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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	No. 97 CR 12486
v.)	Honorable
)	Thomas Joseph Hennelly,
Kevin Malone,)	Judge, presiding.
Defendant-Appellant)	

JUSTICE COBBS delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's denial of defendant's leave to file a successive postconviction petition is reversed, and the cause remanded for a new sentencing hearing pursuant to *People v. Davis*, 2014 IL 115595.

¶ 2 Following simultaneous but severed jury trials, defendant Kevin Malone, along with co-defendant Rommel Winters, was convicted of two counts of first degree murder and sentenced to mandatory concurrent terms of natural life in prison in the shooting deaths of Carl Barbee and Jerome Coleman. Defendant was 17 years old at the time of the offense. The trial evidence

established that defendant shot and killed Barbee and Coleman after Rommell drove a car to the location of the offense. On appeal, defendant argues, and the State concedes, that the circuit court erred in not granting him leave to file a successive postconviction petition. We agree.

¶ 3 On direct appeal, defendant raised several trial errors, but did not challenge his sentence. On July 13, 2001, this court affirmed defendant's convictions and sentences in an unpublished order. *People v. Malone*, No. 1-99-4011 (2001) (unpublished order pursuant to Supreme Court Rule 23). In 2002, defendant filed a *pro se* postconviction petition which challenged his mandatory natural life sentence as being unconstitutional because the trial judge had no discretion to consider that he was a juvenile or his rehabilitative potential. The circuit court summarily dismissed this petition and this court affirmed the dismissal. In 2005, defendant filed a *pro se* 2-1401 petition claiming that he was unconstitutionally sentenced under Public Act 89-203, which our supreme court found violated the single subject rule pursuant to *People v. Wooters*, 188 Ill. 2d 500 (1999). The circuit court summarily dismissed this petition and this court affirmed the dismissal.

¶ 4 On July 10, 2013, defendant filed the instant motion for leave to file a successive postconviction petition which alleged, pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that the statute mandating natural life in prison was unconstitutional, as applied to him, because he was a juvenile at the time of the offense. On July 17, 2012, the circuit court denied leave to file his successive petition. Defendant now appeals from that denial.

¶ 5 The Post-Conviction Hearing Act (the Act) contemplates the filing of only one postconviction petition. *People v. Davis*, 2014 IL 115595, ¶ 14. However, a successive petition for postconviction relief can be considered on its merits if it meets the cause and prejudice test put forth in section 122-1(f) of the Act. See 725 ILCS 5/122-1(f) (West 2012). To satisfy this test, a petitioner "must show good cause for failing to raise the claimed error in a prior

proceeding and that actual prejudice resulted from the error." *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). "Cause" is defined as an objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding and "prejudice" exists where the petitioner can show that the alleged constitutional error so infected his trial that the resulting conviction violated due process. *Id.* at 153-54. The failure to establish either prong of the cause and prejudice test is a statutory bar to the filing of a successive postconviction petition. See *People v. Lee*, 207 Ill. 2d. 1, 5 (2003).

¶ 6 In this appeal, defendant maintains that his natural life sentence for a murder that occurred when he was under 18 years of age is unconstitutional under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). In *Miller*, the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 2460. While not imposing a categorical bar on life sentences for juveniles, the Court required "that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471.

¶ 7 In *People v. Davis*, 2014 IL 115595, ¶ 34 our supreme court held that *Miller* applies retroactively to cases on collateral review. The defendant in *Davis* filed a successive postconviction petition arguing that his mandatory sentence of natural life imprisonment for an offense he committed when he was 14 years old violated the Eighth Amendment to the United States Constitution. *Id.* ¶ 9. The court held that, the *Miller* ruling, which was decided after the defendant filed his prior postconviction petition, constitutes "cause" for purposes of the Act because it was not available earlier to counsel, and constitutes "prejudice" because it applies retroactively to defendant's sentencing hearing, rendering his mandatory life sentence

unconstitutional. *Id.* ¶ 42. The court then remanded the case for resentencing, "where the court may consider all permissible sentences." *Id.* ¶ 43.

¶ 8 Similarly, defendant in the instant case demonstrates cause because the holding in *People v. Davis*, 2014 IL 115595, establishing that the *Miller* decision applies retroactively, was not available to him at the time of his successive postconviction petition and demonstrates prejudice because the holdings in both *Miller* and *Davis* renders defendant's mandatory life sentence unconstitutional. Therefore, defendant's sentence is invalid and he is entitled to a new sentencing hearing.

¶ 9 Furthermore, we acknowledge defendant's additional arguments which challenge the "scheme of Illinois statutes" mandating adult prosecutions of juveniles. Specifically, defendant argues that the automatic transfer provision (730 ILCS 405/5-130)(West 1996)), which automatically excludes certain juveniles from juvenile jurisdiction, is unconstitutional. However, we note that during the pendency of this appeal, our supreme court denied a petition for rehearing in *People v. Patterson*, 2014 IL 115102, which rejected procedural and substantive due process challenges to the automatic transfer provision, upheld the provision's constitutionality, and reaffirmed its decisions in *People v. M.A.*, 124 Ill. 2d 135 (1988), and *People v. J.S.*, 103 Ill. 2d 395 (1984). *Id.* ¶¶ 92-95. Moreover, additional constitutional challenges to the provision are still pending before our supreme court in *People v. Pacheco*, No. 116402, and *People v. Jenkins*, No. 115979. Thus, we decline to entertain defendant's constitutionality challenge.

¶ 10 For the foregoing reasons, the circuit court of Cook County's denial of leave to file a successive postconviction petition is reversed and the case remanded for resentencing not inconsistent with this order.

¶ 11 Reversed and remanded.