No. 122100

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 3-14-0793.
Respondent-Appellant,	)	There on appeal from the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois, No. 12-CF-0086.
-vs-	)	
MYRON T. LESLEY	)	Honorable Cynthia Raccuglia, Judge Presiding.
Petitioner-Appellee	)	

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether the post-conviction court committed reversible error by forcing Myron Lesley to represent himself during his post-conviction proceedings following a disagreement with his court-appointed attorney, without first admonishing Lesley about his right to counsel or warning him that his conduct could result in waiver of his right to counsel.[1]

[1] In addition to the issue presented for review in this Court, Appellee raised an issue in the appellate court below which that court did not address in its opinion: "Whether the post-conviction court applied an incorrect standard at Myron Lesley's evidentiary hearing on counsel's ineffectiveness at plea proceedings by requiring Lesley to establish that the court would have found him innocent if the cause had proceeded to trial." If this Court reverses the judgment of the appellate court, Appellee requests that the case be remanded to the appellate court with directions to decide that issue.

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STATEMENT OF FACTS

The State's statement of facts is sufficient, and any additional facts necessary to the resolution of this issue will be included in the argument portion of this brief.

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STANDARD OF REVIEW

The standard of review of the adequacy of a counsel waiver is *de novo*. *People v. Leeper*, 317 Ill. App. 3d 475 (5th Dist. 2000). The State agrees that this is the appropriate standard of review. (St. Br. at 1)

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ARGUMENT

The Post-Conviction Court Committed Reversible Error by Forcing Myron Lesley to Represent Himself During His Post-Conviction Proceedings Following a Disagreement with His Court-appointed Attorney, Without First Admonishing Lesley about His Right to Counsel or Warning Him That His Conduct Could Result in Waiver of His Right to Counsel.

Myron Lesley and Assistant Public Defender ("APD") Douglas Kramarsic, who had been appointed to represent Lesley in post-conviction proceedings, appeared in court on February 20, 2014, and told the circuit court that they had an argument about the case. (R. 152) Lesley requested a continuance to hire a lawyer. (R. 152) The court allowed the continuance, telling Lesley that the court could not appoint a different public defender, but that it could allow him to hire an attorney. (R. 153) The court kept APD Kramarsic assigned to the case to see if Lesley was able to hire an attorney. (R. 156)

However, after an additional continuance, Lesley informed the court that he was unable to hire an attorney because he didn't have enough money. (R. 168) Lesley told the court that he had asked APD Kramarsic "three times back there are you going to help me and he gave me no answer." (R. 168) Kramarsic reminded the court that he and Lesley had argued about the case previously, and that Lesley had told him he did not want him to do anything on the case. (R. 168) The court then allowed APD Kramarsic to withdraw and

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told Lesley that he would have to represent himself. (R. 169) Lesley responded, "No, I can't represent myself." (R. 169) The court told Lesley that he was "going to have to [represent himself]" and gave him 35 days to prepare for a hearing on the motion to dismiss. (R. 169)

After a hearing on the State's motion to dismiss, at which Lesley represented himself, the court granted the State's motion in part and dismissed all claims except for Lesley's claim that he received ineffective assistance of counsel at his guilty plea proceedings. (R. 177-83) With respect to that claim, the court granted a third-stage evidentiary hearing. (R. 183) Following the evidentiary hearing, at which Lesley again represented himself, the court denied Lesley's petition. (R. 188-90, 252) The court's actions in forcing Lesley to represent himself at the hearing on the State's motion to dismiss and at the third-stage evidentiary hearing deprived Lesley of his statutory right to counsel in post-conviction proceedings.

A. The Appellate Court Properly Found That the Circuit Court Erred in Requiring Lesley to Proceed *Pro Se* Where He Had Not Waived His Right to Counsel, Either Expressly or Through His Conduct.

As the appellate court noted, there are three ways that a defendant can waive the right to counsel: 1) expressly; 2) forfeiture; and 3) waiver by conduct. *People v. Lesley*, 2017 IL App (3d) 140793 (2017), ¶ 17, citing *People v. Ames*, 2012 IL App (4th) 110513, ¶¶ 26, 28. Forfeiture of counsel "is reserved for the most severe cases of misconduct," for example, physically

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attacking defense counsel, and in those instances, no warning of forfeiture of counsel is necessary. *Lesley*, *Id.* at ¶ 17, citing *Ames*, 2012 IL App (4th) 110513 at ¶ 37 and *State v. Hampton*, 208 Ariz. 241, 92 P.3d 871, 874 (2004). By comparison, waiver by conduct involves less serious misconduct, and requires that the court first warn a defendant that if his misconduct continues, he could lose the right to appointed counsel, and any misconduct thereafter will be treated as an implied consent to proceed *pro se. Lesley*, *Id*. at ¶ 19; *See also United States v. Goldberg*, 67 F. 3d 1092, 1100-01 (3d Cir. 1995)).

In *Goldberg*, the Third Circuit Court of Appeals described "waiver by conduct" as a "hybrid situation" that "combines elements of waiver and forfeiture." 67 F. 3d at 1100. The *Golberg* court, which found that in waiver by conduct situations, a defendant should be warned about the consequences of additional misconduct, looked to the United States Supreme Court's holding in *Illinois v. Allen*, 397 U.S. 337 (1970). In *Allen*, the Court considered whether a trial court could remove an unruly defendant from the courtroom without violating his Sixth Amendment right to be present at his trial. 397 U.S. at 343. As the *Goldberg* court emphasized, *Allen* held that "a defendant can lose his [Sixth Amendment] right to be present at trial, if *after he has been warned by the judge that he will be removed if he continues his disruptive behavior*, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom." *Goldberg*, 67 F. 3d at 1100-

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1101, citing *Allen*, 397 U.S. at 343 (emphasis added by *Goldberg* court).

The appellate court in *Lesley* properly determined that Lesley's behavior, while inappropriate, did not rise to the level of forfeiture, which requires no warning, and that the circuit court therefore committed reversible error by failing to warn Lesley that he would lose the right to appointed counsel if his misconduct continued. *Lesley*, 2017 IL App (3d) 140793 at ¶¶ 21, 25.

In *Ames*, upon with the *Lesley* court relied in reaching its holding, Ames had a statutory right to counsel at his supervision revocation proceedings. 725 ILCS 5/113-3(b). Ames and his court-appointed attorney had a "significant disagreement," and Ames "fired" his court-appointed attorney. 2012 IL App (4th) 110513, ¶ 8. The attorney filed a motion to withdraw, citing the "toxic nature" of their relationship. *Id.* The court granted the attorney's motion to withdraw and appointed another attorney to represent Ames. *Id.*, at ¶12. However, after six weeks, the second court-appointed attorney also asked to withdraw on the basis that Ames did not want any advice from her and because he constantly argued with her and questioned her, preventing any kind of "meaningful conversations" about the case. *Id.,* at ¶¶ 13-15. Ames did not object to the attorney's withdrawal, and the court allowed the motion. *Id.,* at ¶ 16.

Ames told the court that he did not want to represent himself, and the court granted a continuance for him to hire an attorney. *Id.,* at ¶ 19. At the end of the proceedings that day, the court told Ames, "Please don't do yourself

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a disservice. Come that day or be prepared to try this." *Id.* However, when the parties appeared on the next court date, Ames told the court that he was unable to hire an attorney because he didn't have enough money. *Id.,* at ¶ 20. The court said that Ames' only option was to represent himself, and the matter proceeded to a hearing on the State's petition to revoke supervision and to a sentencing hearing. *Id.,* at ¶ 20. The appellate court held that the trial court's actions constituted reversible error because the court should have first warned Ames that if his inability to cooperate with counsel continued, it would constitute waiver of his right to counsel. *Id.,* at ¶ 38.

Both *Ames* and *Lesley* are well-reasoned opinions that recognize the importance of the right to counsel, whether it be derived from the constitution or statute, and that the waiver of the right to counsel must be knowing and intelligent, whether it be through conduct, or asserted expressly. *Lesley*, 2017 IL App (3d) 140793, at ¶ 22; *Ames*, 2012 IL App (4th) 110513, at ¶ 39, citing *State v. Weiss*, 92 Ohio App. 3d 681, 637 N.E.2d 47, 50 (1993). These principles, detailed below, require that this Court uphold the appellate court's finding that the circuit court violated Myron Lesley's right to counsel by requiring him to represent himself, when he did not forfeit or waive, either expressly or by conduct, his right to counsel.

B. Illinois Courts Have a Well-Established Commitment to Protecting a Defendant's Statutory Right to Counsel As Strongly as a Defendant's Constitutional Right to Counsel.

A waiver of a constitutional right is only valid when it is clear that

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there has been an intentional relinquishment or abandonment of a known right. *People v. McClanahan*, 191 Ill. 2d 127, 137 (2000). "Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *People v. Johnson*, 75 Ill. 2d 180, 187 (1979), quoting *Brady v. United States*, 397 U.S. 742, 748 (1970). Courts must "indulge in every reasonable presumption against waiver" of the right to counsel. *People v. Burton*, 184 Ill.2d 1, 23 (1998).

This Court has applied these same principles when analyzing waiver of a defendant's statutory right to counsel. In *People v. Campbell*, 224 Ill. 2d 80, 82, 85-86 (2007), the defendant was charged with a misdemeanor that was punishable by imprisonment, which afforded him a statutory right to counsel. The defendant argued that he had not properly waived his right to counsel prior to being allowed to represent himself. This Court agreed, and found that there had been no compliance with Supreme Court Rule 401(a) because the trial court never informed the defendant of his right to counsel, the nature of the charge against him, and range of possible penalties. 224 Ill. 2d at 84-85. In reversing the defendant's conviction, this Court rejected the State's argument that there was no need for such admonishments because the defendant had only a statutory right to counsel, rather than a constitutional right. This Court stated, "Significantly, nothing in either Rule 401(a) or this court's jurisprudence supports the State's assertion that Rule 401(a) is concerned solely with waivers of the constitutional right to counsel.

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On the contrary, this court has confirmed that Rule 401(a) is wholly unconcerned with the source from which the right to counsel derives." *Id.* at 86. While Rule 401(a) does not apply in post-conviction proceedings, this Court's reasoning that a defendant's waiver of counsel must be knowing, intelligent and voluntary – regardless of whether that right derives from the constitution or statute – applies to Lesley's case.

Similarly, Illinois appellate courts have followed the reasoning of this Court in determining that a defendant's waiver of a statutory right to counsel must be knowing, voluntary and intelligent. In *People v. Vernon,* 396 Ill. App. 3d 145 (2nd Dist. 2009), the defendant was charged with the unlawful display of martial arts devices at Illinois Beach State Park. In finding that there was no valid waiver of the defendant's statutory right to counsel when he represented himself at a hearing on a motion to dismiss the charge, the court stated, "Although a deprivation of counsel in a case where the court does not impose a sentence of imprisonment is not a sixth amendment violation, we deem the lack of counsel, in the absence of a failure to waive the statutory right, to be a plain and serious error." 396 Ill. App. 3d at 150 (internal citations omitted). The court continued, "When a defendant with a sixth amendment right to counsel has not made a knowing and voluntary right, that person's proceeding without counsel (at a critical stage) is a sixth amendment violation. We cannot see why the analysis would be any different when only the statutory right to counsel applies." *Id.* at 152; *See also People v. Gray,* 2013 IL App (1st) 101064, ¶23 (in post-conviction proceedings, a

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defendant must knowingly and intelligently relinquish his right to counsel); *People v. Reid*, 2014 IL App (3d) 130296, ¶ 11 (the requirement that a waiver be knowing and voluntary applies to both constitutional and statutory rights); *Department of Public Aid ex rel. Allen v. Dixon*, 323 Ill. App. 3d 600, 603 (3rd Dist. 2001) (same); *People v. O'Leary*, 376 Ill. App. 3d 39 (2nd Dist. 2007) (reversing defendant's conviction because of a violation of her statutory right to counsel); *People v. Sebag*, 110 Ill. App. 3d 821 (2nd Dist. 1982) (reversing defendant's conviction where defendant did not properly waive his statutory right to counsel).

Accordingly, based on this Court's reasoning in *Campbell*, and the holdings of multiple appellate courts, this Court should reject the State's argument that "concerns that apply to waivers of the constitutional right to counsel do not apply with equal force to the statutory right to counsel." (St. Br. at 17) The *Lesley* court's finding that "[t]he distinction between how and where the defendant's right to counsel originated is one without significance" is firmly rooted in Illinois law. 2017 IL App (3d) 140793, at ¶ 22.

C. The Right to Counsel During Post-Conviction Proceedings Must Be Protected.

The State additionally argues that Lesley's waiver of counsel in post-conviction proceedings is less entitled to protection because in post-conviction proceedings, the petitioner has already had a constitutionally guaranteed fair trial with the assistance of counsel, and because a post-conviction petitioner is only entitled to a "reasonable level of assistance" of counsel. (St. Br. at 23,

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33)

While the standards of performance of counsel differ at trial and in post-conviction proceedings, the standards for waiver of counsel remain consistent. *See e.g. Campbell*, 224 Ill. 2d at 85-86; *Vernon*, 396 Ill. App. 3d at 152; *Gray,* 2013 IL App (1st) 101064, at ¶23; *Reid*, 2014 IL App (3d) 130296, at ¶ 11; *Depart. of Public Aid ex rel. Allen v. Dixon*, 323 Ill. App. 3d at 603.

Moreover, the State's argument ignores the significance of post-conviction proceedings, which are often the first chance that a criminal defendant has to challenge trial counsel's ineffectiveness. In *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), the United States Supreme Court found that post-conviction counsel's inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a defendant's procedural default of a claim of ineffective assistance at trial. In reaching this holding, the Court reasoned, "[w]here, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." 566 U.S. at 11; *See also Trevino v. Thaler*, 569 U.S. 413, 428 (2013)(inadequate assistance of post-conviction counsel constitutes cause for purposes of procedural default of a claim of ineffective assistance at trial where state procedural framework, by reason of its design and operation, makes it highly unlikely that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal); *People v. Rose*, 43

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Ill.2d 273, 279 (1969) (if a defendant fails to appeal, he is still entitled to assert in a post-conviction petition any trial errors violating the constitutional rights which the Post-Conviction Hearing Act is designed to protect and preserve).

In the instant case, Lesley could not have raised a claim of trial counsel's ineffective assistance at plea proceedings on direct appeal, because the ineffective assistance of counsel claim he raised necessarily required evidence of facts not contained in the record in the trial court. (R. 191-242) Post-conviction proceedings were the only method by which he could challenge trial counsel's performance surrounding plea proceedings, and his right to post-conviction counsel should be subject to the same waiver requirements as constitutional and statutory counsel in other circumstances.

The State also attempts to diminish the significance of post-conviction counsel by arguing that in the post-conviction process, the defendant no longer faces a loss of liberty. (St. Br. at 23) However, post-conviction proceedings are often the only way that a defendant may *regain* his liberty. *See e.g. Martinez,* 566 U.S. at 11; *People v. Martin-Trigona*, 111 Ill. 2d 295, 299 (1986) (persons deprived of liberty can utilize protection of Post-Conviction Hearing Act to challenge unacceptable restraints imposed in violation of an individual's state or federal constitutional rights).

Because of the significance of post-conviction proceedings in protecting an individual's state and federal constitution rights, this Court has recognized that a petitioner's post-conviction rights are governed by

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principles of due process guaranteed by the Illinois Constitution. *See People v. Bounds*, 182 Ill. 2d 1, 5 (1998) (dismissal of petition at hearing which court had informed parties was to be status call deprived petitioner of proper notice and opportunity to complete discovery, and violated his right to procedural due process under the Illinois Constitution). In *People v. Kitchen*, 189 Ill. 2d 424, 434-35 (1999), this Court followed *Bounds* and held that dismissal of a post-conviction petition at a hearing to resolve a discovery dispute, without notice to the parties or argument from either side, and without the filing of a motion to dismiss by the State, violated the petitioner's due process rights. In reaching this conclusion, this Court stated, "In vacating the circuit court's judgment, we today, as in *Bounds*, mean to send a clear message to both bench and bar that the protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance." 189 Ill. 2d at 435.

The State also argues that "the most critical stage of the post-conviction process" is when the original petition is considered by the post-conviction court because "it is at this stage of the proceedings that the court determines whether proceedings shall go forward or end." (St. Br. at 23-24) The State reasons that because the second and third stages are not as important, "less egregious conduct should justify forfeiture of appointed counsel on collateral review." (St. Br. at 23-24) To support its argument that the first stage of post-conviction proceedings is the most important, the State cites to this Court's opinion in *People v. Davis*, 156 Ill. 2d 149, 163 (1993). In

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Davis, this Court examined whether post-conviction counsel has an obligation to review transcripts unrelated to claims raised in the *pro se* post-conviction petition, and concluded that appointed counsel is required to examine as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner. *Davis*, 156 Ill. 2d at 165. In that sense, the first stage of post-conviction proceedings is the most significant for determining which claims, if any, will go forward and will dictate counsel's actions, once appointed, in investigating and shaping those claims for further review. *Id.*

However, this fact does not diminish in any way the significance and need for counsel at the second and third stages of post-conviction proceedings. If counsel were not necessary for the proper presentation of a petitioner's claims, the legislature would not have provided for the appointment of counsel at the second and third stages. *People v. Suarez*, 224 Ill. 2d 37, 46 (2007) (in granting the right to counsel at second and third stage of post-conviction proceedings, the legislature realized that most first stage post-conviction petitions would be drafted by *pro se* litigants, and allowed for the appointment of counsel to ensure that the complaints of a prisoner are adequately presented).

This Court has also recognized that the Post-Conviction Hearing Act, in allowing for the appointment of counsel at the second and third stages of post-conviction proceedings, requires that appointed post-conviction counsel consult with the prisoner either by mail or in person, ascertain his alleged

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grievances, examine the record of proceedings at the trial, and if necessary, amend the *pro se* petition. *Suarez*, 224 Ill. 2d at 46, quoting *People v. Slaughter*, 39 Ill.2d 278, 285 (1968) ("The statute cannot perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court.") This Court's decision in *Slaughter* led to the adoption of Supreme Court Rule 651(c) to clearly outline the duties of appointed counsel in post-conviction proceedings, and this Court has held that counsel's failure to comply with Rule 651(c) cannot be considered harmless error. *Suarez*, 224 Ill. 2d at 46, 52.

This Court clearly recognizes the significance of counsel in post-conviction proceedings and should reject the State's attempts to minimize the need for protection of that right by arguing that less egregious conduct suffices to forfeit counsel in post-conviction proceedings.

D. Lesley's Conduct Did Not Rise to the Level of Forfeiture of His Right to Counsel.

As the *Lesley* court recognized, finding that a defendant has waived counsel by forfeiture is reserved for the most egregious of situations, in which no warning of the potential loss of counsel is necessary. *Lesley*, 2017 IL App (3d) 140793 at ¶ 17, citing *Ames*, 2012 IL App (4th) 110513 at ¶ 37 and *State v. Hampton*, 208 Ariz. 241, 92 P.3d 871, 874 (2004); *see also United States v. Goldberg*, 67 F. 3d 1092, 1100 (3rd Cir. 1995).

Because forfeiture is such an extreme penalty, some courts require an

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evidentiary hearing when the alleged misconduct occurred outside the presence of the court. *See, e.g., State v. Krause*, 817 N.W.2d 136, 148 (Minn. 2012) (finding that defendant's due process rights were violated by an inadequate hearing to determine whether defendant's conduct constituted forfeiture of counsel); *Commonwealth v. Means,* 54 N.E.3d 458, 466 (Mass. 2016) ("At the very least, the 'full and fair opportunity at a hearing to offer evidence as to the totality of circumstances' bearing on the issue of forfeiture requires an opportunity for the defendant to consult fully with counsel and for counsel to marshal evidence relevant to the conduct underlying the forfeiture"); *State v. Lehmen*, 749 N.W.2d 76, 82 (Minn. App. 2008) ("an evidentiary hearing is required in order for the court to determine whether the alleged misconduct... actually occurred"); *King v. Superior Court*, 107 Cal.App.4th 929, 949 (2003) (before a finding of forfeiture is made, a defendant is entitled to a hearing with effective assistance of counsel, and has the right to be present and to cross-examine witnesses).

Examples of extreme misconduct that has resulted in the forfeiture of counsel include situations in which a defendant has physically assaulted counsel or threatened the life of counsel or counsel's family. *See e.g. Gilchrist v. O'Keefe*, 260 F.3d 87, 90, 99–100 (2d Cir.2001) (upholding finding of forfeiture because the petitioner punched his attorney in the head); *United States v. Leggett*, 162 F.3d 237, 250–51 (3d Cir.1998) (holding that a defendant's physical assault of his attorney at a hearing qualifies as the type of "extremely serious misconduct" that amounts to the forfeiture of the right

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to counsel); *United States v. Thompson*, 335 F.3d 782, 785 (8th Cir.2003) (defendant's threat to kill his attorney justified permitting counsel to withdraw and refusing to appoint substitute counsel); *United States v. McLeod*, 53 F.3d 322, 325–26 (11th Cir.1995) (holding that defendant forfeited his right to counsel by verbally abusing and threatening to harm his attorney, threatening to sue his attorney on four different occasions, and attempting to persuade his attorney to engage in unethical conduct).

Lesley does not dispute, as the State contends, that physically assaulting one's attorney constitutes the sort of "extremely serious misconduct" that warrants forfeiture of counsel. (St. Br. at 24) The State also notes, however, that courts have affirmed forfeitures in the absence of a physical attack on counsel, citing to *McLeod, supra*, *United States v. Thomas*, 357 F. 3d 357 (3rd Cir. 2004); *State v. Nisbet*, 134 A.3d 840 (Maine 2016); *Kostyshyn v. State*, 51 A. 3d 416 (Del. 2016); *State v. Boyd*, 682 S.E.2d 463 (N.C. App. 2009); *State v. Cummings*, 546 N.W.2d 406 (Wis. 1996) (St. Br. at 25-27) The State argues that Lesley's actions were comparable to the defendants in *McLeod*, *Kostyshyn, Thomas* and *Nisbet*, and that Lesley similarly forfeited his right to counsel. (St. Br. at 27) Yet, an examination of the facts in the cases highlighted by the State, when compared to Lesley's actions, establishes that forfeiture was not warranted in Lesley's case.

In *McLeod*, the defendant fired his first attorney, alleging ineffective assistance of counsel, and then threatened the second attorney that the court appointed, telling him, "You crackers are setting me up. I knew you were one

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of them crackers... Don't you cross me. Don't you fuck with me.... I am going to sue you and all them other lawyers in the firm... Nobody fucks with Jackie McLeod.... I am going to get even with all you crackers when I get out of here." 53 F. 3d 322, 326, n. 9-10. McLeod had also threatened to sue his attorney on four separate occasions, and attempted to persuade him to engage in unethical practices, such as eliciting untruthful testimony from witnesses, and filing frivolous lawsuits against other witnesses so they would be considered biased when called to testify. *Id.* at 326, n. 11.

In *Kostyshyn,* the defendant refused to sign his notice of appeal, yelled "[Y]ou're fired! You're an idiot," during a hearing in court, and then later left counsel a 30 minute voice mail. 51 A.3d at 418. In this voice mail, Kostyshyn told his attorney to withdraw from the case, threatened to sue his attorney, accused him of being incompetent and colluding with the prosecutor, and made insulting comments about his attorney. *Id.* After these actions, the attorney was allowed to withdraw, and the court appointed a second attorney, whom the court described as having an "impeccable [reputation]" and possessing "the demeanor, patience and tolerance" that would allow him to work with Kostyshyn. *Id.* However, Kostyshyn was similarly abusive to his second attorney, and threatened him, including a threat to refer him to disciplinary counsel, resulting in withdrawal of the second attorney. *Id.*

In *Thomas*, the defendant engaged in abusive behavior towards a series of attorneys. His first attorney, who was privately retained, withdrew for nonpayment, and Thomas said he questioned his attorney's

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"professionalism and Federal experience." 357 F.3d at 359. His second attorney, who had been appointed, withdrew because of a "breakdown of communications" and because she "no longer ha[d] the trust and confidence of her client." *Id.* The court appointed another attorney, but he also sought to withdraw after a couple of months on the basis that he had "one or more acrimonious exchanges" with Thomas that resulted in Thomas being unwilling to speak or discuss matters essential to the case. *Id.* at 360.

The court appointed a fourth attorney, and warned Thomas that if he continued to act in this manner with his attorneys, which by many courts would be considered misconduct, his behavior might result in the waiver of his right to counsel. *Id.* at 360. The court engaged in additional dialogue with Thomas about waiver, and explained that if Thomas were found to have waived counsel by his misconduct, he would need to represent himself. *Id.* The court also explained the range of penalties and the possible difficulties in representing himself. *Id.* Two months later, the fourth attorney sought to withdraw on the basis that Thomas refused to provide information necessary to the defense, insisted counsel file frivolous motions, threatened counsel, tore up correspondence from counsel, and then during a phone conversation, screamed at counsel to withdraw and hung up on him. *Id.* at 361.

In *Nisbet*, the defendant engaged in argumentative and difficult behavior with his first three attorneys, causing them all to withdraw. 134 A.3d at 845-46. The court then appointed two attorneys as co-counsel, informing Nisbet that these would be the last attorneys appointed. *Id.* at 846.

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During the first two months that these attorneys represented him, the parties appeared in court four times to address discovery requests filed by Nisbet himself, including one for 28 month's worth of telephone calls and the issuance of dozens of subpoenas for documents that the State said did not exist. *Id.* at 847. Several months later, these attorneys sought to withdraw on the basis that Nisbet insisted they engage in unethical conduct, accused them of working against his interests and suggested they sit at the prosecutor's table. *Id.* The court informed Nisbet that if these attorneys were to withdraw, he would need to represent himself, but the court deferred on ruling on the motion so that Nisbet could be evaluated for fitness. *Id.* at 847-48. Nisbet was subsequently found fit, but the court denied the motion to withdraw. *Id.* at 848.

However, one week later, counsel filed another motion to withdraw, stating that their relationship had further deteriorated. Specifically, while listening to a recording relevant to Nisbet's defense, one of the attorneys asked Nisbet to stop arguing and be quiet so they could hear the recording. *Id.* at 849. Nisbet became angry, telling the attorney:

> Don't fucking tell me to be quiet... I know you are working against me. I will never forget what you've done. You have fucked with the wrong guy. I don't care if I get 15 years, when I get out I will be outside your house with a high-powered B.B. gun and I will take your eye out. I'm not getting life. I'll never forget. I'm coming after you whenever I get out. I will never forget you.

As the threats continued towards that attorney, the other attorney pounded on the door to get help from the jail staff. *Id.* Nisbet did not dispute any of the

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conduct described by the attorneys. *Id.*

At the outset, it is worth noting that *Thomas* and *Nisbet* both involved situations where the court clearly warned the defendant that if his misconduct continued, he would need to represent himself. *Thomas*, 357 F.3d at 360; *Nisbet*, 134 A.3d at 847-48. In both instances, the defendant was aware that the continued misconduct would result in waiver of counsel, but in both instances, defendant's behavior not only continued, but worsened. 357 F.3d at 361; 134 A.3d at 849. But because in both cases the trial courts and reviewing courts found that both waiver by conduct and forfeiture had occurred, the behavior will be analyzed in terms of forfeiture.

The detailed account of the behaviors resulting in forfeiture in *McLeod*, *Kostyshyn, Thomas* and *Nisbet* set forth above indicates that the defendants were not found to have forfeited counsel until they had compiled an extensive list of aggressive, threatening and inappropriate behaviors towards multiple attorneys. *See McLeod*, 53 F. 3d 322, 326, n. 9-11; *Kostyshyn,* 51 A.3d at 418; *Thomas*, 357 F. 3d at 360-61; *Nisbet*,134 A.3d at 847-48. In sharp contrast, Lesley displayed inappropriate conduct on a single occasion, and nothing was so egregious as to justify a finding of forfeiture of counsel.

On October 31, 2013, when LaSalle County Public Defender ("PD") Timothy Cappellini was first assigned to Lesley's case, no inappropriate conduct occurred. (R. 126-29)

On November 21, 2013, the second time PD Cappellini met with Lesley, no misconduct occurred. The record shows that on this court date,

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Lesley and PD Cappellini disagreed about the proper procedure for obtaining transcripts relevant to post-conviction proceedings. (R. 132-37) They explained to the court the basis for their disagreement, and the court explained that it was easier for PD Cappelini to get the necessary transcripts, and that it would make sure PD Cappellini received them. (R. 135) While the two appeared to have argued, the matter seemed resolved by the end of the proceedings.

When APD Kramarsic appeared in court to represent Lesley on December 19, 2013, no misconduct occurred. (R. 139-47) APD Kramarsic told the court, "I had a chance to speak with Mr. Lesley this morning. I had a chance to speak with him regarding some more specifics that we wanted to know regarding this matter. I've also issued him some case law. Specifically 730 ILCS 5/5-8-4." (R. 140) APD Kramarsic indicated the he also gave Lesley copies of the sentencing transcripts, and the matter was continued for status. (R. 140-41)

The sole example of inappropriate behavior occurred on February 20, 2014, when Lesley and APD Kramarsic had a disagreement while discussing Lesley's *pro se* post-conviction petition. APD Kramarsic informed the court that he met with Lesley before the proceedings to discuss the statutory problems or legal issues he saw in Lesley's motion, when Lesley became belligerent and "told me numerous times to go fuck myself. He told me that he has fired me. That he wishes to hire his own lawyer. He, at that point, in a physical and aggressive manner, grabbed all of the papers out of my hands. I

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at that point, I got up, I left the room while he continued to yell obscenities at me." (R. 152)

In response, Lesley explained to the court, "He came back there and told me something totally different. It wasn't all this and all that. It got out of hand – not out of hand, he tried to treat me like I am stupid or something.... And I told the officers, they – I said why don't somebody come back here at 12:55 to talk to me? Sure enough, that's what happened, and then I'm trying to show him something and he's ignoring it and I'm yelling at him, I don't think he's trying to help me, he's trying to hurt me." (R. 153)

Lesley then asked the court for a 60-day continuance so that he could try to hire an attorney, which the court granted. (R. 153-54) When the parties appeared in court on April 24, 2014, Lesley indicated that he was still trying to find an attorney to represent him. (R. 161) APD Kramarsic stated that he had "tried to discuss that matter with [Lesley] this morning; and it is one hundred percent absolutely clear from our conversations that he wants nothing to do with me in this case." (R. 160)

At the next court date of June 12, 2014, Lesley had not been able to hire a private attorney because he did not have sufficient funds, so he asked APD Kramarsic to continue his representation. (R. 166-67) Lesley told the court, "I asked [Kramarsic] three times back there are you going to help me and he gave me no answer." (R. 166) APD Kramarsic responded, "This is the third time I've attempted to talk to him about this case. First time I met with him, he did not agree with the– with my ideas with the case and the way I

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wanted to proceed.... The second time I met with him again I tried to explain what I felt about the case. Again, he disagreed with me. That was the time that he lunged at me and swore at me and told me to leave, and certainly I could tell at that point that obviously he does not want me to help him at all. He just doesn't agree with my theory of the case and clearly does not want me involved with it and I feel like I'm stuck here because I don't know what else to do. He's told me numerous times he does not want me to do anything." (R. 167-68)

After APD Kramarsic finished talking, the court stated, "All right, well, I find, knowing Mr. Lesley, and considering the issues involved here, that it appears that you do not want to listen to Mr. Kramarsic.... [Y]ou can't choose what Public Defender you are going to have so I'll allow the Public Defender to withdraw." (R. 168) Lesley again explained he had no funding for an attorney and insisted that he "never lunged" at Kramarsic. (R. 168-69) Lesley told the court, "I can't represent myself," but the court responded, "Well, you're going to have to." (R. 169)

However, the fact that Lesley disagreed with Kramarsic's assessment that the case did not have strong issues when they first met is not surprising, and in no way inappropriate, considering Lesley had drafted the petition raising what he believed to be valid claims establishing violations of his constitutional rights. While Lesley's outburst the second time he met with Kramarsic was certainly not appropriate, it was hardly grounds to find that Lesley forfeited the right to counsel. This is particularly true when Lesley no

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longer sought new counsel by the June 12, 2014, court date and was essentially begging APD Kramarsic to represent him in post-conviction proceedings. He was not asking that a new public defender be appointed; rather, he asked APD Kramarsic to help him three times, but Kramarsic would not respond. (R. 166) Lesley had no desire to represent himself, which he told the court, and he appeared ready and willing to cooperate with APD Kramarsic. Yet the court allowed APD Kramarsic to withdraw. As the appellate court below correctly held, this was not a case of misconduct warranting summary forfeiture of appointed counsel. *Lesley*, 2017 IL App (3d) 140793, at ¶25.

Instead, this is a case where the court should have warned Lesley that if he continued to disagree and argue with his attorney, he would lose his right to appointed counsel and be required to represent himself. *Lesley*, 2017 IL App (3d) 140793, at ¶25; *see also e.g. Goldberg*, 67 F. 3d at 1101 (when conduct is not severe enough to warrant forfeiture, defendant must be warned about the consequences of his conduct, including risks of proceeding *pro se*); *State v. Boykin*, 478 S.E.2d 689 (S.C. App. 1996) (trial court's finding of forfeiture reversed where defendant threatened and verbally abused his court-appointed attorney on one occasion; trial court should have first warned defendant of the consequences of his actions and dangers of self-representation); *State v. Holmes*, 302 S.W.3d 831, 33 (Tenn. 2010) (reversing trial court's finding of forfeiture where defendant told his court-appointed attorney "I know how to get rid of you," and later poked his attorney in the

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face and knocked his glasses off; defendant's actions did not rise to the level of extremely serious misconduct that warrants forfeiture of counsel without a warning and opportunity to conform his conduct). Considering that on June 12, 2014, Lesley appeared in court wanting to work with APD Kramarsic and asking for help from him, the court should have simply warned Lesley that he would lose the right to appointed counsel if any other misconduct occurred.

E. The Post-Conviction Court Never Warned Lesley That He Would Lose His Right To Appointed Counsel If His Misconduct Continued.

The State argues that alternatively, if Lesley did not forfeit his right to counsel, he waived his right to counsel by conduct because the trial court admonished Lesley on February 20, 2014, that it could not give him another public defender, but it could allow him to hire someone. (St. Br. at 30) (R. 154) Significantly, as the court's comments came *after* Lesley's disagreement with APD Kramarsic, the comments did not constitute a warning of any kind about future misconduct. The court also kept APD Kramarsic appointed to the case after giving Lesley the opportunity to see if he could hire an attorney, indicating the court did not believe in any way that Lesley had forfeited his right to APD Kramarsic's representation. (R. 153-56) The dialogue went as follows:

> Lesley: .... and then I'm trying to show him [Kramarsic] something and he's ignoring it and I'm yelling at him, I don't think he's trying to help me, he's trying to hurt me.

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If I could get a 60 day continuance, Your Honor, I think I could hire me an attorney.

Court: You want to hire an attorney?

Lesley: Yes, ma'am.

Court: All right, then I will do that for you because I can see there was developing problems even before today.

Lesley: Yes, ma'am.

Court: I can't give you another Public Defender but I can certainly let you hire somebody.

Lesley: Yes, ma'am.

Court: So I'll do that.

* * *

Court: I just can't give you another Public Defender, but I'd be glad to let you hire someone.

Kramarsic: Your honor, I guess at this point it may leave me in limbo. I guess if you're still leaving me as the attorney of record there are issues that I would want to correct with this but Mr. Lesley certainly does not wish to hear anything that I have to say.

Court: I will leaving it open to – you will want to correct certain things and you can do it now. Go ahead, I mean who is representing him, Mr. Cappellini?

Kramarsic: I am representing him, Your Honor. It was my

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understanding there were some issues before, I'm not quite sure what, but it's now my case.

Court: Is this the first time you met him?

Kramarsic: I met him once previously before the discuss the issues and now after I talked with him, I had the opportunity to look into things that he told me and was at this point going to correct certain things, try to explain that to him, but it certainly did not – certainly wasn't able to explain anything.

Court: Is there anything you want to put on the record today?

Kramarsic: I mean, I would just like to say that I have reviewed the records, I have reviewed everything involved in this case. I haven't filed my certification regarding that, which I was going to file my amended petition, but I can't even get to the point of being able to do that.

Court: And I won't have you do that.

Kramarsic: Okay.

Court: Right now, nothing you will do, because he's requested time to –

Kramarsic: Sure.

Court: – get a private lawyer. And so I'm reserving any ruling on you filing anything, nor are you under any obligation to do that until I see what Mr. Lesley can find in 60 days, so

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let's do that for you.

Lesley: I appreciate that.

(R. 153-56) Accordingly, at the end of the proceedings on February 20, 2014, APD Kramarsic continued to represent Lesley, but the court instructed him to hold off on doing anything on the case in the event Lesley was able to hire private counsel.

At the next court date of April 24, 2014, APD Kramarsic told the court that Lesley still wished to find a private attorney, which Lesley confirmed to the court. The following dialogue occurred between the parties:

Kramarsic: Your Honor, I can address the Court. This matter was set for status regarding Mr. Lesley's attempt to hire private counsel. I have tried to discuss that matter with him this morning; and it is one hundred percent absolutely clear from our conversations that he wants nothing to do with me on this case.

Court: Okay.

Kramarsic: And short of begging him to – which I won't do, he doesn't want me.

Court: Mr. Leslie [sic], what is your status? I can ask you that.

Lesley: Ma'am, I'm trying to find an attorney. That's all.

ASA: Judge, it's been two months.

Lesley: I've been coming here since October.

ASA: It's been two months since we set this over for status on

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him hiring an attorney. At this time, Judge, the State would ask that this matter be set over for a hearing on the Motion to Dismiss that we filed in this matter.

Court: All right. I'm going to set it for a hearing on the Motion to Dismiss. Now if between now and then– At that hearing date, I'll address whether, you know – I'm aware he won't talk to you. And so you won't be representing him at any hearing at this point. I'll set for a hearing and see what happens concerning your representation.

Lesley: Yes, ma'am.

Court: All right. So, we'll do that. And if he doesn't have a lawyer then, I'll have to address him as to his options. But you put on the record that he doesn't want to talk to you. That's fine. You have – I'm not dismissing you completely. I'm leaving options open. But I won't expect you to be prepared for a hearing is what I am saying.

Kramarsi: Okay.

Court: You're still in the case.

(R. 160-62)

The majority opinion in *Lesley* correctly characterized the trial court's statements as follows: "The trial court failed to warn defendant that he could waive his right to counsel through his conduct, but indicated that defendant would still have his option of appointed counsel if he failed to hire a private

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attorney." 2017 IL App (3d) 140793, at ¶ 23. It is not surprising then that when Lesley appeared at the next court date, having been unable to secure private counsel because he didn't have enough money, Lesley thought that APD Kamarsic would represent him, and Lesley asked Kramarsic three times if he would help him with his post-conviction proceedings. (R. 166)

The dissent in *Lesley* wrote:

> It seems clear that from as early as February 20, 2014, the trial court was putting defendant on notice that if he could not get along with the public defender, then he would either have to hire private counsel or represent himself. If it was not clear then, it certainly should have been clear on April 24, 2014. It is hard to understand how anyone in the courtroom that day could not understand that the options were to get along and cooperate with the public defender, hire your own counsel, or proceed *pro se*.

2017 IL App (3d) 140793 (2017), ¶ 35 (Schmidt, J., dissenting)

However, the dissent's recitation isn't an entirely accurate account of the options that the trial court gave Lesley. First, there was no reference at either the February 20 or April 24 court dates that Lesley would need to proceed *pro se* if he could not find an attorney. Additionally, the dissent failed to acknowledge that the trial court's comments at both the February 20 and April 24 court dates indicated that APD Kramarsic was still a viable option for Lesley. When Lesley appeared in court on June 12, 2014, he appeared ready to cooperate with APD Kramarsic and sought his help, having relied on the trial court's statements that it would not appoint another public defender to represent Lesley, but that it would keep Kramarsic assigned to the case.

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The only reference at all to Lesley proceeding *pro se* was at the November 21, 2013 court date. On that date, Lesley and PD Cappellini disagreed about the proper procedure for getting the necessary transcripts, with Lesley wanting to obtain them. (R. 133) PD Cappellini, by his own account, told Lesley, "I said if he doesn't want me to represent him, he can go *pro se*. Otherwise, I will acquire the transcripts, I will review 'em and I will be the attorney." (R. 134) After a discussion in which the court assured Lesley that PD Cappellini could get the transcripts more easily, the court told Lesley "... if you are not going to listen to him, then you have to tell me you want to go *pro se*. If you want to call Mr. Kuleck [a private attorney], you can do what you want but the point is whoever represents you is going to tell you that. That you have to listen to them." (R. 137) This general admonishment did not constitute a warning that any additional misconduct or arguments would result in Lesley losing the right to appointed counsel, particularly when at the next two court dates, the trial court indicated to Lesley that his appointed attorney was still assigned to the case.

For these reasons, this case is unlike *United States v. Pittman*, 816 F. 3d 419 (6th Cir. 2016) and *United States v. Oreye*, 263 F. 3d 669 (7th Cir. 2001), relied on by the State to support its argument that Lesley waived counsel by conduct. (St. Br. at 28) In *Oreye*, the defendant was specifically told if he dismissed his second appointed counsel and did not find a substitute at his own expense, he would have to proceed *pro se*. 263 F. 3d at 670. In *Pittman*, defendant argued that the court violated his Sixth

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Amendment right to counsel when it declined to appoint a sixth attorney before trial and required him to proceed *pro se* with standby counsel. 816 F. 3d at 425. Lesley did not seek the appointment of another attorney (much less a sixth attorney); he simply wanted to proceed with his current court-appointed attorney. For these reasons, this court should reject the State's reliance on *Oreye* and *Pittman*.

Finally, the State argues that Lesley confirmed his "choice" to represent himself at the conclusion of the hearing on the State's motion to dismiss, when Lesley responded affirmatively to the court's question of whether he "still want[ed] to represent [him]self" at the subsequent third-stage evidentiary hearing. (St. Br. at 30) At the end of the hearing on the motion to dismiss, the following dialogue occurred:

Court: So what I am going to do is deny the Motion to Dismiss and grant you a hearing, Mr. Lesley. And we need to have a status. You still want to represent yourself, obviously?

Lesley: Pretty much.

Court: Is that true?

Lesley: Yes, ma'am. But I need to go back to my prison and do the research. Last time I left here, I went right back to Stateville. I ain't been nowhere. I ain't been, they don't give me no library or nothing.

Court: Alright. Well, let's set a hearing.

(R. 183-84)

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The court's question, which was presented as more of a statement, that Lesley "still want[ed] to represent [him]self, obviously" did not amount to confirmation of a "choice" in any way. Lesley had wanted to proceed with appointed counsel, but the court found that he had waived his right to appointed counsel, and forced him to represent himself because he couldn't afford private counsel. When the court asked, "You still want to represent yourself, obviously?," the court never informed him that it had reversed its previous ruling and was willing to appoint counsel. As such, the court was essentially confirming that Lesley did not want to hire counsel, which was the only other option the court had made available to him besides representing himself, and Lesley's responses of "pretty much" and "[y]es, ma'am" in response to the court's inquiry did nothing but confirm that Lesley had not experienced a change in his financial situation that would allow him to hire private counsel.

F. Lesley Did Not Knowingly and Intelligently Waive His Right to Post-Conviction Counsel.

The State cites to a Pennsylvania state court opinion in *Comm. v. Meehan*, 628 A.2d 1151, 1157 (Pa. Super. 1993), for the standard of effecting a knowing and understanding waiver of the statutory right to counsel in a post-conviction proceeding. (St. Br. at 32) In that case, the court held that before allowing a petitioner in post-conviction proceedings to proceed *pro se*, a court's inquiry must necessarily include a discussion of whether the defendant understands: (1) his right to be represented by counsel; (2) that if

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he waives this right, he will still be bound by all normal procedural rules; and (3) that many rights and potential claims may be permanently lost if not timely asserted. 628 A.2d at 1157. While the court in *Meehan* did not conduct a complete inquiry that followed these standards, the court's discussion demonstrated that defendant was adequately apprised of his right to counsel and of the consequences which would follow in the event that he elected to represent himself. 628 A.2d at 1159. The conversation with the court included a detailed account of what the defendant wished to do differently in terms of presenting evidence and details of the amended petition of which counsel was unaware. Under these circumstances, the *Meehan* court found the defendant's waiver to have been knowing, intelligent and voluntary. *Id.*

By comparison, other than understanding that at some point, Lesley had the right to appointed counsel (though it is unclear at what point he lost that right), Lesley had little idea of what to expect when forced to proceed *pro se* at his post-conviction proceedings. While he knew that post-conviction counsel could obtain transcripts for him, there is no indication that he was apprised by the court of the advantages of representation by counsel and of the dangers and pitfalls of representing himself. *See People v. Lego*, 168 Ill.2d 561, 564 (1996), citing *Faretta v. California*, 422 U.S. 806, 835 (1975) and *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (before a defendant is allowed to waive his right to counsel, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with

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eyes open); *see also* 134 Ill. 3d R. 651(c) (setting forth responsibilities of post-conviction counsel). Indeed, it is not clear that Lesley knew that an evidentiary hearing was even a possibility he might face during post-conviction proceedings. While there is no precise formula in Illinois of what a post-conviction court must inform a defendant if and when he wishes to proceed *pro se*, a defendant must nevertheless knowingly and intelligently relinquish his right to counsel. *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011).

While the State argues that "petitioner possessed a degree of legal sophistication," (St. Br. at 33), the record suggests otherwise. A review of the transcripts from the evidentiary hearing demonstrates that Lesley was woefully unprepared for what he needed to do during post-conviction proceedings to establish his claim of ineffective assistance of counsel, and he struggled quite a bit to represent himself. He began the evidentiary hearing by asking questions of Michael Olewinski, the assistant public defender who had represented him during his guilty plea. (R. 198) Shortly after questioning began, Lesley told Olewinski that he would need to see the lab report because he did not have a copy, and then asserted, "So at this time, your Honor, too, I would like to – motion to dismiss the indictment on insufficient allegations." (R. 198) The court responded, "We are not there, sir." (R. 198) The court then explained that Lesley needed to limit his focus to the ineffective assistance of counsel claim. (R. 199)

Lesley continued to attempt to question Olewinski about the contents of the lab report, but the court interrupted him and said, "You pled guilty, sir.

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You need to deal with that complaint that he allegedly made you plead guilty." (R. 202) Lesley responded, "That's what I'm trying to do, your Honor." (R. 202) Lesley continued to attempt to ask questions of Olewinski, and after Olewinski testified that he had fought many drug cases before, Lesley responded, "Okay. Then you know where I'm coming from then. You are trying to pretend like I'm crazy now. I'm not." (R. 208) The court intervened, "Don't argue with him. Ask him the points you want to make. You have got to ask it. Then you– you get to testify. Just ask him– I still – I am the one you have got to convince. And if I don't understand the question and I'm telling you I don't, I'm giving you a chance to re-ask it. I don't know what you are asking him." (R. 208) The questioning continued, and the court again interjected, "You know, sir, why don't you get back to your point so we don't have to argue. Why aren't you asking him why you did not attack the report?" (R. 216) Lesley responded, "I'm asking– he told me he don't remember him coming to see me. He don't know why he didn't come to see me." (R. 216) The court responded, "No. You're off another point." (R. 216) Lesley explained, "No. This is what I want to know. I am asking him why he didn't contest this about these drugs." (R. 216) The court said, "Ask him that," to which Lesley responded, "I have been asking him that. He still ain't saying nothing. He told me that three times. I've been asking him. He didn't respond. That's why I'm trying to go to something different." (R. 216-17)

It is clear that Lesley would have benefitted from the assistance of post-conviction counsel during the proceedings – benefits he was never

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admonished he would lose if he waived or forfeited his right to counsel. The entire hearing continued in this labored manner, concluding with the court ruling against Lesley and denying his post-conviction petition. (R. 252) In ruling against him, the court told Lesley, "The problem is that you are never going to understand my ruling because you don't understand the law or the burden at this point." (R. 250-51) The court continued, after explaining it did not believe guilty plea counsel was ineffective, "And I feel that you don't understand that, and I feel it's too bad you don't understand that. But I understand why you don't because you are not trained in the law." (R. 252)

Conclusion

As the appellate court recognized in *Ames*, public defenders and their clients are going to argue. The court stated, "[A]ttorneys appointed to represent indigent defendants in criminal cases will rarely find their clients mistaken for Rotary Club members or other leading citizens of the community. Instead, their clients are frequently angry, ignorant, suspicious, and personally abusive toward their court-appointed counsel. Such is the reality of the criminal justice system." 2012 IL App (4th) 110513, at ¶ 48.

However, defendants should be warned that serious misconduct will not be tolerated and be given the opportunity to conform their behavior before losing their right to appointed counsel. In the instant case, Myron Lesley's behavior did not constitute the most egregious types of misconduct that warrants forfeiture of counsel. Instead, the court should have warned Lesley that if his misconduct continued, he would lose the right to appointed

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counsel. *Lesley*, 2017 IL App (3d) 140793, at ¶¶ 21, 25, citing *Ames*, 2012 IL App (4th) 110513, at ¶ 37; *see also Goldberg*, 67 F. 3d at 1100-01. Myron Lesley respectfully requests that this Court affirm the ruling of the appellate court and find that the trial court committed reversible error when it found, without any warning, that Lesley had waived or forfeited his right to court-appointed counsel.

In the alternative, if this Court does not rule in Lesley's favor on the above issue, he respectfully requests that this Court remand the matter to the Third District Appellate Court for ruling on the issue which that court did not address in its opinion.

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CONCLUSION

For the foregoing reasons, Myron T. Lesley, defendant-appellee, respectfully requests that this Court affirm the ruling of the appellate court based on the issue briefed in this appeal.

In the alternative, if this Court does not rule in Lesley's favor on the above issue, he respectfully requests that this Court remand the matter to the Third District Appellate Court for ruling on the issue which that court did not address in its opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Tiffany Boye Green, 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 forty-one pages.

/s/Tiffany Boye Green
TIFFANY BOYE GREEN
Assistant Appellate Defender

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No. 122100

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 3-14-0793.
Plaintiff-Appellant,	)	There on appeal from the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois, No. 12-CF-0086.
-vs-	)	
MYRON T. LESLEY	)	Honorable Cynthia Raccuglia, Judge Presiding.
Defendant-Appellee	)	

NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, mglick@atg.state.il.us;

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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. On March 20, 2018, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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