

**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).

2018 IL App (4th) 160376-U

NO. 4-16-0376

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

August 10, 2018

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Brown County
MICHAEL E. CRENSHAW,	)	No. 09CF5
Defendant-Appellant.	)	
	)	Honorable
	)	Diane Lagoski,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Harris and Justice Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the trial court’s denial of defendant’s motion for leave to file his successive postconviction petition.

¶ 2 This case comes to us on appeal of the trial court’s denial of defendant’s motion for leave to file his successive postconviction petition. We affirm the trial court’s judgment.

¶ 3 I. BACKGROUND

¶ 4 In February 2009, the State charged defendant, Michael E. Crenshaw, by information with one count of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2008)) when defendant committed an act of sexual penetration of his 15-year-old daughter, H.H, on or about February 9, 2009.

¶ 5 In October 2009, defendant’s bench trial commenced. H.H. testified defendant entered H.H.’s bedroom in the early morning and forced H.H. to have sex with him on February

9, 2009. H.H. planned for this in advance because defendant entered H.H.'s bedroom and demanded sex from H.H. before. H.H. recorded defendant assaulting H.H. on her cell phone by holding her phone in her hands while defendant forced himself on H.H. Defendant thought H.H. was playing a game on her cell phone, but H.H. was recording defendant sexually assaulting her.

¶ 6 H.H. played the recording for her friends at school and her stepmother, Stephanie Crenshaw. After hearing the recording, Stephanie immediately left the home with her two younger children. When Stephanie confronted defendant about the recording, defendant told Stephanie he went to H.H.'s room to get a massage. Later in the day on February 9, 2009, H.H. called the police from a friend's house to report defendant sexually assaulted her.

¶ 7 The trial court convicted defendant of criminal sexual assault.

¶ 8 In November 2009, the trial court denied defendant's motion for a new trial and sentenced defendant to eight years' imprisonment.

¶ 9 In December 2009, the trial court denied defendant's motion to reconsider his sentence.

¶ 10 Defendant appealed. On direct appeal, defendant argued the trial court erred in (1) denying his motion to suppress his confession, (2) admitting H.H.'s cell phone recording of the alleged sexual assault, and (3) imposing an excessive sentence. This court affirmed defendant's conviction and sentence. *People v. Crenshaw*, 2011 IL App (4th) 090908, ¶ 26, 959 N.E.2d 703.

¶ 11 In March 2010, defendant filed a *pro se* postconviction petition. Defendant alleged he was denied due process when Judge Diane Lagoski failed to recuse herself from his criminal trial because the trial judge, Judge Lagoski, was presiding over the divorce case between defendant and his wife. Defendant further claimed Judge Lagoski had a conflict of

interest because one of the prosecution witnesses was the granddaughter of Judge Lagoski's housekeeper. Defendant also argued his rights were violated by hearsay testimony from witnesses being admitted over his objections. Defendant added allegations of ineffective assistance of trial counsel and stated there was newly discovered evidence.

¶ 12 The trial court appointed counsel to represent defendant on his petition. In October 2010, counsel filed an amended postconviction petition, which raised issues concerning ineffective assistance of counsel, newly discovered evidence, and judicial error. Defendant also argued Judge Lagoski should have recused herself because one of the State's witnesses was a family friend for whom Judge Lagoski had purchased gifts, which created an appearance of impropriety. Defendant added Judge Lagoski erred in not advising defendant of the maximum penalties for the sexual assault charge and the charge being non-probationable. Defendant contended had he known probation was not an option, defendant "may have changed his mind as to whether to accept a plea negotiation or go to trial."

¶ 13 In November 2010, Judge Lagoski partially dismissed defendant's amended postconviction petition. Judge Lagoski discharged several of defendant's claims, but found defendant's ineffective assistance of counsel claim regarding counsel's failure to warn defendant he would be ineligible for probation if found guilty alleged a possible constitutional violation warranting relief.

¶ 14 In February 2011, the State filed an answer. An evidentiary hearing followed. Judge Lagoski found defendant had not met his burden and denied defendant's amended petition.

¶ 15 This court affirmed the trial court's denial of defendant's petition. *People v. Crenshaw*, 2012 IL App (4th) 110202, ¶ 18, 974 N.E.2d 1002.

¶ 16 In December 2012, defendant filed a second *pro se* motion for substitution of

judge, a petition for leave to file a successive postconviction petition, and successive postconviction petition.

¶ 17 In January 2013, Judge Robert Adrian conducted a hearing on defendant's motion for substitution of judge. Judge Adrian denied defendant's motion and held defendant had "not presented sufficient evidence to show that Judge Lagoski could not hear the case or any further proceedings therein because of bias or prejudice."

¶ 18 In June 2013, the State filed a motion to dismiss defendant's successive postconviction petition, arguing defendant did not obtain leave of court before filing the successive petition. Judge Lagoski granted the motion to dismiss. Defendant filed a motion to reconsider.

¶ 19 In August 2013, defendant filed a second motion for a hearing. Defendant claimed his motion to reconsider had not been ruled on.

¶ 20 In September 2013, defendant filed a third motion for a hearing. At a hearing, Judge Lagoski granted defendant's motion to reconsider and set the matter for a hearing on whether the successive postconviction petition could be filed.

¶ 21 After the hearing, defendant filed a *pro se* petition for leave of court to file an amended successive postconviction petition. Defendant alleged he met the cause-and-prejudice test and postconviction counsel was ineffective under Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) because counsel failed to examine the record from the trial proceedings, make any amendments necessary to the postconviction petition, or amend the initial *pro se* postconviction petition to include a claim of ineffective assistance of appellate counsel. In addition to the petition for leave to file, defendant attached the amended successive postconviction petition, which consisted of over 100 handwritten pages and nearly 50 pages of

exhibits.

¶ 22 In November 2013, the trial court dismissed defendant's motion for leave.

¶ 23 This court affirmed the trial court's dismissal of defendant's motion for leave. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 18, 38 N.E.3d 1256.

¶ 24 In January 2016, defendant filed a second *pro se* motion for leave to file a successive postconviction petition. Defendant summarized the issues in his motion for leave in an accompanying affidavit: (1) he previously filed a successive postconviction petition alleging innocence and the trial court committed plain error by dismissing exculpatory evidence at trial; (2) trial counsel provided ineffective assistance by failing to call expert witnesses to refute the State's theory of the case and establish a conspiracy against defendant; (3) the trial judge had a conflict of interest, was not impartial, and violated Rule 63 of the Illinois Code of Judicial Conduct Ill. S. Ct. Code of Jud. Con., Canon 3 (eff. Jan. 1, 2016); and (4) appointed postconviction counsel on defendant's first postconviction petition provided inadequate representation by failing to adequately amend defendant's postconviction petition to include issues of ineffective assistance of appellate counsel on direct appeal.

¶ 25 In March 2016, the trial court held a hearing on defendant's motion for petition for leave.

¶ 26 At the hearing, the State stated as follows:

"Yes, your Honor. Well, I filed a motion to dismiss the petition stating several reasons. Mainly, that the petition, in the instant petition, is alleging many of the same things raised in its prior post-conviction filings; for example, reference to actual innocence, plain error, judicial bias, conflict of interest, and ineffective assistance of counsel in his initial post-conviction proceedings. That denial of that

was appealed, as the Court mentioned. And they did – although they didn't consider the merits of his petition, they did consider the allegations, or made in his petition for leave to file, which is basically many of the same allegations as the actual petition, post-conviction petition itself, and they made certain findings on those; particularly, in regards to judicial bias, and the ineffective assistance, and in regards to the certificate, the Rule 651 (c). Again, all raised again, and this would be his third post-conviction filing, a second successive filing here. I think the defendant has a fundamental misunderstanding of one of the final findings or holdings of the appellate court in where they said they do not reach the merits of the defendant's successive petition as it wasn't considered filed. Well, the reason it wasn't considered filed is because the Court denied it at the first stage. So it was never filed. The defendant alleges specifically in his current petition that because it wasn't considered he can reallege everything. Well. And that's, I think, why most of the allegations are merely a repeat, and, hence, the main justification for dismissing it because they aren't any real new allegations raised in this petition. So we're asking that again it be denied at this first stage.”

¶ 27 Defendant objected. Defendant stated, “This proceeding because it's supposed to be a proceeding that the Court is supposed to make by what the Supreme Court states here.”

¶ 28 The trial court stated, “All right. Well, that's not the way I read the Appellate Court decision from the Fourth District.” Defendant and the State proceeded to argue the issues. The court denied defendant's petition.

¶ 29 In April 2016, defendant filed a motion to reconsider the denial of leave to file the successive petition.

¶ 30 In May 2016, the trial court denied defendant’s motion to reconsider.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Defendant argues the denial of his motion for leave to file his successive postconviction petition should be reversed because the State provided input on defendant’s motion, which the Post-Conviction Hearing Act does not authorize, and the circuit court relied on the State’s involvement. Defendant adds the case should be remanded for further proceedings before a different and neutral judge because of defendant’s accusations of judicial bias and conflict of interest in his motion.

¶ 34 The State responds the State’s input at the hearing for defendant’s motion for leave to file a successive post-conviction petition was *de minimis*. The State adds even if the State’s participation was significant defendant’s argument is barred by *res judicata* and collateral estoppel. The State further argues defendant failed to satisfy the cause-and-prejudice test. We agree with the State.

¶ 35 Defendant’s appeal of the circuit court’s denial of his motion for leave to file a successive postconviction petition is governed by section 122-1(f) of the Post-Conviction Hearing Act 725 ILCS 5/122-1(f) (West 2012), which provides:

“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.”

¶ 36 The Illinois Supreme Court holds, “The plain language of section 122–1(f) prohibits the filing of a successive postconviction petition without first obtaining leave of court.” *People v. LaPointe*, 227 Ill. 2d 39, 44, 879 N.E.2d 275, 278 (2007). Further, section 122-1(f) of the Post-Conviction Hearing Act “expressly conditions leave to file on the petitioner’s satisfaction of the cause-and-prejudice test.” *LaPointe*, 227 Ill. 2d at 44; *People v. Conick*, 232 Ill. 2d 132, 139, 902 N.E.2d 637, 642 (2008). The standard of review for the summary dismissal of a postconviction petition is *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002); *People v. Coleman*, 183 Ill. 2d 366, 389, 701 N.E.2d 1063, 1075 (1998) (referring to standard of review as plenary).

¶ 37 Defendant argues when a *pro se* petitioner seeks leave to file a successive petition, the State should be allowed no input at the cause-and-prejudice stage of successive postconviction proceedings, but the State may file a motion to dismiss or a responsive pleading. The State concedes the State participated in the hearing, but the State’s involvement was minimal.

¶ 38 Defendant’s reliance on *People v. Bailey*, 2017 IL 121450 is misplaced. The Illinois Supreme Court held, “the State should not be permitted to participate at the cause and prejudice stage of successive postconviction proceedings.” *Bailey*, 2017 IL 121450, ¶ 24. The Illinois Supreme Court explained although the Post-Conviction Act “does not expressly prohibit the State’s input, we find that the Act contemplates an independent determination by the circuit court. The motion for leave to file is directed to the court, and it is the court that must decide the

legal question of whether a defendant has satisfied the section 122-1(f) requirement of showing cause and prejudice.” *Bailey*, 2017 IL 121450, ¶ 24.

¶ 39 Additionally, “permitting the State to argue against a finding of cause and prejudice at this preliminary stage, when the defendant is not represented by counsel, is inequitable, fundamentally unfair, and raises due process concerns.” *Bailey*, 2017 IL 121450, ¶ 27. The Illinois Supreme Court held the circuit court erred by permitting the State’s input during the cause-and-prejudice stage. *Bailey*, 2017 IL 121450, ¶¶ 41, 49.

¶ 40 The Illinois Supreme Court held the question of whether defendant’s motion shows cause and prejudice was a question of law. *Bailey*, 2017 IL 121450, ¶ 49. The Illinois Supreme Court went on to review defendant’s motion in the interest of judicial economy, found defendant failed to demonstrate cause and prejudice, and affirmed denial of defendant’s motion for leave. *Bailey*, 2017 IL 121450, ¶ 49.

¶ 41 Here, although the State participated in the hearing, the State’s participation was minimal. The State restated defendant’s arguments in past filings, the previous holding of this court, and prior trial court findings. The State did not argue the merits of defendant’s claims or specific reasons defendant’s claims lacked merit. The trial court did not rely on the State’s input and did not need to rely on the State’s input to deny defendant’s motion for leave. The trial court disagreed with defendant the State should have no input during the hearing based on this court’s holding in *Crenshaw*, 2015 IL App (4th) 131035, which is evidenced by the trial court’s statement, “that’s not the way I read the Appellate Court decision from the Fourth District.” We hold the State’s input at the hearing for defendant’s motion for leave was *de minimis*.

¶ 42 Defendant also argues he met the cause-and-prejudice test. The State responds defendant failed to satisfy the cause-and-prejudice test because defendant raised the same claims

in his third postconviction petition as in his second postconviction petition. We agree with the State.

¶ 43 The Illinois Supreme Court held the cause-and-prejudice test in section 122-1(f) of the Post-Conviction Hearing Act “unambiguously requires a defendant to obtain leave of the trial court prior to filing a successive postconviction petition.” *People v. Smith*, 2014 IL 115946, ¶ 33, 21 N.E.3d 1172. Further,

“Section 122–1(f) contains no express provision for fully resolving the cause-and-prejudice determination prior to proceeding with the three-stage postconviction process outlined in the Act. Section 122–1(f) does not answer whether a successive postconviction petitioner must demonstrate cause and prejudice by actively *pleading* it, or by actually *proving* it. If the petitioner is required to prove cause and prejudice, section 122–1(f) does not provide a method for presentation of evidence.

From a practical standpoint, if a petitioner is required to establish cause and prejudice conclusively prior to being granted leave to file a successive petition, it may render the entire three-stage postconviction process superfluous. Section 122–1(f) does not provide that a petitioner is entitled to relief upon satisfaction of the cause-and-prejudice test. It only gives a petitioner an avenue for filing a successive postconviction petition. The legislature clearly intended for further proceedings on successive postconviction petitions.” (Emphasis in original). *Smith*, 2014 IL 115946, ¶¶ 28-29.

¶ 44 The cause-and-prejudice test “is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122–3 so that a claim

raised in a successive petition may be considered on its merits.” *Smith*, 2014 IL 115946, ¶ 34. The Illinois Supreme Court analogized the cause-and-prejudice test in the context of a successive postconviction petition to the cause-and-prejudice test for ineffective assistance of counsel articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Smith*, 2014 IL 115946, ¶ 34. “[A] defendant’s *pro se* motion for leave to file a successive postconviction petition will meet the section 122–1(f) cause and prejudice requirement if the motion adequately alleges facts demonstrating cause and prejudice.” *Smith*, 2014 IL 115946, ¶ 34.

¶ 45 Here, defendant failed to demonstrate cause and prejudice. In defendant’s third postconviction petition, defendant raised issues regarding judicial bias, conflict of interest, plain error, ineffective assistance of counsel, the Rule 651(c) certificate, and defendant’s actual innocence, which were the same issues defendant raised in his second postconviction petition.

¶ 46 This court held defendant’s claims in his second postconviction petition had no merit for three reasons. *Crenshaw*, 2015 IL App (4th) 131035, ¶ 43. First, postconviction counsel specifically stated he satisfied the requirements of Rule 651(c). *Crenshaw*, 2015 IL App (4th) 131035, ¶¶ 40-43. Second, defendant’s counsel was not ineffective for choosing not to raise judicial bias and conflict of interest. *Crenshaw*, 2015 IL App (4th) 131035, ¶ 43. Third, defendant’s claims of judicial bias and conflict of interest are frivolous and patently nonmeritorious since defendant failed to provide specific examples or instances of bias or prejudice on the part of Judge Lagoski and nothing in the record indicated Judge Lagoski relied on any information derived from the divorce case to the detriment of defendant at his criminal trial. *Crenshaw*, 2015 IL App (4th) 131035, ¶¶ 43, 44.

¶ 47 This court held defendant’s claims in his second postconviction petition failed to meet the cause-and-prejudice test of section 122-1(f) and the trial court correctly denied

defendant leave to file his successive postconviction petition. *Crenshaw*, 2015 IL App (4th) 131035, ¶¶ 43-45. Because defendant's claims in his third postconviction petition are the same as in his second postconviction, defendant failed to meet the cause-and-prejudice test and the trial court correctly denied defendant leave to file his successive postconviction petition.

¶ 48 The Illinois Supreme Court holds issues defendant raised on direct appeal are barred from consideration by the doctrine of *res judicata*. *People v. Williams*, 209 Ill. 2d 227, 233, 807 N.E.2d 448, 452 (2004); *People v. Griffin*, 178 Ill. 2d 65, 73, 687 N.E.2d 820, 827 (1997). Defendant already raised issues regarding judicial bias, conflict of interest, plain error, ineffective assistance of counsel, the Rule 651(c) certificate, and defendant's actual innocence, which are barred by *res judicata*.

¶ 49 III. CONCLUSION

¶ 50 We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal, 55 ILCS 5/4-2002 (West 2016).

¶ 51 Affirmed.