

Nos. 1-14-0887 & 1-14-0937

**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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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the  |
|                                      | ) | Circuit Court of |
| Plaintiff-Appellee,                  | ) | Cook County      |
|                                      | ) |                  |
| v.                                   | ) | 96 CR 10513      |
|                                      | ) |                  |
| MICHAEL SMITH,                       | ) | Honorable        |
|                                      | ) | James B. Linn,   |
| Defendant-Appellant.                 | ) | Judge Presiding. |

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JUSTICE PIERCE delivered the judgment of the court.  
Justices Neville and Simon concurred in the judgment.

**ORDER**

*Held:* The circuit court did not err when it denied defendant leave to file his successive postconviction petition.

¶ 1 More than 20 years after our supreme court established the void-sentence rule in *People v. Arna*, 168 Ill. 2d 107, 113 (1995), the court found the rule to be "constitutionally unsound" in *People v. Castleberry*, 2015 IL 116916, ¶ 19 and abolished the rule. Prior to the decision in *Castleberry*, while *Arna* was still in effect, defendant sought to attack his consecutive 60-year extended term sentence for aggravated criminal sexual assault and 40-year extended term sentences for home invasion and armed robbery in this appeal from the denial of leave to file his successive postconviction petition. Defendant argued that his extended term sentences were unauthorized by law and therefore void because the trial court did not find the proper factors in

imposing the extended term sentences. *Castleberry* was decided while defendant's appeal was pending here but we found that it did not apply to defendant's case because his case was pending on collateral review, not direct appeal. As such, defendant was entitled to bring his claim that his unauthorized sentences were void under *Arna*. We vacated the extended term portion of defendant's 60-year and 40-year sentences and reduced his sentence to 30 years' imprisonment for aggravated criminal sexual assault and 30 years' imprisonment for home invasion and armed robbery, to be served consecutively, for a total of 60 years' imprisonment, as requested by defendant.

¶ 2 In a March 29, 2017, supervisory order, our supreme court instructed us to vacate our judgment in *People v. Smith*, 2016 IL App (1st) 141013, and to consider the effect of *People v. Price*, 2016 IL 118613, on the defendant's argument that his extended-term sentences are void, and determine if a different result is warranted. We vacated our judgment on June 15, 2017. The parties were allowed to file supplemental briefs with respect to the *Price* decision. Upon reconsideration, we affirm the judgment of the circuit court denying defendant leave to file a successive postconviction petition.

¶ 3 BACKGROUND

¶ 4 The facts of the underlying case are not relevant here and therefore we need not discuss them. A recitation of the facts can be found in our order affirming defendant's conviction. *People v. Smith*, No. 1-97-2414 (Mar. 2, 1999) (unpublished order under Supreme Court Rule 23). We note that we also affirmed the summary dismissal of defendant's first postconviction petition in *People v. Smith*, No. 1-03-1075 (Oct. 25, 2004) (unpublished order under Supreme Court Rule 23), defendant's successive postconviction petition in *People v. Smith*, No. 1-08-

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0191 (June 26, 2009) (unpublished order under Supreme Court Rule 23), and defendant's subsequent successive postconviction petitions in *People v. Smith*, No. 1-10-0659 (Oct. 7, 2011) (unpublished order under Supreme Court Rule 23), *People v. Smith*, No. 1-11-1648 (Jan. 16, 2013) (unpublished order under Supreme Court Rule 23), and *People v. Smith*, No. 1-13-2510 (June 9, 2015) (unpublished order under Supreme Court Rule 23).

¶ 5 Defendant filed a motion on January 30, 2014, seeking leave to file another successive postconviction petition wherein defendant argued that: (1) he was denied his right to a jury trial; (2) his sentence is improper in that the aggravating factors were not pled and proven; and (3) he was denied his right to the transcripts from his grand jury. On February 6, 2014, the trial court denied defendant leave to file his petition. This appeal followed.

¶ 6 ANALYSIS

¶ 7 Defendant was convicted of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 1996)), home invasion (720 ILCS 5/12-11(a)(1), (2) (West 1996)) and armed robbery (720 ILCS 5/18-2 (West 1996)), which are all Class X offenses. A defendant convicted of a Class X offense shall be sentenced to a prison term of 6 to 30 years. 730 ILCS 5/5-8-1(a)(3) (West 1996). The factors that a trial court may consider as reasons to impose an extended term sentence beyond the sentence authorized for a Class X offense are listed in section 5-5-3.2(b) (730 ILCS 5/5-3.2(b) (West 1996)). "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 \*\*\* unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present." 730 ILCS 5/5-8-2(a) (West 1996).

¶ 8 A trial court is required to "set forth his reasons for imposing the particular sentence he

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enters in the case." 730 ILCS 5/5-8-1(b) (West 1996). In imposing defendant's Class X extended term sentences, the court began by stating that it was imposing consecutive sentences because consecutive sentences were required to protect the public from further criminal conduct. The court went on to say, "[t]he State is also urging me to sentence you to the extended term because there are certain aggravating factors which are contained in 730 Illinois Compiled Statutes, 5/5-5-3.2, factors in aggravation." The court found the following aggravating factors were present: (1) defendant's conduct caused or threatened serious harm (730 ILCS 5/5-5-3.2(a)(1) (West 1996)); (2) defendant had a history of delinquency (730 ILCS 5/5-5-3.2(a)(3) (West 1996)); and (3) the sentence is necessary to deter others from committing the same offense (730 ILCS 5/5-5-3.2(a)(7) (West 1996)). These aggravating factors, which are specified in section 5-5-3.2(a)(1) (730 ILCS 5/5-5-3.2(a) (West 1996)), allow a court to impose a more serious sentence within the normal, nonextended term range. The aggravating factors the trial court found did not include any of the factors specified in section 5-5-3.2(b) which authorize an extended term, yet the court sentenced defendant to extended term sentences. In short, the trial court found the aggravating factors listed under section 5-5-3.2(a) and not any of the factors that must be found to impose an extended term sentence under section 5-5-3.2(b).

¶ 9 Defendant's sole argument in this appeal from the denial of his motion for leave to file a successive postconviction petition was that, although he was sentenced to consecutive extended term Class X sentences under section 5-5-3.2(b) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b) (West 1996)), none of the factors authorizing extended term sentences enumerated in section 5-5-3.2(b) applied in this case nor did the court find any of those factors to be present. Without a finding that any of the enumerated factors were present, the extended term sentences

imposed were not authorized by law and would be considered void under *Arna* and *People v. Thompson*, 209 Ill. 2d 19, 23-25 (2004). In our now vacated opinion, we agreed and found that *Castleberry* did not apply to defendant's collateral attack on his sentence and, therefore, we vacated the extended term portion of defendant's 60-year and 40-year sentences and reduce his sentence to 30 years' imprisonment for aggravated criminal sexual assault and 30 years' imprisonment for home invasion and armed robbery, to be served consecutively, for a total of 60 years' imprisonment.

¶ 10 After the supervisory order directing the vacation of our opinion and reconsideration was entered by the supreme court, the defendant filed his supplemental brief and argues that he should have been granted leave to file his successive postconviction petition because he established cause and prejudice. Defendant also argues that this court has an independent basis under Illinois Supreme Court Rule 615(b)(4) to reduce his sentences to the maximum non-extended term of thirty years' imprisonment on each count, to run concurrently. Finally, defendant argues that applying *Castleberry* to illegal sentences presents constitutional problems that were not present in *Castleberry*, namely that it permits the judiciary to impose criminal penalties the legislature has not authorized without providing any remedy for the illegal deprivation of liberty.

¶ 11 The State argued in its initial brief and again argues in its supplemental brief that the issue defendant presents here, the illegality of defendant's extended term sentences, was not raised in his January 30, 2014, *pro se* motion for leave to file a successive postconviction petition and, therefore, he is not entitled to relief. In support of this argument, the State cites the numerous requirements of the PostConviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

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(West 2014)). The Act provides a criminal defendant a procedure for determining whether he was convicted in substantial violation of his constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). To be entitled to relief under the Act, a defendant must establish a substantial violation of his constitutional rights in the proceedings that produced the conviction or sentence being challenged. *People v. Jones*, 211 Ill. 2d 140, 143-44 (2004).

¶ 12 The Act contemplates the filing of only one postconviction petition. *People v. Evans*, 186 Ill. 2d 83, 89 (1999); 725 ILCS 5/122-1(f) (West 2014). Successive postconviction petitions are governed by section 122-1(f) of the Act, which provides:

“Only one petition may be filed by a petitioner under this Article without leave of the 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.” 725 ILCS 5/122-1(f) (West 2006).

¶ 13 Leave to file successive postconviction petitions may be granted when a defendant has established cause and prejudice, or when fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458-59 (2002); *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010); 725 ILCS 5/122-1(f) (West 2006). Pursuant to the cause-and-prejudice test, the petitioner must show good cause for failing to raise the claimed errors in a prior proceeding and actual prejudice resulting from the claimed errors. *Pitsonbarger*, 205 Ill. 2d at 460; 725 ILCS 5/122-1(f) (West 2006). “Cause” is defined as “any objective factor, external to the defense, which impeded the petitioner’s ability to raise a specific claim at the initial postconviction proceeding.” *Pitsonbarger*, 205 Ill. 2d at 462; 725 ILCS 5/122-1(f) (West 2006). “Prejudice” is defined as an error so infectious to the proceedings that the resulting conviction violates due process.

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*Pitsonbarger*, 205 Ill. 2d at 464; 725 ILCS 5/122-1(f) (West 2006). A defendant must establish cause and prejudice as to each individual claim asserted in a successive postconviction petition to escape dismissal under the doctrine of *res judicata* and waiver. *Pitsonbarger*, 205 Ill. 2d at 463; 725 ILCS 5/122-1(f) (West 2006).

¶ 14 The State places great emphasis on the fact that defendant did not include his current sentencing claim in the successive petition he presented to the trial court and therefore, because the trial court did not consider this issue when it denied defendant leave to file, this court cannot consider this issue for the first time on appeal. The State claims that under traditional postconviction law, a defendant must establish cause and prejudice for each specific claim raised in a successive postconviction petition and, as a result, a defendant may not raise a claim for the first time on appeal. In support, the State cites *People v. Jones*, 213 Ill. 2d 498 (2004).

¶ 15 In *Jones*, the question was whether the defendant could properly raise the question of improper admonishments for the first time on appeal, despite the fact that he did not include the issue in his petition for postconviction relief. *Id.* at 503. In resolving the question presented, our supreme court noted that "our appellate court is not free, as this court is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." *Id.* at 508. The court went on to hold that "defendant may not raise the issue of the improper admonishments for the first time on appeal. The proper forum for the claim is a successive postconviction action." *Id.* at 508-09. The court rejected the defendant's argument that improper admonishments rendered his conviction void. *Id.* at 509.

¶ 16 Here, in response to the State's argument, defendant argues that his petition specifically

complained about the “extended portion” of his sentence and that the “brutal and heinous element” was applied in error. Defendant argues, quoting *People v. Carballido*, 2011 IL App (2d) 090340, ¶ 38, that the inclusion of these facts is sufficient to raise a claim in this appeal because the law recognizes that “it is unlikely that [a *pro se* petitioner] will be aware of the precise legal basis for his claim.”

¶ 17 As we stated in our now vacated opinion, we find the State's argument and its reliance on *Jones* misplaced. Defendant's inartfully drafted petition states, in part, "the focal point for argument sheds an entirely different light on the subject of [his] conviction and/or sentence. Reasonable doubt of [his conviction] comes into question, as does the circumstances surrounding the consecutive nature and extended portion of his sentence. [M]y 100 year sentence, by law, is error and shouldn't have exceeded 30 years in I.D.O.C." We find that the sentencing issue before us was sufficiently raised in defendant's motion for leave to file his successive postconviction petition in the circuit court.

¶ 18 Nonetheless, we agree with the State that, in his initial appellate brief, defendant made no claim attacking the validity of the circuit court's denial of his motion for leave to file his successive postconviction petition or advanced any argument related to the validity of his successive petition. Rather, in his initial appellate brief defendant argued that his failure to raise the issue of the denial of his motion for leave to file his postconviction petition was not fatal because his invalid sentencing claim did "not depend for its viability of his postconviction petition" because *Castleberry* had not yet been decided. *Thompson*, 209 Ill. 2d at 27. Defendant claimed that he had an independent basis, other than the denial of his request for leave to file a successive postconviction petition, to bring this sentencing issue before this court. At the time

this appeal was filed, a "void sentencing order" was subject to attack "at any time or in any court, either directly or collaterally. An argument that an order or judgment is void is not subject to waiver." *Id.* Because defendant did not argue in his initial brief that the trial court erred in denying him leave to file his successive postconviction petition, we treated defendant's claim that the extended term portions of his sentence were void under *Arna* and *Thompson* as a free standing claim.

¶ 19 Again, defendant's opening brief was filed before our supreme court issued its opinion in *Castleberry*, 2015 IL 116916. In *Castleberry*, the court abolished the void sentence rule, "which state[d] that [a] sentence which does not conform to a statutory requirement is void." (Internal quotation marks omitted.) *Id.* ¶ 1. Our supreme court observed that, "recent decisions from this court have undermined the rationale behind the rule to the point that the rule can no longer be considered valid." *Id.* The court stated:

"[O]ur cases have at times also held 'that the power to render the particular judgment or sentence is as important an element of jurisdiction as is personal jurisdiction and subject matter jurisdiction.' [Citation.] Based on this idea, the rule has developed which holds that a circuit court which violates a particular statutory requirement when imposing a sentence acts without 'inherent authority' or 'inherent power.' And, because the court has acted without power, it has acted without jurisdiction, thereby rendering the sentence void. Thus, the void sentence rule is stated: 'A sentence which does not conform to a statutory requirement is void.' [Citation.]" *Id.* ¶ 13.

¶ 20 The *Castleberry* court went on to note that the Illinois Constitution granted circuit courts original jurisdiction over all justiciable matters and therefore:

" [W]hile the legislature can create new justiciable matters by enacting legislation that creates rights and duties, the failure to comply with a statutory requirement or prerequisite does not negate the circuit court's subject matter jurisdiction or constitute a nonwaivable condition precedent to the circuit court's jurisdiction." *Id.* ¶ 15 (quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 37).

As a result, our supreme court abolished the void sentence rule, finding it constitutionally unsound, because a circuit court, being a court of general jurisdiction, does not acquire its jurisdiction from any statute. *Id.*, ¶ 19.

¶ 21 Subsequent to *Castleberry*, our supreme court decided *People v. Price*, 2016 IL 118613, where it considered whether *Castleberry* applies to cases pending in the court at the time *Castleberry* was decided. In *Price*, the defendant filed a petition under section 2-1401 of the Code asserting that his natural life sentence for first degree murder was void. *Price*, 2016 IL 118613, ¶ 1. The defendant's petition was pending in the appellate court at the time *Castleberry* was announced. *Id.* at ¶ 27. The defendant essentially sought to have the supreme court “recharacterize his section 2-1401 petition as a successive postconviction petition that satisfied the ‘cause-and-prejudice test.’ ” *Id.* The court explained that pursuant to *Castleberry*, a sentence that is not in conformance with a statute is not void, but merely voidable and subject to procedural rules and restraints, including forfeiture. *Id.* ¶ 17. The court expressly stated that after *Castleberry*, “a defendant may no longer rely on the void sentence rule to overcome forfeiture of a claimed sentencing error or to challenge a statutorily nonconforming sentence in perpetuity.” *Id.* Furthermore, our supreme court declined to recharacterize the defendant’s 2-1401 petition as a successive postconviction petition and held that the defendant “should not be

permitted to avoid satisfying the cause-and-prejudice test for successive postconviction petitions \*\*\*.” *Id.* ¶ 34.

¶ 22 Defendant now recognizes that under *Castleberry*, an imposed sentence that does not conform to the statute is voidable. Therefore, his extended-term sentences are no longer considered void and are no longer subject to independent attack at any time. Cf. *People v. White*, 2011 IL 109616, ¶ 12. (“In such a case, the defendant's sentence is illegal and void.” *Id.* ¶ 20 (quoting *Arna*, 168 Ill. 2d at 113)). In his supplemental brief, for the first time on appeal, he argues that the circuit court erred in denying him leave to file his supplemental petition because he established the necessary cause and prejudice sufficient for leave to file his supplemental petition. As to cause, defendant states that his exact unauthorized sentence claim raised here, was raised in his original 2003 postconviction proceedings, which was dismissed on the State’s motion at the second stage. After that petition was dismissed, postconviction appellate counsel did not raise the issue in the appeal from the dismissal of the postconviction petition. Defendant claims that because this court has found that his “extended term sentencing claim is meritorious” it was objectively unreasonable for postconviction appellate counsel not to argue this claim on appeal from the dismissal of the postconviction petition. As to the prejudice prong, defendant argues that because this court has found his claim to be meritorious, he was obviously prejudiced by postconviction appellate counsel’s failure to raise the issue.

¶ 23 As previously stated, to satisfy the cause-and-prejudice test, the petitioner must show good cause for failing to raise the claimed errors in a prior proceeding and actual prejudice resulting from the claimed errors. *Pitsonbarger*, 205 Ill. 2d at 460; 725 ILCS 5/122-1(f) (West 2006). “Cause” is defined as “any objective factor, external to the defense, which impeded the

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petitioner's ability to raise a specific claim at the initial postconviction proceeding.”

*Pitsonbarger*, 205 Ill. 2d at 462; 725 ILCS 5/122-1(f) (West 2006). “Prejudice” is defined as an error so infectious to the proceedings that the resulting conviction violates due process.

*Pitsonbarger*, 205 Ill. 2d at 464; 725 ILCS 5/122-1(f) (West 2006).

¶ 24 In his successive postconviction petition defendant argued that the “cause” for his failure to raise the issue regarding his illegal extended-term sentences was ignorance of the law and “poor representation” by counsel. Defendant claimed that he suffered prejudice because his sentence violated due process.

¶ 25 Ignorance of the law does not justify a defendant's failure to include a claim in his initial postconviction petition. *People v. Evans*, 2013 IL 1113471, ¶ 13. With respect to his argument that “poor representation” by counsel prevented him from raising this issue in an earlier proceeding, defendant now argues that his 2004 postconviction appellate counsel was ineffective for failing to raise the illegal extended-term sentences on appeal from the denial of his postconviction petition.

¶ 26 Defendant has attempted to file numerous successive postconviction petitions between his original 2003 postconviction petition and the successive postconviction petition currently pending before this court. See *infra* ¶ 4. He has never raised the issue of his 2003/2004 postconviction appellate counsel's failure to raise the sentencing issue presently before this court in any of those petitions and has provided no reason for his failure to do so. Therefore, we find his claim is subject to forfeiture.

¶ 27 In addition, pursuant to the finding in *Castleberry*, even if the trial court sentenced defendant without considering the required enumerated factors, his sentence is merely voidable

for lack of statutory authority and can no longer be considered void and subject to attack in the current procedural posture. Furthermore, because the void sentence rule under *Arna* no longer exists as a result of *Castleberry*, postconviction appellate counsel could not now be considered ineffective for failing to raise the issue under *Arna* in 2004. We cannot now find postconviction appellate counsel ineffective and allow this ineffectiveness to establish the required element of cause or prejudice. After *Castleberry*, any failure of postconviction appellate counsel to raise this sentencing issue in 2003/2004 is not a viable theory of collateral attack. Therefore, we find that defendant has not established cause or prejudice for failure to raise this sentencing issue sooner.

¶ 28 We reject defendant's argument that cause and prejudice need not be established and his failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice. To demonstrate such a miscarriage of justice, a petitioner must show actual innocence. *Pitsonbarger*, 205 Ill. 2d at 459; *People v. Edwards*, 2012 IL 111711, ¶ 23. Defendant has failed to allege or establish actual innocence in this case.

¶ 29 Defendant also argues that this court has an independent basis under Illinois Supreme Court Rule 615(b) to reduce his statutorily unauthorized sentences. Our review of defendant's successive postconviction petition reveals that he did not raise this issue in that petition. A defendant may not raise an issue for the first time on appeal from the denial of a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 508 (2004). We therefore reject this argument.

¶ 30 Finally, defendant argues that the effect of *Castleberry* is that defendants who are given illegal sentences have no remedy for their illegal deprivation of liberty. Our supreme court has recognized that:

“After *Castleberry*, a reviewing court may no longer, *sua sponte*, correct a statutorily nonconforming sentence (*id.* ¶¶ 20-24), the State may no longer seek to correct such a sentence on direct review but must seek a writ of mandamus to do so (*id.* ¶¶ 26-27), and a defendant may no longer rely on the void sentence rule to overcome forfeiture of a claimed sentencing error or to challenge a statutorily nonconforming sentence in perpetuity (*id.* ¶¶ 17-19). See also *People v. Thompson*, 2015 IL 118151, ¶ 33, 398 Ill.Dec. 74, 43 N.E.3d 984 (stating that after *Castleberry*, it is “no longer valid” to argue that a sentence that does not conform to a statutory requirement is void).” *Price*, 2016 IL 118613, ¶ 17.

We recognize that some defendants who receive unauthorized sentences may be without an avenue to challenge those sentences where they did not challenge those sentences in accordance with procedural rules and subject to restraints imposed for non-compliance, including forfeiture. *Price*, 2016 IL 118613, ¶ 17. However, we are required to follow the guidance and rulings of our supreme court to prevent defendants from challenging their “nonconforming sentence in perpetuity.” *Castleberry*, 2015 IL 1116916, ¶¶17-19. “It is well-settled that when our supreme court has declared law on any point, only [the supreme court] can modify or overrule its previous decisions, and all lower courts are bound to follow supreme court precedent until such precedent is changed by the supreme court.” *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 366 Ill. App. 3d 730, 734 (2006), *aff’d on other grounds*, 226 Ill. 2d 559. We are bound by the decisions in *Castleberry and Price*.

¶ 31

#### CONCLUSION

¶ 32 Based on the foregoing, we affirm the judgment of the circuit court denying defendant

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leave to file his successive postconviction petition.

¶ 33 Affirmed.