

No. 1-11-0295

**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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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 26366
	)	
DIONTA THOMPSON,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Presiding Justice McBride and Justice Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant appeals denial of leave to file successive post-conviction petition claiming that his term of mandatory supervised release (MSR) is void because it was imposed by the Department of Corrections, making no argument that he showed sufficient cause and prejudice, the denial of leave was not erroneous. The MSR term is not void, and any cause-and-prejudice claim has been forfeited.

¶ 2 Defendant Dionta Thompson appeals from an order of the circuit court denying him leave to file a successive post-conviction petition. He contends that his three-year term of mandatory

supervised release (MSR) violates due process and separation of powers because it was imposed not by the trial court but by the Department of Corrections (Department).<sup>1</sup>

¶ 3 Defendant was charged with the shooting death of Deon Fleming on or about September 29, 2001, in an indictment alleging that he personally discharged a firearm proximately causing Fleming's death. Following a bench trial, the court found defendant guilty of first degree murder and found that he personally discharged a firearm to cause death. The court sentenced defendant in May 2003 to 45 years' imprisonment, the minimum sentence for first degree murder with the 25-year firearm enhancement. The court made no reference to MSR at any time during the sentencing hearing, nor did the mittimus mention MSR.

¶ 4 On direct appeal, this court affirmed defendant's conviction and sentence against a contention that the evidence supported a charge of second degree murder and against challenges to the 25-year firearm enhancement on double enhancement, due process, and disproportionate penalty grounds. *People v. Thompson*, 354 Ill. App. 3d 579 (2004).

¶ 5 In his initial *pro se* post-conviction petition in 2006, defendant alleged that trial counsel was ineffective for advising him to waive a jury trial, for not allowing him to testify at trial, and for refusing to allow him to see State discovery responses including a police report. He also alleged that direct appeal counsel had been ineffective for not contending that the trial court abused its discretion by finding that defendant had failed to prove self-defense. We affirmed the summary dismissal of this petition. *People v. Thompson*, No. 1-06-2521 (2008)(unpublished order under Supreme Court Rule 23).

¶ 6 In the instant successive *pro se* post-conviction petition, filed in November 2010, defendant challenged the 25-year firearm enhancement as unconstitutional and argued that his

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<sup>1</sup>This issue is currently pending before the Illinois Supreme Court in *People v. Evans*, 2011 IL App (1<sup>st</sup>) 100391-U, *appeal allowed*, No. 113471 (Jan. 25, 2012).

three-year MSR term was void as an extension of his sentence. The court dismissed the petition in December 2010, finding that the challenge to the firearm enhancement was barred as *res judicata* and the MSR challenge was forfeited or waived for not having been raised earlier, but also noting that both the firearm enhancement and MSR had been found constitutional by our supreme court. This appeal timely followed.

¶ 7 On appeal, defendant contends that his three-year MSR term is void, violating due process and separation of powers, because it was imposed not by the trial court but by the Department.

¶ 8 A defendant may file only one post-conviction petition without leave of the court, which "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." 725 ILCS 5/122-1(f) (West 2010). While the test for initial petitions to survive summary dismissal is that the petition state the gist of a meritorious claim – that is, a claim of arguable merit – the cause and prejudice test for successive petitions is more exacting than the gist or arguable merit standard. *People v. Edwards*, 2012 IL App (1st) 091651, ¶¶ 21-22, 26. Here, however, defendant maintains that he need not establish cause and prejudice because the order at issue is void. A void judgment can be attacked at any time, including in a successive post-conviction petition that does not meet the statutory requirements of cause and prejudice. *People v. Ramey*, 393 Ill. App. 3d 661, 669-70 (2009).

¶ 9 We conclude, however, that defendant's MSR term is not void. Indeed, a prison sentence *without* MSR would be void. Section 5-8-1(d) of the Code of Corrections provides that "the parole or mandatory supervised release term shall be written as part of the sentencing order and shall be as follows \*\*\* for first degree murder \*\*\* 3 years." 730 ILCS 5/5-8-1(d)(1) (West 2010). The same statute provided, both at the time of defendant's offense in 2001 and his

sentencing in 2003, that "[e]xcept where a term of natural life is imposed, every sentence *shall include as though written therein* a term in addition to the term of imprisonment." (Emphasis added.) 730 ILCS 5/5-8-1(d)(1) (West 2004). Our supreme court has held that the adoption of the MSR statute was within our legislature's powers and does not violate separation of powers doctrine. *People ex rel. Scott v. Israel*, 66 Ill. 2d 190 (1977); *People v. Williams*, 66 Ill. 2d 179 (1977). Thus, a trial court cannot impose a prison sentence that does not include a term of MSR. *People v. Whitfield*, 217 Ill. 2d 177, 201 (2005). Stated another way, when a court imposes a prison sentence for an offense, the term of MSR fixed by section 5-8-1(d) for that offense is automatically required. *People v. Andrews*, 403 Ill. App. 3d 654, 664 (2010).

¶ 10 Moreover, the case cited by defendant in support of his proposition, *Earley v. Murray*, 451 F. 3d 71 (2d Cir. 2006), does not support a holding that the MSR term here was void. Sitting in review of a denial of *habeas* relief, the federal Second Circuit Court of Appeals held in *Earley* that a criminal defendant did not receive New York state's equivalent of MSR – post-release supervision or PRS – because the trial court did not mention PRS in pronouncing sentence. However, even as the *Earley* court remanded its case to the federal district court for further proceedings, it held that its "ruling is not intended to preclude the state from moving in the New York courts to modify Earley's sentence to include the mandatory PRS term." *Earley*, 451 F. 3d at 77.

¶ 11 Having concluded that defendant's MSR term is not void, we note that defendant does not contend, either in his original or reply brief, that he has shown the cause and prejudice required for a successive post-conviction petition. He has therefore forfeited such a contention. "Points not argued [in an appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. Rs. 341(h)(7) (eff. July 1, 2008), 612(I) (eff. Sept. 1, 2006). The "two most important tasks of an appellate court panel when beginning the

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review of a case" are the "ascertainment of its own jurisdiction" and the determination of "which issue or issues, if any, have been forfeited. By giving careful attention to each of these tasks, a court can avoid the possibly unnecessary expenditure of judicial resources." *People v. Smith*, 228 Ill. 2d 95, 106 (2008). We accordingly honor the procedural default and affirm the denial of leave to file defendant's successive post-conviction petition.

¶ 12 Accordingly, the judgment of the circuit court is affirmed.

¶ 13 Affirmed.