

No. 121450

IN THE  
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court
	)	of Illinois, Third District,
Plaintiff-Appellee,	)	No. 3-14-0847.
	)	
	)	There on Appeal from the Circuit
	)	Court of the Twelfth Judicial
v.	)	Circuit, Will County, Illinois
	)	No. 04 CF 1066
	)	
DENNIS L. BAILEY,	)	The Honorable
	)	Edward A. Burmila, Jr.,
Defendant-Appellant.	)	Judge Presiding.

**BRIEF AND APPENDIX OF PLAINTIFF-APPELLEE  
PEOPLE OF THE STATE OF ILLINOIS**

LISA MADIGAN  
Attorney General of Illinois

**DAVID L. FRANKLIN**  
Solicitor General

**MICHAEL M. GLICK**  
**BRIAN MCLEISH**  
Assistant Attorneys General  
100 West Randolph Street, 12th Floor  
Chicago, Illinois 60601-3218  
(312) 814-3692  
[bmcleish@atg.state.il.us](mailto:bmcleish@atg.state.il.us)

*Counsel for Plaintiff-Appellee  
People of the State of Illinois*

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ORAL ARGUMENT REQUESTED 121450

04/12/2017

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### **NATURE OF THE CASE**

Defendant-Appellant Dennis L. Bailey was convicted of residential burglary and disarming a police officer, and the court sentenced him to consecutive twenty-four-year prison terms. After an unsuccessful appeal and postconviction petition, he moved for leave to file a second postconviction petition. The State objected, and the trial court denied leave to file the petition. No issue is raised concerning the charging instrument.

### **ISSUES PRESENTED**

1. Whether the appellate court correctly held that the Post-Conviction Hearing Act does not prohibit the State from objecting to a motion for leave to file a successive postconviction petition.
2. In the alternative, whether remand is unwarranted because the trial court did not rely on the State's written objection or oral statements.

### **JURISDICTION**

Jurisdiction lies under Supreme Court Rules 315, 612, and 651. This Court allowed defendant's petition for leave to appeal on January 25, 2017.

### **STATUTES INVOLVED**

#### **725 ILCS 5/122-1(f)**

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. For purposes of this subsection (f): (1) 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 (2) a prisoner 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 5/122-5**

Within 30 days after the making of an order pursuant to subsection (b) of Section 122-2.1, or within such further time as the court may set, the State shall answer or move to dismiss. In the event that a motion to dismiss is filed and denied, the State must file an answer within 20 days after such denial. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in civil cases.

**STATEMENT OF FACTS**

Following a 2005 jury trial in the Circuit Court of Will County, defendant was convicted of residential burglary and disarming a peace officer. The trial court sentenced him to concurrent twenty-four-year prison terms for these offenses. His direct appeal and first postconviction petition were unsuccessful.

Defendant then filed a motion for leave to file a successive postconviction petition. C559-83.<sup>1</sup> The State filed a five-page written objection. C601-06. A summary of the procedural history comprised two pages. C601-02. Another two and a half pages were devoted to outlining the governing legal standard. C603-05. Finally, in a single, eight-line paragraph, the State argued that defendant had failed to demonstrate actual innocence or cause and prejudice. C605. Defendant filed a response to the objection, reasserting his claim of actual innocence and asserting that he believed he would obtain evidence to show his innocence from a pending declaratory judgment action. C608-11.

The trial court announced its decision in open court. Defendant was not present. Before the court announced the decision, the State restated its objection in two sentences:

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<sup>1</sup> “C\_\_” refers to the common law record, “R\_\_” to the report of proceedings, and “A\_\_” to the appendix.

Basically, Your Honor, our objection is that each of the claims that [defendant] wants to raise in his successive post-conviction petition could have been raised [in] his earlier post-conviction petition which was filed on — in 2009, dismissed by this Court, and the Appellate Court affirmed that dismissal.

He doesn't establish any cause or prejudice for his failure to raise those claims in his previous petition, and while he says he's actually innocent, he offers no support, nothing in support of that claim, so that's why we object to his filing of the successive post-conviction petition.

R1341.

The court then referenced defendant's response, stating, "I like that his claim is that he was under the impression that his request for declaratory judgment would be in his favor." *Id.* The State agreed that this was defendant's argument, and the court denied leave to file. R1341-42.

Defendant appealed, but he did not argue that leave to file should have been granted. A15. Instead, he argued only that the State's written objection and oral statements were improper. *Id.* The appellate court affirmed. A16.

### **Standard of Review**

Questions of statutory interpretation are subject to *de novo* review. *People v. Simpson*, 2015 IL 116512, ¶ 29. And where the trial court has not considered testimony in reaching its conclusion, the denial of a motion for leave to file a successive postconviction petition is likewise reviewed *de novo*. *See People v. Guerrero*, 2012 IL 112020, ¶ 13.

## Argument

### I. The State May Object to a Motion for Leave to File a Successive Postconviction Petition.

#### A. The Post-Conviction Hearing Act creates no exception to the general rule that a party may object to an opponent's motion for leave to file.

The default rule permits a party to file an objection to a motion for leave to file. Indeed, parties file objections to motions for leave to file in many situations where there is no express statutory authorization. *See, e.g., Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350, ¶ 4 (motion for leave to file amended complaint); *People v. Dittmar*, 2011 IL App (2d) 091112, ¶ 35 (motion for leave to file late pleading); *People v. Hernandez*, 345 Ill. App. 3d 163, 166 (2d Dist. 2004) (motion for leave to file supplemental brief). Unless § 122-1 affirmatively prohibits the State from objecting to a motion for leave to file, such an objection should be allowed.

The Post-Conviction Hearing Act (PCHA) does not mention, let alone prohibit, objections to a defendant's motion for leave to file. *See* 725 ILCS 5/122-1, *et seq.* Defendant nevertheless argues that § 122-5, which governs when the State may file a motion to dismiss after a pleading has been filed, implicitly prohibits the State from objecting to a motion for leave to file. Def. Br. 6-7. In so arguing, defendant relies on *People v. Gaultney*, where this Court held that the State may not file a motion to dismiss during the first stage of postconviction proceedings. 174 Ill. 2d 410, 418-20 (1996). Defendant's reliance on *Gaultney* is misplaced.

The *Gaultney* rule arises from § 122-5, which, by its own terms, applies to "Proceedings on [the] petition." 725 ILCS 5/122-5. But until leave to file is granted, there can be no "proceedings on [the] petition." *See People v. Tidwell*, 236 Ill. 2d 150,

161 (2010) (“[A] successive postconviction petition is not considered ‘filed’ for purposes of section 122-1(f), and further proceedings will not follow, until leave is granted.”).

Moreover, if the legislature intended to prohibit the State from objecting to a motion for leave to file, it would not have buried that prohibition in an unrelated section that applies only *after* a petition has been filed. Instead, it would have included the prohibition in § 122-1(f) itself. *Cf.* A19-20 (Amendment 2 to 2013 House Bill 2619) (providing that the decision to grant leave to file “shall be made . . . without pleadings from the State”). Accordingly, neither § 122-5 nor *Gaultney* prohibits the State’s objection.

**B. Illinois courts have consistently held that the State may object to a motion for leave to file, and the legislature has declined to amend § 122-1(f) in light of those holdings.**

The legislature has not amended § 122-1(f) in light of appellate court precedent permitting State objections to motions for leave to file. The legislature’s silence reinforces the conclusion that the State may object. “Where the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court’s statement of the legislative intent.” *Miller v. Lockett*, 98 Ill. 2d 478, 483 (1983). Section 122-1(f) became effective in 2004. In 2008, the appellate court held that *Gaultney* does not apply to motions for leave to file. *People v. Smith*, 383 Ill. App. 3d 1078, 1089 (1st Dist. 2008). Since then, every appellate court panel to consider the question has agreed. *See, e.g., People v. Collier*, 387 Ill. App. 3d 630, 639 (1st Dist. 2008); *People v. Welch*, 392 Ill. App. 3d 948, 955 (3d Dist. 2009);<sup>2</sup> *People v. Crenshaw*,

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<sup>2</sup> Section 122-1(f) does not differentiate between pro se and counseled motions. 725 ILCS 5/122-1(f). Defendant’s attempt to distinguish *Welch* on that basis, *see* Def. Br. 8, thus warrants no further discussion.



2015 IL App (4th) 131035, ¶¶ 31, 35. The House of Representatives passed a bill in 2013 that would have abrogated *Smith*, see A21-22, but that bill stalled in the Senate. By not amending the statute, the General Assembly has acquiesced to the appellate court's construction of the act.

Though this Court has not directly addressed whether the State may object to a motion for leave to file, its precedent is inconsistent with a prohibition on State objections. Specifically, this Court reinstated a circuit court's judgment denying leave to file a successive petition where the State objected to the motion, participated in a hearing, and cross-examined the defendant. *People v. Guerrero*, 2012 IL 112020, ¶¶ 6-9, 13. The appellate court had reviewed the circuit court's judgment *de novo* and reversed. *Id.* at ¶ 13. On appeal, this Court reviewed the circuit court's judgment for manifest error and reinstated it. *Id.* at ¶ 13. If it was improper for the circuit court to rely on the State's participation, this Court would not have deferred to the circuit court's judgment. See *Gaultney*, 174 Ill. 2d at 419 (circuit court reliance on State's participation during first-stage proceedings compels reversal). By applying the manifest error standard, this Court recognized that the circuit court was free to rely on the State's participation. Thus, defendant's proposed rule cannot be reconciled with *Guerrero*.

At the very least, *Guerrero* illustrates that the State must have *some* opportunity to argue that a defendant has not demonstrated cause and prejudice or actual innocence. If the State may not object to a motion for leave to file, it must be permitted to argue the § 122-1(f) requirements in a second-stage motion to dismiss.

**II. In the Alternative, Reversal Is Unwarranted Because the Trial Court Did Not Rely on the State's Written Objection or Oral Statements.**

Even if the State was prohibited from objecting to defendant's motion for leave to file a successive petition, this Court need not reverse and remand because the trial court did not rely on the State's participation. Under similar circumstances, this Court has held that where the State files a premature motion to dismiss, reversal is not required unless "the record shows that the circuit court relied on or was influenced by the motion to dismiss." *Gaultney*, 174 Ill. 2d at 420.

Here, defendant does not argue that the trial court sought the State's input, Def. Br. 10, and there is no indication that the circuit court relied on the State's participation. The State's written objection contained only a cursory, one-paragraph argument, C605, and the oral presentation was no more detailed. R1341. The trial court's sole statement on the record referred to a cause-and-prejudice argument that the State had not addressed. *Id.* Thus, the record does not show that the circuit court relied on or was influenced by the State's participation, and reversal is unwarranted. *See Gaultney*, 174 Ill. 2d at 420.

Finally, the circuit court did not need to rely on the State's objections, as defendant's motion was facially meritless. Defendant did not argue cause and prejudice or assert facts to support such an argument. Likewise, he did not argue that the "newly discovered evidence" to support his actual innocence claim was unavailable at trial or assert facts to support such an argument. *See* C561-62, C572-74. Indeed, defendant has failed to argue the merits of his motion for leave to file both in this Court and the appellate court, thereby signaling the motion's lack of merit.

**Conclusion**

The judgment of the appellate court should be affirmed.

April 12, 2017

Respectfully Submitted,

LISA MADIGAN  
Attorney General of Illinois

DAVID L. FRANKLIN  
Solicitor General

MICHAEL M. GLICK

/s/ Brian McLeish  
BRIAN MCLEISH  
Assistant Attorneys General  
100 West Randolph Street, 12th Floor  
Chicago, Illinois 60601-3218  
(312) 814-3692  
bmcleish@atg.state.il.us

*Counsel for Plaintiff-Appellee  
People of the State of Illinois*

**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is eight pages.

/s/ Brian McLeish  
BRIAN MCLEISH  
Assistant Attorney General

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# APPENDIX

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Rep. Scott Drury

Filed: 4/5/2013

09800HB2961ham002

LRB098 09632 RLC 43988 a

1 AMENDMENT TO HOUSE BILL 2961

2 AMENDMENT NO. \_\_\_\_\_. Amend House Bill 2961, AS AMENDED,  
3 with reference to page and line numbers of House Amendment No.  
4 1, by replacing lines 17 through 26 on page 4 and lines 1  
5 through 14 on page 5 with the following:

6 "(f) Only one petition may be filed by a petitioner under  
7 this Article without leave of the court. The determination as  
8 to whether to grant leave of court shall be made prior to or  
9 contemporaneously with any order made under paragraph (2) of  
10 subsection (a) or subsection (b) of Section 122-2.1 without  
11 pleadings from the State. Leave of court may be granted ~~only~~ if  
12 a petitioner demonstrates:

13 (1) cause for his or her failure to bring the claim in  
14 his or her initial post-conviction proceedings and  
15 prejudice results from that failure; or

16 (2) that there has been a fundamental miscarriage of  
17 justice.

18 For purposes of this subsection (f):

1           (A) ~~(1)~~ a petitioner demonstrates ~~prisoner shows~~ cause  
2       by adequately pleading that ~~identifying~~ an identified  
3       ~~objective~~ factor ~~that~~ impeded his or her ability to raise a  
4       specific claim during his or her initial post-conviction  
5       proceedings; ~~and~~

6           (B) ~~(2)~~ a petitioner demonstrates ~~prisoner shows~~  
7       prejudice by adequately pleading ~~demonstrating~~ that the  
8       claim not raised during his or her initial post-conviction  
9       proceedings so infected the trial that the resulting  
10      conviction or sentence violated due process; and ~~;~~

11          (C) a petitioner demonstrates a fundamental  
12      miscarriage of justice by adequately pleading that there is  
13      newly discovered evidence that establishes a substantial  
14      basis to believe that the petitioner is actually innocent  
15      by clear and convincing evidence."



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please read the Bill. Mr. Clerk, please return the Bill to the Order of Second Reading."

Clerk Hollman: "House Bill 3021, a Bill for an Act concerning transportation. The Bill was read a second time on a previous day. No Committee Amendments. Floor Amendment #2, offered by Representative D'Amico, has been approved for consideration."

Speaker Turner: "Representative D'Amico."

D'Amico: "Thank you, Speaker. I just recommend we adopt the Amendment that becomes the Bill."

Speaker Turner: "Gentleman moves for the adoption of Floor Amendment #2 to House Bill 3021. All those in favor say 'aye'; all those opposed say 'nay'. In the opinion of the Chair, the 'ayes' have it. And the Amendment is adopted. Mr. Clerk."

Clerk Hollman: "No further Amendments. No Motions are filed."

Speaker Turner: "Third Reading. House Bill 2961, Representative Drury. Mr. Clerk, please read the Bill."

Clerk Hollman: "House Bill 2961, a Bill for an Act concerning criminal law. Third Reading of this House Bill."

Speaker Turner: "Representative Drury."

Drury: "Thank you, Mr. Speaker. House Bill 2961 amends the Code of Criminal Procedure of 1963, which deals with the post-conviction... deals with post-conviction petitions. It allows a person to begin a post-conviction proceeding if the person was convicted or an adjudicated delinquent of an offense and was sentenced to a term of imprisonment or another form of detention. In this post-conviction proceeding, the person can assert that his constitutional

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rights were substantially denied or that there was newly discovered evidence that establishes a substantial basis to believe that the defendant is actually innocent by clear and convincing evidence. The Amendment also... the Bill also codifies that a court can allow a successive post-conviction petition where the petitioner demonstrates that there's been a fundamental miscarriage of justice, which requires that he adequately plead, again, that there's newly discovered evidence that establishes a substantial basis to believe that the petitioner is actually innocent. And finally, at the request of Justice Thomas of the Illinois Supreme Court, the Bill puts in place a procedure for when a court could grant leave for a subsequent post-conviction petition. Members of the House, we pass a lot of Bills here that constantly are putting people in prison and there's long debates on this. Unfortunately, there's a lot of times in Illinois where we put people in prison that don't belong there and this Bill provides for justice when there is a wrongful conviction. I ask for an 'aye' vote."

Speaker Turner: "Seeing no debate, the question is, 'Shall House Bill 2961 pass?' All in favor vote 'aye'; all opposed vote 'nay'. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Representative Bellock, Brown, Hatcher, Bill Mitchell, Zalewski. Mr. Clerk, please take the record. On a count of 75 voting 'yes', 34 voting 'no', 0 voting present, House Bill 2961, having received the Constitutional Majority, is hereby declared passed. House Bill 2641, Representative Kosel. Mr. Clerk, please read the Bill.

# **PROOF OF FILING AND SERVICE**

Under penalty of law as provided in 735 ILCS 5/1-109 (2014), the undersigned certifies that the statements set forth in this instrument are true and correct, including that the foregoing **Brief and Appendix of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and was served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by the persons named below on April 12, 2017, and by placing a copy in an envelope with proper prepaid postage affixed and directed to each person named below at the addresses indicated, and by depositing the envelopes in the United States Mail at 100 West Randolph Street, Chicago, Illinois 60601.

Jessica Wayne Arizo, Assistant Appellate Defender  
Office of the State Appellate Defender, Second District  
One Douglas Avenue, Second Floor  
Elgin, Illinois 60120  
2nddistrict.eserve@osad.state.il.us

Lawrence M. Bauer, Deputy Director  
State's Attorneys Appellate Prosecutor  
2032 Larkin Avenue  
Elgin, Illinois 60123  
dbarr@ilsaap.org

James Glasgow  
Will County State's Attorney  
121 North Chicago Street  
Joliet, Illinois 60432

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail an original and twelve copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Brian McLeish

BRIAN MCLEISH

Assistant Attorney General

100 West Randolph Street, 12th Floor

Chicago, Illinois 60601-3218

(312) 814-3692

bmcleish@atg.state.il.us

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