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NATURE OF THE CASE

Dennis Bailey, petitioner-appellant, appeals from an order denying him leave to file a successive post-conviction petition.

An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the post-conviction statute permits the prosecution to participate in the trial court's analysis of a motion for leave to file a successive post-conviction petition.

STATUTE INVOLVED

725 ILCS 5/122-1 (f) (2014):

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.

STATEMENT OF FACTS

Dennis Bailey filed a motion for leave to file a successive post-conviction petition and a “supplemental second successive post-conviction petition,” stemming from convictions for residential burglary and disarming a police officer. (C. 559; 594) After discussing the details of Bailey’s petition with the prosecutor, the judge denied Bailey leave to file his successive post-conviction petition. (R. 1341)

Trial Facts

Bailey represented himself at a jury trial. The evidence revealed that Bailey entered a house at 1453 Garland Court in Joliet in the early morning hours of July 22, 2004. (R. 235, 237) Bailey claimed that he went into the house because he thought his cousin lived there. He wanted to buy a gun from his cousin in order to kill himself. (R. 432-3) He testified that he was going through things in the apartment, trying to figure out if it was his cousin’s residence. (R. 435) Bailey was confronted by Tommie Taylor, who resided in the house and found Bailey going through a purse. (R. 251; 436) Bailey punched Taylor and a fight ensued. (R. 237; 437)

A police officer responded to the scene. When the officer tried to detain Bailey, he reached for the officer’s weapon. (R.366) The gun holster was unsnapped, but the gun was not removed from the holster. (R. 367) When Bailey tried to get the officer’s gun, he stuck himself in the neck with a piece of glass. (R. 247-8) Two watches belonging to Taylor were later found in Bailey’s pocket. (R. 248)

The jury found Bailey guilty of residential burglary and disarming a peace officer. He was sentenced to 24 years in prison on each count, to run concurrently. (C. 240)

Direct appeal

On direct appeal, Bailey's counsel argued only that the trial court erred in requiring Bailey to represent himself even though he had not made a voluntary waiver of counsel. The Appellate Court affirmed Bailey's convictions and sentences on April 9, 2008. A.C. No. 3-06-0139 (C. 311)

First Post-Conviction Petition

Bailey's filed a post-conviction petition on April 29, 2009. That petition alleged: (1) ineffective assistance of appellate counsel for not raising a speedy trial claim; (2) the trial court failed to appoint a new attorney for Bailey at trial and required Bailey to represent himself; (3) Bailey should not have been permitted to represent himself, because he was on psychotropic medication; (4) insufficient evidence because the State's witnesses had a motive to testify falsely; and (5) the trial court failed to recognize that defendant had a hand injury, making it impossible to remove the officer's gun from its holster. (C. 386) The petition was dismissed on July 16, 2009. (C. 470) Appellate counsel filed a motion to withdraw as counsel, pursuant to *Pennsylvania v. Finley*, which was granted on April 4, 2011. (C. 532)

Second post-conviction petition

In his motion for leave to file a successive post-conviction petition and a "supplemental second successive post-conviction petition," Bailey raised the following issues: (1) actual innocence; (2) denial of due process when not permitted to present medical documents that would have shown his hand was so disabled that he could not have taken the officer's gun; (3) denial of due process because he was unfit for trial; (4) denial of right to speedy trial; (5) failure of trial judge to rule on a pretrial motion to dismiss charges based on speedy trial issue; (6) ineffectiveness

of trial counsel for failing to consult with Bailey about a guilty plea offer; and (7) abuse of discretion by the trial court in refusing to allow trial counsel to withdraw. (C. 561-8; 594-8)

On August 25, 2014, the State filed a written objection, arguing that Bailey's actual innocence claim lacked merit and that the other issues either were previously raised either on direct appeal or in Bailey's first post-conviction petition or could have been previously raised. (C. 601) Bailey filed a response to the State's objection. (R. 608)

On October 6, 2014, the trial judge considered the petition. (R. 1340) Assistant State's Attorney Colleen Griffin was present, but Bailey was not. (R. 1340) Griffin outlined her objections to Bailey's motion reiterating her arguments from the written objection. When Griffin commented about Bailey's failure to show cause and prejudice, the judge stated, "I like that his claim is that he was under the impression that his request for declaratory judgment would be in his favor." Griffin replied, "That's, I think, his cause," and the judge then dismissed the petition. (R. 1341) Notice of appeal was timely filed on October 27, 2014. (R. 1340; C. 626)

On appeal, Bailey argued, *inter alia*, that the trial court erred in allowing the State to respond to his motion for leave to file a successive post-conviction petition. The Appellate Court affirmed the dismissal in a unpublished order. *People v. Bailey*, No. 3-14-0847 (September 29, 2016) (*Bailey II*). The Appellate Court relied heavily on its earlier decision in *People v. Bailey*, 2016 IL App (3d) 140207, which involved Bailey's convictions in another Will County case. (*Bailey I*). This Court granted leave to appeal on January 25, 2017.

ARGUMENT

The post-conviction statute does not permit the prosecution to participate in the trial court's analysis of a petitioner's motion for leave to file a successive post-conviction petition.

Dennis Bailey filed a motion for leave to file a successive post-conviction petition. (C. 559; 594) The State filed a written objection. (C. 601) Prior to ruling on the motion, the trial judge discussed the contents of the motion with the prosecutor and listened to the prosecutor's argument asking the motion to be denied. (R. 1340-1) The judge then denied Bailey leave to file his successive post-conviction petition. (R. 1341)

The Post-Conviction Hearing Act (PCHA) does not expressly allow the prosecution to participate in the proceedings where the trial judge determines whether or not to grant a petitioner leave to file a successive petition. Despite this, the Appellate Court found no error here, where the prosecution aided the trial court in deciding to deny Dennis Bailey leave to file his successive petition. *People v. Bailey*, No. 2-14-0847 (September 29, 2016)(unpublished order pursuant to Supreme Court Rule 23) (*Bailey II*) (relying on *People v. Bailey*, 2016 IL App (3d) 140207 (*Bailey I*)).

This is an issue of first impression for this Court and this Court should find that the participation of the prosecutor at this initial stage of the proceedings was in error, as the PCHA does not authorize any such participation.

Denial of leave to file a successive post-conviction petition is reviewed *de novo*. *People v. Love*, 2013 IL App (2d) 120600, ¶27. A circuit court's compliance with statutory procedure is also reviewed *de novo*. *People v. Barber*, 381 Ill. App. 3d 558, 559 (3d Dist. 2008).

The PCHA proscribes the process for litigating post-conviction petitions. 725 ILCS 5/122-1 (2014). Although the PCHA contemplates the filing of only one petition without leave of court, the bar against successive proceedings will be relaxed when the petitioner can either: 1) establish “cause and prejudice” for failing to raise the claim earlier; or 2) demonstrate a “miscarriage of justice” – i.e., show his “actual innocence.” *People v. Edwards*, 2012 IL 111711 (2012), ¶¶22-23; 725 ILCS 5/122-1(f).

Nothing in the plain language of the PCHA, 725 ILCS 5/122-1, including section 122-1(f) (governing successive petitions) and 725 ILCS 5/122-2.1 (governing dismissal orders and the docketing of post-conviction petitions), permits the State to file *any* pleadings before the second stage of post-conviction proceedings. Section 122-5 of the PCHA requires the State to file a responsive pleading but only during the second stage of the proceedings after the circuit court has docketed the petition for further consideration and *appointed counsel to assist the petitioner*. 725 ILCS 5/122-5 (2014). Before that point, the circuit court must consider the petition independently, without any input from either side. *People v. Gaultney*, 174 Ill. 2d 410, 418-20 (1996). (the State’s filing of a motion to dismiss during the first stage of proceedings is premature and improper under the Act, because section 122-2.1 does not authorize any action from the State at the first stage).

Generally, post-conviction proceedings are divided into three distinct stages. *Gaultney*, 174 Ill. 2d at 418. At the first stage, §122-1(a) allows a prisoner to initiate a post-conviction proceeding by filing a petition asserting a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a) (2014). After a petition is filed, the circuit court must determine, within a 90-day period, whether the petitioner

has stated the gist of a constitutional claim. 725 ILCS 5/122-2.1 (2014)

Significantly, §122-2.1(c) provides:

In considering a petition pursuant to this Section, the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding.

Thus, at this first stage, where the circuit court determines whether a petition is frivolous or patently without merit, the PCHA does not permit any further pleadings from the defendant or any responsive pleadings from the State. *Gaultney*, 174 Ill. 2d at 418. Instead, the circuit court must consider the petition independently, without input from either side. Unless the court dismisses the petition pursuant to §122-2.1, it is docketed for further consideration. *Gaultney*, 174 Ill. 2d at 418.

The State's filing of a motion to dismiss during the first stage of proceedings is premature and improper under the PCHA because §122-2.1 does not authorize any action from the State at the first stage. *Gaultney*, 174 Ill. 2d at 420.

The reasoning underpinning *Gaultney* should also apply here. Although section 122-1(f) does not expressly *prohibit* the State from responding to a defendant's motion for leave to file a successive petition, neither does it *allow* the State to file a response to a petitioner's motion. Had the legislature wanted the State to be allowed to file such a response, it would have expressly said so, as it did in section 122-5, which explicitly allows for the State to file a motion to dismiss. When section 122-1(f) is considered with the other sections of the PCHA, it allows the State to participate in post-conviction proceedings only at the second stage, when the petitioner is represented by counsel. *Gaultney*, 174 Ill. 2d at 419-20. At that point, the State can either file an answer to the petition or move to dismiss

it. 725 ILCS 5/122-5.

If the legislature intended the State to participate at any point before then, it would have inserted such language into section 122-1(f). *See People v. Smith*, 2014 IL 115946, ¶30 (when “language is included in one section of a statute but omitted in another section of the same statute, we presume the legislature acted intentionally and purposely in the inclusion or exclusion”), *citing Edwards*, 2012 IL 111711, ¶¶ 26–27. Before the second stage, the trial court alone evaluates the *pro se* petitioner’s pleadings. *See Smith*, 2014 IL 115946, ¶35.

This issue has been addressed in the appellate court. In *People v. Welch*, 392 Ill. App. 3d 948, 955 (3d Dist. 2009), the reviewing court held that the circuit court had not erred by considering the State’s objection when it denied leave to file a successive petition because the petitioner was represented by counsel who argued the motion before it was denied. *Welch* found no error, noting that it had found no authority prohibiting the State’s input on successive petitions, and that both parties had participated in argument regarding whether leave should be granted. *Welch*, 392 Ill. App. 3d at 955.

This case is readily distinguishable from *Welch*. Unlike the petitioner in *Welch*, Bailey was never given the benefit of counsel either before or after the State made its objection. And in *Welch*, defense counsel not only argued against the State’s objection, but also filed the initial motion seeking leave to file. *Welch*, 392 Ill. App. 3d at 951. *Welch* thus provides no support for the circuit court’s actions on the *pro se* petition here.

In *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶33, the Court relied on *Welch* to affirm the denial of a motion for leave to file a successive petition,

finding that the State's participation in the motion-seeking-leave stage promotes finality of judgment and is "consistent with the general principle that only one post-conviction petition may be filed." 2015 IL App (4th) 131035, ¶33. However, because of its reliance on *Welch*, distinguished above, *Crenshaw* should not be followed.

This Court also has given some guidance on this issue. In *People v. Smith*, 2014 IL 115946, this Court affirmed the principle announced in *People v. Edwards*, 2012 IL 111711, ¶ 29, that a petitioner must obtain leave to file a successive petition, as Illinois disfavors successive petitions. *Smith*, 2014 IL 115946, ¶31. *Smith* went on to note that, when seeking leave, the petitioner must establish cause and prejudice and provide sufficient facts and documentation so that the circuit court may rely solely on the petitioner's pleadings when deciding whether leave to file should be granted. *Smith*, 2014 IL 115946, ¶¶32-34. *Smith* concluded that "leave of court to file a successive post-conviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." 2014 IL 115946, ¶35, (emphasis added) citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 463 (2002) ("a petitioner must establish cause and prejudice as to each individual claim asserted in a successive petition"); *People v. Tidwell*, 236 Ill.2d 150, 161 (2010) (a defendant seeking leave to institute a successive postconviction "must submit enough in the way of documentation to allow a circuit court to make that determination"); and *Edwards*, 2012 IL 111711, ¶ 24 ("leave of court should be denied only where it is clear, from a review of the

successive petition and the documentation provided by the petitioner” that the petitioner's claims fail as a matter of law).

Taken to their logical conclusion, *Smith*, *Tidwell*, and *Edwards* show that the State's input at this “pre-proceedings” stage, when considering a petition for leave to file a successive petition, should not be permitted. This Court, in *People v. Wrice*, 2012 IL 111860, ¶87, concluded that, upon remand from the denial of a petition for leave to file a successive post-conviction petition, the case would proceed at stage two and with the appointment of counsel. At that stage, it would be appropriate for the State to have the opportunity to file its responsive pleadings, but not before then. Because the State should not be allowed to have any input at the “pre-proceeding,” it was improper for the State to file its motion to dismiss, in this case and for the trial judge to consider the State's motion.

The trial judge addressed Bailey's motion and the prosecutor detailed her objections to the motion at length. (R. 1341) In response to the prosecutor's argument that Bailey failed to show cause and prejudice, the judge responded, “I like that his claim is that he was under the impression that his request for declaratory judgment would be in his favor.” (R. 1341) When the prosecutor stated, “That's, I think, his cause,” the judge replied that the petition would be dismissed. (R. 1342) This interplay between the judge and the prosecutor shows that the judge considered the prosecutor's arguments before reaching his decision. It therefore cannot be said that the record gives “no indication that the trial judge . . . relied on the [State's] motion.” *See Gaultney*, 174 Ill. 2d at 420.

Further, the trial judge in this case not only allowed the State to participate in the discussion, but also engaged with the prosecutor in belittling the nature

of Bailey's cause and prejudice argument, when neither the defendant nor his attorney was present to defend him. These actions were contrary to the legislative intent of the statute.

In her dissent in *Bailey I* – which addressed the same issue being raised here – Justice McDade stated that “the cause and prejudice test for a *successive* petition is the effective substitute for and procedural equivalent of the first-stage assessment of whether the initial petition is frivolous and patently without merit.” *People v. Bailey*, 2016 IL App (3d) 140207, ¶53 (Emphasis in original). Thus, the State should not have any input in the judge's decision on whether the cause or prejudice test has been met, just as the State can have no input on whether a petition is frivolous or patently without merit.

Additionally, the leave-to-file stage is a *pleading* stage, and not a *proving* stage. *Smith*, 2014 IL 115946, ¶35. Thus, all well-pled facts in the successive petition and supporting affidavits must be taken as true. *People v. Pitsonbarger*, 205 Ill. 2d 444, 467 (2002). In this way, the leave-to-file stage is comparable to the first stage of an initial petition, which is also a pleading stage, and in which the State may not participate in the judge's decision regarding the merits of the petition. *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). For both successive petitions at the leave-to-file stage and first petitions, the trial court – not the State – must be the exclusive gatekeeper.

CONCLUSION

For the foregoing reasons, Dennis Bailey, petitioner-appellant, respectfully requests that this Court reverse the lower court's decision and remand for further proceedings before a different judge to determine whether Bailey should be granted leave to file his successive post-conviction petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jessica Wynne Arizo, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 12 pages.

/s/Jessica Wynne Arizo
JESSICA WYNNE ARIZO
Assistant Appellate Defender

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R494 Report of Proceedings – January 5, 2005
(late afternoon)

Verdict	R497
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R501 Report of Proceedings – January 5, 2005
(late afternoon – continued)

R503 Report of Proceedings – January 24, 2005

R511 Report of Proceedings – January 31, 2005

R520 Report of Proceedings – February 7, 2005

R526 Report of Proceedings – February 14, 2005

R556 Report of Proceedings – February 28, 2005

R573 Report of Proceedings – March 9, 2005

R590 Report of Proceedings – April 28, 2005

- R595 Report of Proceedings – May 11, 2005
- R606 Report of Proceedings – May 16, 2005
- R615 Report of Proceedings – May 20, 2005
- R618 Report of Proceedings – May 24, 2005
- R634 Report of Proceedings – June 2, 2005
- R638 Report of Proceedings – June 3, 2005
- R660 Report of Proceedings – June 16, 2005
- R678 Report of Proceedings – June 30, 2005
- R688 Report of Proceedings – July 19, 2005
- R692 Report of Proceedings – July 20, 2005
- R703 Report of Proceedings – August 24, 2005
- R723 Report of Proceedings – August 29, 2005
No Transcript Prepared
- R724 Report of Proceedings – October 3, 2005
(morning session)
- R730 Report of Proceedings – October 3, 2005
(afternoon session)
- R735 Report of Proceedings – October 4, 2005

Witnesses	Direct	Cross	Re-Direct	Re-Cross
Mary Jane Pluth	R746			

- R751 Report of Proceedings – October 4, 2005
(continued)

Witnesses	Direct	Cross	Re-Direct	Re-Cross
Mary Jane Pluth		R751	R757	
Christina Wilkins	R762	R767		

Opening Statement – State	R769
Closing Statement – Defense	R773
Closing Statement – State	R774

R782 Report of Proceedings – October 5, 2005

R815 Report of Proceedings – October 25, 2005

R844 Report of Proceedings – October 26, 2005

R875 Report of Proceedings – November 1, 2005

R881 Report of Proceedings – November 2, 2005
No Transcript Prepared

R882 Report of Proceedings – November 3, 2005
No Transcript Prepared

R883 Report of Proceedings – November 4, 2005
No Transcript Prepared

R884 Report of Proceedings – November 7, 2005
No Transcript Prepared

R885 Report of Proceedings – January 23, 2006

R893 Report of Proceedings – January 25, 2006

R897 Report of Proceedings – January 26, 2006

R948 Report of Proceedings – January 27, 2006
Motion for Ineffective Assistance of Counsel Denied

R976 Report of Proceedings – January 30, 2006
No Transcript Prepared

R977 Report of Proceedings – February 8, 2006

R1001 Report of Proceedings – February 8, 2006
(continued)

Witnesses	Direct	Cross	Re-Direct	Re-Cross
Regina Bailey	R1030	R1037		

R1056 Report of Proceedings – February 15, 2006
Sentencing

R1077 Report of Proceedings -January 3, 2005 p.m.

R1189 Report of Proceedings-January 4, 2005
Jury Selection
Opening Statements

R1211 State

R1215 Defense

R1220 Report of Proceedings-February 22, 2006
Motion to Reconsider Sentence

R1232 Report of Proceedings-March 8, 2006

R1247 Report of Proceedings-June 19, 2008

R1252 Report of Proceedings-December 24, 2008

R1256 Report of Proceedings-January 20, 2009

Mandate filed

R1259 Report of Proceedings-April 9, 2009
Post-Conviction Petition

R1264 Report of Proceedings-April 29, 2009

R1288 Report of Proceedings-July 14, 2009

R1294 Report of Proceedings-July 16, 2009

R1312 Report of Proceedings-August 4, 2009

R1327 Report of Proceedings-August 28, 2009

R1331 No transcript filed-July 20, 2012

R1332 Report of Proceedings-July 30, 2012

R1335 Report of Proceedings-August 19, 2014

R1340 Report of Proceedings-October 6, 2014
Successive Post-Conviction denied

R1344 Report of Proceedings-October 14, 2014

R1347 Report of Proceedings-October 24, 2014

3-14-2014 11:25:14 WCCM

STATE OF ILLINOIS)
)SS
COUNTY OF WILL)IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

People

Plaintiff

vs

Dennis Bailey

Defendant

CASE NO:

04CF 1066

COURT ORDER

This case comes on defendant's motion for leave to file a successive post-conviction petition. State objects & defendant has filed a response to that objection. Court finds defendant has not established his right to file a successive post-conviction petition as he has established neither cause nor prejudice. Motion for leave to file successive post-conviction denied.

Clerk to notify defendant of this order within 10 days & of his rights under Supreme Court Rule 651(b)

Attorney or Party, if not represented by Attorney

Name

ARDC #

Firm Name

Attorney for

Address

City & Zip

Telephone

Dated

Oct 6, 2014

Entered

Judge

PAMELA J. MCGUIRE, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

White - Court Yellow - Plaintiff Pink - Defendant

25 14 WCCM

17 D Revised (06/06)

12F SUBMITTED - 178881588 - WILL COUNTY DEPT. OF CORRECTIONS - 12/17/2014 10:21:15 AM # 178881591

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STATE OF ILLINOIS

3-14-0847

People v. Dennis Bailey



APPELLATE COURT

THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the
1st Day of January in the year of our Lord Two thousand sixteen, within and
for the Third District of Illinois:

Present -

HONORABLE MARY K. O'BRIEN, Presiding Justice

HONORABLE WILLIAM E. HOLDRIDGE, Justice

HONORABLE ROBERT L. CARTER, Justice

X

HONORABLE DANIEL L. SCHMIDT, Justice

X

HONORABLE VICKI R. WRIGHT, Justice

X

HONORABLE TOM M. LYTTON, Justice

HONORABLE MARY W. McDADE, Justice

BARBARA TRUMBO, Clerk

BE IT REMEMBERED, that afterwards on

Summary

September 29, 2016 the order of the Court was filed in the Clerk's

Office of said Court, in the words and figures following viz:

No. 3-14-0847

Summary Order filed September 29, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

v.

DENNIS BAILEY,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
) Will County, Illinois,
)

) Circuit No. 04-CF-1066
)

) Honorable
) Edward A. Burmila, Jr.,
) Judge, Presiding.
)

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

SUMMARY ORDER

A jury convicted defendant, Dennis Bailey, of residential burglary (720 ILCS 5/19-3(a) (West 2004)) and disarming a peace officer (720 ILCS 5/31-1(a) (West 2004)). The trial court sentenced him to concurrent terms of 24 years' imprisonment in the Department of Corrections. Defendant appealed, arguing that the trial court erred in allowing him to proceed *pro se* at trial as he did not voluntarily and unequivocally waive his right to counsel and that he should have been allowed a continuance once he elected to represent himself. *People v. Bailey*, No. 3-06-0139 (2008) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's convictions and sentence. *Id.*

Defendant filed a postconviction petition, which the trial court dismissed, and defendant appealed. This court granted the motion to withdraw as counsel filed by the Office of the State Appellate Defender and affirmed the dismissal of defendant's postconviction petition. *People v. Bailey*, No. 3-09-0700 (2011) (unpublished order under Supreme Court Rule 23).

Defendant then filed a motion for leave to file a successive postconviction petition, which is the subject of this appeal, arguing: (1) he was actually innocent, as a witness would state that someone let him into the apartment that he was convicted of burglarizing; (2) newly discovered evidence in the form of medical records contradict the evidence that he was capable of disarming a peace officer; (3) the court should have required an examination to determine if defendant was fit to represent himself; (4) his right to a speedy trial was violated; (5) his initial trial counsel was ineffective for "purposely sabotag[ing] his plea-bargain deal"; (6) the trial court abused its discretion in initially refusing to allow trial counsel to withdraw; and (7) the trial court erred in refusing to acknowledge defendant's pretrial motion to dismiss indictment.

The State filed an objection to defendant's motion for leave to file a successive postconviction petition arguing that all of defendant's claims could have been or were raised on direct appeal and that defendant did not meet the cause and prejudice test because he alleged no facts to demonstrate why he did not raise his claims before. See *People v. Owens*, 129 Ill. 2d 303, 317 (1989); *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Further, the State said that defendant failed to allege any facts to support the assertion that he was actually innocent. Defendant filed a response, arguing that he was under the impression that his pending petition for declaratory judgment in a civil case against the judge would have been decided in his favor and then the court would have turned over documents to support his newly discovered evidence claims.

The court held a hearing on defendant's motion. The State was present, but defendant was not. The State orally argued against the motion. The court then said, "I like that his claim is that he was under the impression that his request for declaratory judgment would be in his favor." To which the State said, "That's, I think, his cause." The court then denied the motion.

On appeal, defendant argues solely that the State should not have been permitted to respond to his motion for leave to file a successive postconviction petition. He does not argue the merits of his successive postconviction petition.

Defendant raised this same issue in a different case decided by this court. *People v. Bailey*, 2016 IL App (3d) 140207 (hereinafter *Bailey I*). In *Bailey I*, defendant filed a motion for leave to file a successive postconviction petition. *Id.* ¶ 15. At a hearing at which defendant was not present, the trial court addressed defendant's motion and the State responded orally to the motion, arguing that all the allegations could have been or were raised previously or lacked merit. *Id.* ¶ 16. The trial court agreed with the State and denied the motion. *Id.* On appeal, we held that the State could respond to motions to file successive postconviction petitions. *Id.* ¶ 22. We stated that the general rule is that parties are allowed to respond to motions filed by the opposing party (*People v. Shellstrom*, 345 Ill. App. 3d 175, 179 (2003)), and that, therefore, in order to deviate from that rule, the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) would have to create an exception prohibiting the State from responding to a defendant's motion for leave to file a successive petition. *Bailey*, 2016 IL App (3d) 140207, ¶ 20. We then looked at section 122-1(f) of the Act and determined that it did not prohibit input from the State, finding further support in *People v. Welch*, 392 Ill. App. 3d 948, 955 (2009), and *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 33. *Bailey*, 2016 IL App (3d) 140207, ¶ 22. Lastly, we distinguished *People v. Gaultney*, 174 Ill. 2d 410 (1996), *People v. Smith*, 2014 IL

115946, and the proposed legislation to amend section 122-1(f) of the Act, all of which defendant relies upon here. *Bailey*, 2016 IL App (3d) 140207, ¶¶ 24-27.

This case is essentially the same as *Bailey I*. Here, defendant filed a motion to file a successive postconviction petition. The State filed a written objection, to which defendant had the opportunity to respond in writing. The State then orally supported its objection in court without defendant present. Like *Bailey I*, we hold that there is nothing in the Act or in defendant's cited case law to prohibit the State from responding to defendant's motion. See *id.* ¶¶ 20-27.

For the foregoing reasons, we affirm the judgment of the circuit court of Will County. This decision is issued in accordance with Illinois Supreme Court Rule 23(c)(2) (eff. July 1, 2011).

Affirmed.

STATE OF ILLINOIS,)
 APPELLATE COURT,) ss.
 THIRD DISTRICT)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the order of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 29th day of September in the year of our Lord two thousand sixteen.

Barbara A. Jumbo

Clerk of the Appellate Court

RECEIVED
 SEP 29 2016
 CLERK OF THE APPELLATE COURT
 OTTAWA, ILLINOIS

3-14-0847
10/28/14 11:09:41 WCCH

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NOTICE OF APPEAL
APPEAL TAKEN FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN
WILL COUNTY, ILLINOIS
APPEAL TAKEN TO THE APPELLATE COURT, THIRD JUDICIAL DISTRICT, ILLINOIS
The People of the State of Illinois

Plaintiffs-Appellees,
 -vs-
 DENNIS L BAILEY (B-44818)
 Defendant-Appellant

Case No 04CF1066

☐ Joining Prior Appeal / ☒ Separate Appeal / ☐ Cross Appeal
 (Mark One)

An appeal is taken from the Order of Judgment described below

- (1) Court to which appeal is taken is the Appellate Court
 (2) Name of Appellant and address to which notices shall be sent
 NAME DENNIS L BAILEY (B-44818)
 ADDRESS MENARD CORRECTIONAL CENTER P O BOX 1000 MENARD IL 62259

- (3) Name and address of Appellant's Attorney on appeal
 NAME Peter A Carusona, Deputy Defender
Office of the State Appellate Defender
Third Judicial District
770 E Etna Rd
Ottawa, Illinois 61350

If Appellant is indigent and has no attorney, does he/she want one appointed?
 YES

- (4) Date of Judgment or Order JANUARY 5, 2005
 (a) Sentencing Date FEBRUARY 8, 2006
 (b) Motion for New Trial AMENDED MOTION FOR NEW TRIAL DENIED 2-8-06
 (c) Motion to Vacate Guilty Plea _____
 (d) Other _____
- (5) Offense of which convicted CT 1-RESIDENTIAL BURGLARY, CLASS 1 & CT 2-DISARMING A PEACE OFFICER, CLASS 2
- (6) Sentence 24 YEARS IDOC
- (7) If appeal is not from a conviction, nature of order appealed from _____
- (8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal

(Signed)

(May be signed by appellant, attorney, or clerk of circuit court)

PAMELA J McGUIRE
 Clerk of the Circuit Court
 NOAPL

cc State's Attorney
 Attorney General

10-28-14 11 09 41 WCCH

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