

NOTICE  
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2018 IL App (5th) 140457-U

NO. 5-14-0457

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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,	)	Williamson County.
	)	
v.	)	No. 98-CF-314
	)	
JAMES L. WESTRAY,	)	Honorable
	)	John Speroni,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE CHAPMAN delivered the judgment of the court.  
Justices Cates and Overstreet concurred in the judgment.

**ORDER**

¶ 1 *Held:* Commutation of the defendant's death sentence rendered moot his claim that he received ineffective assistance of counsel during the aggravation-mitigation stage of capital sentencing because this is an argument that relates solely to sentencing.

¶ 2 The defendant, James L. Westray, pled guilty to murder in 1998 and was sentenced to death. He subsequently filed a postconviction petition, asserting that plea counsel provided ineffective assistance because he failed to adequately investigate and present evidence in mitigation during the aggravation-mitigation phase of capital sentencing. While the petition was pending, former Governor George Ryan commuted the defendant's death sentence to a sentence of natural life in prison. The defendant

appeals the second-stage dismissal of his petition, arguing that (1) he made a substantial showing of a constitutional violation; (2) the court abused its discretion by refusing to appoint an investigator to help postconviction counsel locate two witnesses the defendant claims plea counsel should have called; and (3) the court erred in holding that the commutation of his death sentence rendered his claims moot. We affirm.

¶ 3 The defendant entered an open plea of guilty in the August 1998 murder of Elizabeth Opatt. Opatt was murdered during a robbery of Hurley's Show Bar, where she was tending bar. A jury found the defendant eligible for the death penalty based on the fact that the murder took place during a robbery. See 720 ILCS 5/9-1(b)(6) (West 1998). The matter then proceeded to a hearing on aggravation and mitigation.

¶ 4 As evidence in aggravation, the State presented the testimony of several southern Illinois police officers concerning a string of residential burglaries and robberies that took place early in 1989. Most of these incidents involved the theft of guns, cash, and jewelry from people who operated palm-reading businesses in their homes. Officer Robert Powell testified that these crimes were carried out by "a large group of younger men under the direction of another—of an older gentleman." The defendant, then an 18-year-old high school senior, admitted to police that he participated in "several" of the crimes.

¶ 5 Officers described six specific crimes the defendant took part in—one attempted armed robbery, four residential burglaries, and the burglary of a True Value Hardware store. The burglary of the store involved the theft of bolt cutters, which could be used in future burglaries. During one of the residential burglaries, the defendant and five other young men entered the home of palm-reader Sadie Marks, cut the phone line, and looked

for a place to put dynamite. They intended to return later, place the dynamite, and blow up the house. Officer Powell testified that the defendant cooperated with police investigating these crimes but showed no remorse for his actions.

¶ 6 The State also presented evidence that the defendant committed two more recent armed robberies. In October 1997, the defendant and another individual robbed the owners of Pulley's Barbecue. They confronted the owners in the parking lot after the restaurant closed, and they demanded a bank bag containing cash from the restaurant and keys to the owners' car. In July 1998, the defendant committed an armed robbery at the depository of the Bank of Marion with the assistance of Keith Cook, his codefendant in this case, and Cook's wife, Tracy. Tracy worked at the Dollar General store with Lorraine Bakke. After the store closed, Bakke took the cash from that day's sales to deposit it in the Marion State Bank depository. For the protection of its employees, the store required a second employee to follow in a separate vehicle. Keith Cook picked up Tracy Cook and they followed Bakke's car to the bank. When Bakke got out of her car to make the deposit, the defendant emerged from hiding in the bushes and robbed her. The Cooks falsely told police that they thought the robber was black.

¶ 7 The State presented the testimony of Rex Hopper, who knew the defendant and agreed to act as an informant. Hopper asked the defendant and Cook to meet him at a hotel so the three of them could plan another robbery. Hopper did not really intend to commit the robbery with them, however, and he arrived at the meeting wearing a wire. Hopper testified that during this meeting, the defendant admitted to him that he was involved in the robberies at Pulley's Barbecue and the Bank of Marion. Hopper further

testified that the defendant agreed to participate in the robbery Hopper proposed during the meeting. According to Hopper, the defendant told him that he intended to "shoot the lady at the register" during the proposed robbery. Hopper told the defendant that they would have to share the money with another individual who had "set up" the robbery, and the defendant "talked about killing him, too."

¶ 8 Officer Jim Webb was one of the officers who arrested the defendant in the murder of Elizabeth Opatt. He testified that the defendant resisted arrest and attempted to flee from the scene. However, the defendant was apprehended and taken into custody. Officer Eric Frattini interviewed the defendant the following day. Officer Frattini testified that the defendant showed no remorse.

¶ 9 Finally, the State presented evidence that the defendant attempted to escape from jail while he was awaiting trial on these charges. He managed to get to the roof of the jail through the duct work. When confronted, he jumped off the roof, fell three stories, and was taken to the hospital.

¶ 10 The defendant's mother, Claudine Kalaboke, testified for the defendant. She testified that she married Louis Westray when the defendant was four years old. The defendant grew up believing that Louis was his biological father. She testified that Louis was "very abusive to Jamie, physically, mentally abusive." She described one particularly brutal incident of abuse. She testified that Louis told the defendant to stand in front of a recliner. When the defendant asked him why, Louis said, "I want you to have someplace soft to fall when I hit you." Kalaboke testified that Louis then hit the defendant, who fell into the recliner. Louis then "continued to beat him until he broke the back of the recliner

down." Kalaboke further testified that Louis's ongoing abuse of the defendant resulted in the Department of Children and Family Services removing the defendant from the home on two different occasions. Both times, he was placed with relatives but later returned home.

¶ 11 Kalaboke testified that the defendant found out that Louis Westray was not his biological father at the age of 15 when he overheard Louis mention this fact during a heated argument with Kalaboke. She divorced Louis when the defendant was 17. They initially moved to Arizona, but the defendant was homesick and decided to move back to Illinois after visiting friends over Christmas vacation. Kalaboke moved back to the area a few months later.

¶ 12 Kalaboke testified that the defendant moved in with Louis when he returned to Illinois, but Louis kicked him out of the house shortly thereafter. The defendant then moved in with friends. She explained that these friends got the defendant involved in a gang and introduced him to Mr. Humphries. Mr. Humphries was the "older gentleman" involved with the burglaries of home-based palm-reading businesses discussed by the State's witnesses. Kalaboke testified that the defendant went to prison for his role in those burglaries before finishing high school.

¶ 13 Kalaboke also testified about the defendant's life after he was released from prison. She testified that the defendant met and married a woman named Tara. The couple got involved in Christian ministry working with inner-city youth and gang members. Later, they divorced. According to Kalaboke, the defendant became depressed

after his divorce. He started drinking and spending time with the group of friends who got him involved with Mr. Humphries.

¶ 14 The defendant testified on his own behalf. Much of his testimony describing his abuse at the hands of Louis Westray paralleled that of his mother. The defendant testified in more detail about how he came to be involved with the gang led by Mr. Humphries. He explained that one day in February 1989, when he was 18 years old and a senior in high school, he and Louis got into an argument. He testified, "Instead of taking a beating, this time I took off running." He moved in with three of his friends who were a year older than him and had their own apartment. The three friends informed the defendant that they made their living by robbing "Gypsy palm readers" and asked if he wanted to join them.

¶ 15 The defendant explained how the group operated. A man named Charles Humphries, who was in his 40s, provided the younger men with weapons and told them "exactly what to do." He instructed them to steal jewelry, cash, and guns because these things were easy to dispose of.

¶ 16 The defendant next testified about his cooperation with police investigating the Humphries gang's criminal activity. According to the defendant, he told his mother about his involvement because "there was [*sic*] some things happening within this organization that were pretty scary." His mother advised him to talk to Louis, who was a police officer. Louis put the defendant in contact with one of the officers investigating the crimes. The defendant provided police with information about the crimes. He testified that he went to jail for six months.

¶ 17 The defendant also testified about how he returned to a life of crime after his divorce from Tara. He explained that he worked as a security manager at a bar managed by his friend. There, he met Tracy Cook, the wife of his codefendant in the Opatt murder. Due to financial difficulties, the defendant and his new girlfriend moved in with Tracy and Keith Cook. According to the defendant, the robbery of Tracy's coworker at the Bank of Marion depository was the Cooks' idea.

¶ 18 The defendant also presented the testimony of a friend, Beth Ann Kern. Kern knew who the defendant was when they were in high school together, but she did not get to know him personally until much later. She testified that "it was common knowledge that he had an abusive childhood." Kern became friends with the defendant when she served with him in their church's drama ministry. She also testified that when she saw him after his divorce from Tara, he was devastated.

¶ 19 The jury found that the mitigating evidence was not sufficient to preclude the imposition of a death sentence.

¶ 20 The defendant appealed his conviction, arguing that he was not properly advised of his appeal rights in accordance with Illinois Supreme Court Rule 605(b) (eff. Aug. 1, 1992). He also challenged a jury instruction given during the death penalty eligibility hearing, and he claimed that the prosecutor improperly argued that his guilty plea constituted a confession to being the shooter, something the State was required to prove before he could be sentenced to death. See 720 ILCS 5/9-1(b)(6)(a) (West 1998).

¶ 21 In April 2000, while his appeal was pending, the defendant filed a *pro se* postconviction petition. He asserted that he received ineffective assistance of plea counsel

because counsel advised him to plead guilty before reviewing discovery provided by the State, advised him not to testify at the eligibility hearing, and failed to conduct a reasonable investigation into potential mitigating evidence. The court advanced the petition to the second stage and appointed counsel, but the parties subsequently agreed that the petition should be held in abeyance until the defendant's direct appeal could be resolved.

¶ 22 In September 2000, after the State conceded that the defendant was not properly admonished, the Illinois Supreme Court remanded the defendant's case to the trial court for proceedings in compliance with Rule 605(b). See *People v. Janes*, 158 Ill. 2d 27, 35-36 (1994). After he was properly admonished, the defendant, through newly-appointed counsel, filed a motion to withdraw his guilty plea. He argued that (1) his plea was not knowing and voluntary because he was acting under a misapprehension of fact and law and (2) plea counsel was ineffective for failing to more thoroughly investigate evidence in mitigation.

¶ 23 In July 2001, the court denied the defendant's motion to withdraw his plea. The defendant appealed that ruling to the Illinois Supreme Court. In January 2003, while that appeal was pending, then-Governor George Ryan commuted the defendant's death sentence to a sentence of natural life in prison. The Illinois Supreme Court dismissed the defendant's appeal but later reinstated the appeal on the defendant's motion. The Illinois Supreme Court then transferred the defendant's appeal to this court. The defendant argued before this court that neither the trial court nor plea counsel advised him that his guilty plea could be construed as an admission that he inflicted Elizabeth Opatt's fatal injuries,



an element the State was required to prove at the eligibility hearing. See 720 ILCS 5/9-1(b)(6)(a) (West 1998). As a result, he argued, his plea was not knowing and intelligent. He also argued that he was entitled to a new eligibility hearing. In September 2008, we rejected these arguments and affirmed the court's order denying the defendant's motion to withdraw his guilty plea. See *People v. Westray*, No. 5-06-0678 (Sept. 23, 2008) (unpublished order under Illinois Supreme Court Rule 23), *petition for leave to appeal denied*, 231 Ill. 2d 653 (2009).

¶ 24 In 2013, the defendant filed an amended postconviction petition through appointed counsel. He argued that plea counsel was ineffective for failure to investigate and present available evidence in mitigation and that postplea counsel was ineffective for failing to raise this issue. He further argued that his claim was not rendered moot by the commutation of his death sentence. This was so, he explained, because a natural life sentence was not mandatory. Thus, he contended, had the death penalty not been imposed, he could have been sentenced to a nonextended-term sentence of 20 to 60 years. In the petition, counsel also outlined the efforts she made to investigate the defendant's claims. She noted that in reviewing the defendant's school records, she uncovered a "summary of counseling" prepared by high school social worker Randy Knox. Counsel attempted to locate Knox but was unable to do so. She also attempted unsuccessfully to locate Derek Flatt, a school friend of the defendant's who witnessed at least one incident of abuse by Louis Westray. Counsel noted that she filed a motion for the appointment of an investigator to help her locate these witnesses, but the court denied that motion.

¶ 25 The State filed a motion to dismiss the amended petition, arguing that in light of former Governor Ryan's commutation of the defendant's death sentence, his claim that he received ineffective assistance of counsel during the aggravation-mitigation hearing was moot. The court agreed and dismissed the defendant's petition on this basis in August 2014. This appeal followed.

¶ 26 Before turning to the merits of the defendant's contentions, we note that the question of whether his claim became moot when the former governor commuted his sentence is a question of jurisdiction. Illinois courts do not have jurisdiction to consider issues that are moot because we lack jurisdiction to render opinions that are advisory in nature. *People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 407-08 (1990). This court has jurisdiction to consider whether the postconviction court correctly determined that the defendant's claim was moot, thereby depriving it of jurisdiction. However, if we find that the court did lack jurisdiction, our own jurisdiction is limited to that question, and we may not consider the merits of the defendant's remaining arguments. See *People v. Bailey*, 2014 IL 115459, ¶ 29. With this limitation in mind, we turn to the defendant's arguments.

¶ 27 The defendant argues that the court incorrectly determined that the issues raised in his postconviction petition are moot in light of the former governor's commutation of his death sentence. We disagree.

¶ 28 In *People v. Lucas*, 203 Ill. 2d 410 (2002), the Illinois Supreme Court addressed the precise question before us. There, as here, the defendant alleged in a postconviction petition that his attorney provided ineffective assistance during the sentencing phase of a

death penalty case by failing to present the testimony of several witnesses as evidence in mitigation. *Id.* at 418. He appealed the second-stage dismissal of his petition. *Id.* at 412. While his appeal was pending, then-Governor Ryan commuted his death sentence to a sentence of natural life without the possibility of parole. *Id.* at 418-19. The Illinois Supreme Court explained that commutation removed the defendant's death sentence and replaced it "with a lesser, executively imposed sentence." *Id.* at 419. The court thus concluded that the defendant's sentencing issue was moot. *Id.*

¶ 29 The court reached this conclusion due to the nature of the governor's power to commute sentences. As the Illinois Supreme Court has explained, the governor's decision to commute a defendant's sentence is "not subject to control by the courts or the legislature." *People v. Mata*, 217 Ill. 2d 535, 541 (2005) (citing *People ex rel. Madigan v. Snyder*, 208 Ill. 2d 457, 473 (2004)). Although the governor does not have the authority to increase a defendant's sentence (*id.* at 542), his authority to commute sentences is "extremely broad" and, as discussed, generally not subject to judicial review (*id.* at 541). Thus, when a defendant's death sentence is commuted to a less harsh sentence of natural life in prison, a court is unable to offer effective relief to a defendant challenging his sentence. *Lucas*, 203 Ill. 2d at 418; *People v. Harris*, 357 Ill. App. 3d 330, 336 (2005).

¶ 30 Since *Lucas*, the Illinois Supreme Court has consistently held that the commutation of a death sentence renders moot any challenges to the sentence resulting from flaws at the aggravation-mitigation phase. See, e.g., *Mata*, 217 Ill. 2d at 547; *People v. Williams*, 209 Ill. 2d 227, 232 (2004); *People v. Evans*, 209 Ill. 2d 194, 208 (2004); *People v. Miller*, 203 Ill. 2d 433, 438 (2002). The defendant acknowledges this authority.

However, he calls our attention to two cases in which the Seventh Circuit Court of Appeals reached the opposite conclusion. See *Simpson v. Battaglia*, 458 F.3d 585, 595 (7th Cir. 2006); *Madej v. Briley*, 371 F.3d 898, 899 (7th Cir. 2004). He argues that federal constitutional law trumps state law. See *Mata*, 217 Ill. 2d at 546-47; *Madej*, 371 F.3d at 899. We do not find this argument persuasive.

¶ 31 The defendant is correct in stating that federal constitutional law takes precedence over conflicting state laws. "State courts have an obligation to enforce and protect every right granted by the Constitution of the United States." *Mata*, 217 Ill. 2d at 546. This, of course, includes the right to the effective assistance of counsel. It does not follow, however, that we are obliged to follow the decisions of the Seventh Circuit analyzing the interplay between this right and the governor's commutation power. See *Rose v. Hodges*, 423 U.S. 19, 22 (1975) (upholding state laws that did not provide for additional judicial sentencing procedures following the commutation of death sentences); *People v. O'Neal*, 40 Ill. App. 3d 448, 450 (1976) (noting that the holdings of federal courts are not binding on Illinois courts with the exception of the United States Supreme Court's holdings). By contrast, we *are* obliged to follow the precedents of the Illinois Supreme Court. *Harris*, 357 Ill. App. 3d at 337. Unless and until either the United States Supreme Court or the Illinois Supreme Court holds otherwise, both this court and the trial court are bound by the Illinois Supreme Court's determination that the commutation of a defendant's death sentence renders claims such as the one raised here moot. The trial court correctly followed these holdings.

¶ 32 For the reasons stated, we affirm the judgment of the court dismissing the defendant's postconviction petition.

¶ 33 Affirmed.