

No. 1-11-2577

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County.
)	
v.)	No. 91 CR 3548
)	
ADDOLFO DAVIS,)	Honorable
)	Angela Munari Petrone,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant appeals from the denial of his successive post-conviction petition in which he asserted that his sentence of life without parole for murder is an illegal sentence because it is "cruel and unusual punishment" under the Eighth Amendment of the United States Constitution. Under the principles articulated in *Miller v. Alabama*, 132 S. Ct. 24455 (2012), we vacate defendant's sentence and remand for resentencing. This decision is in line with this court's recently published opinion in *People v. Williams*, 2012 IL App (1st) 111145¹ and we adopt the reasoning from that opinion into this order. The circuit court's ruling on his ineffective assistance of counsel claim is affirmed.

¹See also *People v. Morfil*, 2012 IL App (1st) 103568

I. PROCEDURAL HISTORY

¶ 3 Many of the facts from this criminal case are unnecessary to our disposition of this appeal. Suffice it to say that the defendant was a juvenile and given a mandatory sentence of life in prison without possibility of parole. Any detailed rendition of the facts of this case are provided in this court's prior opinion, *People v. Davis*, 388 Ill. App. 3d 869 (2009). However, we point out that defendant was found guilty by a jury of two counts of first degree murder, two counts of attempted murder and home invasion. He received natural life imprisonment for the murder convictions, 30 years imprisonment for each count of attempted murder and 30 years imprisonment for the home invasion, with all sentences to run concurrently. *People v. Davis*, 388 Ill. App. 3d 869, 874 (2009). He appealed those convictions and sentences directly. This court affirmed the convictions and sentences on October 25, 1995. *People v. Davis*, No. 1-93-1821 (Rule 23 October 23, 1995). The supreme court denied defendant's request for leave to appeal. *People v. Davis*, No. 80170 (January 31, 1996)

¶ 4 Defendant filed three *pro se* postconviction petitions. The first one was filed October 11, 1996 which the circuit court dismissed on November 20, 1996. *People v. Davis*, 388 Ill. App. 3d 869, 874 (2009). On December 18, 1996, defendant filed an amended *pro se* postconviction petition together with a motion for substitution of judges. This petition was dismissed by the circuit court on March 17, 1997. *Id.* On March 5, 1999, this court affirmed the circuit court rulings (*People v. Davis*, No. 1-98-2277 (Rule 23 Order, March 5, 1999)) and again, leave to appeal to the supreme court was denied. No. 87387 (October 6, 1999). Defendant filed his third *pro se* postconviction petition on November 10, 1998. *People v. Davis*, 388 Ill. App. 3d 869, 875 (2009). On *res judicata*

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grounds, the circuit court dismissed the third petition and the dismissal was affirmed on appeal. *People v. Davis*, No. 1-99-0159 (Rule 23 Order, September 10, 1999). Leave to appeal to the supreme court was denied, as well. *People v. Davis*, No. 88512 (February 2, 2000).

¶ 5 Defendant filed a section 2-1401 petition pursuant to the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) on September 25, 2002, alleging that his sentence imposed on him as a juvenile was unconstitutional. This petition was subsequently treated as another postconviction petition and counsel was appointed who filed a supplement to this petition and argued that pursuant to *People v. Miller*, 202 Ill. 2d 328 (2002), his natural life sentence was unconstitutional because defendant did not actually participate in the act of killing. The State filed a motion to dismiss this petition and argued that defendant's reliance on *Miller* was inappropriate because defendant was an active participant before, during and after the shootings. *People v. Davis*, 388 Ill. App. 3d 869, 877 (2009). New counsel for defendant stepped in and filed a second supplemental postconviction petition and additionally argued that defendant's sentence violated the Eighth Amendment to the United States Constitution. *Id.* This new counsel also filed a supplemental response to the State's motion to dismiss and argued defendant was convicted under a theory of accountability so that the *Miller* case should be applied retroactively. Additionally, counsel argued that the statute requiring mandatory life sentence when applied to a juvenile violated the Constitution. *Id.*

¶ 6 A hearing was held on this petition. The circuit court found that defendant "had great participation in the murders," thereby distinguishing the *Miller* case where the defendant "only acted as a lookout" and dismissed the petition. *Id.* This court affirmed the dismissal and held that pursuant to *Teague v. Lane*, 489 U.S. 288 (1989) and *People v. Flowers*, 138 Ill. 2d 218 (1990), the

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supreme court's decision in *Miller* did not apply retroactively to the instant case because the conviction and sentence were final before the issuance of the *Miller* decision. This court did state that "[i]t is the opinion of this panel of the appellate court that if there was ever a case that should be applied to cases on collateral review even though it does not meet the requirements of *Teague*, *People v. Miller*, 202 Ill. 2d 328 (2002), is that case." (citing *Teague v. Lane*, 489 U.S. 288 (1989). Leave to appeal this decision was denied on September 30, 2009 (No, 108407) and the United States Supreme Court denied *certiorari* on March 1, 2010. *Davis v. Illinois*, 130 S. Ct. 1707 (No. 09-8354 Mar. 1, 2010).

¶ 7 This appeal stems from defendant's "Motion For Leave To File A Verified Successive Post-Conviction Petition", filed on April 18, 2011. Plaintiff alleged both that the mandatory natural life sentence imposed on him violated the Eighth Amendment relying on *Graham v. Florida*, 130 S. Ct. 2011 (2010) and argued new grounds for ineffective assistance of counsel at the transfer hearing because his counsel failed to interview an eyewitness, Lamont Baxter. On August 1, 2011, the circuit court denied the motion for leave to file a successive petition. Specifically, the court held that *Graham* did not apply to the instant case because *Graham* held that natural life sentences could not be imposed on "a juvenile offender who did not commit a homicide" and defendant was convicted of two homicides. The court also denied defendant leave to file his successive postconviction petition, finding that Lamont Baxter's 2010 affidavit submitted in support of the motion directly contradicted Baxter's grand jury testimony, trial testimony and his statements made to police shortly after the murders occurred.

¶ 8 This timely appeal followed.

¶ 9

II. DISCUSSION

¶ 10 In this appeal, defendant argues that despite being sentenced prior to the United States Supreme Court ruling in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the mandatory sentence he received is unconstitutional and, therefore, illegal, as it violates the mandate against cruel and unusual punishment because of his status as a juvenile at the time he participated in the murders for which the punishment was imposed. Defendant submits that *Miller* requires that this court vacate his mandatory life-without-parole sentence and remand to the circuit court for a resentencing hearing consistent with the principles outlined by the United States Supreme Court.

¶ 11 As we recently stated:

"The Act allows criminal defendants to challenge their conviction or sentence based on substantial deprivations of their constitutional rights. *People v. Peoples*, 205 Ill. 2d 480, 509 (2002). The filing of only one postconviction petition is contemplated under the Act. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). A petition under the Act is a collateral proceeding, not an appeal. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). Therefore, *res judicata* bars issues previously raised on appeal. *Id.* at 233. Similarly, issues not raised, even though they could have been raised on appeal, are waived. *Id.* However, a successive petition will be considered on its merits, and the statutory bar to doing so will be relaxed, in the interest of fundamental fairness. *Id.* In order to have a successive petition

considered, a petitioner must satisfy the cause-and-prejudice test. *People v. Ortiz*, 235 Ill. 2d 319, 329 (2009)." *People v. Williams*, 2012 IL App (1st) 111145 ¶ 35.

¶ 12 The cause-and prejudice test is codified in section 122-1(f) of the Act, which states:

"(f) Only one petition may be filed by a petitioner *** without leave of 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. 735 ILCS 5/122-1(f) (West 2010).

¶ 13 *Miller v. Alabama*, 132 S. Ct. 2455 (2012) is the third in a recent line of United States Supreme Court cases that addresses the "cruel and unusual punishment" aspect of the Eighth Amendment of the United States Constitution as it should be applied in juvenile sentencing proceedings. The first case was *Roper v. Simmons*, 543 U.S. 551, 578 (2005), which prohibited the death penalty as a sentence for defendants who committed their crime before the age of eighteen. The second case was *Graham v. Florida*, 130 S. Ct. 2011 (2010), which prohibited a sentence of life

without parole for a juvenile offender who committed a non-homicide crime. Finally, earlier this year, the United States Supreme Court issued its opinion in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that based on both the *Roper* and *Graham* precedents, any provision which requires a mandatory sentence for a juvenile to life in prison without parole violates the Eighth Amendment and is unconstitutional.

¶ 14 We note that *Miller* did not foreclose the trial court's ability to impose a sentence of life in prison without possibility of parole on a juvenile convicted of a homicide, such as the defendant in the instant case. *Miller* does require, however, that a trial court consider "how children are different, and how these differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

¶ 15 The *Miller* court clearly stated, as follows:

"Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surround him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for the

incompetencies associated with his youth—for example, his inability to deal with police officers and prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* (Internal citations omitted).

¶ 16 The State argues that the holding in *Miller v. Alabama* should not be applied retroactively as it does not meet the standards for such application as explained in *Teague v. Lane*, 489 U.S. 288 (1989), and defendant has not met his burden under the cause and prejudice test as codified in section 122-1(f) of the Post-Conviction Hearing Act. 735 ILCS 5/122-1(f) (West 2010). This court recently addressed this issue in *People v. Williams*, 2012 IL App (1st) 111145, where we held :

"To determine whether *Miller* created a new constitutional rule of criminal procedure such that it can be applied retroactively in this case, we look to the standards set forth by the Supreme Court in *Teague v. Lane* and adopted by our supreme court in *People v. Flowers*. *People v. Sanders*, 238 Ill. 2d 391, 400-02 (2010) (citing *Teague v. Lane*, 489 U.S. (1989), and *People v. Flowers*, 138 Ill. 2d 218 (1990). Our supreme court has explained the *Teague* analysis as such:

'Generally, new rules are not to be applied retroactively to cases on

collateral review except in two instances: (1) if the rule places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe; or (2) if the rule requires the observance of those procedures that are implicit in the concept of ordered liberty.' *Id.* at 401.

The second exception is limited to " 'watershed rules of criminal procedure' " and to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.* (quoting *Teague*, 489 U.S. at 311.

We hold that the Supreme Court's decision in *Miller* should be retroactively applied in this case because it is a rule that 'requires the observance of those procedures that are implicit in the concept of ordered liberty. *Id.*' *People v. Williams*, 2012 IL App (1st)111145 ¶51-52.

¶ 17 "[W]hen a defendant has met his burden under *Teague* that a new rule must be retroactively applied, the defendant has also met his burden under the cause-and-prejudice test." *People v. Williams*, 2012 IL App (1st) 111145 ¶ 54 (citing 735 ILCS 5/122-1(f) (West 2010)); *People v.*

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Pitsonbarger, 205 Ill. 2d 444, 461-62 (2002). In the context of a claim based upon *Miller v. Alabama*, this is because the sentencing procedure violated due process.

¶ 18 Therefore, it is imperative that a trial court, prior to sentencing a juvenile who would otherwise be faced with a mandatory sentence of life in prison without parole, must have an opportunity to consider any mitigating factor which the defendant wishes to raise and have the flexibility to alter the sentence from the harshest possible (natural life without possibility of parole) to something less. A new sentencing hearing would comply with the requirement of the holding in *Miller* that "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate the principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Miller*, 130 S. Ct. at 2475.

¶ 19 In addition to his claims under *Miller v. Alabama*, defendant's latest successive postconviction petition also asserts that he received ineffective assistance of counsel at his juvenile transfer proceeding. Defendant bases this assertion on an affidavit of an eyewitness, Lamont Baxter, to the double murder. Baxter had given a statement to the police shortly after the crime, he testified before the grand jury and he testified at defendant's trial. In his affidavit, Baxter averred that he "did not remember" being interviewed by defendant's lawyer prior to trial. Baxter also said that "he did not remember [defendant] saying anything during the incident", that a co-defendant "was the ringleader and was doing most of the talking", and that defendant "looked like a scared kid being told what to do."

¶ 20 The postconviction court ruled that Baxter's 2010 affidavit was directly contradicted by his

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testimony before the grand jury and at defendant's trial, as well as Baxter's statements to the police. As a result, the court deemed Baxter's affidavit insufficient to meet defendant's burden under the cause-and-prejudice test.

¶ 21 We note that defendant attacked the sufficiency of his juvenile transfer hearing on his direct appeal. In rejecting defendant's arguments, this court recited the evidence presented at the transfer hearing. This court noted that defendant's probation officer testified that defendant had prior findings of delinquency for armed robbery and armed violence. The probation officer recommended that the defendant be transferred to adult jurisdiction. The juvenile court also considered Baxter's grand jury testimony. This court affirmed the transfer. *People v. Davis*, No. 1-93-1821 (October 24, 1995).

¶ 22 Defendant also raised ineffective assistance of counsel claims in at least three prior postconviction petitions. This court rejected those claims. *People v. Davis*, 388 Ill. App. 3d 869, 871 and 884 (2009). In one of those appeals, this court rejected defendant's ineffective assistance of counsel claims as they were barred by the doctrine of *res judicata* because he had raised an ineffective assistance of counsel claim in a previous postconviction petition. *People v. Davis*, No. 1-99-0159 (Rule 23 Order September 10, 1999). We find that defendant has failed to meet his burden of showing cause due to his failure to identify an objective factor that impeded his ability to raise his claim of ineffective assistance of juvenile court counsel during his three prior postconviction petitions which asserted ineffective assistance of counsel. Defendant has also failed to show this claim so infected the trial that the resulting conviction or sentence violated due process. There is no rational possibility that the juvenile court judge would not have transferred defendant

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to adult jurisdiction, even if the judge could have considered the contents of Baxter's 2010 affidavit. Consequently, we affirm the circuit court's denial of defendant's successive postconviction petition based on this issue. We note that, as we have remanded this matter to the circuit court for a new sentencing hearing, either party may call Lamont Baxter to testify at that hearing.

¶ 23

III. CONCLUSION

¶ 24 For all the forgoing reasons and for those reasons cited in our recently published opinion in *People v. Williams*, 2012 IL App (1st) 111145, we vacate defendant's sentence and remand for resentencing not inconsistent with this order. We vacate the dismissal of the claim in defendant's successive postconviction petition based on *Miller v. Alabama*, 132 S. Ct. 2455 (2012). We affirm the dismissal of the claim in defendant's successive postconviction petition asserting ineffective assistance of counsel at the juvenile transfer hearing.

¶ 25 Affirmed in part and vacated in part; cause remanded with directions.