

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).

2019 IL App (4th) 160911-U

NO. 4-16-0911

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 27, 2019

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
DONALD E. NOBLES,)	No. 78CF154
Defendant-Appellant.)	
)	Honorable
)	Thomas E. Griffith Jr.,
)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Holder White and Justice Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed, granting the Office of the State Appellate Defender’s motion to withdraw as postconviction counsel.
- ¶ 2 In November 1978, defendant, Donald E. Nobles, also known as Jamal Sharif, was convicted of four counts of first degree murder for shooting and killing Rosalyn Nesbitt and choking and beating Clyde Davis to death. Since his conviction, he has filed four postconviction petitions, two writs of *habeas corpus* in federal district court, a petition for clemency, and two state *habeas corpus* petitions. In August 2016, defendant filed a motion for leave to file a successive postconviction petition, which would have been his fifth postconviction petition, and the trial court denied the motion. Defendant appealed, and the court appointed the Office of the State Appellate Defender (OSAD) to represent him.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending any appeal in this cause would be frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In April 1978, defendant shot and killed Nesbitt, his girlfriend at the time. While awaiting trial in custody for killing Nesbitt, defendant choked and beat his cellmate, Davis, to death. The State charged defendant with two counts of first degree murder as to the killing of Nesbitt, alleging he shot her without lawful justification and with the intent to kill or do great bodily harm (count I) (Ill. Rev. Stat. 1977, ch. 38, ¶ 9-1(a)(1)) and he killed Nesbitt by shooting her knowingly and without lawful justification, knowing that such acts created a strong probability of death (count II) (Ill. Rev. Stat. 1977, ch. 38, ¶ 9-1(a)(2)). The State also charged defendant with two counts of first degree murder as to the killing of Davis, alleging defendant, with the intent to kill or do great bodily harm, killed Davis by strangulation without lawful justification (count III) (Ill. Rev. Stat. 1977, ch. 38, ¶ 9-1(a)(1)) and he killed Davis by strangulation knowingly and without lawful justification, knowing that such acts created a strong probability of death (count IV) (Ill. Rev. Stat. 1977, ch. 38, ¶ 9-1(a)(2)). The jury convicted defendant of both murders, and the trial court sentenced defendant to natural life in prison for the murder of Davis and a concurrent term of 40 years in prison for the murder of Nesbitt.

¶ 6 Defendant's convictions and sentences were affirmed on direct appeal. See *People v. Nobles*, 83 Ill. App. 3d 711, 717, 404 N.E.2d 330, 335 (1980). Defendant filed his first postconviction petition *pro se* in 1980. No further action was taken on the petition, and defendant filed a second postconviction petition in 1984. The petition was treated as an amendment to the 1980 petition and was dismissed by the trial court. The dismissal was appealed, and this court

affirmed the dismissal. *People v. Nobles*, 144 Ill. App. 3d 1186, 510 N.E.2d 1336 (1986) (table) (unpublished order under Supreme Court Rule 23). His third postconviction petition was filed in 1989, and the court found it was barred and the allegations were frivolous and patently without merit. This court affirmed the dismissal of the petition. *People v. Nobles*, 193 Ill. App. 3d 1113, 578 N.E.2d 335 (1990) (table) (unpublished order under Supreme Court Rule 23).

¶ 7 Defendant filed a petition for writ of *habeas corpus* in federal district court, and the trial court's denial was affirmed on appeal. *Nobles v. Welborn*, No. 93-3215, 1995 U.S. App. WESTLAW 564666 (7th Cir. Sept. 19, 1995). Defendant also filed a clemency petition. In 2000, defendant filed his fourth postconviction petition, which was dismissed as frivolous and patently without merit as it was a successive petition and untimely. Defendant filed a state petition for *habeas corpus* in September 2000, which the trial court dismissed. In 2009, defendant filed a motion for relief from judgment, and the State filed a motion to dismiss, which the court granted. In 2014, defendant filed a second state *habeas corpus* petition, which was denied. The court's denial was affirmed on appeal. *Sharif v. Williams*, 2015 IL App (3d) 140865-U, ¶ 9.

¶ 8 In August 2016, defendant filed a motion for leave to file a successive postconviction petition, his fifth. The trial court denied the motion, finding defendant did not allege actual innocence and defendant failed to show cause or prejudice.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 OSAD has filed a motion to withdraw its representation of defendant and a supporting memorandum of law. The record shows proof of service on defendant. This court granted defendant leave to file a response by November 29, 2018. Defendant filed a response on November 26, 2018. In that response, he states he has a meritorious claim but offers no evidence

to support that assertion. The State filed a brief disagreeing with defendant's response and asking this court to allow OSAD to withdraw. Based on our examination of the record, we conclude, as has OSAD, an appeal in this cause would be without arguable merit.

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) “provides a method by which defendants may assert that, in the proceedings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights.” *People v. Wrice*, 2012 IL 111860, ¶ 47, 962 N.E.2d 934. “[T]he language of the Act and our own case law make clear that only one postconviction proceeding is contemplated under the Act.” *People v. Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829. “Where, as here, a defendant seeks to institute a successive postconviction proceeding, the defendant must first obtain leave of court.” *Wrice*, 2012 IL 111860, ¶ 47. Our supreme court has “provided two bases upon which the bar against successive proceedings will be relaxed,” “cause and prejudice” and the “fundamental miscarriage of justice.” (Internal quotation marks omitted.) *Edwards*, 2012 IL 111711, ¶¶ 22-23. “In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence.” *Edwards*, 2012 IL 111711, ¶ 23. “The General Assembly codified the cause-and-prejudice exception in section 122-1(f) of the Act ***.” *Edwards*, 2012 IL 111711, ¶ 22. “[A] prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings” and “shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.” 725 ILCS 5/122-1(f) (West 2016).

¶ 13 In this case, in the motion for leave to file a successive petition, defendant is not arguing “actual innocence”; therefore, this is not a claimed miscarriage of justice. Instead, defendant may only obtain leave to file by showing both “cause and prejudice.”

¶ 14 Here, defendant’s first postconviction petition was filed in 1980. His most recent motion for leave to file a successive petition in 2016 cites *People v. Bailey*, 2013 IL 113690, 985 N.E.2d 987, challenging his sentence of natural life by referencing a standard established in 2009 by *People v. Smith*, 233 Ill. 2d 1, 23, 906 N.E.2d 529, 542 (2009). Because the standard did not exist prior to that date, he would have no ability to raise it in his initial postconviction petition. However, he cannot establish prejudice.

¶ 15 For this analysis, we need not address the question of whether *Bailey* applies retroactively, as the trial court did. The standard defendant cites applies when there is confusion about whether the jury convicted a defendant of felony murder or intentional and knowing murder because it was given general versus specific verdict forms and the offenses have different sentencing consequences. *Bailey*, 2013 IL 113690, ¶ 57. That standard is not implicated here as defendant was not charged with felony murder but instead intentional and knowing murder in each respective count. Since both charges carried the same sentences, it did not matter that a general verdict form was used. At the time of defendant’s conviction, a defendant 18 years or older who had been found guilty of murder could be sentenced to death if any number of aggravating factors were present, one of which was killing an inmate in the Department of Corrections. Defendant was 22 years old when he killed Davis. The jury decided he should receive a term of imprisonment as opposed to the death penalty. The trial court found the murder to be “exceptionally brutal or heinous indicative of wanton cruelty,” which was an aggravating factor that allowed the court to impose a sentence of natural life. Ill. Rev. Stat., 1978 Supp., ch.

