<sup>1</sup> In his petition, defendant alleged, *inter alia*, that the elements of criminal sexual assault were "subsumed" by the home invasion statute and therefore a conviction and sentence for both offenses violated double jeopardy. The circuit court determined that the issue had been addressed on defendant's direct appeal and was therefore barred by *res judicata*. Defendant now

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<sup>1</sup>Defendant also has another case pending before this court, *People v. Sceerey*, No. 1-10-1581. The two cases are not consolidated.

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appeals the summary dismissal of his postconviction petition.

¶ 14

#### ANALYSIS

¶ 15 Defendant contends that the postconviction court erred in summarily dismissing his postconviction petition where his conviction and sentence for the lesser-included offense of criminal sexual assault was void because it violated double jeopardy. Specifically, defendant argues that he was improperly convicted and sentenced on both home invasion and criminal sexual assault. He argues that criminal sexual assault was the predicate offense for home invasion and, thus, these multiple convictions and sentences violated double jeopardy.

¶ 16 The State responds that the postconviction court did not, in fact, err in dismissing defendant's petition where defendant's contention was barred by *res judicata*. Specifically, the State posits that defendant brought a one-act, one-crime claim on direct appeal, and now seeks to advance an identical claim under the guise of a double jeopardy claim in his postconviction petition. This claim, however, is barred by *res judicata* because the substantive issue was previously addressed and denied. We agree.

¶ 17 The Post-Conviction Hearing Act provides a remedy for defendants whose constitutional rights were substantially violated in their original trial or sentencing hearing when such a claim was not, and could not have been, previously adjudicated. *People v. Enis*, 194 Ill. 2d 361, 375 (2000).

¶ 18 The summary dismissal of a postconviction petition is appropriate at the first stage of postconviction review where the circuit court finds that it is frivolous and patently without merit

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(725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, the petition has no arguable basis in either law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). To have no arguable basis, the petition must be based on an “indisputably meritless legal theory or a fanciful factual allegation.” *Hodges*, 234 Ill. 2d at 16. In order for a defendant to circumvent dismissal at the first stage, he must allege the “gist” of a constitutional claim, which is low threshold. *Hodges*, 234 Ill. 2d at 9-10. This standard requires only that a defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The summary dismissal of a postconviction petition is a legal question which we review *de novo*. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 247 (2001). “Although the trial court’s reasons for dismissing [the] petition may provide assistance to this court, we review the judgment, and not the reasons given for the judgment.” *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 19 An action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). Any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted. *Tenner*, 206 Ill. 2d at 392; *People v. West*, 187 Ill. 2d 418, 426 (1999). Under the principles of *res judicata*, “ ‘a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.’ ” *People v. Creek*, 94 Ill. 2d 526, 533 (1983), quoting *People v. Kidd*, 398 Ill. 405, 408 (1947). A postconviction petition is frivolous or patently without merit if the claims are barred by *res judicata* or forfeiture. *People v. Blair*,

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215 Ill. 2d 427, 226 (2005) ("[T]he legislature intended to allow a judge to summarily dismiss [postconviction] petitions where facts ascertainable from the record reveal the petition's claims have already been decided, waived or forfeited").

¶ 20 Here, although defendant now re-frames the argument from his direct appeal, it is nonetheless the same argument. We previously addressed defendant's substantive contention that criminal sexual assault is a lesser-included offense of home invasion, and defendant's instant attempt to re-frame it as a violation of double jeopardy as opposed to a violation of the one-act, one-crime doctrine is unavailing.

¶ 21 At the motion to reconsider sentence below, defendant unsuccessfully argued that his conviction for criminal sexual assault was a lesser-included offense of home invasion, thus violating both double jeopardy and the one-act, one-crime doctrine. The trial court denied his motion and determined that he was properly sentenced to consecutive sentences for criminal sexual assault and home invasion. Defendant then appealed to this court. On appeal, defendant abandoned his double jeopardy claim, but continued to argue that his conviction for criminal sexual assault should be vacated under the one-act, one-crime doctrine. *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23). We denied defendant's claim and held that criminal sexual assault was not a lesser-included offense of home invasion in this case. In so finding, we considered the specifics of the charging instruments in the instant case, examining the factual description of the charges in the indictment " ' "to see whether the description of the greater offense contains a " 'broad foundation' " or " 'main outline' " of the lesser offense." ' " *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme

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Court Rule 23), quoting *People v. Johnson*, 368 Ill. App. 3d 1146, 1165 (2006), quoting *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). We compared the statutory definition of criminal sexual assault as set forth in section 12-13 of the Code of Criminal Procedure, 720 ILCS 5/12-13(a) (West 2000), with the factual description of the charges in the indictment. According to statute, a person commits the crime of criminal sexual assault when he:

" '(1) commits an act of sexual penetration by the use of force or threat of force; or

¶ 22(2) commits an act of sexual penetration and the accused knew that the victim was unable to understand \* \* \* or was unable to give knowing consent; or

¶ 23(3) commits an act of sexual penetration with a victim who was under 18 \* \* \* and the accused was a family member; or

¶ 24(4) commits an act of sexual penetration with a victim who was at least 13 \* \* \* but under 18 \* \* \* and the accused was 17 \* \* \* and held a position of trust, authority or supervision in relation to the victim.' " *People v. Sceerey*, No. 1-06-0307 (2007)

(unpublished order under Supreme Court Rule 23), quoting 720 ILCS 5/12-13(a) (West 2000).

¶ 25 The charging instrument for home invasion in defendant's case alleged that defendant:

" '[C]ommitted the offense of home invasion in that he, not being a peace officer acting in the line of duty, without authority,

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knowingly entered the dwelling place of Amanda [C.], and he remained in such a dwelling place until he know or had reason to know that one or more person were present, committed the offense of criminal sex assault in violation of Chapter 720 Act 5 Section 12-13, against Amanda C. within that dwelling place[.]' " *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23).

Upon comparing these, we concluded:

"the home invasion charging instrument did not set forth a broad foundation or main outline of criminal sexual assault. In particular, it did not explicitly allege[] that defendant committed an act of sexual penetration nor did it describe any of the other required elements of that crime as outlined in the four subsections of the statute. See 720 ILCS 5/12-13(a) (West 2000). Thus, as defined in Count 2 of the indictment here, home invasion lacked factual elements that are necessary to the offense of criminal sexual assault. To prove home invasion in this case, the State had to prove that defendant was not a peace officer, that he knowingly and without authority entered Amanda C.'s home, that he remained there until he knew that someone was present, and that he ' "committed the offense of criminal sex assault in violation of

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Chapter 720 Act 5 Section 12-13" ' against Amanda C. in that home. Clearly, this count does not explicitly refer to an act of sexual penetration nor to any other element in relation to the offense of criminal sexual assault. See 720 ILCS 5/12-13(a) (West 2000).' " *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23).

We then went on to find that the missing elements of the offense could not be inferred from the phrase in Count 2 of home invasion that alleged defendant " 'committed the offense of criminal sex assault in violation of Chapter 720 Act 5 Section 12-13.' " *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23). We held that the description in Count 2 of home invasion did not set forth a "broad foundation or main outline" of criminal sexual assault and that the allegations of home invasion and the elements of criminal sexual assault was " 'simply too tenuous' to identify criminal sexual assault as a lesser-included offense of home invasion." *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23), quoting *Johnson*, 368 Ill. App. 3d at 1166.

¶ 26 In his postconviction petition, defendant again argues that criminal sexual assault is a lesser-included offense of home invasion. His argument is as follows:

"[I]t is impossible to prove the offense of home invasion charged under the (a)(6) predicate, without proving the elements of whichever enumerated offense in Sub-Section 6, is alleged. Consequently, the elements of the predicate offense are not only

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'subsumed' by the home invasion statute, but necessarily included as well, and as such, conviction and/or sentence on that necessarily included lesser offense is prohibited by the double jeopardy clause of the [U]nited [S]tates [C]onstitution."

Defendant's argument, made first in a motion to reconsider sentence, then decided by this court on direct appeal, and finally repeated in the instant appeal of the dismissal of his postconviction petition is frivolous because the principle of *res judicata* bars grounds that were previously litigated. See *Blair*, 215 Ill. 2d at 445.

¶ 27 Defendant's attempt to save this identical claim from the bar of *res judicata* by relying on *People v. Miller*, 238 Ill. 2d 161 (2010), does not persuade us differently. Defendant argues that *Miller* "clarified that the abstract elements approach is the proper method to be used in determining when an offense is a lesser-included offense of another." *Miller*, however, is inapposite to the case at bar as it does not relate to double jeopardy claims.

¶ 28 In *Miller*, the defendant was charged with and convicted of burglary, retail theft, and aggravated assault. *Miller*, 238 Ill. 2d at 163-64. He argued that his conviction for retail theft must be vacated pursuant to the one-act, one-crime doctrine because it was a lesser-included offense of burglary. *Miller*, 238 Ill. 2d at 164. The appellate court vacated the retail theft conviction after applying the charging instrument approach, determining that defendant's indictment for burglary alleged the "main outline" of retail theft and was therefore a lesser-included offense of burglary. *Miller*, 238 Ill. 2d at 164. Thereafter, our supreme court reversed the appellate court and affirmed the trial court, holding that both of the defendant's convictions

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could stand. *Miller*, 238 Ill. 2d at 176. The court noted that section 2-9(a) of the Code defines an included offense as one that is "established by proof of lesser facts or mental state, or both, than the charged offense." *Miller*, 238 Ill. 2d at 165-66. Observing that the statutory definition provides little guidance as to the source to be examined in determining whether the definition is satisfied, the court noted that three possible methods had developed: the abstract-elements approach, the charging-instrument approach, and the factual or evidence-adduced-at-trial approach. *Miller*, 238 Ill. 2d at 166. The court held that, when the issue is whether one charged offense is a lesser included offense of another charged offense, the correct approach is the abstract-elements approach. *Miller*, 238 Ill. 2d at 173.

¶ 29 After concluding that the abstract elements approach should be applied under the one-act, one-crime doctrine in that situation, the court noted that its determination was consistent with the principles of double jeopardy. *Miller*, 238 Ill. 2d at 174. The court stated, "[t]o determine whether an offense is a lesser-included offense, and thus, the same as the greater offense for double jeopardy purposes, the United States Supreme Court employs the same elements test [citation.], the equivalent of the abstract elements approach which we have adopted in the case at bar." *Miller*, 238 Ill. 2d at 174-75. The Supreme Court established the same-elements test in *Blockburger v. United States*, 284 U.S. 299 (1932), to determine whether a constitutional double jeopardy violation has occurred, and Illinois applies the same test. *People v. Dinelli*, 217 Ill. 2d 387, 403-04 (2005). Because the same-elements test, which is equivalent to the abstract elements test, has applied to double jeopardy violations since 1932, defendant cannot now argue that *Miller* "clarified" the law regarding multiple acts supporting separate convictions.

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Defendant's contentions to the contrary are unavailing, as they are made in an effort to overcome the bar of *res judicata*. *Miller* clearly discusses lesser-included offenses only in the context of the one-act, one-crime doctrine and has no effect on the established body of law that applies to constitutional claims of double jeopardy.

¶ 30 Accordingly, because defendant fails to overcome the procedural bar of *res judicata*, we find that the trial court did not err in summarily dismissing defendant's postconviction petition.

¶ 31 **CONCLUSION**

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.