

No. 1-12-3260

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 85 CR 8448
)	
DONZELL HARRIS,)	Honorable
)	Robert V. Boharic,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the claims in defendant's successive postconviction petition were alleged and addressed in prior collateral petitions, his claims are barred from review by *res judicata* and the trial court did not error in denying him leave to file the successive petition.
- ¶ 2 Defendant Donzell Harris appeals from the dismissal of his motion for leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant contends that the trial court erred in denying him leave to file his successive petition because: (1) he is actually innocent of "the separate offense created by the death penalty statute of subsection 9-1(b) of the Criminal Code of 1961" (Code) (720 ILCS 5/9-1(b) (West 1986)); (2) he was improperly convicted of two counts of murder where there was only one victim; and (3) section 9-1(b) of the Code was

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unconstitutionally applied to him because the death penalty aggravating factor was not included in the indictment. We affirm.

¶ 3 The record on appeal does not include the original trial proceedings. The following facts are taken from our previous appellate orders. See *People v. Harris*, No. 1-86-1595 (1988) (unpublished order under Supreme Court Rule 23); *People v. Harris*, Nos. 1-06-1765, 1-06-0910 (cons.) (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 Defendant was charged with two counts of murder and one count of armed violence based on the shooting of his wife, the victim, in May 1985. At the jury trial, an eyewitness testified that he saw defendant approach his wife on a bicycle and yell, "Say, you b****, why are you doing this?" The witness said defendant then got his bicycle, walked toward the victim, pulled out a gun, and shot her twice in the head. The crime was committed near the Wood Street branch of the circuit court. That morning, defendant was scheduled to appear at court on the victim's complaint but failed to do so. The shooting occurred shortly after the victim left court, where she had earlier appeared to testify against defendant. Eventually, defendant was arrested and positively identified by the eyewitness in an in-person lineup. The jury found defendant guilty of murder and the State's motion for a death penalty hearing was granted. Defendant requested that the hearing be conducted in front of a jury.

¶ 5 At the sentencing hearing, the State argued that defendant was eligible for death under section 9-1(b)(8) of the Code. At that time, section 9-1(b)(8) allowed for a sentence of death where:

"[T]he defendant committed the murder with intent to prevent the murdered individual from testifying or participating in any investigation or prosecution, either against the defendant or

another; or the defendant committed the murder because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against defendant or another." 720 ILCS 5/9-1(b)(8) (West 1986).

¶ 6 After hearing the evidence, the jury was unable to unanimously conclude that defendant was death eligible. Outside the presence of the jury, the circuit court found that the murder was an "exceptionally brutal and heinous offense" based on defendant shooting the victim down the street from the circuit court where she had been "seeking protection of the court." The court therefore sentenced defendant to natural life imprisonment¹.

¶ 7 In May 1986, defendant appealed arguing, in pertinent part: (1) his sentence should be vacated because it was based on an aggravating factor which the "jury found did not exist" and therefore the judge's imposition of the life sentence violated collateral estoppel; and (2) the trial court's finding that the murder was brutal and heinous was erroneous.

¶ 8 In February 1988, the appellate court affirmed the judgment of the circuit court. *Harris*, No. 1-86-1595. Specifically, the court found that "the jury did not make a final determination that the aggravating factor did not exist" and did not make "any conclusive decision *** on this factual issue sufficient for the doctrine of collateral estoppel to be applicable." The court also found that the court properly found defendant committed a brutal and heinous crime and properly sentenced him to natural life imprisonment pursuant to section 5-8-1(a)(1)(b) of the Code.

¹ The original mittimus reflects that defendant was convicted of two counts of murder. However, as we noted in a prior order, in August 1997, the circuit court corrected the mittimus to merge the two murder counts into one count of first degree murder. *Harris*, Nos. 1-06-1765, 1-06-0910 (cons.), slip op. at 5 (2009).

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¶ 9 Following his appeal, defendant filed a multitude of collateral pleadings. The procedural history is covered in detail in previous appellate orders. See *Harris*, Nos. 1-06-1765, 1-06-0910 (cons.); *People v. Harris*, No. 1-08-2904 (2009). We will discuss the procedural history to the extent necessary to understand the present appeal, taken from our previous orders.

¶ 10 In January 1992, defendant filed his first *pro se* postconviction petition, alleging that, in pertinent part, his natural life sentence was improperly imposed where the offense was not brutal and heinous. The circuit court dismissed his petition as untimely. Defendant appealed and the public defender who represented defendant on appeal filed a motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The appellate court granted counsel's motion to withdraw. The court also concluded that defendant's petition was untimely and that his allegations were either barred by *res judicata* or waiver, or were unsupported by the record. *People v. Harris*, No. 1-92-2468 (1993) (unpublished order under Supreme Court Rule 23).

¶ 11 In October 1998, defendant filed his first successive postconviction petition, which was summarily dismissed by the circuit court. Defendant appealed and the appellate court granted appellate counsel's *Finley* motion to withdraw as counsel, affirming the judgment of the circuit court. *People v. Harris*, No. 1-98-4406 (1999) (unpublished order under Supreme Court Rule 23).

¶ 12 In April 2001, defendant filed his second successive *pro se* postconviction petition, alleging that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The circuit court summarily dismissed the petition, finding that *Apprendi* did not apply in cases where the death penalty could have been applicable and concluding that no constitutional violation had occurred. On appeal, defendant argued that the circuit court erred in dismissing his petition because: (1) his extended term sentence was unconstitutional based on *Apprendi*; and (2) the

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court incorrectly ruled that *Apprendi* did not apply retroactively to untimely and successive postconviction petitions. The appellate court affirmed the judgment of the circuit court. *People v. Harris*, No. 1-01-2566 (2002) (unpublished order under Supreme Court Rule 23).

¶ 13 In July 2003, defendant filed a "Petition for Relief from Judgment/Sentence 735 ILCS 5/2-1401 (F) (West 2000) Code of Civil Procedure," alleging: (1) the Illinois death penalty scheme was unconstitutionally applied to him where the jury was allowed to hear improper evidence; (2) the indictment violated his state and federal constitutional rights; (3) his sentence violated *Apprendi*. The circuit court characterized defendant's filing as a successive postconviction petition and dismissed the petition as frivolous and patently without merit. The court determined defendant's claims were waived because they were not included in his original petition and fundamental fairness did not require the court to overlook the waiver.

¶ 14 In October 2003, defendant filed another petition under section 2-1401, essentially repeating his allegations from the July 2003 petition with citation to different authority. The court dismissed the petition and, in March 2005, the appellate court affirmed the circuit court's judgment on both the July and October 2003 petitions. *People v. Harris*, Nos. 1-03-3460, 1-04-1182 (cons.) (2005) (unpublished order under Supreme Court Rule 23).

¶ 15 In April 2005, defendant filed his fourth *pro se* successive postconviction petition, arguing that his natural life sentence was unconstitutional under *Apprendi* because it was based on a finding that the crime was brutal and heinous, elements that were not included in the indictment and not proven beyond a reasonable doubt. The circuit court summarily dismissed defendant's petition, holding that *Apprendi* offered defendant no basis for relief because defendant's direct appeal concluded long before the decision was announced. On appeal, the state appellate defender appointed to represent defendant filed a *Finely* motion to withdraw as

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counsel. The appellate court granted counsel's motion to withdraw and affirmed the judgment of the circuit court. *People .v Harris*, No. 1-05-1765 (2006) (unpublished order under Supreme Court Rule 23).

¶ 16 In November 2005, defendant filed another section 2-1401 petition, alleging that the trial court improperly sentenced him to natural life in prison because: (1) "the judge improperly combined two sentencing statutes" in imposing the sentence; and (2) his sentence was based on dual convictions even though there was only one victim and therefore violated the one-act, one-crime rule. In February 2006, the State filed a motion to dismiss the petition. In March 2006, the circuit court granted the State's motion to dismiss, finding that defendant's arguments were barred from consideration by *res judicata*.

¶ 17 In April 2006, defendant filed another successive postconviction petition, and in May filed a supplemental successive postconviction petition, in which he alleged that his sentence was unconstitutional because it was based on a finding that the crime was "brutal and heinous," elements that were not included in the indictment or proven to the jury beyond a reasonable doubt. The circuit court dismissed his petition.

¶ 18 Defendant appealed from the circuit court's dismissal of both the November 2005 section 2-1401 petition and the April 2006 postconviction petition, and the appellate court affirmed the dismissals on appeal. *Harris*, Nos. 1-06-1765, 1-06-0910 (cons.) (2008) (unpublished order under Supreme Court Rule 23). The appellate court found that the sentencing arguments in defendant's postconviction petition were barred by *res judicata* as they had been raised in his April 2001, July 2003, and April 2005 postconviction petitions, and his October 2003 section 2-1401 petition. In each instance, his allegations were rejected by the circuit and appellate courts. As to the section 2-1401 petition, the court found that the petition was untimely filed, the

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Apprendi issue was barred by *res judicata*, and the record directly contradicted his one-act, one-crime rule claim because the two counts of murder had been merged into one.

¶ 19 In July 2006, defendant filed a *pro se* section 2-1401 petition. The circuit court's dismissal of the petition was affirmed by the appellate court. *People v. Harris*, No. 1-07-0313 (2008) (unpublished order under Supreme Court Rule 23).

¶ 20 In June 2008, defendant filed a motion for leave to file another successive *pro se* postconviction petition. The circuit court summarily dismissed the petition and the appellate court affirmed the dismissal. *People v. Harris*, No. 1-08-2164 (2011) (unpublished order under Supreme Court Rule 23).

¶ 21 In September 2008, defendant filed a *pro se* petition for writ of *habeas corpus* alleging that his sentence was void because the circuit court usurped the role of the jury in finding aggravating factors to impose a natural life sentence. The circuit court dismissed the petition. The public defender appointed to represent defendant on appeal filed a *Finley* motion to withdraw as counsel. The appellate court granted the motion and affirmed the judgment of the circuit court. *People v. Harris*, No. 1-08-2904 (2009) (unpublished order under Supreme Court Rule 23).

¶ 22 On April 9, 2010, defendant filed the motion for leave to file the instant successive *pro se* postconviction petition. In it, he alleged that he was actually innocent of the aggravating factor that would "allow for the imposition of death or a natural life sentence," citing due process under the fourteenth amendment and equal protection under the United States and Illinois constitutions.

¶ 23 On April 17, 2012, defendant filed a "Motion to Discharge Petitioner Pursuant to Article 122-6 of 725 ILCS 5/122 of the Post-Conviction Hearing Act," alleging again that he was actually innocent of section 9-1(b) of the Code because "there was never a charge by the Cook

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County Grand Jury Indictment and no preliminary [*sic*] hearing held to establish probable cause to try petitioner for a Capital Offense."

¶ 24 On June 22, 2012, the circuit court denied defendant's motion for leave to file his successive petition, finding that "everything raised in his successive petition has already been resolved [by] *res judicata* or have [*sic*] been dealt with on appeal."

¶ 25 On appeal, defendant first contends that he is actually innocent because no evidence was introduced that he murdered "a State's witness in an exceptional and brutal manner to support a separate offense triggering the death penalty statute."

¶ 26 Under the Act, a defendant may challenge his conviction or sentence based on a violation of a constitutional right that could not have been addressed on direct appeal. *People v. Chatman*, 357 Ill. App. 3d 695, 698 (2005). The Act contemplates the filing of only one petition. *People v. Edwards*, 2012 IL 111711, ¶ 22. Therefore, all issues actually decided on direct appeal or in the original postconviction petition proceedings are barred by the doctrine of *res judicata*, and all issues that could have been raised in the original proceeding or original postconviction proceeding, but were not, are waived. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). The general bar against successive postconviction petitions may be relaxed only if: (1) the defendant establishes "cause and prejudice" for the failure to raise the claim sooner; or (2) the defendant demonstrates a "fundamental miscarriage of justice." *Id.* at ¶¶ 22-23 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)). To show cause, a defendant must show that an objective factor impeded his or her ability to raise a specific claim during his initial postconviction proceedings. 725 ILCS 5/122-1(f) (West 2012); *Pitsonbarger*, 205 Ill. 2d at 460. A defendant can show prejudice by demonstrating the claim not previously raised "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f);

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Pitsonbarger, 205 Ill. 2d at 464. To show a fundamental miscarriage of justice, a defendant must show he is actually innocent. *Edwards*, 2012 IL 111711, ¶ 23.

¶ 27 Here, defendant claims he is actually innocent because he was not charged with "capital murder" pursuant to section 9-1(b) of the Code. We first note that defendant's claim is not an actual innocence claim, as he is not at all claiming that he did not shoot the victim. See *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (quoting *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)) (recognizing that "the hallmark of 'actual innocence' means 'total vindication' or 'exoneration' "). Moreover, defendant has raised essentially the same claim before the circuit and appellate court on multiple previous occasions, including: on direct appeal, in his April 2001, July 2003, April 2005, and April 2006 successive postconviction petitions, and in his October 2003 and November 2005 section 2-1401 petitions. Even though defendant has attempted to recharacterize the claim here as an actual innocence claim, that does not change the fact that the same claim has already been ruled on by the circuit and appellate courts. Therefore, this claim is barred from consideration by *res judicata*. *Blair*, 215 Ill. 2d at 443.

¶ 28 Defendant next contends that he was improperly convicted of two counts of murder where there was only one victim, based on the one act, one crime doctrine. See *People v. Miller*, 238 Ill. 2d 161, 165 (2010) (a defendant cannot be convicted for more than one offense arising out of the same physical act). Defendant concedes that he forfeited this issue on appeal because he did not raise the issue in his successive postconviction petition, but asks that we review the issue as plain error. However, the supreme court has held consistently that a claim not raised in a postconviction petition cannot be raised for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006) (citing *People v. Jones*, 213 Ill. 2d 498, 505 (2004); *People v. Davis*, 156 Ill. 2d 149, 158-60 (1993)). Moreover, defendant made the same one act, one crime doctrine

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argument in his November 2005 section 2-1401 petition. On appeal from the dismissal of that petition, the appellate court explained that, in regard to defendant's claim that his sentence was void in violation of the one act, one crime rule:

"[W]e find that this contention is directly contradicted by the record below. The record reveals that although the initial *mittimus* reflected that the trial court imposed a sentence of natural life imprisonment for two counts of first degree murder, on August 20, 1997, the circuit court corrected the *mittimus* to reflect that the two counts of murder were merged into one." *Harris*, Nos. 1-06-1765, 1-06-0910 (cons.), slip op. at 19-20.

Because the issue has already been addressed by both the circuit and appellate courts, we find that this claim is barred from consideration in the present case by *res judicata*. *Blair*, 215 Ill. 2d at 443. Nonetheless, we point out that the relief sought has already been granted since there is only one judgment of conviction for murder that was entered against defendant.

¶ 29 Defendant's final contention is that section 9-1(b) of the Code was unconstitutionally applied in his case because the indictment did not allege a charge under that particular statute. Once again, defendant has alleged this same claim in previous petitions, specifically his July 2003 and October 2003 petitions. Therefore, this issue is also barred by *res judicata*.

¶ 30 Finally, we note that defendant cannot meet the requirements of the cause and prejudice test for any of his three issues. In each prior instance of consideration, these claims have consistently been resolved against defendant. Because defendant's claims have no merit, he cannot show prejudice. *Pitsonbarger*, 205 Ill. 2d at 464. Moreover, at no point in his petition or appellate briefs has defendant suggested that there was some objective factor that impeded his

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ability to bring any of these claims in his original postconviction petition. *Id.* at 460. Therefore, defendant cannot meet the requirements of the cause and prejudice test. Under these circumstances, we find the trial court properly denied defendant leave to file his successive postconviction petition.

¶ 31 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 32 Affirmed.