No. 121450

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Appellate Court of Illinois, No. 3-14-0847. |
| Respondent-Appellee, | ) | There on appeal from the Circuit Court of the Twelfth Judicial |
| -vs- | ) | Circuit, Will County, Illinois, No. 04 CF 1066. |
| DENNIS L. BAILEY | ) | Honorable Edward A. Burmila, Jr., |
| Petitioner-Appellant | ) | Judge Presiding. |

# REPLY BRIEF FOR PETITIONER-APPELLANT

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>DENNIS L. BAILEY<br><br>Petitioner-Appellant | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 3-14-0847.<br><br>There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 04 CF 1066.<br><br>Honorable Edward A. Burmila, Jr., Judge Presiding. |

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**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.**

In his opening brief, Dennis Bailey argued that the prosecution improperly participated in the trial court's analysis of his motion for leave to file a successive post-conviction petition, where the Post-Conviction Hearing Act (PCHA) does not authorize any participation by the prosecutor.

The State argues that because the PCHA does not mention objections to a defendant's motion to leave to file, such objections should be allowed. The State cites several cases where courts have allowed objections to be made, despite no express statutory authorization for objections. (St. Br. 4) However, none of the cases cited by the State involved objections to motions that would serve to bar a defendant from having his contentions of constitutional error heard by the court, as would occur in this case. The fact that courts have allowed responses to motions

in situations unrelated to the post-conviction context should have little bearing on the issue presented here.

The State further argues that *People v. Gaultney,* 174 Ill. 2d 410 (1996), applies only to cases after leave to file a successive petition has been granted. (St. Br. 4) But, the reasoning in *Gaultney*, as it pertains to §122-5, actually supports prohibiting the State's involvement until after the trial court has allowed the defendant leave to file the successive petition. The State's participation at the earliest stage is prohibited so that the prosecutor's arguments do not "contaminate the circuit court's determination" allowing the judge to make an "independent evaluation" of the defendant's pleading. 174 Ill. 2d at 419. At the initial stage – whether it be the first-stage of post-conviction proceedings or the leave-to-file stage for a successive post-conviction petition – the defendant is typically neither present in open court nor represented by counsel. Allowing the State to participate makes it a one-sided argument.

Citing *Miller v. Lockett*, 98 Ill. 2d 478, 483 (1983), the State argues, that because the legislature has not amended Sec. 122-1(f) in light of several appellate court cases holding that the State may object to a petitioner's motion for leave to file, the legislature has "acquiesced" in the appellate court's understanding of "the legislative intent." (St. Br. 5) However, *Lockett* dealt with an issue that had been previously decided by this Court. The issue in this case has never been addressed by this Court and it is premature to suggest that the legislature has "acquiesced" to the legislative intent as interpreted by the appellate court. The fact that the Senate failed to pass an amendment to the statute prohibiting the

prosecution's involvement at the leave to file stage does not definitively show that the legislature agreed with the appellate court's construction of the PCHA. The General Assembly may be awaiting for this Court to address this issue.

Further, the cases that the State asserts that the legislature has relied upon in failing to amend the statute – those it also asserts that this Court should rely upon – are either distinguishable from this case or improperly rely on a distinguishable case. *People v. Welch*, 392 Ill. App. 3d 948, 955 (3d Dist 2009), *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶33, *People v. Collier*, 387 Ill. App. 3d 630, 639 (1st Dist. 2008), and *People v. Smith*, 383 Ill. App. 3d 1078, 1089 (1st Dist. 2008). (St. Br. 5).

*Crenshaw* relied on *Welch* to affirm the denial of a *pro se* motion for leave to file a successive petition. 2015 IL App (4th) 131035, ¶33. *Welch* is distinguishable because defendant there, unlike the defendant in *Crenshaw* or the defendant here, was represented by counsel. And in *Welch*, counsel not only filed the motion seeking leave to submit a successive petition, but also argued against the State's objection. *Welch*, 392 Ill. App. 3d at 951. Thus, *Crenshaw* wrongly relied on *Welch* in holding that the State may provide the trial court with "input" at the leave to file stage. 2015 IL App (4th) 131035, ¶33.

The State asserts that the defendant's argument that *Welch* is distinguishable because the defendant in *Welch* was represented by counsel "warrants no further discussion," because Section 122-1(f) "does not differentiate between *pro se* and counseled motions." (St. Br. 5, footnote 2). However, whether or not the statute provides distinguishes between *pro se* defendants and those represented by attorneys

is not dispositive. In *Welch*, the judge did not merely hear arguments from the prosecutor, as happened in this case, but rather heard arguments from both sides before making his decision. 392 Ill. App. 3d at 955.

The *Smith* case cited by the State is also distinguishable. In *Smith*, the court stated that, "even if the State were not permitted to participate in the proceedings prior to the granting of leave to file, the State's input was incidental and collateral to the trial court's decision to deny defendant leave to file her post-conviction petition." 383 Ill. App. 3d at 1089. The same cannot be said here, where the record shows that judge did rely on the State's input.

The State claims that "the trial court did not rely on the State's participation." Relatedly, the State claims that the prosecutor's written objection was a "cursory one-paragraph argument" and that the trial court's statement on the record "referred to a cause and prejudice argument that the State had not addressed." (St. Br. 7).

However, the judge's comments about cause and prejudice addressed exactly what the State raised in its objection. (C. 605; R. 1341) The State's written objection referenced "purported medical evidence that would show he was unable to commit these crimes, and his attempts to secure this evidence." (C. 605) In his comments, the judge specifically noted Bailey's argument about cause and how it related to his request for declaratory judgment, stating, "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) After he stated, "That's, I think, his cause," the judge then dismissed the petition. (R. 1342) Bailey's request for declaratory judgment involved

his attempt to get the medical records referenced by the State in its argument. (C. 575, 577, 586) Thus, any suggestion that the judge's ruling was unrelated to the State's argument is incorrect. This interplay between the judge and the prosecutor shows that the judge considered the prosecutor's arguments before reaching his decision.

Further, the judge's discussion with the prosecutor about Bailey's cause and prejudice argument involved the points that Bailey made in his written response to the State's objection. (C. 608; 610) If the judge considered the defendant's arguments in response to the State's motion, it follows that the judge also considered the arguments made by the State.

The State's reliance on *People v. Collier*, 387 Ill. App. 3d 630 (1st Dist. 2008), is also misplaced (St. Br. 5). *Collier* relied on *Smith* and noted similarities to *Smith* in that the "discussion did not focus on the merits of defendant's claims, but rather on the nature of the proceeding and the need to writ-in the defendant from the Department of Corrections." 387 Ill. App. 3d at 639. As stated above, that was not the case here, where the discussion between the judge and the prosecutor dealt with the merits of Bailey's claims, not merely some logistical matter.

The State argues that *People v. Guerrero*, 2012 IL 112020, supports its contention that the prosecutor may offer input at the leave to file stage. (St. Br. 6). But, *Guerrero* did not address the appropriateness of the prosecution's input and the defense in that case never argued on appeal that the prosecutor's input was improper. Further, the proceedings there involved a scenario altogether different than what occurred here.

In *Guerrero*, the trial court appointed an attorney for a defendant who had filed a motion for leave to file and an amended post-conviction petition. 2012 IL 112020 at ¶7. The trial court then held a hearing, where the defendant testified regarding the cause and prejudice portion of his argument. 2012 IL 112020 at ¶7-9. The experience of the defendant in *Guerrero* was a far cry from what happened to Dennis Bailey. Bailey had his motion decided by the judge who discussed the issue with the prosecutor, without Bailey being present himself or having defense counsel argue his position. This distinction – the absence of defense counsel to aid Bailey in his arguments – is noteworthy, as Bailey's inability to articulate why he lacked the documentation needed to support his claim was met with derision by the judge and prosecutor.

The State also argues that "the circuit court did not need to rely on the State's objections, as defendant's motion was "facially meritless." (St. Br. 7) However, when determining whether the trial court improperly considered the State's input, the merits of the motion for leave to file a successive post-conviction petition are irrelevant. Violation of the rule barring State input can be harmless, but only where "the record gives no indication that the trial judge sought input from the State or relied on the motion to dismiss." *Gaultney*, 174 Ill. 2d at 420. There is no exception based on the merits of the petition.

## CONCLUSION

For the foregoing reasons, as well as those set forth in his opening brief, 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 he 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 reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the proof of service is 7 pages.

/s/Jessica Wynne Arizo
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**NOTICE AND PROOF OF SERVICE**

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. An electronic copy of the Reply Brief in the above-entitled cause was submitted to the Clerk of the above Court for filing on April 26, 2017. On that same date, we electronically served the Attorney General of Illinois and opposing counsel, and one courtesy copy was provided to the State's Attorneys Appellate Prosecutor, and one copy each was mailed to the Will County State's Attorney Office and to the petitioner-appellant in envelopes deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. The original and twelve copies of the Reply Brief will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.



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