

No. 1-16-0004

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, Illinois.
)	
v.)	No. 94 CR 8144
)	
DERRICK JORDAN,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Walker concurred in the judgment.

ORDER

¶ 1 *Held:* Denial of leave to file second successive postconviction petition alleging that 43-year sentence for juvenile defendant violated Eighth Amendment affirmed where defendant did not establish prejudice.

¶ 2 Following a 1995 jury trial, defendant Derrick Jordan was convicted of first degree murder and attempted first degree murder for crimes he committed at 14 years old. He was sentenced to 60 years' imprisonment for murder and 26 years for attempted murder, to run consecutively. Jordan's conviction was affirmed on direct appeal, and he has since filed

numerous collateral attacks on his conviction, including a postconviction petition in August 1999, a petition for *habeas corpus* relief in December 2012, and a motion seeking leave to file a successive postconviction petition in December 2013. None of these collateral attacks afforded Jordan any relief.

¶ 3 On May 6, 2015, Jordan moved to file a second successive postconviction petition in which he argued that his aggregate 86-year sentence violated the Eighth Amendment prohibition on cruel and unusual punishment, citing *Miller v. Alabama*, 567 U.S. 460 (2012). The trial court denied his motion in August 2015, holding that he had shown neither cause nor prejudice for failing to raise this claim in an earlier petition. For the reasons that follow, we affirm.

¶ 4 BACKGROUND

¶ 5 On the morning of April 1, 1993, Malcolm and Carolyn Lofton accompanied Veronica Humes, their 31-year-old wheelchair-bound, paraplegic niece, to a currency exchange in Chicago to cash a disability check.¹ Upon cashing the check, Veronica gave some of the money to Carolyn, who put it in her sock. The trio then walked to a nearby restaurant, but upon finding it closed, decided to walk to Carolyn's brother's house. As they were on their way, Jordan ran up behind them, put a gun to Carolyn's head, and demanded money. Veronica gave all the money she had to Carolyn, who handed it to Jordan, but Jordan continued to demand money. He pulled Carolyn into a nearby gangway and when Malcolm approached, Jordan shot him in the shoulder. Malcolm backed away intending to go to Carolyn's brother's house for help. Meanwhile, Jordan went through Carolyn's pockets and, finding nothing, shot her in the head. Veronica, just a few feet away, began to scream, and Malcolm, ten feet away, turned around to see Carolyn on the ground. Jordan had fled.

¹ Jordan argues that because the issue on appeal is "procedural," the facts of his offense are irrelevant. We disagree. A brief summary of the circumstances of the crime is necessary to illuminate for the reader the reason for the length of the sentence imposed.

¶ 6 On October 24, 1993, Jordan went to the home of Sammy Simmons demanding \$5 that he was owed. When Simmons went upstairs to retrieve the money, Jordan shot him in the back. During their investigation of this crime, the police questioned Jordan, who told them he had a gun under his mattress. The police recovered the gun and discovered it was the same caliber as that used to shoot Carolyn.

¶ 7 Jordan was arrested for the murder of Carolyn in December 1993. Malcolm and Veronica eventually identified Jordan as the shooter in a line-up and photo array in December 1993 and January 1994.

¶ 8 For his crimes, Jordan was tried as an adult following a discretionary transfer hearing in juvenile court pursuant to section 5-4(3)(b) of the Juvenile Court Act. 705 ILCS 405/5-4(3)(b) (West 1992).

¶ 9 At sentencing, the State introduced evidence in aggravation regarding the incident involving Simmons.

¶ 10 The State urged the court to impose a natural life sentence because the murder was indicative of wanton cruelty, or alternatively, to impose an extended and consecutive term of imprisonment. An extended term for murder amounted to 60 to 100 years' imprisonment to run consecutively with the sentence for attempted murder. Jordan, in mitigation, argued that he was innocent and that the evidence against him was weak and prejudicial. He maintained that because he was only 16, he was entitled to leniency and mercy.

¶ 11 In imposing sentence, the trial court observed: “[t]his is an extraordinary case, particularly as it comes down to sentencing. On the one hand, I do refer to this in mitigation, the defendant is incredibly – was 14 years old at the time of the crime.” After discussing the

overwhelming evidence of Jordan's guilt based in large part on the two eyewitness identifications, the court continued:

“What is relevant, matters in mitigation, first is the extreme youth of the defendant at the time of the crime. 14 years of age. I do have before me a report, school report of the defendant while he was in custody[.] [T]o say the evidence introduced at the trial indicated that Mr. Jordan was less than a – considerably less than an outstanding student, history of truancy, indeed from high school but apparently the defendant certainly can do the work. Because the juvenile detention center said he earned an A in math, A in reading, A in history, A in geography, B in spelling; Also earned an A in conduct and A in effort.

One of the tragedies of this offense is that clearly the defendant had a potential to achieve. Indeed, I believe the evidence *** showed the defendant could have probably been anything he wanted to be. Enormous potential and he's throwing it down the drain, so to speak. What a tragedy. It's a tragedy for him and his family, no question.”

But after noting Jordan's age, the court pointed out numerous factors in aggravation, including the fact that one of the victims of the robbery was a paraplegic, the killing was intentional and profit-driven, and it occurred “during the daylight hours in the street of Chicago in a common residential commercial area.” The court acknowledged that “this is most difficult because I have to weigh those factors against the extraordinary factor of defendant's age at the time of the killing.” While the court found justification for an extended term or a natural life sentence, it stated that it would “try to leave some hope open” and sentenced Jordan to consecutive terms of

60 years' imprisonment for murder and 26 years for attempted murder, for an aggregate sentence of 86 years.

¶ 12 Under the statute in effect at that time, Jordan was (and continues to be) eligible to receive day-for-day credit for good conduct, reducing his sentence by 50% for a total of 43 years' imprisonment. See 730 ILCS 5/3-6-3(a)(1), (a)(2) (West 1992).

¶ 13 As noted, in the decades following trial, Jordan pursued an unsuccessful direct appeal, as well as several forms of collateral relief, including a postconviction petition, a petition for *habeas corpus*, and a successive postconviction petition, all of which were likewise unsuccessful.

¶ 14 This appeal stems from Jordan's motion for leave to file a second successive postconviction petition filed on May 6, 2015, in which he challenged the imposition of his 86-year sentence on the basis that it violated *Miller v. Alabama*, 567 U.S. 460 (2012), finding unconstitutional the imposition of mandatory life sentences without the possibility of parole on juveniles. The trial court denied him leave to file this petition, finding that Jordan failed to establish either cause or prejudice. Jordan timely appealed.

¶ 15 ANALYSIS

¶ 16 At the outset, we acknowledge our order of December 20, 2016, disposing of Jordan's appeals from the trial court's denial of *habeas corpus* relief and its denial of leave to file a successive postconviction petition. *People v. Jordan*, Nos. 1-14-3845, 1-15-2312 (consolidated) (2016) (unpublished summary order under Illinois Supreme Court Rule 23(c)). Although neither the *habeas* petition nor the successive postconviction petition raised sentencing issues, our order noted the potential *Miller* implications of Jordan's 86-year sentence without expressing an opinion on the merits of such a claim. We were unaware at the time that Jordan had, in fact,

already requested and been denied leave to file the instant petition challenging his sentence on constitutional grounds.

¶ 17 The Post-Conviction Hearing Act, which is a tool by which a person subject to a criminal sentence can challenge his conviction on the grounds that it was the result of a substantial denial of his constitutional rights (725 ILCS 5/122-1(a)(1) (West 2014)), ordinarily contemplates the filing of a single postconviction petition (*People v. Brown*, 2017 IL App (1st) 150132, ¶ 35). Indeed, the Act explicitly states that “any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.” 725 ILCS 5/122-3 (West 2014). This is because successive postconviction petitions “plague the finality of criminal litigation.” *Brown*, 2017 IL App (1st) 150132, ¶ 36 (quoting *People v. Tenner*, 206 Ill. 2d 381, 392 (1991)).

¶ 18 A defendant may not file a successive postconviction petition unless he has first obtained leave of court. 725 ILCS 5/122-1(f) (West 2014). And a court will grant leave to file only if a petitioner can demonstrate cause and prejudice for not having raised the alleged errors in his or her original postconviction petition. *People v. Bailey*, 2017 IL 121450, ¶ 15. “Cause” is an objective factor that impeded counsel’s ability to raise the claim earlier, while “prejudice” occurs when the alleged constitutional error so infected the entire trial that the resulting conviction or sentence violates due process. *People v. Ortiz*, 235 Ill. 2d 319, 329 (2009). We review *de novo* a trial court’s denial of leave to file a successive postconviction petition. *Bailey*, 2017 IL 121450, ¶ 13.

¶ 19 Turning first to cause, the trial court found that Jordan failed to show cause for not raising his claim earlier where *Miller*, on which his Eighth Amendment claim rested, was decided in 2012, years before he moved to file his second successive postconviction petition in

2015. The court found that Jordan could have raised this claim in his first successive postconviction petition which he sought leave to file in December 2013.

¶ 20 But the State concedes that the trial court’s decision on this point was erroneous given that the Illinois Supreme Court did not extend *Miller* to apply to a term of years that amounted to a life sentence until its decisions in *People v. Reyes*, 2016 IL 119271 and *People v. Holman*, 2017 IL 120655. We agree. While the Supreme Court in *Miller* held that a mandatory life sentence for juveniles was unconstitutional, this holding was not directly applicable to Jordan given that the trial court in his case exercised its discretion to sentence Jordan to a term of years. To be sure, Jordan could have argued that the reasoning underlying *Miller* was applicable to his case, but it was not until our supreme court’s decisions in *Reyes* and *Holman* that this argument was likely to persuade an Illinois trial court. In *Reyes*, the supreme court relied on *Miller* to conclude that consecutive mandatory minimum sentences with a mandatory firearm enhancement, amounting to an aggregate sentence of 97 years’ imprisonment, violated the Eighth Amendment when applied to juveniles. *Reyes*, 2016 IL 119271, ¶ 9. And in *Holman*, the court applied *Miller*’s reasoning to conclude that a court could not constitutionally exercise its discretion to impose a life sentence without parole for a juvenile unless it took into consideration the defendant’s “youth and attendant characteristics.” *Holman*, 2017 IL 120655, ¶ 46. Because these cases were decided recently, we conclude that Jordan has established cause for failing to raise his *Miller* claim earlier.

¶ 21 With regard to prejudice, it is helpful to begin by outlining the principles illuminating the Supreme Court’s line of cases (culminating in *Miller*) addressing constitutional concerns in juvenile sentencing. In *Miller*, the Court explained that children are “constitutionally different” from adults for sentencing purposes and are less deserving of the most severe punishments.

Miller, 567 U.S. at 471. The reasons for this are threefold: (1) children lack maturity and have an underdeveloped sense of responsibility, resulting in recklessness and impulsivity; (2) children are more vulnerable to negative influences and outside pressures; and (3) a child’s character and traits are not as “fixed” as an adult’s and his actions do not necessarily reflect irretrievable depravity. (Internal citations and quotations omitted.) *Id.* As a juvenile matures, the Court has reasoned, these “deficiencies” – namely, rashness, proclivity for risk-taking, and the inability to assess consequences – will be reformed, and thus, children should not be subject to an “irrevocable judgment” that does not take into consideration these circumstances of youth. *Id.* at 471, 477. Based in large part on this reasoning, the Supreme Court has found unconstitutional the death penalty for juveniles (*Roper v. Simmons*, 543 U.S. 551, 578 (2005)), as well as mandatory life sentences without the possibility of parole for both non-homicide (*Graham v. Florida*, 560 U.S. 48, 74, 82 (2010)), and homicide convictions (*Miller*, 567 U.S. at 480)).

¶ 22 Our own supreme court has extended *Miller*’s reasoning to find unconstitutional mandatory term-of-years sentences that have the practical effect of a life sentence as well as discretionary life sentences imposed without considering the mitigating characteristics of youth. *Reyes*, 2016 IL 119271, ¶ 9; *Holman*, 2017 IL 120655, ¶ 46. Now, Jordan urges us to further extend *Miller* to prohibit as unconstitutional the imposition of discretionary term-of-years sentences that a juvenile may not outlive.

¶ 23 Our analysis of Jordan’s claim starts from the premise that his sentence is in fact 43 years, given that he is eligible for day-for-day credit for good conduct. According to the Illinois Department of Corrections website (of which we may take judicial notice (*People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66)), Jordan is eligible for parole in July 2039, at the age of 60, and

his projected discharge date is July 3, 2042, when he will be 64 years old.² As the State points out, a long line of cases from this court has held that eligibility for release in ones' sixties is far from a *de facto* life sentence. *People v. Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 7 (50 years' imprisonment not a *de facto* life sentence where defendant eligible for release at 65); *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 16 (45 year sentence, allowing for release at 62); *People v. Hoy*, 2017 IL App (1st) 142596, ¶ 46; (52 year sentence, allowing for release by 68); *People v. Evans*, 2017 IL App (1st) 143562, ¶¶ 15-16 (45 year sentence, allowing for release at 62); *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 10, n. 6, ¶ 58 (50 year sentence, allowing for release at 66); *People v. Perez*, 2018 IL App (1st) 153629, ¶¶ 37-38 (53 year sentence, allowing for release at 70).

¶ 24 We are mindful that Jordan's release in his early to mid sixties may render this a sentence he will not outlive, given his alleged actuarial lifespan, but it is "objectively survivable" (*Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 73). And for our purposes, this is what matters. We decline to enter "into the weeds of actuarial tables" to calculate Jordan's likely lifespan, as we are poorly equipped to do so. See *Evans*, 2017 IL App (1st) 143562, ¶ 15; see also *Perez*, 2018 IL App (1st) 153629, ¶ 37; but see *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶¶ 25-27 (reversing denial of leave to file a second successive postconviction petition where defendant would need to outlive his life expectancy as a prison inmate (64) to survive his 100 year sentence, which, with day-for-day good conduct credit, would result in his release at the age of 67).

¶ 25 Jordan's crime was, by any measure, truly horrific. He murdered a woman and shot her husband in front of their disabled niece in broad daylight in an alley off a residential Chicago

² At the time of the trial court's order denying Jordan leave to file this petition, his release date according to the IDOC website was November 3, 2039, when he would be 61 years old.

street. Nothing in *Miller* jurisprudence requires that a juvenile defendant who commits such an exceptionally brutal offense is entitled to a sentence that he is assured to outlive. To the contrary, in the context of juvenile sentencing, the Supreme Court has expressly held that “[a] State is not required to guarantee eventual freedom,” but must provide only a “meaningful opportunity to obtain release.” *Graham*, 560 U.S. at 75; see also *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (states may comply with *Miller* by allowing juveniles to be eligible for parole). Jordan’s sentence, with its possibility for parole at the age of 60, affords him that opportunity. Accordingly, we conclude that because Jordan’s sentence does not fall within the ambit of *Miller* as a matter of law, he has not established the requisite prejudice necessary to obtain leave to file a second successive postconviction petition.

¶ 26 On rehearing, Jordan argues that his second successive postconviction petition also challenged his sentence under the proportionate penalties clause of the Illinois Constitution. While Jordan made this claim in his appellate brief, he made no attempt to demonstrate the requisite cause and prejudice necessary to obtain leave to file a successive postconviction petition on this basis. *Supra* ¶ 18. Under these circumstances, we find he has forfeited this argument. See *Sexton v. City of Chicago*, 2012 IL App (1st) 100010, ¶ 79 (failure to develop argument results in waiver); see also Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017).

¶ 27 Forfeiture aside, Jordan cannot, in any event, establish cause for his failure to raise a proportionate penalties challenge in his original postconviction petition. Unlike Jordan’s *Miller* claim, which depended on recent Illinois Supreme Court jurisprudence (*supra* ¶ 20), Jordan’s challenge to his sentence on proportionate penalties grounds does not rely on recent case law or any other objective factor that impeded his ability to raise this claim in 1999, when he filed his

initial postconviction petition. The absence of an explanation for his failure to raise this claim earlier precludes relief on this basis. See *Bailey*, 2017 IL 121450, ¶ 15.

¶ 28

CONCLUSION

¶ 29

The judgment of the trial court is affirmed.

¶ 30

Affirmed.