No. 122378

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, v. DARRYL SIMMS, Petitioner-Appellee.	) Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-14-1251)) There on Appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, No. 85 CF 707)) The Honorable Daniel P. Guerin, Judge Presiding.

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

In 1985, petitioner invaded the victim's home, sexually assaulted her, strangled her, and stabbed her twenty-five times. For his crimes, petitioner was convicted of first degree murder, among other charges, and sentenced to death. This Court, after twice vacating petitioner's sentence and ordering new sentencing hearings, finally affirmed petitioner's death sentence in 1995. Petitioner then filed a postconviction petition, alleging forty-five claims of error at his third sentencing hearing. After the trial court dismissed the petition, this Court reversed that judgment in part and remanded for an evidentiary hearing on three claims. The governor commuted petitioner's death sentence to natural life in prison, and petitioner then withdrew those remaining claims.

Ten years later, petitioner moved to "reinstate" his withdrawn postconviction claims. The trial court denied the motion. The appellate court reversed, ordering the trial court to evaluate whether petitioner's decade of delay before seeking reinstatement was due to his "culpable negligence." This Court granted the People's petition for leave to appeal that judgment.

ISSUES PRESENTED FOR REVIEW

1. Whether, because neither the Post-Conviction Hearing Act nor the Civil Code authorizes "reinstatement" of withdrawn petitions, petitioner's motion to reinstate instead constitutes a new postconviction petition.

2. Whether petitioner's new petition is barred as successive.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). On November 22, 2017, this Court granted the People's timely petition for leave to appeal.

STATUTES INVOLVED

725 ILCS 5/122-5 (Proceedings on petition).

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

735 ILCS 5/13-217 (1994) (Reversal or dismissal).[1]

> In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or

[1] As this Court has explained, the 1994 version of the statute currently governs. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 44 n.1.

> administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater[.]

STATEMENT OF FACTS[2]

A. Petitioner's Convictions

In April 1985, petitioner was indicted on twenty-four counts, including the first degree murder of Lillian LaCrosse, C13-21 (Counts 1-9); aggravated criminal sexual assault, C22-28 (Counts 10-16); criminal sexual assault, C29 (Count 17); armed robbery, C30 (Count 18); home invasion, C31 (Count 19); and residential burglary, C32-36 (Counts 20-24).

Petitioner waived his jury right, and the case proceeded to a bench trial. R420-21. Testimony established that in April 1985, petitioner lived in the same apartment complex as twenty-five-year-old Lillian LaCrosse, her husband Richard, and the LaCrosses' three small children. R466-67, R492. On April 17, the eldest child was recovering from chicken pox, and Lillian's parents, George and Marie Spencer, were at the apartment almost the entire day to help her care for the children. R441-45, R456.

Richard LaCrosse left around 10:00 p.m. to start a shift at his second job. R475. When he returned to the apartment at 7:30 a.m., he found Lillian's body lying on the floor in a pool of blood. R478-80. She had stab wounds to her neck, and her pants had been removed. R480-81, R498-99. Semen was recovered from her body. R712. Richard testified that he last

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[2] The common law record and report of proceedings are cited as "C" and "R," respectively.

had intercourse with his wife more than a week before she was killed, R473, and blood-typing analysis confirmed that petitioner could have been the source of the semen, R709, R712-13.

Lillian had been stabbed at least twenty-five times, and she died due to blood loss. R571, R573. Variations in the size and shape of her wounds indicated that her attacker had used at least two different weapons. R572-73. Lillian had also been strangled before she died. R571, R573-74.

Crime scene investigators found blood on the kitchen floor near the telephone, which had been removed from its hook. R479, R510. The LaCrosses' phone records revealed that a call had been placed at 12:30 a.m. to a residence in Bellwood, Illinois, where petitioner's sister had been staying. R694-97, R833. A trail of blood led from the back door of the LaCrosses' apartment, down a set of stairs, and out of the building, R517-18; blood was found on the door leading into petitioner's nearby apartment building and on the floor of the entryway, R526-28, as well as inside petitioner's apartment on the refrigerator and bathtub, R610, R632-34.

At 2:30 a.m. on April 18th, petitioner visited the emergency room of a nearby hospital, where he was treated for a laceration on his inner thigh. R539-42. Petitioner told medical personnel that he had injured himself while peeling potatoes. R541.

Following his arrest on April 19th, R621-23, petitioner agreed to talk to detectives, R743-48. When questioned about his injury, petitioner first

repeated his story about potatoes, then claimed that he had gotten into a fight at a bar. R749-50. Detectives informed petitioner that they had found a trail of blood leading from the back door of the LaCrosses' apartment into his building. R751. Petitioner then said that "he would tell the truth" because they already knew what had happened. R751-52.

According to petitioner, he stepped outside of his apartment building on the night of the 18th, and Lillian called to him from her balcony and invited him to come up to her apartment. R757-58. Petitioner claimed that he had been seeing Lillian for a month, and they had engaged in sexual intercourse around twenty times, including once that afternoon. R760-61, R768. Lillian let him into her apartment, and he kissed and fondled her. R759. They smoked cigarettes and talked, and Lillian became agitated when petitioner said that he needed to leave, complaining that petitioner was using her for sex. R761.

Petitioner told detectives that he used the LaCrosses' phone to call his sister, and Lillian suddenly approached him and stabbed him in the thigh. R763. Petitioner wrestled the knife away from Lillian and stabbed her in the shoulder. *Id*. She screamed, and petitioner strangled her with both hands until she lost consciousness. R763-64. Petitioner stated that he was using a towel "to wipe his fingerprints off of" Lillian's body when she regained consciousness and began to struggle with him. R764. Because petitioner feared that he would be charged with attempted murder and "didn't want to

leave any witness," he stabbed Lillian at least ten more times. R765. Petitioner then fled the apartment, taking a purse and video camera, which he later discarded in a Chicago alleyway. R767-68, R773-74.

The trial judge convicted petitioner of all charges. C101.

B. Petitioner's Death Sentence and Three Direct Appeals

The case proceeded to a sentencing hearing, and petitioner again waived his right to a jury. R929-30. At the first stage, the trial judge found petitioner eligible for the death penalty because he had killed the victim in the course of committing other felonies, including aggravated criminal sexual assault and armed robbery. R927-28. At the second stage, the prosecution presented victim impact statements from Lillian's brother, R952-55; parents, R1215-21, R1223-25; and husband, R1041-43. The State also presented evidence of petitioner's extensive criminal history, which included the sexual assault and battery of Sharon Williams in 1980, R1110-20; the sexual assault and strangulation of Sandra Sender in 1983, R1165-96; and the sexual assault and attempted murder of Mary Matas in 1985, R1138-64. After hearing the evidence in aggravation and mitigation, the trial court sentenced petitioner to death. C113, C128-30.

On appeal, this Court affirmed petitioner's convictions but held, pursuant to an intervening Supreme Court decision, *Booth v. Maryland*, 482 U.S. 496, 509 (1987), that the trial court had erred in admitting victim impact statements. *People v. Simms*, 121 Ill. 2d 259, 271-72 (1988). The

Court thus vacated petitioner's sentence and remanded for a new sentencing hearing. *Id.* at 275-76.

On remand, petitioner opted for a jury. At the first stage, to prove that petitioner was eligible for the death penalty, the prosecution presented the testimony of several guilt-phase witnesses, including Lillian's father, who again testified about the events of the day leading up to Lillian's death, R2136-42, and her husband, who again testified about finding Lillian's raped, stabbed, and bloodied body, R2143-54, R2260-61. The trial court instructed jurors that petitioner was death-eligible if he killed the victim in the course of committing one of four qualifying felonies: aggravated criminal sexual assault, home invasion, armed robbery, or residential burglary. R2366-67. The jury found petitioner eligible. R2374, C374. After hearing further evidence in aggravation and mitigation, the jury determined that death was the appropriate sentence, R2965-66, C432, and the trial court imposed judgment accordingly, C434-35.

Petitioner challenged his death sentence in a second appeal, arguing, among other things, that the trial court erred in instructing the jury that petitioner was death-eligible if he killed Lillian in the course of committing a residential burglary. *People v. Simms*, 143 Ill. 2d 154, 168-69 (1991). This Court agreed, vacated petitioner's death sentence, and remanded for a third capital sentencing hearing. *Id.* at 173.

By the time of the third sentencing hearing, the Supreme Court had overruled *Booth* in *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991). Accordingly, the trial court held that victim impact statements would be admissible at the third hearing. *See* C529; R3059-60.

At the eligibility phase of the third sentencing hearing, Richard LaCrosse again testified about finding his wife's body "laying on the floor . . . , half undressed, and in a pool of blood," R4434; and George and Marie Spencer again testified about spending the day before the murder with Lillian and her three children, R4535-40, R4860-66. After the jury found petitioner eligible for the death penalty, R4982, C1240, each witness returned to the stand to provide a victim impact statement, R5754-67.

The State again presented evidence concerning petitioner's prior criminal history, including, as relevant here, his assaults of Matas in March 1985. Matas testified that she left work at a drug store in Hillsdale, Illinois, and got into the driver's seat of her car, which she had left unlocked, R5271-72, when petitioner grabbed her from behind and cut her neck with a knife, R5274-75. Petitioner moved to the front seat, cut open Matas's shirt, pulled down her pants, then raped her and struck her in the face. R5275-78. Matas lost consciousness, and when she came to, petitioner was gone and she was tied to the steering wheel. R5278-79. Three weeks later, petitioner attacked Matas a second time at her home, hitting her in the face with a wrench. R5282-86. In July 1985, Matas viewed a photo array containing petitioner's

photograph, and she identified petitioner as her attacker without "any hesitation" or "any doubt." R5288. Matas subsequently identified petitioner from an in-person lineup.

Detective Martin Mueller of the Hillsdale Police Department testified that he responded to both incidents involving Matas. R5314-16. In July 1985, after reading a news report about petitioner's arrest for the LaCrosse murder, Mueller prepared the photo array that contained petitioner's photograph. R5316-17. He showed the array to Matas, and she "[a]ll of a sudden . . . became emotionally upset" and identified petitioner as her assailant. R5319-20. In September 1985, Mueller showed Matas a lineup, and she again identified petitioner. R5288-89, R5324-25.

The prosecution also presented testimony concerning petitioner's behavior while in custody. Joseph Mogavero testified that in March 1993, while serving a sentence for forgery in the DuPage County Jail, he was housed in the same cell block as petitioner. R5172-74. Petitioner bragged to him about being a member of the Black Gangster Disciples. R5174. On cross-examination, Mogavero denied being offered any benefit in exchange for that testimony. R5184. The State corroborated petitioner's gang affiliation by introducing, among other things, photographs of his multiple gang-related tattoos. R5584-86.

Petitioner was again sentenced to death. R6531, C1329-30, C1413. This Court affirmed petitioner's sentence in his third appeal, *People v.*

Simms, 168 Ill. 2d 176, 201 (1995), and the United States Supreme Court denied petitioner's ensuing petition for writ of certiorari, *Simms v. Illinois*, 518 U.S. 1021 (1996).

C. Petitioner's Postconviction Proceedings

In November 1995, petitioner filed a postconviction petition pursuant to 725 ILCS 5/122-1. C1465-1517. Eighteen months later, he filed an amended petition that raised forty-five claims, all pertaining to alleged errors at his third sentencing hearing. C1705-1970. Among other things, petitioner claimed that the State knowingly presented false testimony from Matas and Detective Mueller that overstated Matas's certainty when identifying petitioner, and from Mogavero that falsely denied receiving a benefit for his testimony.

The trial court dismissed the petition without an evidentiary hearing. A12-35, C2196. On appeal, this Court affirmed that judgment in part but vacated the dismissal of petitioner's claims that the prosecutor presented false testimony of Matas, Mueller, and Mogavero and remanded for an evidentiary hearing on those issues. A36-68. Following remand, the parties engaged in extensive pre-hearing discovery, C2330-39, C2364, that included the forensic testing of evidence gathered during the Matas investigation, C2452-53, C2461, C2476, C2488, C2502-03, C2526-28. The evidentiary hearing had not yet commenced when, on January 13, 2003, then-Governor

George Ryan commuted petitioner's sentence to natural life in prison as part of his blanket commutation of all Illinois death sentences. C2529.

In July 2004, petitioner filed a "withdrawal of claims," stating that he wished to withdraw the three remaining postconviction claims and that he understood that "there [would] be no evidentiary hearing on them, as was ordered by the Illinois Supreme Court." A72. The trial court entered an order stating that the claims were withdrawn and "no further proceedings remain[ed] pending." A73.

Seven years later, petitioner filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401, seeking to vacate the 2004 judgment dismissing his claims. C2672-2749. The trial court denied the petition as untimely, C2857, and the appellate court summarily affirmed that judgment, concluding that petitioner's appeal raised no issue of arguable merit, C3812-18.

In July 2014, petitioner filed a "motion for reinstatement and void judgment," A74-81, and tendered a postconviction petition raising the three claims he withdrew in 2004, C3823-41. Petitioner asked to reinstate his withdrawn claims and to have his refiled petition "'treated as the original.'" A74 (quoting *People v. English*, 374 Ill. App. 3d 404, 407 (3d Dist. 2007)). The trial court denied the request, stating, without further elaboration, that "the court finds *People v. English*, 381 Ill. App. 3d 906 (3d Dist. 2008) and *People v. Macri*, 2011 IL App (2d) 100325 dispositive." A86; *see also* A84-85. Both

cited cases addressed the circumstances under which a postconviction petitioner may reinstate a withdrawn petition. *English* held that a postconviction petitioner may invoke 735 ILCS 5/13-217 (1994) to refile a withdrawn petition, and stated that a trial court should not dismiss a petition "timely filed within one year of voluntarily withdrawing an initial petition." 381 Ill. App. 3d at 910. *Macri* held, conversely, that a trial court need not grant a request to reinstate a withdrawn petition filed after more than one year has elapsed. 2011 IL App (2d) 100325, ¶¶ 7-8.

The appellate court inferred, based on the trial court's citation to *English* and *Macri*, that it had "ruled that the motion to reinstate was time-barred as a matter of law because [petitioner] filed it more than one year after his postconviction petition was voluntarily dismissed." A2. The appellate court disagreed with that proposition, holding that "the trial court had the discretion to grant the motion to reinstate if [petitioner] sufficiently pleaded that the delay was not due to his culpable negligence." *Id.*

Specifically, the appellate court reasoned that a civil plaintiff who voluntarily dismisses a complaint "'may commence a new action within one year or within the remaining period of limitation, whichever is greater.'" A8 (quoting 735 ILCS 5/13-217 (1994)). Attributing the same right to postconviction petitioners who withdraw petitions, the appellate court held that a petitioner could reinstate his withdrawn claims *either* within one year or "within the remaining period of limitation" set forth in 725 ILCS 5/122-

1(c). A8. Under the latter provision, the limitations period for filing an initial postconviction petition is six months from the termination of a petitioner's direct appeal, but a petitioner may seek to excuse a late filing by showing that the delay "was not due to his . . . culpable negligence." 725 ILCS 5/122-1(c). Reading the two provisions together, the appellate court concluded that a trial court confronted with a motion to reinstate a withdrawn postconviction petition filed long after the withdrawal must "consider[ ] whether defendant alleged facts showing that the delay was not due to his culpable negligence." A9.

This Court granted the People's petition for leave to appeal that judgment.

STANDARD OF REVIEW

The scope of a trial court's authority to reinstate withdrawn postconviction claims is a legal question that this Court reviews de novo. *See People v. McClure*, 218 Ill. 2d 375, 381 (2006); *English*, 381 Ill. App. 3d at 908.

ARGUMENT

I. Neither the Post-Conviction Hearing Act Nor the Civil Code Authorizes Reinstatement of Withdrawn Postconviction Claims; Instead, Petitioner Must File a New Petition.

This case presents an issue of first impression in this Court: whether a petitioner who withdraws a postconviction petition may reinstate it. The Post-Conviction Hearing Act, 725 ILCS 5/122-1, *et seq*. ("the Act") provides that a trial court may "grant leave, at any stage of the proceeding prior to

entry of judgment, to withdraw a petition," 725 ILCS 5/122-5, but it does not specify the consequences of a withdrawal or explicitly address reinstatement.

The Illinois Appellate Court has found authority for "reinstatement" of withdrawn claims in the last sentence of section 122-5, which allows a court to "make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition . . . as is generally provided in civil cases." 725 ILCS 5/122-5. The appellate court has construed motions to reinstate as permissible "further pleadings," *People v. Pace*, 386 Ill. App. 3d 1056, 1060-61 (4th Dist. 2008), and has also found that postconviction petitioners may invoke 735 ILCS 5/12-317 (1994), which governs the refiling of dismissed civil complaints, *see English*, 381 Ill. App. 3d at 910.

Both holdings are erroneous. Petitioner may not "reinstate" a withdrawn petition; instead, he must file a new petition to proceed with his claims.

A. Properly Construed in Light of Its Plain Language and Purpose, the Act Does Not Authorize Motions to Reinstate, But Instead Requires Petitioner to File a New Petition.

The Act does not permit motions to reinstate withdrawn petitions. In finding otherwise, the appellate court has interpreted 725 ILCS 5/122-5 in a manner that undermines the finality of convictions and contravenes the plain language of the statute.

In construing a statute, "[t]he cardinal rule . . . is to ascertain and give effect to the legislature's intent." *People v. Johnson*, 2017 IL 120310, ¶ 15. The best indication of legislative intent "is the language of the statute, given its plain and ordinary meaning." *Id.* This Court also considers the purposes of the Act and presumes that the General Assembly sought to avoid "absurd, inconvenient, or unjust result[s]." *Id.* ¶¶ 15, 21. The Court "must view the statute as a whole, construing words and phrases in context to other relevant statutory provisions and not in isolation." *Murphy-Hylton v. Lieberman Mgmt. Servs., Inc.*, 2016 IL 120394, ¶ 25; *see also, e.g., In re Det. of Lieberman*, 201 Ill. 2d 300, 319-20 (2002).

1. The General Assembly has adopted a comprehensive framework for litigating postconviction claims that ensures the finality of convictions.

"The Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their [constitutional] rights." *Johnson*, 2017 IL 120310, ¶ 14. "[P]ostconviction proceedings are *sui generis* and the 'remedy provided by the Act does not fall strictly into the category of either a criminal or civil proceeding.'" *People v. Williams*, 2017 IL App (1st) 152021, ¶ 28 (quoting *People ex rel. Daley v. Fitzgerald*, 123 Ill. 2d 175, 181 (1988)).

The General Assembly has adopted a comprehensive framework that balances a defendant's interest in rectifying constitutional violations against society's interest in the finality of criminal convictions. *See People v. Szabo*,

186 Ill. 2d 19, 23 (1998); *People v. Flores*, 153 Ill. 2d 264, 274-75 (1992). As this Court has recognized, "the State has a legitimate interest in the finality of criminal litigation and judgments" because "'[w]ithout finality, the criminal law is deprived of much of its deterrent effect.'" *Flores*, 153 Ill. 2d at 274 (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)); *accord People v. Sanders*, 238 Ill. 2d 391, 401 (2010).

The Act promotes finality by (1) placing strict time limits on initial petitions and (2) barring successive petitions. *Flores*, 153 Ill. 2d at 274-75. On the first point, the Act not only "severely limits the time period" for filing a petition, *id*. at 275; but, over time, "the legislature has gradually decreased the time period in which a petition may be filed," *Johnson*, 2017 IL 120310, ¶ 21. Under the current version of the statute, a petitioner must file his petition within six months of the termination of his direct appeal. *See* 725 ILCS 5/122-1(c) (2018); *Johnson*, 2017 IL 120310, ¶ 24. Failure to comply with the six-month limitation may be excused only if petitioner "alleges facts showing that the delay was not due to his . . . culpable negligence." 725 ILCS 5/122-1(c).

Second, the Act promotes finality by barring successive petitions. *See People v. Holman*, 2017 IL 120655, ¶ 25 ("successive petitions impede the finality of criminal litigation"); *Flores*, 153 Ill. 2d at 274 ("[t]he successive filing of post-conviction petitions plagues . . . finality"). "The Act contemplates the filing of only one postconviction petition." *People v. Bailey*,

2017 IL 121450, ¶ 15. To file a successive petition, a petitioner must first obtain leave of court by showing "cause and prejudice" or setting forth a colorable claim of actual innocence. *See* 725 ILCS 5/122-1(f); *Bailey*, 2017 IL 121450, ¶ 15; *People v. Edwards*, 2012 IL 111711, ¶ 24.

Because petitioner does not claim that he is actually innocent, he is subject to both the statutory time limit and the bar on successive filings. The appellate court's holding that petitioner may properly "reinstate" withdrawn claims ten years after their dismissal without satisfying the standards for filing a successive petition improperly circumvents both of these provisions that ensure the finality of convictions.

2. 725 ILCS 5/122-5 does not authorize motions to reinstate withdrawn petitions, but instead requires filing a new petition subject to the strictures of the Act.

The appellate court has reasoned that section 122-5 permits motions to reinstate through its language authorizing "further pleadings." *See Pace*, 386 Ill. App. 3d at 1060. Specifically, the Act "grant[s] authority to courts to 'make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings.'" *Id.* (quoting 725 ILCS 5/122-5 (2006)) (added emphasis removed). The appellate court has held that moving to reinstate withdrawn claims "is the same as asking the court to allow 'pleading over' or to permit the 'filing [of] further pleadings.'" *Id.*; *see also People v. York*, 2016 IL App (5th) 130579, ¶ 30 (holding that "[a] motion to

reinstate is a pleading other than an original petition," such that a trial court may "extend the applicable . . . time limit" for filing).

This holding misreads the Act, which enumerates four pleadings — initial petitions, successive petitions, motions to dismiss, and answers — and sets forth procedural and substantive criteria governing each. *See* 725 ILCS 5/122-1 (procedural criteria for initial and successive petitions); 725 ILCS 5/122-2 (substantive criteria for petitions); 725 ILCS 5/122-5 (criteria and timing requirements for motions to dismiss and answers). The statutory language authorizing — but providing neither substantive nor procedural criteria for — "*further* pleadings," by definition, cannot encompass initial or successive petitions.

And a "motion to reinstate" is not a "further pleading"; it is a petition. As this Court has recognized, substance controls over the title affixed to a filing. Thus, a trial court may construe a document that is substantively a postconviction petition, but labeled something else, as a petition governed by the Act. *See People v. Swamynathan*, 236 Ill. 2d 103, 111-12 (2010) (motion to vacate guilty plea construed as postconviction petition); *People v. Shellstrom*, 216 Ill. 2d 45, 50-53 (2005) (*mandamus* complaint construed as postconviction petition); *People v. Starks*, 365 Ill. App. 3d 592, 597 (2d Dist. 2006) (motion for new trial construed as postconviction petition). Analogously, in the federal habeas context, the Supreme Court of the United States has held that a "motion to reconsider" the denial of a habeas petition

that seeks relief on the merits of a constitutional claim should be deemed a successive habeas petition, noting that "[a] habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a habeas corpus application, at least similar enough that failing to subject it to the same requirements would be inconsistent with the statute." *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005) (internal quotation marks omitted). Similarly, postconviction petitioners should not be permitted to evade the restrictions on successive filings simply by renaming successive petitions "motions to reinstate."

The distinction between reinstatement and refiling is not, as the appellate court suggested, a matter of meaningless semantics; rather, the categorization has jurisdictional significance. In *Harris*, the First District held that a trial court lacked jurisdiction to consider a motion to reinstate filed more than thirty days after a postconviction petitioner withdrew his claims. 2016 IL App (1st) 141778, ¶ 19. The First District reasoned that the judgment of dismissal was "a final judgment" that could be challenged through a timely-filed motion to vacate pursuant to 735 ILCS 5/2-1203; after the thirty-day period for filing such a motion expired, however, the trial court lost jurisdiction. *Id.* ¶¶ 18-19. Underscoring the distinction between reinstatement and refiling, *Harris* opined in dicta that the petitioner could instead "refile" his withdrawn petition. *Id.* ¶ 22.

The distinction between reinstatement and refiling is crucial here as well. Although the appellate court criticized *Harris* as "poorly reasoned" because "there is no logical difference between" a motion to reinstate and a newly filed petition, A8, a new petition clearly must comply with the Act's requirements, and if that petition is successive, petitioner must meet stringent criteria before it may be filed at all, 725 ILCS 5/122-1(f); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010) ("it is clearly defendant's burden under the statute to obtain 'leave' of court before a successive postconviction petition may be 'filed'"). Only by concluding that a motion to reinstate is something *other* than a petition could the appellate court deem it a permissible "further pleading[ ]" that could be filed at any time without permission. *See York*, 2016 IL App (5th) 130579, ¶ 30.

This Court should find that a "motion to reinstate" is not a valid vehicle for pursuing relief on withdrawn postconviction claims. Regardless of its title, a filing seeking postconviction relief constitutes a petition that is subject to the Act's restrictions.

B. The Civil Code Does Not Authorize Reinstatement, but Instead Requires the Filing of a New Petition.

Permitting motions to reinstate is not only contrary to the Act; it also departs from ordinary civil practice. "[G]eneral civil practice rules and procedures apply . . . to the extent they do not conflict with [the Act]." *Bailey*, 2017 IL 121450, ¶ 29. The Civil Code "can be looked to for guidance if the Act

is silent concerning a procedural matter." *Williams*, 2017 IL App (1st) 152021, ¶ 28.

Relying on the civil character of postconviction proceedings, the appellate court has analogized the withdrawal of a postconviction petition to the voluntary dismissal of a civil complaint and held that postconviction petitioners may invoke 735 ILCS 5/13-217 (1994) to "reinstate" a withdrawn petition. *See* A8; *York*, 2016 IL App (5th) 130579, ¶ 27; *English*, 381 Ill. App. 3d at 910. Even assuming that postconviction petitioners could invoke this civil provision, *but see infra* Section II.B.1, it provides no basis for "reinstatement."

Instead, the civil statute underscores that petitioner must file a new petition — not resuscitate an old one. The statute provides that if "[an] action is voluntarily dismissed by the plaintiff," the plaintiff "may commence *a new action* within one year or within the remaining period of limitation, whichever is greater." 735 ILCS 5/13-217 (1994) (emphasis added). Consistent with the italicized language, if a plaintiff refiles a complaint following a voluntary dismissal, "the refiled action is an entirely new and separate action, not a reinstatement of the old action." *Dubina v. Mesirow Realty Dev., Inc.*, 178 Ill. 2d 496, 504 (1997).

These civil precedents underscore that a motion to reinstate is not a valid vehicle for proceeding on withdrawn postconviction claims. Instead, a petitioner must file a new petition to seek further review.

II. Petitioner's New Petition Is Barred as Successive.

The critical question here is not whether petitioner may "reinstate" his withdrawn claims, but instead whether he may *refile* his claims and have his filing treated as an original (as opposed to successive) petition.

He cannot. Petitioner's filing should be deemed an improper successive petition for two reasons.[3] First, he withdrew his original petition only in part, after entry of a final judgment denying forty-two claims. That judgment has *res judicata* effect with respect to petitioner's withdrawn claims and compels a finding that any new petition is successive. Second, the trial court's 2004 judgment dismissing petitioner's three withdrawn claims also renders petitioner's new petition successive because it, too, constitutes a final resolution of an initial postconviction petition that is no longer subject to attack.

A. The Final Judgment Denying Forty-Two Claims on the Merits Renders Any Subsequent Attempt to Obtain Postconviction Relief Successive.

By finding that petitioner was entitled to refile his petition upon a showing that his delay was not due to "culpable negligence," without

[3] Petitioner has not attempted to meet the standard for filing a successive petition; therefore, this Court need not address the issue. *See Tidwell*, 236 Ill. 2d at 157 (petitioner bears burden of demonstrating cause and prejudice). In any event, petitioner plainly could not satisfy his burden because the claims he seeks to raise pertaining to his sentencing hearing were mooted by the commutation of his sentence. *See People v. Mata*, 217 Ill. 2d 535, 547 (2005) (sentencing issues unrelated to eligibility mooted by commutation).

satisfying the criteria for a successive petition, the appellate court ignored that petitioner had already pursued forty-two postconviction claims to a judgment on the merits.

The procedural posture of this case distinguishes it from all others in which a petitioner has been permitted to refile a withdrawn petition and have it treated as his "original" petition. In those cases, the petitioner had withdrawn his petition before any claims were adjudicated. *See York*, 2016 IL App (5th) 130579, ¶¶ 9-11, 29 (where petitioner withdrew petition at second stage, newly filed petition would be treated as original petition, subject to ordinary time limit for first petitions); *English*, 381 Ill. App. 3d at 909 (petitioner who withdrew petition at first stage was entitled to "refile and reinstate the petition and have it treated as the original"); *see also Harris*, 2016 IL App (1st) 141778, ¶ 22 (stating in dicta that petitioner who withdrew initial petition at second stage, before adjudication on merits, could refile that petition).

The final judgment disposing of the vast majority of petitioner's postconviction claims on the merits renders any subsequent attempt to pursue postconviction relief successive. It is of no moment that the three claims at issue were not adjudicated: "a ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill. 2d 194, 198 (2000).

Again, analogous civil practice rules compel this result. If a civil plaintiff voluntarily dismisses a complaint only in part after litigating some claims to a final judgment, then a new complaint — even one that he is statutory entitled to file pursuant to 735 ILCS 5/13-217 (1994) — may nevertheless be barred by *res judicata*. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 473 (2008). "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action," and it "extends not only to what was actually decided in the original action, but also to matters which could have been decided in that suit." *Rein v. Davis A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996). Accordingly, "a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense" with respect to the unadjudicated claims. *Hudson*, 228 Ill. 2d at 473.

The same principle applies here. Because petitioner has already pursued an initial postconviction petition to a final judgment with *res judicata* effect, his new petition must be considered successive. For this reason alone, the appellate court's judgment should be reversed.

B. The Ten-Year-Old Judgment Dismissing Petitioner's Three Withdrawn Claims Also Renders any New Petition Successive.

The appellate court's judgment would be erroneous, however, even if this Court had not already adjudicated dozens of petitioner's postconviction claims on the merits, because the 2004 judgment dismissing his three withdrawn claims also renders his new petition successive.

Typically, a court does not scrutinize the rationale underlying the dismissal of an initial postconviction petition before concluding that a subsequent petition is barred as successive. *See People v. Love*, 2013 IL App (2d) 120600, ¶ 43 (declining to review whether judgment dismissing initial petition was flawed and finding new petition successive). Thus, unless a petitioner vacates a judgment of dismissal, a subsequent petition should be deemed successive.[4]

As discussed, the appellate court has held that a withdrawn petition may be refiled as an initial petition under 735 ILCS 5/13-217 (1994) by analogizing the withdrawal of a postconviction petition to a civil plaintiff's voluntary dismissal of a complaint. *See York*, 2016 IL App (5th) 130579, ¶ 27; *English*, 381 Ill. App. 3d at 909-10; *Pace*, 386 Ill. App. 3d at 1061-63. At

[4] A petitioner could seek to vacate the judgment of dismissal by filing a timely motion within thirty days, *see Harris*, 2016 IL App (1st) 141778, ¶¶ 18-19 (citing 735 ILCS 5/2-1203), or a petition for relief from judgment within two years, *see* 735 ILCS 5/2-1401. Here, petitioner tried, and failed, to vacate the 2004 judgment through an untimely petition for relief from judgment that he filed three years before the motion to reinstate. *See* C2672-2749.

first, the appellate court allowed petitioners to refile withdrawn petitions within the one-year grace period provided by the civil statute. *See English*, 381 Ill. App. 3d at 910; *Pace*, 386 Ill. App. 3d at 1062-63. Then the appellate court went further, holding that a petitioner who failed to act within the one-year grace period could still refile a withdrawn petition by showing that his delay was not due to culpable negligence. *See* A8-9; *York*, 2016 IL App (5th) 130579, ¶ 27.

This logic is flawed in two respects. First, postconviction petitioners may not invoke 735 ILCS 5/13-217 (1994), because its one-year grace period is inconsistent with the Act's six-month deadline. Second, even if the civil provision applied to postconviction petitioners, it provides at most a one-year grace period. At a minimum, after that deadline has passed, any new petition must be considered successive.

1. Postconviction petitioners cannot invoke the one-year grace period provided by 735 ILCS 5/13-217 (1994).

The appellate court's first error was in holding that 735 ILCS 5/13-217 (1994) applies to postconviction petitioners. This Court, of course, is not bound by those decisions, *see O'Casek v. Children's Home & Aid Soc. of Ill.*, 229 Ill. 2d 421, 440 (2008), and they are not persuasive. The appellate court assumed that postconviction petitioners may invoke the civil statute's one-

year grace period without considering that this time period conflicts with the Act.[5]

"Although postconviction proceedings are considered civil in nature, they are *sui generis* and for that reason general civil practice rules and procedures apply only to the extent they do not conflict with [the Act]." *Bailey*, 2017 IL 121450, ¶ 29. "[T]he Code can be looked to for guidance if the Act is silent concerning a procedural matter," *Harris*, 2016 IL App (1st) 141778, ¶ 16, but the Act is highly specific with respect to time limits for filing initial petitions and the treatment of successive filings, provisions that are designed to ensure the finality of convictions. *See supra* Section I.A.1. Even the withdrawal provision that petitioner invoked when dismissing his claims limits a right that civil plaintiffs would otherwise enjoy, to expedite the disposition of meritless claims. Whereas a typical civil plaintiff has an absolute right to voluntarily dismiss his complaint, *see* 735 ILCS 5/2-1009(a), a postconviction petitioner must obtain leave of court to withdraw his petition, 725 ILCS 5/122-5. Absent an abuse of discretion, a trial court may *deny* a petitioner's motion to withdraw and instead enter a final judgment on

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[5] The First District stated, incorrectly, that this Court "has determined the one year savings clause set forth in section 13-217 of the Code applies to post conviction proceedings." *Harris*, 2016 IL App (1st) 141778, ¶ 22. The cases that the First District cited in support of that proposition, *see id.*, merely held that postconviction proceedings are civil in nature. *See People v. Johnson*, 191 Ill. 2d 257, 269-70 (2000) (addressing whether postconviction petitioners could invoke criminal procedures for assessing fitness); *People v. Clements*, 38 Ill. 2d 213, 215-16 (1967) (addressing whether civil standards applied to State's answer to postconviction petition).

the merits of a petition. *People v. Chester*, 2014 IL App (4th) 120564, ¶¶ 22-26. The fact that the Act restricts petitioners' ability to withdraw their petitions suggests that the legislature did not intend for postconviction petitioners to be subject to general civil rules governing voluntary dismissals — including the statute authorizing refiling of a dismissed complaint within one year.

And applying the one-year grace period of 735 ILCS 5/13-217 (1994) to postconviction petitioners would undermine the Act. *See Bailey*, 2017 IL 121450, ¶ 29 ("[G]eneral civil practice rules and procedures apply only to the extent they do not conflict with [the Act]."). Not only has "the legislature . . . always intended to provide a deadline for filing a postconviction petition," but it has steadily shortened that deadline through a series of amendments. *Johnson*, 2017 IL 120310, ¶ 21. The current time limit is six months from the termination of a direct appeal. 725 ILCS 5/122-1(c) (2018). By permitting postconviction petitioners to refile withdrawn petitions at any time within the one-year grace period offered by the Civil Code, the appellate court has granted those petitioners a period at least twice as long as the General Assembly deemed appropriate.

2. Even if ILCS 5/13-217 (1994) applied to postconviction petitioners, they would need to act within the statute's one-year grace period to avoid the successive petition bar.

If this Court were to conclude (or assume), to the contrary, that postconviction petitioners may invoke 735 ILCS 5/13-217 (1994), then it

should clarify that a petitioner may refile a withdrawn petition only within the one-year grace period the statute provides. If a petitioner fails to act within that period, the judgment dismissing his initial petition renders any subsequent petition successive. *See Macri*, 2011 IL App (2d) 100325, ¶ 8 (where petitioner attempted to reinstate postconviction petition six years after withdrawing it, he "was not entitled to have his petition automatically reinstated and treated as an original petition"). Stated differently, even if a voluntary dismissal of an initial postconviction petition could operate as a dismissal without prejudice in appropriate circumstances, such a dismissal must be considered "with prejudice" if a petitioner fails to refile within one year. *Cf. S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 502 (1998) (holding that judgment dismissing case for want of prosecution becomes final judgment on expiration of one-year refiling period provided by section 13-217; at that time, "the order effectively 'ascertains and fixes absolutely and finally the rights of the parties in the lawsuit'") (quoting *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982)).

Most cases that have applied 735 ILCS 5/13-217 (1994) to postconviction petitioners involved petitions filed within the one-year grace period. *See English*, 381 Ill. App. 3d at 909-10; *Pace*, 386 Ill. App. 3d at 1062-63; *see also Harris*, 2016 IL App (1st) 141778, ¶ 22. Those cases are not directly controlling because petitioner here "sought to reinstate his petition well after one year," A7; accordingly, to resolve the issue here, this Court

need not decide whether all of those precedents were wrongly decided. This Court should clarify, however, that the appellate court erred when it extended these precedents beyond all reasonable bounds, holding that petitioner could refile his withdrawn petition nine years after the putative grace period lapsed.

Under the civil statute, a plaintiff who voluntarily dismisses a complaint "may commence a new action within one year *or* within the remaining period of limitation, whichever is greater." 735 ILCS 5/13-217 (1994) (emphasis added). The appellate court, here and in *York*, held that postconviction petitioners who fail to refile within the one-year grace period may rely on the second prong of the statute referring to the "remaining period of limitation." A8; *York*, 2016 IL App (5th) 130579, ¶ 27. The limitations provision of the Act, however, includes an escape hatch that prolongs the limitations period indefinitely: a petitioner may file a late initial petition if he "alleges facts showing that the delay was not due to his . . . culpable negligence." *See* 725 ILCS 5/122-1(c). Reading the two statutes together, the appellate court held that a petitioner who seeks to refile withdrawn claims "beyond the prescribed time limits" must be given an "opportunity to plead facts showing that the delay was not due to his culpable negligence." A8.

That holding "is at odds with the purpose of the statute, which includes providing deadlines for filing a postconviction petition." *Johnson*, 2017 IL 120310, ¶ 21. In *Johnson*, this Court rejected a woodenly literal

construction of the Act's time limits that would have resulted in some petitioners "having no deadline," such that they "could file a postconviction petition more than 20, 30, or even 50 years after an appeal, a period longer than any deadline ever imposed by the Act." *Id.* A rule permitting petitioners to refile withdrawn petitions long after the one-year grace period is equally absurd, as this case illustrates. Here, petitioner seeks to reinstate a petition more than three decades after his conviction and more than ten years after he expressly abandoned the claims he now seeks to revisit.

Moreover, a one-year refiling period is more than sufficient to protect defendants' interests in vindicating their constitutional rights. The appellate court expressed concern that adopting a hard deadline "renders meaningless the provision allowing for a voluntary withdrawal" of a petition. *York*, 2016 IL App (5th) 130579, ¶ 28. But in truth, such a petitioner gains a distinct advantage, given that a one-year period for refiling is twice as long as the six-month deadline for an initial filing set forth in the Act. Furthermore, a petitioner who fails to act within one year would not be precluded from seeking relief; he simply must satisfy the Act's requirements for filing a successive petition. Holding that a judgment dismissing a withdrawn postconviction petition becomes a dismissal with prejudice after one year has passed ensures that petitioners do not evade the mechanisms that the General Assembly enacted to promote the finality of criminal convictions.

Therefore, if this Court concludes 735 ILCS 5/13-217 (1994) applies, it should hold that a postconviction petitioner who attempts to refile a withdrawn petition under that civil provision may not also have the timeliness of his filing judged under a "culpable negligence" standard. Where he has failed to act within one year of the dismissal of a withdrawn petition, that judgment of dismissal is final, and any attempt to "refile" withdrawn claims must satisfy the criteria for successive petitions. And for this reason as well, petitioner's new petition is barred.

CONCLUSION

This Court should reverse the appellate court's judgment and reinstate the judgment of the Circuit Court of DuPage County.

April 11, 2018

Respectfully submitted,

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RULE 341(c) CERTIFICATE

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

/s Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General

APPENDIX

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Illinois Official Reports

Appellate Court

***People v. Simms*, 2017 IL App (2d) 141251**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DARYL SIMMS, Defendant-Appellant.
District & No.	Second District Docket No. 2-14-1251
Filed	May 12, 2017
Decision Under Review	Appeal from the Circuit Court of Du Page County, No. 85-CF-707; the Hon. Daniel P. Guerin, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	Michael J. Pelletier, Thomas A. Lilien, and Fletcher P. Hamill, of State Appellate Defender's Office, of Elgin, for appellant. Robert B. Berlin, State's Attorney, of Wheaton (Lisa A. Hoffman, Assistant State's Attorney, of counsel), for the People.
Panel	JUSTICE SPENCE delivered the judgment of the court, with opinion. Justices Jorgensen and Schostok concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Daryl Simms, appeals from the trial court's denial of his motion to reinstate a petition that he previously filed under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). The trial court ruled that the motion to reinstate was time-barred as a matter of law because defendant filed it more than one year after his postconviction petition was voluntarily dismissed. We conclude that the trial court had the discretion to grant the motion to reinstate if defendant sufficiently pleaded that the delay was not due to his culpable negligence. We therefore reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 Following a bench trial, defendant was convicted of murder (Ill. Rev. Stat. 1985, ch. 38, ¶ 9-1(a)), aggravated criminal sexual assault (Ill. Rev. Stat. 1985, ch. 38, ¶ 12-14(a)), criminal sexual assault (Ill. Rev. Stat. 1985, ch. 38, ¶ 12-13(a)), armed robbery (Ill. Rev. Stat. 1985, ch. 38, ¶ 18-2), home invasion (Ill. Rev. Stat. 1985, ch. 38, ¶ 12-11(a)), and residential burglary (Ill. Rev. Stat. 1985, ch. 38, ¶ 19-3(a)). He was sentenced to death. On direct appeal, the supreme court affirmed defendant's convictions but remanded for resentencing because the trial court had improperly allowed victim impact statements during sentencing. *People v. Simms*, 121 Ill. 2d 259, 275-76 (1988). On remand, defendant elected to be sentenced by a jury, which found him eligible for the death penalty. In the resulting appeal, the supreme court again remanded the cause for resentencing, this time due to an improper jury instruction. *People v. Simms*, 143 Ill. 2d 154, 171-72 (1991). Defendant was resentenced to death upon remand, and the supreme court affirmed on appeal. *People v. Simms*, 168 Ill. 2d 176, 182 (1995).

¶ 4 Defendant filed a postconviction petition on November 14, 1995. With the trial court's leave, he filed an amended postconviction petition on May 21, 1997. The trial court dismissed the amended petition without an evidentiary hearing. On appeal, the supreme court affirmed the dismissal of most of the claims but reversed the dismissal of claims alleging perjury. *People v. Simms*, 192 Ill. 2d 348, 392, 430 (2000). It remanded the cause for an evidentiary hearing. *Id.*

¶ 5 In January 2003, as part of a mass commutation of death sentences, then Governor George Ryan commuted defendant's death sentence to life imprisonment. At the time, defendant's postconviction petition was still pending. On July 7, 2004, defendant filed a pleading entitled "Withdrawal of Claims" in which he expressed a desire to withdraw the remaining postconviction claims. Defendant stated that he was aware that, after withdrawing the claims, no evidentiary hearing would take place. Defendant further stated that he was withdrawing the claims freely and voluntarily, after having consulted with his postconviction counsel. The same day, the trial court entered an order stating: "Petitioner wishing to withdraw Claims III, IV and V of his Amended Petition," those "[c]laims *** are withdrawn [and] no further proceedings remain pending in this court."

¶ 6 On October 18, 2011, defendant filed a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), seeking reinstatement of his postconviction petition. He argued that the July 7, 2004, order disposing of his remaining postconviction claims was void because (1) the State coerced him into withdrawing his petition, by stating that it would seek reinstatement of the death penalty if he succeeded on his postconviction challenge, (2) his postconviction counsel and the State fraudulently concealed

that the courts would likely decide that the reimposition of the death penalty would be unlawful, and (3) the procedure through which the withdrawal took place was unlawful. The trial court granted the State's motion to dismiss the section 2-1401 petition as untimely. On appeal, the Office of the State Appellate Defender sought to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993). We granted the motion to withdraw, stating that (1) a due-process violation did not *ipso facto* imply a void judgment and (2) no other exception to section 2-1401's two-year limitations period applied. *People v. Simms*, 2013 IL App (2d) 120204-U, ¶¶ 11-14 (summary order).

¶ 7 On July 1, 2014, defendant filed a motion to reinstate his postconviction petition; the trial court's ruling on that motion is the subject of the instant appeal. As part of the motion, defendant reasserted the postconviction claims that the supreme court had determined merited an evidentiary hearing. On July 22, 2014, the trial court ordered the State to file a response to the motion and ordered defendant to thereafter file a reply. The State argued in its response that the trial court should deny defendant's motion because under *People v. English*, 381 Ill. App. 3d 906 (2008), and *People v. Macri*, 2011 IL App (2d) 100325, a postconviction petition could not be reinstated more than one year after it was voluntarily withdrawn. In his reply, defendant argued, *inter alia*, that his situation was distinguishable from *Macri* because the supreme court had remanded some of his postconviction claims for an evidentiary hearing and because section 122-5 of the Postconviction Act (725 ILCS 5/122-5 (West 2014)) allowed the trial court to extend the time for filing pleadings.

¶ 8 On September 8, 2014, the trial court denied defendant's motion to reinstate as untimely pursuant to the cases cited by the State. The trial court denied defendant's motion to reconsider on October 21, 2014. This court granted defendant's motion for leave to file a late notice of appeal.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant contests the trial court's denial of his motion to reinstate. As the trial court denied the petition as untimely as a matter of law, we review its ruling *de novo*. See *English*, 381 Ill. App. 3d at 908.

¶ 11 We begin by examining *English* and *Macri*, the cases relied on by the trial court. In *English*, the defendant was granted leave to voluntarily dismiss his postconviction petition without prejudice. *Id.* at 907. He then sought to reinstate it within one year, but the trial court denied his motion. *Id.* On appeal, the court stated as follows. Section 122-5 of the Postconviction Act (725 ILCS 5/122-5 (West 2004)) gives the trial court the discretion to allow the voluntary withdrawal of a postconviction petition at any time before judgment is entered. *English*, 381 Ill. App. 3d at 909. The voluntary withdrawal of a postconviction petition is the equivalent of a voluntary dismissal in a civil case. *Id.* A defendant who is permitted to voluntarily withdraw a postconviction petition can refile and reinstate it, but the Postconviction Act does not provide an explicit time limit for the refiling. *Id.*

¶ 12 Because postconviction proceedings are civil, a court can enter orders in such proceedings " 'as is generally provided in civil cases.' " *Id.* (quoting 725 ILCS 5/122-5 (West 2004)). Therefore, if the Postconviction Act is silent about a procedural matter, courts can look to the Code. *Id.* Section 13-217 of the Code (735 ILCS 5/13-217 (West 2004)) allows a plaintiff who voluntarily dismisses an action one year to refile the action, so a postconviction petition filed within one year after voluntary withdrawal is likewise timely. *English*, 381 Ill. App. 3d at 910.

As the defendant sought to reinstate his postconviction petition within one year after voluntarily dismissing it, the trial court erred by denying his motion to reinstate. *Id.*

¶ 13 In *Macri*, the defendant unsuccessfully sought to reinstate his postconviction petition almost six years after he withdrew it. *Macri*, 2011 IL App (2d) 100325, ¶ 3. On appeal, the defendant argued that the trial court should have treated his petition as a " 'new original petition.' " *Id.* ¶ 4. This court noted that the defendant's petition was filed beyond the one-year period in which a defendant was entitled to automatic reinstatement under *English* and that it was also beyond the limitations period for initial postconviction petitions provided in section 122-1(c) of the Postconviction Act (725 ILCS 5/122-1(c) (West 2010)). *Macri*, 2011 IL App (2d) 100325, ¶ 8. We stated, "Thus, even assuming that a petition sought to be refiled beyond a year but within the limitations period must be automatically reinstated, [the] defendant was not entitled to have his petition automatically reinstated and treated as an original petition." *Id.* Recognizing that section 122-5 of the Postconviction Act gives trial courts a great deal of discretion, we went on to state, "In reaching this conclusion, we note that [the] defendant makes no argument that the trial court abused its discretion in denying his motion." *Id.* ¶ 9. We stated that the defendant's only argument was that, once he voluntarily withdrew his petition, he could refile the petition without leave of the court at any time and have it treated as the original petition. *Id.* We disagreed with this position, stating that "[o]nly if the trial court allowed defendant to reinstate his petition would his petition have been treated as an original petition." *Id.*

¶ 14 Defendant argues that the trial court misinterpreted *English* and *Macri* as prohibiting the refiling of a petition more than one year after it was withdrawn. He argues that, in doing so, the trial court failed to exercise its discretion when ruling on his motion to reinstate, thereby abusing its discretion. See *People v. Partee*, 268 Ill. App. 3d 857, 868-69 (1994) (where a trial court erroneously believes that it has no discretion in a matter, its ruling must be reversed).

¶ 15 Defendant argues that, while we recognized in *Macri* the presence of a one-year limitation on the automatic reinstatement of a withdrawn petition, we placed no limit on the trial court's discretion to allow reinstatement beyond one year. Defendant argues that section 122-5 of the Postconviction Act gives trial courts wide discretion in how to proceed on postconviction petitions. Defendant further argues that, unlike in *English* and *Macri*, the supreme court had ruled that two of his claims made substantial showings that his constitutional rights had been violated during the sentencing hearing and his petition was in the third stage of proceedings when he withdrew it. Defendant argues that his situation is also distinguishable because he gave a plausible explanation of why he decided to withdraw his meritorious petition. Specifically, he alleged in his amended petition that the State had taken the position that, if he prevailed on his postconviction claims, it could seek the death penalty against him. Defendant maintains that his allegation was well supported, as the State took that position in numerous cases until the supreme court finally rejected it in 2006. See *People v. Morris*, 219 Ill. 2d 373, 384-85 (2006) (finding that Governor Ryan's clemency orders precluded the State from seeking the death penalty if a defendant were retried for the same crime). Defendant contends that the trial court, in exercising its discretion whether to allow a late motion to reinstate, should have considered that he faced the possibility of the death penalty when he withdrew his meritorious petition.

¶ 16 The State argues that any reading of *Macri* that allows refiling or reinstatement of a voluntarily withdrawn postconviction petition after one year contravenes the Code. The State

further argues that in *People v. English*, 2013 IL 112890, ¶ 14, the supreme court cited with approval the principle that a voluntarily dismissed postconviction petition may be refiled only within one year of dismissal.

¶ 17 The State additionally relies on section 13-217 of the Code (735 ILCS 5/13-217 (West 2014)), which provides that, if a plaintiff voluntarily dismisses an action, the plaintiff "may commence a new action within one year or within the remaining period of limitation, whichever is greater." The State maintains that this section potentially extends the limitations period for filing an action and that, "had the defendant sought to refile or reinstate within one year of his voluntary withdrawal, he would have enjoyed an extension of the limitations period set forth in the [Postconviction] Act, as the time for filing a post-conviction petition would have expired by the time he filed his motion to reinstate." The State argues that defendant cites no authority for the proposition that there is an infinite extension of the limitations period for a defendant who voluntarily withdraws or dismisses a postconviction petition.

¶ 18 The State also argues that *People v. Harris*, 2016 IL App (1st) 141778, suggests that a trial court's jurisdiction to consider a motion to reinstate a voluntarily withdrawn postconviction petition terminates 30 days after the withdrawal. In *Harris*, the defendant filed a postconviction petition on May 7, 2010, and the trial court granted his motion to withdraw it on June 8, 2012. The defendant sought to vacate that order on July 5, 2012, and the trial court denied the motion to vacate on July 27, 2012. On June 6, 2013, the defendant filed a motion to refile and reinstate the postconviction petition. *Id.* ¶ 1. At a hearing on January 31, 2014, the trial court recalled denying the motion to vacate and did not think that there were any pending motions before it. *Id.* ¶ 10. On June 10, 2014, the defendant filed a motion to obtain a ruling on his motion to refile and reinstate. *Id.* ¶ 1. Before obtaining a ruling, the defendant filed a notice of appeal on June 16, 2014. The trial court denied the motion to refile and reinstate on January 9, 2015. *Id.*

¶ 19 On appeal, the defendant challenged the trial court's July 27, 2012, order denying his motion to vacate the order granting his motion to withdraw the postconviction petition. *Id.* ¶ 13. The appellate court cited case law for the proposition that an order allowing a voluntary dismissal is a final judgment for appeal purposes. *Id.* ¶ 19. It then extrapolated that the trial court lost jurisdiction over the matter 30 days after it denied the defendant's motion to vacate and that it thereafter did not have jurisdiction to rule on the defendant's motion to refile and reinstate. *Id.* The appellate court further stated that the defendant's notice of appeal was likewise untimely because it was not filed within 30 days after the denial of the motion to vacate. *Id.*

¶ 20 The *Harris* court declined to follow *English*, 381 Ill. App. 3d 906, stating that the decision failed to recognize that the trial court lost jurisdiction to rule on the motion to vacate 30 days after the entry of the final judgment. *Harris*, 2016 IL App (1st) 141778, ¶ 21. The *Harris* court stated that its determination did not interfere with "a defendant's ability to refile his postconviction petition within one year" under section 13-217 of the Code, in that "all defendant need do to invoke his right under section 13-217 is file his post conviction petition again." *Id.* ¶ 22.

¶ 21 Applying *Harris*'s analysis to this case, the State argues that the trial court did not have jurisdiction to consider defendant's motion to reinstate because he filed it on July 1, 2014, more than 30 days after the trial court's July 7, 2004, grant of defendant's motion to withdraw the postconviction petition. The State maintains that, although *Harris* appears at odds with

English and *Macri*, all three cases agree that, if a defendant voluntarily dismisses his petition, postconviction proceedings can continue only if he refiles it within one year. Accordingly, the State argues that this case law is no help to defendant because he waited more than 10 years to seek reinstatement of his postconviction petition. The State contends that under *Harris* the appropriate disposition is dismissal, whereas under *English* and *Macri* the appropriate disposition is to affirm the denial of the reinstatement. The State argues that under either scenario defendant is not entitled to relief.

¶ 22 Defendant responds, and we agree, that the supreme court's decision in *English*, 2013 IL 112890, ¶ 14, has no bearing on this case because it was not on an appeal from the appellate court's decision in *English*, 381 Ill. App. 3d 906, and the supreme court referred to that appellate court decision simply as part of its description of the case's procedural history.

¶ 23 Defendant further argues that this case is not governed by section 13-217 of the Code. Defendant asserts that under *English*, 381 Ill. App. 3d 906, the statute simply limits the trial court's discretion with respect to a motion to reinstate filed within one year after the withdrawal, in that the trial court must grant such a motion. Defendant argues that, after the one-year period, the trial court has the discretion to "extend[ ] the time of filing any pleading other than the original petition." 725 ILCS 5/122-5 (West 2014).

¶ 24 Defendant also argues that we should reject *Harris*'s analysis because it is based on meaningless semantics. Specifically, *Harris* holds that, 30 days after a postconviction petition's voluntary withdrawal, a trial court loses jurisdiction to hear a motion to "reinstate" the petition but maintains jurisdiction if the same petition is "refiled." Defendant notes that the *English* defendant was allowed to "reinstate" his petition without "refiling" it. *English*, 381 Ill. App. 3d at 910. Defendant maintains that there is no functional difference between moving to "reinstate" a withdrawn petition and "refiling" the same petition. In any event, defendant argues that even under *Harris* the trial court had jurisdiction here, as he "refiled" his petition by filing a new version of it on the same day that he filed a motion to reinstate his petition.

¶ 25 We note that neither party has cited or addressed *People v. York*, 2016 IL App (5th) 130579, which supports defendant's position that the trial court has the discretion to allow a motion to reinstate a voluntarily withdrawn postconviction petition. In *York*, 16 months after voluntarily withdrawing his postconviction petition, the defendant filed a new postconviction petition raising the same issue, and he asked the trial court to set aside the withdrawal. The trial court summarily dismissed the petition, ruling that, if it was a successive petition, it did not allege facts showing cause and prejudice and, if it was not a successive petition, it was untimely. *Id.* ¶ 1.

¶ 26 The appellate court stated as follows. The situation was distinguishable from *English*, as the defendant did not seek to reinstate his petition within one year after withdrawing it. *Id.* ¶ 20. Section 122-5 of the Postconviction Act allows a defendant to voluntarily withdraw his petition at any time before a final judgment, and it gives the trial court the discretion to enter orders allowing " 'amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading *** as shall be appropriate, just and reasonable[,] and as is generally provided in civil cases.' " *Id.* ¶ 27 (quoting 725 ILCS 5/122-5 (West 2012)). The voluntary withdrawal of a petition is like a voluntary dismissal in civil cases, and section 13-217 allows a defendant to refile a voluntarily dismissed action within one year after the dismissal or within the original limitations period for filing an action. *Id.* Under the Postconviction Act, the limitations period is three years from the

conviction date " '*unless* the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.' " (Emphasis in original.) *Id.* (quoting 725 ILCS 5/122-1(c) (West 2012)). Thus, a defendant seeking to reinstate a voluntarily withdrawn petition after more than one year (and after the limitations period) must be given the opportunity to demonstrate that the delay was not due to his culpable negligence. *Id.* Section 122-5 further supports this outcome, as it explicitly grants postconviction courts the discretion to extend " 'the time of filing any pleading other than the original petition.' " *Id.* ¶ 30 (quoting 725 ILCS 5/122-5 (West 2012)). The defendant's new petition was essentially a motion to reinstate the original petition, and as such a motion was a "pleading" other than the original petition, the trial court had the discretion to extend the limitations period. *Id.*

¶ 27 The appellate court also reasoned that the State's position, that a voluntarily withdrawn petition must be treated as a successive petition if the defendant did not seek to reinstate it within one year, rendered the provision allowing for a withdrawal meaningless for many defendants. *Id.* ¶ 29. That is, treating the one-year limit in section 13-217 as an absolute bar to reinstating a petition would put many defendants in a worse position than if they had not filed timely petitions in the first place, as successive petitions face additional hurdles. *Id.*

¶ 28 Returning to the case law cited by the parties, we observe that this situation is distinguishable from *English* because the court there held that a defendant is entitled to the automatic reinstatement of a voluntarily withdrawn postconviction petition within one year after its withdrawal, whereas in this case defendant sought to reinstate his petition well after one year. Therefore, as in *Macri*, we need not decide whether we agree with *English*'s position on automatic reinstatement. See *Macri*, 2011 IL App (2d) 100325, ¶ 8 ("Thus, *even assuming* that a petition sought to be refiled beyond a year but within the limitations period must be automatically reinstated, [the] defendant was not entitled to have his petition automatically reinstated and treated as an original petition." (Emphasis added.)).

¶ 29 Contrary to the State's position, *Macri* also does not resolve the issue here. In *Macri*, the defendant argued only that he was entitled to the automatic reinstatement of his voluntarily withdrawn postconviction petition at any time without leave of the court. *Id.* ¶ 9. We expressly pointed out that, although section 122-5 of the Postconviction Act gives trial courts a great deal of discretion, the defendant did not argue that the trial court abused its discretion in denying his motion. *Id.* In contrast, this is precisely the argument defendant advances here.

¶ 30 *Harris* does not convince us that we lack jurisdiction over this matter. In that case, the defendant challenged only the denial of his motion to vacate the trial court's order granting his motion to withdraw his postconviction petition, as opposed to the denial of his motion to refile and reinstate. *Harris*, 2016 IL App (1st) 141778, ¶ 13. Moreover, we disagree with *Harris*'s rationale that, just because a trial court might lose jurisdiction to hear a defendant's motion to vacate an order allowing a voluntary dismissal 30 days after the order is entered, the trial court also loses jurisdiction to rule on a defendant's subsequent motion to refile and reinstate. See *id.* ¶ 19. *Harris* did not cite any relevant authority to this effect, and such an outcome presupposes that the two types of motions are seeking the same relief. However, a motion to vacate the grant of a request to voluntarily withdraw a postconviction petition seeks to have the petition proceed as if it were never withdrawn in the first place. In contrast, a motion to refile and reinstate does not attack the ruling allowing the voluntary withdrawal of the petition but rather seeks to reinitiate the proceedings. In a situation such as the one at bar, the grant of a timely motion to vacate an order allowing a voluntary withdrawal would mean that a trial court would

not have to consider any other time restrictions or whether the defendant alleged facts showing a lack of culpable negligence for a delay, whereas such considerations are relevant for a motion to refile and reinstate. See *York*, 2016 IL App (5th) 130579, ¶ 27. *Harris* did concede that a defendant is able to "refile" a postconviction petition within one year under section 13-217 (*id.* ¶ 22), but it did not see this as contradictory to its position that a trial court could not rule on a defendant's motion "to refile and reinstate" more than 30 days after it denied the defendant's motion to vacate (*id.* ¶ 19). We agree with defendant that there is no logical difference between the two. In sum, we believe that *Harris* presents a poorly reasoned analysis of the timeliness of motions to refile and reinstate, and we choose not to follow it.

¶ 31 We ultimately agree with *York* that there is not an absolute one-year bar to seeking to reinstate a voluntarily withdrawn postconviction petition. Rather, a defendant filing such a motion beyond the prescribed time limits has the opportunity to plead facts showing that the delay was not due to his culpable negligence, and it is within the trial court's discretion whether to grant the motion to reinstate the petition.

¶ 32 As many of the aforementioned cases point out, the Postconviction Act gives the trial court the discretion to allow the defendant to withdraw the postconviction petition at any time prior to judgment (725 ILCS 5/122-5 (West 2014)), but it does not explicitly discuss when the petition may be reinstated. The trial court is given discretion regarding proceedings on a postconviction petition, specifically rulings "as to [the] amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable *and as is generally provided in civil cases*." (Emphasis added.) *Id.* Postconviction proceedings are civil, as reflected in section 122-5, so courts can look to the Code if the Postconviction Act does not address a procedural matter. *English*, 381 Ill. App. 3d at 909. Under section 13-217 of the Code, a plaintiff "may commence a new action within one year or within the remaining period of limitation, whichever is greater, *** after the action is voluntarily dismissed by the plaintiff." 735 ILCS 5/13-217 (West 1994).[1] As stated, the one-year period is not applicable here. As to the "remaining period of limitation" (*id.*), the Postconviction Act provides limitations periods for filing a petition, specifically six months after proceedings in the United States Supreme Court have concluded; six months from the date for filing a *certiorari* petition, if none has been filed[2]; and three years from the conviction if no appeal has been filed (725 ILCS 5/122-1(c) (West 2014)). However, as *York* noted, section 122-1(c) allows a defendant to bypass these time limitations by "alleg[ing] facts showing that the delay was not due to his or her culpable negligence." *Id.*[3] Logically, the trial court must have the discretion to determine whether this standard has been met in the motion to reinstate, which also corresponds to the discretion given to the trial court in section 122-5 to extend "the time of filing any pleading

[1]The 1994 version of section 13-217 is currently in effect because the subsequent version of the statute included amendments that the supreme court found unconstitutional in their entirety in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). See *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 44 n.1.

[2]Our supreme court has construed this portion of the provision as six months from the date for filing a petition for *certiorari* or a petition for leave to appeal. *People v. Johnson*, 2017 IL 120310, ¶ 24.

[3]Although not applicable here, the time limitations also do not apply if the defendant claims actual innocence. 725 ILCS 5/122-1(c) (West 2014).

other than the original petition." 725 ILCS 5/122-5 (West 2014); see *York*, 2016 IL App (5th) 130579, ¶ 30. This conclusion is consistent with the language of the Postconviction Act and the Code, and it is also in harmony with the analyses in *English*, *Macri*, and *York*. Accordingly, here the trial court erred in denying defendant's motion to reinstate as untimely without considering whether defendant alleged facts showing that the delay was not due to his culpable negligence. See *York*, 2016 IL App (5th) 130579, ¶ 27. We therefore reverse the trial court's denial of defendant's motion to reinstate his postconviction petition, and we remand for further proceedings during which the trial court shall exercise its discretion to determine if defendant sufficiently alleged that the delay in filing the motion was not due to his culpable negligence.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we reverse the judgment of the Du Page County circuit court and remand for further proceedings consistent with this opinion.

¶ 35 Reversed and remanded.

0S0113

STATE OF ILLINOIS APPELLATE COURT SECOND DISTRICT

OFFICE OF THE CLERK
847/695-3750
847/695-0092 TDD

APPELLATE COURT BUILDING
55 SYMPHONY WAY
ELGIN, ILLINOIS 60120-5558

Appeal from the Circuit Court of County of DuPage

Trial Court No.: 85CF707

THE COURT HAS THIS DAY, 12/31/14, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-14-1251

People v. Simms, Darryl

Motion by pro se defendant-appellant, Darryl Simms, for leave to file a Late Notice of Appeal. Motion allowed, and the Clerk of the Appellate Court is directed to transmit the Late Notice of Appeal to the Circuit Court Clerk of DuPage County for filing.

The office of the State Appellate Defender is appointed to represent his interests on appeal.

Robert J. Mangan
Clerk

cc: Darryl Simms
Honorable Robert B. Berlin
Lisa A. Hoffman

pf 082

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ORIGINAL 14-1251

IN THE
CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

FILED
2015 JAN -5 PM 2:19

PEOPLE OF STATE OF ILLINOIS PLAINTIFF, V. DARRYL SIMMS DEFENDANT,	POST-CONVICTION PROCEEDINGS NOTICE OF APPEAL 85 CF 707 Hon. Judge Daniel P. Guerin Presiding.

NOTICE OF APPEAL

Notice is hereby given that, Darryl Simms pro se, appeal the final order of Judge Daniel P. Guerin which denied defendant's post-conviction petition and Motion for reinstatement of such post-conviction petition, entered on September 8, 2014 and the denial of defendant's motion for reconsideration of the denial of the motion to reinstate voluntarily withdrawn postconviction petition entered on October 21, 2014. Defendant ask that he is appointed counsel to represent him in the appeal. pursuant to S.Ct. Rule 651(c) This appeal is taken to the Illinois Appellate Court for the second district

Respectfully,

Darryl Simms

Darryl Simms
P.O.Box 1700 #N12255
Galesburg, IL. 61401

N0000003
C0003994

60/10

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

DU PAGE COUNTY - WHEATON, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
Plaintiff,)
)
vs.) NO. 85 CF 707
)
DARRYL SIMMS,)
)
Defendant.)

AMENDED PETITION FOR POST-CONVICTION AND POST JUDGMENT RELIEF

CLAIM I

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO WHERE PROSPECTIVE JURORS WERE IMPROPERLY EXCUSED BY THE STATE'S EXERCISE OF PEREMPTORY CHALLENGES

The Supreme Court recognizes a fundamental distinction between peremptory challenge of jurors and challenges of cause. The exclusion for cause based on general objections to death penalty on moral or religious grounds is forbidden. Outside the area of racial discrimination the U.S. Supreme Court has refused to limit the right of peremptory challenge jurors. The Petitioner questions the dismissal of six (6) prospective jurors who he claims expressed some reservation about the death penalty yet whom were not dismissed for cause by the Court. The court finds that the Petitioner was not deprived of a fair and impartial jury by such action. The Petitioner has failed to establish his substantial depravation of his

Constitutional rights and, therefore, this Count will be summarily dismissed.

Even if the Defendant had made a substantial showing of a Constitutional violation, this issue was not previously raised is therefore waived. Issues which could have been raised on direct Appeal but were not are deemed waived.

CLAIM II

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE THE JURY WAS REPEATEDLY MISLED BY THE JUDGE AND THE PROSECUTOR THAT THE JURIES ROLE WAS TO RECOMMENT WHETHER OR NOT THE DEATH SENTENCE SHOULD BE IMPOSED AGAINST THE PETITIONER

The Petitioner claims that the juries sense of responsibility was diminished as a result of the statements made by the Court and the State during the jury selection process and closing argument. Trial counsel had an opportunity to hear these remarks in context and did not object. In addition this claim could have been raised on direct appeal and was not. Use of word "recommend" does not per se diminish the juries sense of responsibility in imposing the death penalty. The Illinois Supreme Court found that in similar cases that the State of the Court's use of the word "recommend" did not so mislead the jury or diminish the sense of responsibility in determining whether the death penalty was appropriate. The Court finds that the Petitioner has failed to establish through affidavits and the record that the jury sense of responsibility was diminished. The Petitioner further claims that there was ineffectiveness of trial counsel or appellate counsel and failed to raise this issue on appeal. This Court will consider claims that have not been properly preserved if they constitute plain error. The plain error rule permits the Court to take notice of plain errors and defects affecting substantial rights and this is where the evidence is closely balanced or where the error affects the fundamental fairness of the proceedings. This Court notes that the Illinois Supreme Court in

Simms III found that the "evidence here was not closely balanced". This Court when evaluating Caldwell claims it is necessary to look at the total trial scene including jury selection, sentencing hearing, the Courts instructions and counsels argument. It is clear from the record when viewed in its entirely that the complained of statements did not cause confusion by the jurors as to their role in these proceedings. Furether, voir dire was done individually, with each juror examined outside the presence of the other jurors. This Court finds that just as in the case of People v. Howard the jurors in this case were fully and accurately instructed as to their role and their significance of their determination and that the "scattered use of the word recommend clearly did not mislead the jurors regarding their role". This Court further notes that in its introductory remarks to the entire venire the Court (C1139 through C1152) clearly explained the juries role in the two stage sentencing proceedings. Lastly this Court has reviewed the actual transcript of each of the jurors mentioned in the Petitioner's petition and when viewed in context and considering all of the questions asked it is clear that there was not a Caldwell violation.

CLAIM III

PETITIONERS CLAIM THAT THE STATE WITHHELD EVIDENCE REGARDING JOSEPH MOGAVERO

The Petitioner claims that had the State withheld certain evidence regarding Joseph Mogavero and that there is a reasonable probability that the result of the proceeding would have been different.

For purposes of determining whether to grant an evidentiary hearing on a post-conviction petition, the Court is required to accept well pleaded facts in the petition and any accompany

affidavits is true. In this case, the trial counsels inability to recall the State's disclosure of evidence regarding an aggravation witnesses criminal background is insufficient to establish depravation of a substantial Constitutional right. The State's position is that there is no Constitutional right to discovery at the sentencing phase. The Illinois Supreme Court found that a sentencing hearing is not governed by the restrictive Rules of Evidence and, therefore, discovery is not Constitutionally required. Mogaveros testimony dealt with the fact that the defendant was a member of a gang and as such that evidence would go to the defendants character as well as his rehabilitataive potential. The evidence regarding petitioners gang affiliation was reliable and relevant, having been corroborated by four different witnesses. Petitioner had been given an opportunity to extensively examine Mr. Mogavero and in addition Mogavero tetified regarding his own substance abuse problems and criminal background. The jury was provided sufficient evidence to judge the reliability of Mogavero's testimony. The jury was made aware of Mogavero's substance abuse problems during cross examination. The Petitioner on this issue has failed to eestablish a depravation of a substantial Constitutional riight. Further the Petitioner has failed that the evidence would have impacted the outcome of the case even if it had been disclosed to the defense.

CLAIM IV

THE STATE VIOLATED THE PETITIONERS CONSTITUTIONAL RIGHTS CONCERNING THE TESTIMONY OF MARY MATAS AND MARTIN MUELLER

The Petitioner claims that the State withheld Bellwood Police Department report dated June 12, 1995 and 37 pages of a Hillside report regarding an attack on Mary S. Matas, an

aggravation witness. The Petitioner allegation is unsupported by the record or accompanying affidavits and does not constitute a substantial showing of violation of Constitutional right. The Petitioner provides no support for the allegations that the State or Hillside Police Department knowingly withheld information from the Petitioner in October of 1985. Petitioner further claims that Mary Sue Matas provided perjured testimony in regard to her identification of the Petitioner. The Court finds that the Petitioner has failed to establish that Mary Sue Matas has committed perjury and therefore has failed to show that there was a reasonable probability that the result would have been different. Mary Matas had an opportunity to view three (3) separate photo lineups containing the Petitioner and one (l) in-person lineup. The Petitioner has failed to support his claim that these police reports "materially conflict" with the testimony of Mary Matas or Martin Mueller. Petitioner had an opportunity extensively cross examine her with regard to her identification of the Petitioner as her attacker. In addition, her testimony if consistent with the Petitioners attached reports, establishes mere inconsistencies that do not establish perjury and only go to the weight and the credibility of the evidence. In this case Mary matas testimony contains minor inconsistencies from the police reports, and this does not, however, constitute a substantial Constitutional violation. The Petitioners allegation that Martin S.. Mueller altered or falsified Hillside Police reports is unsupported by the record or affidavits. Therefore, Petitioner has failed to allege a substantial Constitutional violation. Further, Petitioner has failed to show that all of these police reports were not tendered or given to the Petitioner in 1985. Petitioner has failed to establish that Martin S. Mueller has committed perjury. There is absolutely no evidence that the outcome of the sentencing hearing would have been different assuming arguendo that Petitioner had a right to these records and these records were not provided back in 1985.

CLAIM V

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE THE STATE KNOWINGLY USED PERJURED TESTIMONY

Petitioner claims that the State knowingly used perjured testimony of Joseph Mogavero, Mary Sue Matas and Martin Mueller. The Court finds that the Petitioner failed to provide support for the allegation that any of the witnesses committed perjury or that the State knowingly used perjured testimony. In the absence of an allegation of knowingly use of false testimony or at least some lack of diligence on the part of the State there can be no violation of due process. Cases cited by the Petitioner deal with the knowing use of false testimony. To prevail under a 2-1401 petition Petitioner must prove by clear and convincing evidence the testimony was false, and probably given controlled the outcome.

CLAIM VI

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE THE JURY WAS NOT INFORMED OF THE POSSIBLE PERIOD OF INCARCERATION THE COURT IMPOSE IF THE PETITIONER WAS NOT SENTENCED TO DEATH

The Petitioner claims that trial counsel was ineffective for withdrawing the purposed jury instruction set forth the sentences which the Petitioner could receive if not sentenced to death. Trial counsels decision to withdraw the proposed jury instruction was a matter of trial strategy and, therefore, did not constitute ineffective assistance, and further Petitioner failed to establish that had the jury instruction been proposed the result of the proceedings would have been different. Further this issue was previously addressed in Petitioners second appeal. Furthermore,

Petitioner has failed to establish that Appellate counsel was ineffective for failing to raise the issue of trial courts effectiveness before the Supreme Court on appeal on his third sentencing hearing. As stated previously trial counsel was ineffective for failing to resubmit the proposed jury instruction, therefore, Appellate counsel could not be ineffective for failing to raise trial counsels ineffective. The submission of the jury instruction to the trial court would not have changed the outcome of the sentencing hearing and would have been improper. In Simms III the Supreme Court found

> "The evidence here was not closely balanced. Defendants crime was especially gruesome involving rape, theft and murder by multiple stab wounds. Furthermore, aggravation evidence was extensive, showing defendants long criminal history including violent crimes against women. Over his lifetime defendant has had extensive dealings with both the juvenile and adult criminal justice systems but the defendant has remained unrehabilitated".

CLAIM VII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS IN THAT HE WAS PROHIBITED FROM INFORMING THE JURY THAT PETITIONER REQUESTED A SENTENCE OF NATURAL LIFE IN PRISON IF HE WAS NOT SENTENCED TO DEATH

Petitioner claims that had the jury been informed that the Petitioner could or would receive a sentence of natural life without parole, there was a reasonable probability that the result would have been different. This Court notes that the Petitioner previously raised the issue of his right to this instruction in People v. Simms III. Petitioner cannot obtain relief under the post-conviction Act by "rephrasing previously addressed issues in Constitutional terms" in his petition. The Court finds that the Petitioner was not denied a fair reliable sentencing hearing because of the one closing comment of the State's Attorney which was objected to and sustained by the Court. The single comment by the Prosecution fails to

raise to the same level "misconduct" necessary to invoke the plain error exception to the waiver rule or was so prejudicial that real justice was denied.

CLAIM VIII

PETITIONER CLAIMS THAT THE PROSECUTOR IMPROPERLY DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY AT THE FIRST STAGE OF THE SENTENCING HEARING.

Trial counsel for Petitioner did not object to the Prosecutors statement and therefore this issue has been waived. Even if trial counsel had objected to State's comments Petitioner has faailed to show that the outcome of the first stage of the proceedings would have been different. Also, when the comments are read in context it is clear that the jury sense of responsibility was not diminished.

CLAIM IX

PETITIONER CLAIMS THAT HE WAS DENIED A FAIR AND RELIABLE SENTENCING HEARING AS A RESULT OF THE PROSECUTOR'S CLOSING ARGUMENTS

Court finds that where the Petitioner has previously taken a direct appeal asserting certain issues. Judgment of the reviewing court is res judicata as to all issues actually decided and any other claims that could have been presented are waived. Illinois courts have continually held that a Petitioner cannot obtain relief under a post-conviction proceeding by simply rephrasing previously addressed issued. Petitioner attempts to avert the waiver principle by asserting trial counsel and appellate counsel were ineffective for not previously not addressing these claims, however, under the Strickland analysis Petitioner must show the performance of both trial and appellate counsel fell below an objective standard of reasonableness and the outcome would have different but for the performance of counsel. Counsel cannot be found ineffective for failing to

make meritless claims. The claims and statement of the prosecutors are to be considered in context of the entire argument and the fact that such comments are supported by the evidence or reasonable inferences to be drawn from the evidence. Victim impact evidence is admissible and may be properly considered. Furthermore the jury can consider the lack of remorse of the defendant as it effects his ability to be rehabilitated. This Court finds that with regard to the question of prosecutorial misconduct the defendant was not deprived of a fair trial. This Court finds that on this issue the petitioner was given a fair reliable sentencing hearing.

CLAIM X

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING STAGE DURING CLOSING ARGUMENTS IN THAT PETITIONERS COUNSEL STATED THERE WAS SUFFICIENT AGGRAVATING EVIDENCE TO IMPOSE THE DEATH PENALTY AND WHERE COUNSELS STATEMENTS RESULTED IN AN ABANDONMENT OF PETITIONER'S CASE

The Petitioner alleges that his counsel abandoned the Petitioner during the closing arguments at the second phase of the sentencing hearing thereby depriving him of effective assistance of counsel. As stated previously the standard of effectiveness of counsel is set forth in the Strickland vs. Washington. The Court finds that the petitioner cannot prove defense attorneys Wayne Brucar representation fell below an objective reasonableness. Mr. Brucar instead of focusing on the aggravating evidence, focused on mitigating factors. The State's position is that Brucars comments demonstrated sound trial strategy. By admitting the acts were horrible and the wreckage created on the victims family, he attempted to lessen their impact and to focus on the mitigating factors. Furthermore, to establish ineffective assistance of counsel at the death sentencing hearing phase the defendant must prove the

attorneys representation were deficient and that but for the attorneys deficient conduct the jury would have concluded that the balance of aggravation mitigation factors did not warrant death. Petitioners assertion that the outcome would have been different is not supported within the evidence. Finally the petitioner claims that this could have been raised on the direct appeal, however, it was waived by appellate counsel and further neither trial counsel or appellate counsel has a duty to assert a frivolous claim.

CLAIM XI

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS IN THAT THERE WAS EVIDENCE PETITIONER'S UNADJUDICATED CRIMINAL CONDUCT

Petitioner states that during the second phase of the sentencing hearing the State presented testimony concerning conduct for which the Petitioner had never been convicted and for which he often had not been charged. Petitioner further claims that his trial counsel and his appellate counsel were ineffective to object or raise this issue on appeal as it relates to ineffectiveness of trial counsel. This Court finds that it is proper for the jury to consider evidence of unadjudicated criminal conduct during the second stage of the sentencing hearing. The customary rules of evidence are relaxed at the capital sentencing hearing. Instead relevance and reliability are the factors in determining what evidence is admissible during sentencing hearing. The evidence presented in this case of prior conduct was relevant because it concerned the defendants character, rehabilitative potential and his ability to exist in a prison society. The Petitioner had an opportunity to examine to cross examine each of the witnesses that were called. Further this same exact allegation was addressed in People v. Simms II and

attorneys representation were deficient and that but for the attorneys deficient conduct the jury would have concluded that the balance of aggravation mitigation factors did not warrant death. Petitioners assertion that the outcome would have been different is not supported within the evidence. Finally the petitioner claims that this could have been raised on the direct appeal, however, it was waived by appellate counsel and further neither trial counsel or appellate counsel has a duty to assert a frivolous claim.

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its consequences barred by res judicata.

CLAIM XII

PETITIONERS CLAIM THAT HE WAS DENIED A FAIR RELIABLE AND ACCURATE SENTENCING HEARING BY THE ADMISSION OF EVIDENCE OF JUVENILE STATION ADJUSTMENTS

Petitioner claims that trial counsel was ineffective for failing to object to the introduction of station adjustment testimony and that appellate counsel was ineffective in failing to raise the ineffectiveness of the trial counsel. The Criminal Code requires that consideration be given to any "any aggravating or any mitigating facts which are relevant to the imposition of the death penalty". "During the second phase of the death penalty hearing is important for the sentencing body to hear the most complete information possible regarding defendants life and characteristics". The range of admissibility of evidence given both the State and defendant is broadened so long as the evidence is relevant and reliable.

CLAIM XIII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS DUE TO THE ADMISSION OF TWO PRIOR JUVENILE ADJUDICATION'S

Petitioner claims that trial counsel was ineffective for failing to object to the introduction of two prior juvenile adjudications and appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel. The Illinois Supreme Court has held that the introduction of adjudication's in an adult sentencing hearing is proper. A defendants prior delinquency adjudication is highly relevant in determining whether the defendants character is such that death is the appropriate punishment.

CLAIM XIV

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE AT THE SENTENCING HEARING THE JURY WAS INFORMED THAT THE PETITIONER HAD MULTIPLE CONVICTIONS FOR RESIDENTIAL BURGLARY

Petitioner claims that had the multiple convictions for residential burglary had not been introduced into evidence at the sentencing hearing, there is reasonable probability that the result would have been different. Post Conviction proceedings are limited to issues which have not and could not have been adjudicated. All issues actually decided on direct appeal are res judicata. Petitioner attempted to assert the same violation of his rights in People v. Simms I and II. The Petitioners present argument is substantially the same as the one he made on direct appeal in the aforementioned cases. Therefore, this argument in post-conviction is foreclosed by the doctrine of res judicata.

CLAIM XV & XVI

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE HE WAS DENIED THE RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AT THE FIRST AND SECOND STAGE

Petitioner claims that over the trial counsel's objection, the Court admitted certain hearsay statements and that Appellate counsel was ineffective for failing to raise this claim on appeal and that he did not receive a fair, reliable and accurate sentencing hearing. Had this above evidence not been introduced at the sentencing hearing there was a reasonable probability that the result would be different. Under the death penalty statute, evidence that would not ordinarily be admissible at the guilt or innocence stage may be admissible during the sentencing hearing. The Illinois Supreme Court has held hearsay evidence may be admitted at a capital sentencing hearing without cross examination were relevant and reliable. Commander Gorniak's testimony that he confronted the Petitioner with Sherrod's statement and Petitioner then admitted to stabbing

the victim is not hearsay. Further it should be noted that the Court gave a limiting instruction to the jury regarding this particular statement. With respect to the testimony of the other witnesses, Lillian LaCrosse the statements fall within the exception of the hearsay rule. The statement that is hearsay may be admissible if it satisfies an exception recognized by Illinois Common Law. The statement that expresses the declarance then existing state of mind, emotion sensation or phyyscal condition is admissible as a hearsay exception. Further it should be noted that the Court admonished the jury as to how they were to consider this particular evidence.

CLAIM XVII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS IN THAT THE TRIAL COURT DID NOT SUPPRESS PETITIONER'S STATEMENTS

Petitioner asserts in his post conviction petition that his Constitutional rights were violated when the trial Court failed to grant the defendant's motion to suppress statements concerning an unrelated sexual assault and a portion of the statement was admitted during the sentencing hearing. Petitioner fails to acknowledge that this very same issue was previously adjudicated and decided by the Illinois Supreme Court by the People v. Simms II. Petitioner has presented no new evidence to undermine the Court's previous decision. The Supreme Court found that the admission of statements not to have been plain error because the evidence was not closely balance and because the admission does not deny the defendant a fair sentencing hearing. Quoting from the Illinois Supreme Court

> "There is no reasonable probability that the admission of the challenged statement changed the outcome of the sentencing hearing".

CLAIM XVIII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE THE STATE VIOLATED A COURT ORDER AND ELICITED INFORMATION FROM A WITNESS THAT PETITION HAD A PRIOR DEATH PENALTY

Petitioner claims that the State violated a court order by eliciting from a witness testimony regarding Petitioner's prior death penalty sentence. Appellate counsel failed to raise the issue on direct appeal. The Petitioner claims that this Court must consider the State's violation of the motion in limine in light of the numerous incidence's of prosecuterial misconduct and consider the accumulative impact of all the errors in the case. This Court finds that taking the facts is alleged in the Petitioner's brief, as true, it is clear that an objection to Dr. Wahlstrom's testimony was made and sustained before it violated the Petitioner's motion in limine.

CLAIM XIX

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE VICTIM IMPACT EVIDENCE WAS INTRODUCED AT THE SENTENCING HEARING

Petitioner claims that the victim impact evidence was improperly introduced at the sentencing hearing. The victim impact evidence was objected to by trial counsel during the Petitioner's sentencing hearing. Therefore, Petitioner's appellate counsel could have raised this issue on direct appeal but did not. It is well established in Illinois that a claim that could have been but were not raised on direct appeal are waived for consideration on the Post Conviction Hearing Act. While the doctrine of waiver does not bar from consideration an issue that stems from incompetency of counsel on appeal, that same competency must stem from counsels failure to raise issues which were meritorious. Appellate counsel has no

obligation to raise every conceivable argument then might be made and counsels assessment of what to raise and argue will not be questioned unless it is said that his judgment patently erroneous.

CLAIM XX

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE PETITIONER REQUESTED THAT THE STATE DISCLOSE THE AGGRAVATING EVIDENCE WHICH IT INTENDED TO PRODUCE AT THE SENTENCING HEARING

Petitioner claims that he was denied a fair, reliable and accurate sentencing hearing by failure of the State to disclose aggravating evidence and failure to disclose such evidence contributed to the ineffectiveness of trial counsel and that had such evidence been disclosed there is a reasonable probability that the result would have been different. Specifically, Petitioner raises the testimony of Attorney Zellner, the criminal history of Joseph Mogavero and the State's failure to disclose the Hillside police reports. The Supreme Court has repeatedly held that the defendant is not Constitutionally entitled to discovery of the State's aggravating evidence.

CLAIM XXI

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS IN THAT THERE HAS BEEN A DELAY IN EXECUTING THE DEATH SENTENCE IS CRUEL AND UNUSUAL PUNISHMENT

Petitioner states that on three different occasions he has been sentenced to death and that a continued resentencing of death to the defendant by the State is in violation of the double jeopardy clause of the United States and Illinois Constitution and further amounts to the imposition of cruel and unusual punishment. Petitioner has failed to allege this claim at the trial or on directed field therefore this issue has been waived.

CLAIM XXII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE PETITIONER FORMER ATTORNEY , KATHLEEN ZELLNER, TESTIFIED AGAINST THE PETITIONER DURING THE SENTENCING HEARING

Petitioner claims that his Constitutional rights were violated when "his former attorney" Kathy Zellner testified at a sentencing hearing about witnessing a battery and sexual act that the Petitioner committed in the fall of 1991. This Court finds that contrary to the Petitioner's allegation Zellner did not have an attorney-client relationship with Petitioner. Further that Attorney Zellner's testimony concerned observations and not "privileged communications". Petitioner has failed to set forth a confidential relationship between Zellner and the Petitioner. Further this Court finds that even if the Petitioner were able to establish this type of relationship this Petitioner has made no showing that the observation Zellner testified to were in confidence or secret. The acts themselves occurred in a crowded dayroom at the Illinois Department of Corrections where at least two other persons were present. Further this alleged claim was not raised on appeal and is waived.

CLAIM XXIII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS BECAUSE TELANDER WAS APPOINTED AS A SPECIAL PROSECUTOR AND HIS RELATIONSHIP WITH HIS FORMER ATTORNEY, ZELLNER

The Petitioner maintains he was denied his Constitutional right because Brian Telander was appointed as a special prosecutor and that Zellner related to the prosecution observations of criminal conduct she observed which ultimately were used in aggravation evidence in the sentencing hearing. This issue had been presented to the trial court on June 16, 1993 in a motion

to disqualify Attorney Telander. That motion was denied. Petitioner took a direct appeal where he failed to assert any error concerning this ruling. The issue is now barred by principles of res judicata and waiver. Further the Petitioner's claim that the ineffectiveness assistance of trial counsel or appellate counsel is not met by the two pronged test as required under Strickland.

CLAIM XXIV

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE THE TRIAL COURT DENIED THE PETITIONER'S RIGHT OF ALLOCUTION AT THE DEATH PENALTY SENTENCE HEARING

Petitioner claims that he was improperly denied his right of allocution at the death penalty sentencing hearing. The Supreme Court has repeatedly held that there is no statutory or Constitutional right to allocution at the capitol sentencing hearing. Therefore, trial counsel and appellate counsel cannot be found ineffective for failing to raise a merit less claim.

CLAIM XXV

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE THE TRIAL COURT REFUSED TO EITHER LIMIT THE STATE'S TO ONE CLOSING ARGUMENT DURING THE SENTENCING HEARING OR TO PERMIT THE PETITIONER TO OPEN AND CLOSE THE FINAL ARGUMENTS AT THE SENTENCING HEARING

Petitioner states that where the Illinois death penalty statute lacks any burden of persuasion during the second stage of the sentencing hearing and to refuse to limit the State to one closing argument during the sentencing or permitting the Petitioner to open and

close the arguments denied the Petitioner fair and reliable sentencing hearing. This issue could have been and was not raised on direct appeal and therefore is waived. Further this claims is without merit and appellate counsel is not ineffective for raising it. The Supreme Court previously decided this issue adversely in a claim of error in the Ramirez case.

CLAIM XXVI

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS DURING THE GUILT INNOCENT PHASE OF THE TRIAL.

Petitioner alleges that trial counsel was ineffective for failing to request the trial court to vacate the multiple convictions for residential burglary and had trial counsel performed effectively the result of the proceedings would have been different. These claims had been previously addressed earlier in this post-conviction petition ruling.

CLAIM XXVII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS DURING HIS THIRD CAPITAL SENTENCING HEARING

The Petitioner in this claim maintains that as a result of the accumulative errors set forth earlier in this petition of post-conviction relief and based upon the totality of the circumstances he was denied a fair reliable sentencing hearing. Petitioner further claims that had trial counsel performed effectively there was a reasonable probability that the results of the proceedings would have been different. It is the trial court's ruling that these claims have been addressed earlier in the post-conviction petition and that this particular claim is without merit.

CLAIM XXVIII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS ON THE DIRECT APPEAL OF HIS CONVICTION AND THE THIRD CAPITAL SENTENCING HEARING

Petitioner in this claim maintains that appellate counsel was ineffective for failing to raise trial courts ineffectiveness as set forth in the earlier claims in this post-conviction petition and that had appellate counsel performed effectively that is a reasonable probability that the results of the proceedings would have been different. This trial court finds pursuant to it's earlier rulings on the various claims set forth in the post-conviction petition, that this general claim is without merit.

CLAIM XXIX

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT WHERE JURY INSTRUCTIONS GIVEN AT THE FIRST STAGE OF THE SENTENCING HEARING DID NOT INCLUDE A MENTAL STATE FOR THE UNDERLYING FELONIES WHICH NEEDED TO BE PROVED BEYOND A REASONABLE DOUBT IN ORDER FOR THE JURY TO FIND THE PETITIONER

This Court notes nothing in the Petitioner's petition or affidavit demonstrates that the jury in this was misapplied the law. This Court notes that at the time of the trial the Court followed the Illinois pattern jury instructions.

CLAIM XXX

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE PETITIONER'S TENDERED INSTRUCTIONS CONCERNING THE APPLICABILITY OF MERCY WAS REFUSED

Petitioner claims that the jury instructions did not inform the jury that sympathy, mercy or compassionable are relevant considerations. This issue was decided by the Illinois Supreme Court in People v. Simms II and is therefore res judicata. The Petitioner

cannot obtain relief under the post-conviction hearing act by "rerphrasing previously addressed issues and Constitutional terms" in his petition.

CLAIM XXXI

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT OF A FAIR AND RELIABLE SENTENCING HEARING BY FAILING TO GIVE VARIOUS PURPOSED JURY INSTRUCTIONS

Petitioner claims that he was denied a fair reliable sentencing hearing by failure to give certain proposed jury instructions. These instructions could not have and were not challenged on direct appeal therefore, the Petitioner is barred by the doctrine of waiver from raising them in his post-conviction petition. While the doctrine of waiver does not bar from consideration any issue which stems from incompetency of counsel on appeal this incompetency must stem from counsels failure to raise issues which are meritorious. Further the Petitioner has failed to provide any evidence that the outcome of the sentencing hearing would have been different had the proposed instructions been given.

CLAIM XXXII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS BECAUSE UNDER THE ILLINOIS DEATH PENALTY ACT AND UNDER THE JURY INSTRUCTIONS WHICH FAILED TO ADEQUATELY GUIDE THE JURY AS TO WHICH SIDE HAD THE BURDEN OF PROOF AND WHAT THE STANDARD TO APPLY AND CONSIDERING THE MITIGATING EVIDENCE

The Petitioner claims that the jury instructions failed to adequately guide the jury as to which side has the burden of proof and what the standard to applying the mitigating evidence. Again appellate counsel failed to raise this issue on appeal therefore it is waived. The doctrine of waiver is relaxed but only where fundamental fairness requires. Court finds that there is

nothing in the petitioner's post-conviction petition of affidavits that demonstrates the jury in this case was confused or misapplied the law.

CLAIM XXXIII

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE DEATH IS NOT AN APPROPRIATE PENALTY IN THIS CASE

Petitioner claims that death is an inappropriate penalty in this case. This Court finds that this claims fails to allege a substantial violation of a Constitutional right. The purpose of a post-conviction proceeding is to resolve issues of Constitutional violations and not to retry the guilt or innocence of the Petitioner. Upon reviewing the imposition of a death sentence in a particular case the Court must determine whether the circumstances of the crime and defendants character are such that they are deterrent and retributive functions of the sanction will be served by imposing the death penalty. This review requires an individualize consideration of the circumstances of the offense and the character and background of the offender. The cases cited by the Petitioner deal with defendants who led relative blameless lives except for one explosive episode for which they were sentenced to death. Death was the appropriate sentence in this case particularly in light wherein the Illinois Supreme Court in Simms III stated "the evidence was not closely balanced. Defendants crime was especially gruesome involving rape, theft and murder. Furthermore aggravation evidence was extensive showing defendant's long criminal history involving violent crimes against women. Over his lifetime the Petitioner has had extensive dealings with both the juvenile and adult criminal justice systems but Petitioner has failed and remained unrehabilitated".

CLAIM XXXIV

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE THE ILLINOIS DEATH PENALTY STATUTE SHIFTS A BURDEN OF PROOF IN A RISK OF NON PERSUASION TO THE PETITIONER ON THE ISSUE OF LIFE OR DEATH

Petitioner makes a series of claims challenging the factual validity of the death penalty statute. Some of these claims have been previously raised and therefore the doctrine of res judicata applies. Further the Petitioner fails to provide any valid reasons why the remaining claims were not raised on direct appeal and therefore waived. In any event the Illinois Supreme Court has decided each of these claims adversely to the claim of error and therefore the Petitioner is not afforded relaxation of principles of waiver res judicata as a result of either trial counsel or appellate counsels failure to address them.

CLAIMS XXXIV THROUGH CLAIM XLV

This Court adopts the legal reasoning and arguments together with the case law as set forth in the motion to dismiss the post conviction petition filed by DuPage County State's Attorneys Office as it relates to the above numbered claims raised by the Petitioner in his post conviction petition.

WHEREFORE, based upon the reasons stated herein this Memorandum, the Court grants the Peoples Motion To Dismiss Petitioner's Post Conviction Petition and Post Judgment Relief.

State's Attorneys office is instructed to draw an Order in accordance with this Opinion.

Petitioner shall be appointed appellate counsel and notice of appeal shall be filed

instanter.

Respectfully submitted,

RONALD B. MEHLING
Circuit Judge

192 Ill.2d 348
Supreme Court of Illinois.

The PEOPLE of the State of Illinois, Appellee,
v.
Darryl SIMMS, Appellant.

No. 86200.
|
Aug. 10, 2000.

Defendant was convicted of murder, aggravated criminal sexual assault, criminal sexual assault, armed robbery, home invasion, and residential burglary, and was sentenced to death. The Supreme Court, 121 Ill.2d 259, 117 Ill.Dec. 147, 520 N.E.2d 308, affirmed convictions, but vacated death sentence, and after death sentence was imposed in second resentencing, again vacated death sentence and remanded, 143 Ill.2d 154, 157 Ill.Dec. 483, 572 N.E.2d 947. After third death sentence was affirmed, 168 Ill.2d 176, 659 N.E.2d 922, 213 Ill.Dec. 576, defendant sought post-conviction relief. The Circuit Court, Du Page County, Ronald B. Mehling, J., denied petition without an evidentiary hearing. On direct appeal, the Supreme Court, Freeman, J., held that: (1) rule that jurors are not removable for cause because they voice general objections to death penalty does not limit State's use of peremptory challenges at voir dire; (2) instructions, and comments by prosecutor, did not mislead jury regarding its sentencing role; (3) jury was properly instructed on armed robbery charge; (4) allegations that prosecution had failed to disclose evidence which cast doubt on allegedly perjured testimony of prosecution witnesses were sufficient to warrant evidentiary hearing; (5) trial counsel did not fail to subject prosecution's case to adversarial testing; (6) death sentence was not excessive; and (7) 15-year delay in execution of sentence resulting from direct appeal and post-conviction proceedings was not cruel and unusual punishment.

Affirmed in part and reversed in part, and remanded.

Harrison, C.J., dissented and filed opinion.

Attorneys and Law Firms

****1104 *357 ***666** Ronald H. Farley, Jr., of Naperville, for appellant.

James E. Ryan, Attorney General, of Springfield (Joel D. Bertocchi, Solicitor General, and William L. Browers and Colleen M. Griffin, Assistant Attorneys General, of Chicago, of counsel), for the People.

Opinion

Justice FREEMAN delivered the opinion of the court:

On November 14, 1995, defendant, Darryl Simms, filed a post-conviction petition in the circuit court of Du Page County pursuant to the Post–Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 1994)). With leave of court, on May 21, 1997, defendant filed an amended petition in which he sought relief pursuant to the Post–Conviction Hearing Act and section 2–1401 of the Code of Civil Procedure (***358** 735 ILCS 5/2–1401 (West 1994)). On August 12, 1998, the circuit court dismissed the amended petition without an evidentiary hearing. Defendant appeals directly to this court. 134 Ill.2d R. 651(a). We affirm in part, reverse in part and remand for an evidentiary hearing on certain claims raised by defendant.

BACKGROUND

Following a bench trial, defendant was convicted of murder (Ill.Rev.Stat.1985, ch. 38, par. 9–1(a)), aggravated criminal sexual assault (Ill.Rev.Stat.1985, ch. 38, par. 12–14(a)), criminal sexual assault (Ill.Rev.Stat.1985, ch. 38, par. 12–13(a)), armed robbery (Ill.Rev.Stat.1985, ch. 38, par. 18–2), home invasion (Ill.Rev.Stat.1985, ch. 38, par. 12–11(a)) and residential burglary (Ill.Rev.Stat.1985, ch. 38, par. 19–3(a)). At a separate hearing, the trial court sentenced defendant to death. See Ill.Rev.Stat.1985, ch. 38, par. 9–1(b)(6). On direct appeal, this court affirmed defendant's convictions, but reversed and remanded for a new death sentencing hearing because of error during the aggravation-mitigation stage of the hearing. *People v. Simms,* 121 Ill.2d 259, 117 Ill.Dec. 147, 520 N.E.2d 308 (1988) (*Simms I*).

On remand, a jury determined that defendant was eligible for the death penalty and there were no mitigating factors sufficient to preclude the imposition of a death sentence. Accordingly, the trial court sentenced defendant to death. Again, on appeal, this court reversed and remanded for a new death sentencing hearing because of error during

the aggravation-mitigation stage of the hearing. *People v. Simms,* 143 Ill.2d 154, 157 Ill.Dec. 483, 572 N.E.2d 947 (1991) (*Simms II*).

At the third death sentencing hearing, a jury once more found defendant eligible for the death penalty and concluded that there were no mitigating factors sufficient ****1105 ***667** to preclude the imposition of a death sentence. Consequently, the trial court sentenced defendant to death. On appeal, this court affirmed defendant's death sentence. ***359** *People v. Simms,* 168 Ill.2d 176, 213 Ill.Dec. 576, 659 N.E.2d 922 (1995) (*Simms III*). Subsequently, the United States Supreme Court denied defendant's petition for a writ of *certiorari. Simms v. Illinois,* 518 U.S. 1021, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996).

In *Simms I, Simms II,* and *Simms III,* we set forth in detail the facts supporting defendant's convictions and death sentence. To the extent that facts contained in these opinions pertain to the issues defendant raises in his amended petition, we will repeat them as we consider each issue.

DISCUSSION

[1] [2] [3] [4] A proceeding brought under the Post-Conviction Hearing Act is not a direct appeal but a collateral attack on the judgment of conviction. *People v. Hawkins,* 181 Ill.2d 41, 50, 228 Ill.Dec. 924, 690 N.E.2d 999 (1998). The purpose of the proceeding is to determine whether in the proceedings which resulted in the judgment of conviction there was a substantial denial of the petitioner's rights under either the state or federal constitution. 725 ILCS 5/122–1 (West 1994). The petitioner in a post-conviction proceeding is not entitled to an evidentiary hearing as a matter of right (*People v. Evans,* 186 Ill.2d 83, 89, 237 Ill.Dec. 118, 708 N.E.2d 1158 (1999); *People v. Coleman,* 183 Ill.2d 366, 381, 233 Ill.Dec. 789, 701 N.E.2d 1063 (1998); *People v. Guest,* 166 Ill.2d 381, 389, 211 Ill.Dec. 490, 655 N.E.2d 873 (1995)), and the petition cannot consist of nonfactual and nonspecific assertions which merely amount to conclusions that errors occurred at trial (*People v. Kitchen,* 189 Ill.2d 424, 433, 244 Ill.Dec. 890, 727 N.E.2d 189 (1999); *Coleman,* 183 Ill.2d at 381, 233 Ill.Dec. 789, 701 N.E.2d 1063; *Guest,* 166 Ill.2d at 389, 211 Ill.Dec. 490, 655 N.E.2d 873). Rather, the allegations in the petition must be supported by the record in the original trial proceedings or by the affidavits filed with the petition, and the petition is subject to dismissal when the allegations are contradicted by the record. *Coleman,* 183 Ill.2d at 381–82, 233 Ill.Dec. 789, 701 N.E.2d 1063. For the purpose of determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits, ***360** in light of the original trial record, are to be taken as true. *Evans,* 186 Ill.2d at 89, 237 Ill.Dec. 118, 708 N.E.2d 1158; *Coleman,* 183 Ill.2d at 380–82, 233 Ill.Dec. 789, 701 N.E.2d 1063.

[5] [6] [7] [8] [9] [10] In a post-conviction proceeding, issues that could have been presented on the direct appeal of the conviction but were not are deemed waived. *People v. Richardson,* 189 Ill.2d 401, 407–08, 245 Ill.Dec. 109, 727 N.E.2d 362 (2000); *Evans,* 186 Ill.2d at 89, 237 Ill.Dec. 118, 708 N.E.2d 1158. Further, determinations of the reviewing court on direct appeal are *res judicata* as to issues actually decided. *People v. Williams,* 186 Ill.2d 55, 62, 237 Ill.Dec. 112, 708 N.E.2d 1152 (1999); *People v. Griffin,* 178 Ill.2d 65, 73, 227 Ill.Dec. 338, 687 N.E.2d 820 (1997); *People v. Mahaffey,* 165 Ill.2d 445, 452, 209 Ill.Dec. 246, 651 N.E.2d 174 (1995). The petitioner may not avoid the bar of *res judicata* simply by rephrasing issues previously addressed on direct appeal. *Williams,* 186 Ill.2d at 62, 237 Ill.Dec. 112, 708 N.E.2d 1152. On the other hand, when a petitioner's claims are based upon matters outside the record, this court has emphasized that it is not the intent of the Act that such claims be adjudicated on the pleadings. *Kitchen,* 189 Ill.2d at 433, 244 Ill.Dec. 890, 727 N.E.2d 189; *Coleman,* 183 Ill.2d at 382, 233 Ill.Dec. 789, 701 N.E.2d 1063. Rather, the function of the pleadings in a proceeding under the Act is to determine whether the petitioner is entitled to a hearing. *Coleman,* 183 Ill.2d at 382, 233 Ill.Dec. 789, 701 N.E.2d 1063. The circuit court's dismissal of the post-conviction petition without an evidentiary hearing is ****1106 ***668** reviewed *de novo. Coleman,* 183 Ill.2d at 387–89, 233 Ill.Dec. 789, 701 N.E.2d 1063.

As noted above, the circuit court dismissed defendant's amended petition without an evidentiary hearing. The amended petition contains allegations of numerous constitutional violations at defendant's third death sentencing hearing. For the most part, defense counsel did not object to the alleged errors at trial nor include them in a written post-trial motion. Furthermore, on direct appeal, appellate counsel did not include the alleged errors

amongst the issues raised. In anticipation of a claim by the State that the alleged errors have been waived, defendant argues that his trial counsel was ineffective ***361** in failing to preserve the alleged errors for review, and his appellate counsel was ineffective in failing to bring the alleged errors to this court's attention on direct appeal or to argue that trial counsel was ineffective.

[11] [12] [13] [14] A defendant is guaranteed the effective assistance of counsel at trial and at a death sentencing hearing. *Strickland v. Washington,* 466 U.S. 668, 686–87, 104 S.Ct. 2052, 2063–64, 80 L.Ed.2d 674, 692–93 (1984). A defendant is also guaranteed the effective assistance of counsel on direct appeal as of right (*Evitts v. Lucey,* 469 U.S. 387, 396–97, 105 S.Ct. 830, 836–37, 83 L.Ed.2d 821, 830–31 (1985)), and a claim of ineffective assistance of appellate counsel is cognizable under the Post–Conviction Hearing Act (*People v. Mack,* 167 Ill.2d 525, 531, 212 Ill.Dec. 955, 658 N.E.2d 437 (1995)). Accordingly, this court has held that the doctrine of waiver should not bar consideration of an issue where the alleged waiver stems from incompetency of appellate counsel in failing to raise the issue on appeal. *Mack,* 167 Ill.2d at 531–32, 212 Ill.Dec. 955, 658 N.E.2d 437; *Guest,* 166 Ill.2d at 390, 211 Ill.Dec. 490, 655 N.E.2d 873; *People v. Caballero,* 126 Ill.2d 248, 269–70, 128 Ill.Dec. 1, 533 N.E.2d 1089 (1989).

[15] To establish a claim of ineffective assistance of counsel, a defendant must satisfy the familiar *Strickland* test. See *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. The test is composed of two prongs: deficiency and prejudice. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

[16] First, the defendant must prove that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. A court measures counsel's performance by an objective standard of competence under prevailing professional norms. To establish deficiency, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Evans,* 186 Ill.2d at 93, 237 Ill.Dec. 118, 708 N.E.2d 1158; *Griffin,* 178 Ill.2d at 73–74, 227 Ill.Dec. 338, 687 N.E.2d 820.

[17] ***362** Second, the defendant must establish prejudice. The defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The prejudice prong of *Strickland* entails more than an "outcome-determinative" test. The defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Evans,* 186 Ill.2d at 93, 237 Ill.Dec. 118, 708 N.E.2d 1158; *Griffin,* 178 Ill.2d at 74, 227 Ill.Dec. 338, 687 N.E.2d 820.

[18] A defendant must satisfy both prongs of the *Strickland* test. Therefore, "failure to establish either proposition will be fatal to the claim." *People v. Sanchez,* 169 Ill.2d 472, 487, 215 Ill.Dec. 59, 662 N.E.2d 1199 (1996); accord *Guest,* 166 Ill.2d at 390, 211 Ill.Dec. 490, 655 N.E.2d 873.

[19] [20] [21] [22] A court uses the *Strickland* analysis also to test the adequacy of appellate counsel. ****1107 ***669** *Mahaffey,* 165 Ill.2d at 458, 209 Ill.Dec. 246, 651 N.E.2d 174; *Caballero,* 126 Ill.2d at 269–70, 128 Ill.Dec. 1, 533 N.E.2d 1089. A defendant who contends that appellate counsel rendered ineffective assistance, *e.g.,* by failing to argue a particular issue, must show that appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced the defendant. *People v. West,* 187 Ill.2d 418, 435, 241 Ill.Dec. 535, 719 N.E.2d 664 (1999) (and cases cited therein). Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Easley,* 192 Ill.2d 307, 329, 249 Ill.Dec. 537, 736 N.E.2d 975 (2000); *West,* 187 Ill.2d at 435, 241 Ill.Dec. 535, 719 N.E.2d 664. Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue (*Mack,* 167 Ill.2d at 534, 212 Ill.Dec. 955, 658 N.E.2d 437), for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal (*Easley,* 192 Ill.2d at 329, 249 Ill.Dec. 537, 736 N.E.2d 975; *West,* 187 Ill.2d at 435, 241 Ill.Dec. 535, 719 N.E.2d 664; *Guest,* 166 Ill.2d at 390, 211 Ill.Dec. 490, 655 N.E.2d 873).

With these principles in mind, we turn to the specific allegations in defendant's amended petition.

*363 I. Peremptory Challenges

[23] Defendant contends that he was denied a fair sentencing hearing because the State used its peremptory challenges to remove six prospective jurors who expressed reservations about the death penalty, but were not excusable for cause under *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and its progeny. Under *Witherspoon,* prospective jurors may not be excused for cause merely because they voice general objections to the death penalty or express conscientious or religious scruples against the imposition of the death penalty. *Witherspoon,* 391 U.S. at 522, 88 S.Ct. at 1776–77, 20 L.Ed.2d at 784–85. Defendant complains that, through the use of its peremptory challenges, the State was able to do what it could not do under *Witherspoon:* obtain a jury inclined to return a verdict imposing the death sentence. Defendant concludes that the trial court erred in allowing the State to exercise its peremptory challenges to excuse the prospective jurors.

[24] Defendant concedes that trial counsel failed to preserve the issue for review because counsel neither objected to the removal of the prospective jurors during *voir dire* nor raised the issue in a post-trial motion. See *People v. Gilliam,* 172 Ill.2d 484, 510, 218 Ill.Dec. 884, 670 N.E.2d 606 (1996); *People v. Pasch,* 152 Ill.2d 133, 168, 178 Ill.Dec. 38, 604 N.E.2d 294 (1992). Defendant also concedes that, on direct appeal, appellate counsel did not question the State's use of the peremptory challenges or argue that trial counsel was ineffective in failing to preserve the issue for review. All of the facts needed to raise this issue were present in the record and available on direct appeal. As stated above, any claim that could have been, but was not, presented to the reviewing court on direct appeal is, thereafter, barred under the doctrine of waiver. *Evans,* 186 Ill.2d at 92, 237 Ill.Dec. 118, 708 N.E.2d 1158.

[25] [26] [27] Defendant contends, however, that trial counsel was ineffective in failing to preserve this issue for review, and appellate counsel was ineffective in failing to argue on *364 direct appeal that trial counsel was ineffective. We disagree. This court has repeatedly held that *Witherspoon* and its progeny do not limit the State's use of peremptory challenges at *voir dire. People v. Coleman,* 168 Ill.2d 509, 549, 214 Ill.Dec. 212, 660 N.E.2d 919 (1995); *People v. Williams,* 161 Ill.2d 1, 55–56, 204 Ill.Dec. 72, 641 N.E.2d 296 (1994); *People v. Howard,* 147 Ill.2d 103, 136–38, 167 Ill.Dec. 914, 588 N.E.2d 1044 (1991); *People* **1108 ***670 *v. Lear,* 143 Ill.2d 138, 150, 157 Ill.Dec. 412, 572 N.E.2d 876 (1991); *People v. Stewart,* 104 Ill.2d 463, 481–82, 85 Ill.Dec. 422, 473 N.E.2d 1227 (1984). Thus, contrary to defendant's assertion, trial counsel was not ineffective for failing to object to the use of the peremptory challenges at *voir dire* or to include the issue in a post-trial motion. Moreover, given our repeated rejection of this claim, appellate counsel cannot be deemed ineffective for failing to raise this issue on appeal or argue that trial counsel was ineffective.

II. *Caldwell* Violations

Citing *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), defendant maintains that the jury was misinformed by the trial court and the State that the jury's role was to "recommend" whether defendant should be sentenced to death. Defendant contends his death sentence must, therefore, be vacated.

At the death sentencing hearing, the trial court conducted individual, sequestered *voir dire.* The trial court used the word "recommend" once in its examination of jurors Peterson, Henning, Brunke, Stephen, and Slager, and twice in its examination of juror Chick. Defendant notes that the trial court also told juror Slager that she had "kind of a limited role." The State used the word "recommend" once in its examination of juror Bozec.

[28] [29] Trial counsel did not object during *voir dire* to the use of the word "recommend." Nor did trial counsel include this issue in a post-trial motion. Appellate counsel neither raised this issue on direct appeal nor argued that trial counsel was ineffective in failing to preserve the issue *365 for review. All of the facts supporting this claim were present in the record and available on direct appeal. The issue is thus waived. *Evans,* 186 Ill.2d at 92, 237 Ill.Dec. 118, 708 N.E.2d 1158; *People v. Lear,* 175 Ill.2d 262, 278, 222 Ill.Dec. 361, 677 N.E.2d 895 (1997). However, as with his challenge to the State's use of the peremptory challenges, defendant argues ineffectiveness of trial counsel in failing to preserve the issue for review and appellate counsel in failing to argue that trial counsel was ineffective. Consequently, we consider the merits of

this issue. *Lear,* 175 Ill.2d at 278, 222 Ill.Dec. 361, 677 N.E.2d 895.

[30] **[31]** In *Caldwell,* the Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell,* 472 U.S. at 328–29, 105 S.Ct. at 2639, 86 L.Ed.2d at 239. In evaluating an alleged *Caldwell* violation, this court considers the challenged remarks in the context of the entire sentencing proceeding. *People v. Flores,* 153 Ill.2d 264, 287, 180 Ill.Dec. 1, 606 N.E.2d 1078 (1992); *People v. Fields,* 135 Ill.2d 18, 57, 142 Ill.Dec. 200, 552 N.E.2d 791 (1990). This court also considers whether the jury instructions and the verdict forms accurately set forth the law regarding the jury's role in imposing the death penalty (*Flores,* 153 Ill.2d at 287, 180 Ill.Dec. 1, 606 N.E.2d 1078; *Fields,* 135 Ill.2d at 57, 142 Ill.Dec. 200, 552 N.E.2d 791; *People v. Perez,* 108 Ill.2d 70, 91, 90 Ill.Dec. 932, 483 N.E.2d 250 (1985)) and the balance between aggravation and mitigation at sentencing (*Flores,* 153 Ill.2d at 287, 180 Ill.Dec. 1, 606 N.E.2d 1078; *Howard,* 147 Ill.2d at 164, 167 Ill.Dec. 914, 588 N.E.2d 1044). No single factor is necessarily dispositive. *Flores,* 153 Ill.2d at 287, 180 Ill.Dec. 1, 606 N.E.2d 1078. The relevant inquiry, considering all the facts and circumstances, is whether the trial court and/or the State misled the jury regarding its sentencing role. *Flores,* 153 Ill.2d at 287, 180 Ill.Dec. 1, 606 N.E.2d 1078; *Perez,* 108 Ill.2d at 90–91, 90 Ill.Dec. 932, 483 N.E.2d 250.

[32] We consider, then, whether the remarks defendant challenges misled the jury. As noted above, use of the word "recommend" at *voir dire* was limited to ****1109** *****671** one comment to each of six jurors, and two comments to the ***366** seventh juror. The trial court conducted individual, sequestered *voir dire,* hence a comment made to one juror would not have been heard by another. Moreover, the jury was repeatedly informed of its responsibility in imposing the death sentence by the trial court, the State, and the defense. In opening remarks at *voir dire,* the trial court informed the prospective jurors that the jury's role was to decide whether defendant was eligible for the death penalty. During questioning of the individual venire members, the trial court repeatedly informed the prospective jurors they would decide whether defendant should be sentenced to death, and the trial court would be bound by that decision. The State and the defense also informed the prospective jurors of the important role they played in the sentencing process. Each of the prospective jurors in question expressed understanding of the jury's role in imposing the death sentence. Lastly, both the jury instructions and the verdict forms accurately set forth the law.

The trial court's remark to juror Slager that she had "kind of a limited role" is taken entirely out of context, as the following questions by the trial court and answers by the juror demonstrate:

> "Q. Then if you determine that he is eligible, then we go to the heart of the case, which would be does he receive the death penalty or not?
>
> A. Yes.
>
> Q. Those are two separate hearings, two separate stages. You understand that?
>
> A. Yes.
>
> Q. Even though you may find him eligible, you don't have to impose the death penalty. On the other hand, if you feel that that's called for under the evidence and the law?
>
> A. Yes.
>
> Q. Should your decision be something other than recommending the death sentence, the matter would be turned over back to the Court and the Court would impose a sentence other than death. You understand that?
>
> ***367** A. Yes.
>
> Q. Are you comfortable with that aspect?
>
> A. Yes.
>
> Q. It is kind of a limited role. You are not deciding guilt or innocence, you are really deciding the penalty aspect and only as it relates to whether he should receive the death penalty or not.
>
> A. Yes."

Viewed in the context of the entire sentencing proceeding, we conclude that the challenged remarks did not mislead the jury regarding its sentencing role. Accordingly, trial

counsel and appellate counsel were not ineffective with respect to this claim.

[33] In a related argument, defendant maintains that three statements the State made to the jury served to diminish the jury's sense of responsibility in imposing the death penalty. During closing argument, the following colloquies took place between prosecutor Telander, defense counsel Brucar, and the trial court:

"MR. TELANDER: The law in this case is what controls your decision and what is going to happen.

Mr. Brucar's argument wants you to feel guilty for following the law. He wants you to think that you are killing Darryl Simms, that you are with premeditation murdering Darryl Simms.

That's just not what is occurring here—

MR. BRUCAR: Objection, I didn't use the term murder.

THE COURT: All right.

MR. TELANDER: *Killing Darryl Simms. That's not what is happening here. That is not the purpose of the hearing.* It is not why every one of us is in this courtroom.

****1110** *****672** We are in this courtroom for one reason. The law.

* * *

MR. TELANDER: [The judge] is going to tell you if you find that there's not a sufficient mitigating factor, the defendant is to be sentenced to death.

That's your job. *Not to think about is the death penalty right or wrong. Is the death penalty final.* Should we consider mercy to Darryl Simms.

***368** MR. BRUCAR: Objection, they can consider mercy for Darryl Simms.

THE COURT: That's true. But it is argument. I will allow him to argue.

* * *

MR. TELANDER: You have to judge your verdict on the evidence.

And *don't let Mr. Brucar make you feel guilty for fulfilling your oath as jurors. You are not killing anyone.*

You are following the law that you swore to do." (Emphasis added.)

Defendant complains of the italicized statements. [1]

1 Throughout this opinion, we consider defendant's challenges to various remarks made by the prosecution or defense counsel. Since we must consider the challenged remarks in context, we have italicized each remark to differentiate the remark from other comments we have provided for context.

Once more, we note trial counsel's failure to object to the remarks at the sentencing hearing, and appellate counsel's failure to argue on direct appeal that trial counsel was ineffective. Waiver applies. *Evans,* 186 Ill.2d at 92, 237 Ill.Dec. 118, 708 N.E.2d 1158. However, we consider the merits of the issue because defendant maintains that trial and appellate counsel were ineffective. *Lear,* 175 Ill.2d at 278, 222 Ill.Dec. 361, 677 N.E.2d 895.

Throughout closing argument, the State argued that the jury's role was to determine whether defendant should be sentenced to death. The State informed the jury that its decision to impose the death penalty would be binding on the trial court. The State also argued that it was not the province of the jury to determine the validity of the death penalty. Rather, the jury should impose the death penalty, if appropriate, without feeling guilty for following the law. See *Pasch,* 152 Ill.2d at 206, 178 Ill.Dec. 38, 604 N.E.2d 294. The State's argument addressed defense counsel's arguments that the State was asking the jury to kill defendant; that the death penalty is final; and the jury's decision to impose the death penalty would stay with it forever.

Defense counsel made an emotional plea for defendant's ***369** life. Repeatedly, counsel told the jury that it would decide whether defendant should live or die, and it had the power to take defendant's life or to spare defendant's life. Thus, counsel nurtured and reinforced the jury's sense of responsibility. We note again that both the jury instructions and the verdict forms accurately set forth the law regarding the jury's role in imposing the death penalty.

Having reviewed the challenged remarks in the context of the entire sentencing proceeding, we conclude that the remarks did not lead the jury to feel less responsible for its sentencing decision. See *People v. Burgess,* 176 Ill.2d 289, 318–19, 223 Ill.Dec. 624, 680 N.E.2d 357 (1997); *Lear,* 175 Ill.2d at 279, 222 Ill.Dec. 361, 677 N.E.2d 895; *People v. Moore,* 171 Ill.2d 74, 120, 215 Ill.Dec. 75, 662 N.E.2d 1215 (1996). Consequently, trial counsel and appellate counsel were not ineffective with respect to this claim.

In a final *Caldwell* challenge, defendant maintains that juror Jekkals was misled regarding her role in imposing the death penalty. During *voir dire,* the State asked juror Jekkals whether she would "sign a verdict recommending the death sentence" if she felt the sentence was appropriate. In an affidavit attached to defendant's post-conviction petition, a defense investigator states that juror Jekkals told the investigator she believed she was making a ****1111 ***673** recommendation to the trial judge whether or not to impose the death penalty.

[34] We note that defendant's challenge to the State's remark at *voir dire* has been waived. *Evans,* 186 Ill.2d at 92, 237 Ill.Dec. 118, 708 N.E.2d 1158. However, the affidavit attached to the petition is evidence unavailable to defendant on direct appeal. Further, defendant maintains that he received ineffective assistance of trial and appellate counsel. We therefore address the issue on the merits. See *Evans,* 186 Ill.2d at 94, 237 Ill.Dec. 118, 708 N.E.2d 1158.

In *People v. Holmes,* 69 Ill.2d 507, 14 Ill.Dec. 460, 372 N.E.2d 656 (1978), this court held that testimony or an affidavit of a juror cannot be used to impeach the verdict reached by a jury, where the ***370** testimony or affidavit is offered in an attempt to prove the motive, method or process by which the jury reached its verdict. The court reasoned that " 'being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore * * * such testimony should not be received to overthrow the verdict to which all assented.' " *Holmes,* 69 Ill.2d at 512–13, 14 Ill.Dec. 460, 372 N.E.2d 656, quoting *State v. Kociolek,* 20 N.J. 92, 99, 118 A.2d 812, 816 (1955).

In the present case, the jury was polled in open court. Each juror, Jekkals included, affirmed that the verdict read in court was his or her verdict. The statement attributed to juror Jekkals in the affidavit is offered to show that she believed she was making a recommendation to the trial court regarding the death penalty; the judge would actually decide whether to impose the death penalty. Such a statement calls into question the "motive, method or process by which the jury reached its verdict." Consequently, the affidavit may not be used to impeach the verdict reached by the jury. See *People v. Hobley,* 182 Ill.2d 404, 457, 231 Ill.Dec. 321, 696 N.E.2d 313 (1998); *People v. McDonald,* 168 Ill.2d 420, 457, 214 Ill.Dec. 125, 660 N.E.2d 832 (1995); *People v. Towns,* 157 Ill.2d 90, 112, 191 Ill.Dec. 24, 623 N.E.2d 269 (1993).

In reviewing each of the alleged *Caldwell* violations, we conclude that the jury was not misled regarding its role in imposing the death penalty. Thus, trial counsel was not ineffective in failing to preserve the issues for review, and appellate counsel was not ineffective in failing to raise the issues on direct appeal or argue that trial counsel was ineffective. Defendant is not entitled to an evidentiary hearing on these claims.

III. Jury's Failure to Consider All Elements in Determining Eligibility

Defendant notes that, in order to find him eligible for the death penalty, the jury was first required to find he murdered Lillian LaCrosse in the course of another ***371** felony. Defendant maintains that certain remarks made by prosecutor Telander during closing argument led the jury to believe it did not have to make a separate finding regarding eligibility but could simply rely on the certified copies of convictions:

> "[MR. TELANDER]: And the last thing we have to show is that the other felony was either aggravated criminal sexual assault or home invasion or armed robbery. * * * If you find that any one of those three felonies existed, he is eligible. But in this case I believe and assert from the evidence that all three existed. And again, how do you know that? Not because I told you. *Not even really because the evidence has told you, but it has.* But you have certified copies of convictions saying that Mr. Simms was convicted of aggravated criminal sexual assault. Mr. Simms was convicted of home invasion, and he was convicted of armed robbery.

* * *

> *I don't mean to make light of your decision, because it is not a light decision. But the decision under the law, you really have no choice to make.* Beyond ****1112** *****674** a reasonable doubt, every single element has been proven, frankly beyond all doubt.
>
> * * *
>
> In addition to the certified copies of convictions, you also have certain facts. A small piece of the trial is brought in to show you what the case was about. To show you how you know he invaded her home, how you know in addition to the convictions that he raped her, how you know he murdered her and how you know he robbed her." (Emphasis added.)

[35] Defense counsel did not object to the italicized remarks at the death sentencing hearing. Further, counsel did not complain of the remarks in a post-trial motion. Appellate counsel did not raise this issue on direct appeal although the facts needed to present the claim were present in the record and available to defendant. Once again, defendant maintains that waiver ***372** should not apply because trial counsel was ineffective in failing to preserve the issue for review, and appellate counsel was ineffective in failing to raise the issue on direct appeal. Thus, we must examine the claim on its merits.

[36] Initially, we observe that the State produced extensive evidence at the death sentencing hearing regarding the commission of the murder, home invasion, aggravated criminal sexual assault and armed robbery. Fourteen witnesses testified at the hearing regarding the circumstances of the crimes. The State also introduced testimony of several witnesses by stipulation. Lastly, the State introduced numerous exhibits relevant to the crimes into evidence.

[37] Next, we note that the trial court instructed the jury it was the jury's duty to determine the facts from the evidence; to apply the law to the facts and in this way decide whether defendant was eligible for a death sentence. The jury was told to presume that defendant was not eligible for the death sentence, a presumption which could not be overcome unless, from all the evidence, the jury was convinced beyond a reasonable doubt that defendant was eligible for a death sentence. The trial court also instructed the jury that the State was required to prove that defendant killed Lillian LaCrosse in the course of an armed robbery, aggravated criminal sexual assault or home invasion. The jury was given two verdict forms: the first declared that the jury could not unanimously find that defendant was eligible for the death sentence because it could not determine that the statutory aggravating factor existed; the second declared that the jury unanimously found that the statutory aggravating factor existed and defendant was eligible for the death penalty. The jurors signed the second verdict form, thereby indicating they had found unanimously that defendant killed Lillian LaCrosse during the course ***373** of another felony. The jury instructions and the verdict forms were proper statements of the law. We must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *Simms II,* 143 Ill.2d at 174, 157 Ill.Dec. 483, 572 N.E.2d 947.

Lastly, the remarks assigned as error were juxtaposed to other statements informing the jury that in order to find defendant eligible for the death penalty, it had to determine defendant killed Lillian LaCrosse in the course of an armed robbery, aggravated criminal sexual assault or home invasion. The State also detailed to the jury the evidence supporting a determination that defendant had committed armed robbery, aggravated criminal sexual assault and home invasion, and asked that the jury find the statutory aggravating factors existed.

In turn, defense counsel informed the jury:

> "You have got a duty here to scrutinize every scintilla [of] evidence in this case. You have to be satisfied beyond a reasonable doubt that these felonies occurred ****1113** *****675** in the course of a murder. Now, you have to ask yourself another question. The evidence that they put in front of you, is it enough to find that person eligible to be killed?"

Defense counsel reviewed the evidence for the jury, arguing the evidence failed to show a forced entry into Lillian LaCrosse's apartment or the use of a weapon or threats to take her property. Trial counsel also highlighted the evidence supporting defendant's claim of an affair and consensual sex with Lillian LaCrosse. In conclusion, counsel told the jury:

> "And you have got a duty to do. You can't put it off on some other Court, saying conviction[s] got to enter, that's it. You can't do that. You are good people, you can't do that. You took an oath, you can't do that. You have to ask yourself, is there enough evidence here for someone to be eligible to be killed?"

In light of the above, we conclude that the jury was not misled regarding the scope of its duties. See *Fields,* 135 Ill.2d at 57, 142 Ill.Dec. 200, 552 N.E.2d 791; *Perez,* 108 Ill.2d at 91, 90 Ill.Dec. 932, 483 N.E.2d 250. The jury was ***374** well aware that it had to determine the existence of a statutory aggravating factor, and the signed verdict form evinces such a determination. For this reason, we reject defendant's claim that trial counsel was ineffective for failing to preserve the issue for review and that appellate counsel was ineffective for failing to raise the issue on direct appeal.

IV. Multiple Convictions

[38] Defendant argues that he was improperly prejudiced by the admission, during the aggravation-mitigation phase of the death sentencing hearing, of four certificates of conviction for residential burglary, all related to defendant's entry into Lillian LaCrosse's apartment on the date of the murder. Defendant notes he could only be guilty of one count of residential burglary. He contends the jury may have believed the three additional convictions for residential burglary were relevant to a determination of his sentence.

Defendant raised this issue on direct appeal. See *Simms III,* 168 Ill.2d at 198, 213 Ill.Dec. 576, 659 N.E.2d 922. The court's determination in *Simms III* is *res judicata. Griffin,* 178 Ill.2d at 73, 227 Ill.Dec. 338, 687 N.E.2d 820.

Defendant maintains, however, that he challenged his convictions in *Simms I,* but the court failed to address the issue. Hence, defendant argues that the court should not have held in *Simms III* that defendant could not challenge his convictions. We decline defendant's invitation to revisit this issue.

V. Jury Instruction–Underlying Felonies

[39] Defendant maintains that the trial court erred in failing to instruct the jury regarding the mental state necessary to sustain a conviction for aggravated criminal sexual assault or armed robbery. Although the jury was instructed regarding the mental state necessary to sustain a conviction for home invasion, the jury returned a general verdict, finding that the aggravating factor ***375** existed, without specifying that its verdict was based on the underlying offense of home invasion. Defendant argues his death sentence must be vacated because the jury may have determined that he was eligible for the death sentence based on the underlying offense of aggravated criminal sexual assault or the underlying offense of armed robbery.

Defendant acknowledges that trial counsel failed to object to the instructions the trial court gave the jury and failed to offer alternate instructions. Also, appellate counsel failed to raise this issue on direct appeal. Defendant maintains, however, that trial counsel was ineffective because trial counsel failed to object to the instructions or offer alternate instructions, and appellate counsel was ineffective because appellate counsel failed to argue that trial counsel was ineffective. We disagree.

In *People v. Terrell,* 132 Ill.2d 178, 209, 138 Ill.Dec. 176, 547 N.E.2d 145 (1989), ****1114** *****676** this court held that the legislature did not intend the aggravated criminal sexual assault statute (Ill.Rev.Stat.1985, ch. 38, par. 12–14) to define a strict liability or public welfare offense. Since the aggravated criminal sexual assault statute does not prescribe a mental state applicable to the offense, a mental state of intent, knowledge or recklessness must be implied. *Terrell,* 132 Ill.2d at 209, 138 Ill.Dec. 176, 547 N.E.2d 145, citing Ill.Rev.Stat.1985, ch. 38, pars. 4–3 through 4–6, 4–9. This court, however, did not consider the additional issue presented here, namely, what, if any, jury instructions are required for the offense of aggravated criminal sexual assault.

In *People v. Burton,* 201 Ill.App.3d 116, 146 Ill.Dec. 1035, 558 N.E.2d 1369 (1990), our appellate court considered this issue and rejected the defendant's contention that he was entitled to instructions setting forth the required mental states the State had to prove to convict him of aggravated criminal sexual assault. The *Burton* court explained that the mental states implied by section 4–3

of the Criminal Code are *376 in the nature of general criminal mental states, distinguished from specific mental states about which the jury must be advised in instructions defining an offense or describing the elements the State must prove. Further, the *Burton* court noted that the mental states implied by section 4–3 of the Criminal Code are mental states which almost always accompany the acts alleged. The *Burton* court concluded:

> "[S]ome mental states involved in offenses, although not specifically mentioned in the statute defining the offense, may be implied in the offense and be specific enough to require instruction to the jury. Under some circumstances, the mental state implied by section 4–3 of the Code may possibly be so specific as to require instruction. [Citation.]
>
> Here, the implied mental states were not specific, and the circuit court did not err in giving the pattern instructions, which did not set forth those mental states." *Burton,* 201 Ill.App.3d at 122, 146 Ill.Dec. 1035, 558 N.E.2d 1369.

Accord *People v. Giles,* 261 Ill.App.3d 833, 845, 200 Ill.Dec. 630, 635 N.E.2d 969 (1994); *People v. Franzen,* 251 Ill.App.3d 813, 830, 190 Ill.Dec. 847, 622 N.E.2d 877 (1993); *People v. Fryer,* 247 Ill.App.3d 1051, 1060, 187 Ill.Dec. 786, 618 N.E.2d 377 (1993); *People v. Bock,* 242 Ill.App.3d 1056, 1075–76, 183 Ill.Dec. 525, 611 N.E.2d 1173 (1993). See also *People v. Bofman,* 283 Ill.App.3d 546, 550–51, 219 Ill.Dec. 118, 670 N.E.2d 796 (1996); *People v. Robinson,* 265 Ill.App.3d 882, 888–89, 202 Ill.Dec. 411, 637 N.E.2d 1147 (1994); *People v. Adams,* 265 Ill.App.3d 181, 187, 202 Ill.Dec. 608, 638 N.E.2d 254 (1994); *People v. Calva,* 256 Ill.App.3d 865, 870, 195 Ill.Dec. 392, 628 N.E.2d 856 (1993).

We agree with the *Burton* court that jury instructions on a specific mental state are not required for the offense of aggravated criminal sexual assault. Consequently, we reject defendant's argument that trial counsel was ineffective for failing to object to the instructions or to offer alternate instructions. We also reject defendant's argument that appellate counsel was ineffective for failing to argue that trial counsel was ineffective.

[40] Next, we consider whether the trial court should have instructed the jury on a specific mental state for the offense of armed robbery. Initially, we note that the statutory provision for the offense of armed robbery, like the *377 statutory provision for the offense of aggravated criminal sexual assault, does not prescribe a particular mental state applicable to the elements of the offense. However, in *People v. Jones,* 149 Ill.2d 288, 297, 172 Ill.Dec. 401, 595 N.E.2d 1071 (1992), this court held that, pursuant to section 4–3 of the Criminal Code, "either intent, knowledge or recklessness is an element of robbery."

[41] **[42]** **[43]** In *People v. Lewis,* 165 Ill.2d 305, 209 Ill.Dec. 144, 651 N.E.2d 72 (1995), this court stated that robbery is a general intent crime, and, unlike specific intent **1115 ***677 crimes, proof that the prohibited harm was intended is not necessary to proof of a general intent crime. *Lewis,* 165 Ill.2d at 337, 209 Ill.Dec. 144, 651 N.E.2d 72. The court concluded that "proof that robbery was intended is not required to sustain a conviction for armed robbery. The gist of armed robbery is simply the taking of another's property by force or threat of force." *Lewis,* 165 Ill.2d at 338, 209 Ill.Dec. 144, 651 N.E.2d 72.

[44] In the present case, evidence was presented that defendant stabbed Lillian LaCrosse and took her purse, her jeans, and a movie camera her parents owned. This evidence supported defendant's conviction for armed robbery. In a statement he gave to the police, defendant admitted killing Lillian LaCrosse but claimed that he took her purse and the movie camera because he feared he had left fingerprints on them the previous afternoon. However, defendant's subjective intent in taking the property, *i.e.,* to dispose of items containing incriminating evidence, was of no import. The jury was instructed that a person commits the offense of armed robbery when he, while carrying on or about his person or while otherwise armed with a dangerous weapon, takes property from the person or presence of another by the use of force or by threatening the imminent use of force. This instruction was appropriate since the mental state of intent, knowledge or recklessness could be inferred from the circumstances of the crime. Pursuant to this court's holding in *Lewis,* the State was not required to prove *378 that defendant acted with the subjective intent to rob Lillian LaCrosse, nor was the trial court required to instruct that the jury must find defendant acted with the subjective intent to rob. See also *People v. Garland,* 254 Ill.App.3d 827, 194 Ill.Dec. 261, 627 N.E.2d 377 (1993); *People v. Childrous,* 196 Ill.App.3d 38, 54, 142 Ill.Dec. 511, 552 N.E.2d 1252 (1990) (listing cases holding mental state is not an essential element for jury instructions on

armed robbery). Thus, trial counsel was not ineffective in failing to object to the jury instructions on armed robbery or offer alternate instructions, and appellate counsel was not ineffective in failing to raise the issue on direct appeal or argue that trial counsel was ineffective.

VI. Disclosure of Aggravating Evidence

[45] Defendant filed a bill of particulars as well as a motion to compel the prosecution to disclose nonstatutory aggravating factors. The trial court denied the motion. Defendant maintains that the death sentencing hearing is a critical stage of trial, and he needed notice and time to prepare a response to the nonstatutory aggravating factors the State intended to introduce. He assigns error to the trial court's denial of his motion to compel.

Trial counsel did not raise this issue in a post-trial motion. Appellate counsel did not raise this issue on direct appeal or argue that trial counsel was ineffective. In his amended petition, defendant has not alleged that appellate counsel was ineffective in this respect. As noted above, issues that could have been presented on direct appeal but were not are waived in subsequent proceedings. *Evans,* 186 Ill.2d at 89, 237 Ill.Dec. 118, 708 N.E.2d 1158. Thus, we conclude that this issue is procedurally barred.

VII. Testimony of Attorney

In his amended petition, defendant argues that the State should not have had attorney Katherine Zellner testify at the second stage of the death sentencing hearing regarding an incident she observed in 1991. Defendant ***379** contends that the information Zellner possessed regarding the incident was subject to the attorney-client privilege and should not have been disclosed absent a waiver of the attorney-client privilege. In a related argument, defendant maintains that Zellner should not have agreed to represent him in 1992 because she knew she might be a witness against him regarding the 1991 incident, and because prosecutor Telander was her partner. The basis for Zellner and Telander's ****1116** *****678** partnership was their joint representation, pursuant to court appointment, of a criminal defendant in Du Page County over a six-month period in 1992. Defendant asserts he was denied the effective assistance of counsel because Zellner's representation of defendant was subject to a *per se* conflict of interest.

At the death sentencing hearing, Zellner testified that in the fall of 1991, while interviewing a client in the visiting room at Pontiac Correctional Center, she observed defendant strike his wife, Christine Simms, in the face. Defendant then unzipped his pants, and his wife performed oral sex on him. Although there are television cameras in the visiting room, they do not record activities at some of the tables in the visiting room. Zellner did not report the incident to the guard seated at a desk by the door. She had reported a sex act she observed on another visit to this very guard, and he failed to take action. Zellner also testified that when she learned that Birkett was prosecuting defendant's case, she told Birkett about the oral sex incident.

At the conclusion of the death sentencing hearing, defendant motioned that the trial court appoint new counsel to review specific allegations of ineffectiveness of trial counsel. Defendant alleged, *inter alia,* that trial counsel was ineffective because he did not have defendant testify to rebut Zellner's testimony. At a post-trial hearing on defendant's motion, Zellner testified as follows. ***380** In the spring of 1992, while she and her associate, Daniel DeLay, were interviewing Larry Eiler, a prisoner at Pontiac she had been appointed to represent, defendant asked Eiler if defendant could talk to Zellner for a moment. Defendant and his wife, Christine Simms, then spoke with Zellner and DeLay. Defendant asked Zellner what she thought of Telander; whether it was ethically appropriate for Telander to become close to the LaCrosse family. She answered that she and Telander were both representing a criminal defendant in Du Page County and, in her opinion, Telander is an ethical attorney. Defendant then asked her if she would see Telander sometime soon. She replied she would see him within the next two weeks. Defendant requested that she ask Telander whether some kind of a deal could be worked out if defendant pled guilty. She said, "I don't know anything about your case, but I will convey the message." Subsequently, she spoke with Telander, with Birkett present. When she told Telander that defendant wanted to plead guilty, Telander and Birkett laughed, explaining that guilt was not at issue; defendant's case had been remanded for a new sentencing hearing.

Zellner also testified that she told Telander and Birkett about the 1991 oral sex incident. She could not recall whether she told them about the incident at the time she relayed defendant's plea-bargaining request or during another conversation. However, she believes they only had one conversation about defendant. Zellner stated that she did not tell defendant and his wife that Telander was a close friend. The first time she met Telander was when they were appointed to jointly represent a criminal defendant in Du Page County. Telander withdrew from the case after six months. Zellner also stated that she has never accepted a defendant facing the death penalty as a private client. She has only represented such defendants when she has been appointed by the court.

***381** We consider first whether Zellner should have been allowed to testify at the death sentencing hearing regarding the 1991 incident. We note that trial counsel did not object to Zellner's testimony at the death sentencing hearing. Furthermore, appellate counsel did not argue on direct appeal that trial counsel was ineffective for failing to object to Zellner's testimony. Defendant maintains, however, that trial counsel was ineffective for failing to object to Zellner's testimony and appellate counsel was ineffective for failing to raise this issue on appeal.

****1117** **[46]** **[47]** **[48]** *****679** The purpose of the attorney-client privilege is to secure for the client the ability to confide freely and fully in his or her attorney, without fear that confidential information will be disseminated to others. *People v. Knuckles,* 165 Ill.2d 125, 130, 209 Ill.Dec. 1, 650 N.E.2d 974 (1995). In *People v. Adam,* 51 Ill.2d 46, 280 N.E.2d 205 (1972), this court restated the essential elements for the creation and application of the attorney-client privilege:

> " '(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.' " *Adam,* 51 Ill.2d at 48, 280 N.E.2d 205, quoting 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961).

The privilege is based upon the confidential nature of such communications. *People v. Williams,* 97 Ill.2d 252, 294, 73 Ill.Dec. 360, 454 N.E.2d 220 (1983).

[49] **[50]** In the present case, defendant cannot argue that he made a privileged communication to Zellner while seeking her legal advice. See *Chicago Trust Co. v. Cook County Hospital,* 298 Ill.App.3d 396, 408, 232 Ill.Dec. 550, 698 N.E.2d 641 (1998). Additionally, the 1991 incident occurred in the presence of others, *i.e.,* Zellner's client and the desk guard, in a room under camera surveillance. At the very least, defendant's behavior was subject to observation by anyone present in ***382** the room. A defendant's voluntary disclosure of information, or other matters subject to being testified to, in the presence of opposing counsel or any other third person who is not the agent of the defendant or his attorney is not privileged. *Williams,* 97 Ill.2d at 295, 73 Ill.Dec. 360, 454 N.E.2d 220.

We conclude that Zellner did not disclose any communication subject to the attorney-client privilege. Trial counsel was not ineffective in failing to object to Zellner's testimony and appellate counsel was not ineffective in failing to raise this issue on direct appeal or argue trial counsel's ineffectiveness.

[51] **[52]** **[53]** Next, we consider whether an attorney-client relationship existed between defendant and Zellner in 1992. The attorney-client relationship is a voluntary, contractual relationship that requires the consent of both of the attorney and client. *In re Chicago Flood Litigation,* 289 Ill.App.3d 937, 941, 224 Ill.Dec. 860, 682 N.E.2d 421 (1997). As explained in *Corti v. Fleisher,* 93 Ill.App.3d 517, 521, 49 Ill.Dec. 74, 417 N.E.2d 764 (1981), the relationship "is only created by a retainer or an offer to retain or a fee paid. (*De Wolf v. Strader* (1861), 26 Ill. 225.) It cannot be created by the attorney alone or by an attorney and a third party who has no authority to act." See also *In re Chicago Flood Litigation,* 289 Ill.App.3d at 941, 224 Ill.Dec. 860, 682 N.E.2d 421; *Holstein v. Grossman,* 246 Ill.App.3d 719, 743, 186 Ill.Dec. 592, 616 N.E.2d 1224 (1993). Being a consensual relationship, "[t]he client must manifest [his] authorization that the attorney act on [his] behalf, and the attorney must indicate [her] acceptance of the power to act on the client's behalf." *Simon v. Wilson,* 291 Ill.App.3d 495, 509, 225 Ill.Dec. 800, 684 N.E.2d 791 (1997).

[54] The record from defendant's death sentencing hearing reveals that throughout the proceedings defendant was represented by three court-appointed attorneys, Baker, Brucar and Ost. Defendant did not seek to have the trial court appoint Zellner as new counsel or as additional counsel. Zellner testified that she did

not discuss possible representation with defendant or defendant's ***383** wife. Defendant wanted a moment of her time; posed some questions regarding Telander; and asked that she inquire of Telander whether a deal could be worked out. These facts do not show a consultation by a layperson with an attorney for the purpose ****1118** *****680** of securing that attorney's legal advice on a particular matter. These facts also do not show that Zellner ever agreed to represent defendant. Although defendant's wife stated in an affidavit that she spoke with Zellner three times about representing defendant, she did not state that either she or defendant paid Zellner a retainer, or attempted to have the trial court appoint Zellner as counsel. To the contrary, in her affidavit defendant's wife indicates that Zellner wanted $15,000 for the sentencing hearing, with a 30% retainer. Further, she states that when she told Zellner she could not raise the money for the fee, Zellner replied that she did not give free advice and there was nothing more to talk about. Thus, the affidavit does not contradict the record, but rather supports our conclusion that an attorney-client relationship did not exist between defendant and Zellner. Consequently, defendant did not have a right to conflict-free representation from Zellner. It follows that the circuit court properly dismissed this claim.

VIII. Perjury

In the amended petition, defendant alleges that three of the State's witnesses, Mary Matas, Detective Mueller of the Hillside police department, and Joseph Mogavero, committed perjury at the death sentencing hearing with full knowledge of the State. Defendant also alleges that the State failed to disclose certain information to the defense in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

***384** Matas' testimony and Detective Mueller's testimony are fundamentally related. First, we will summarize the testimony of these witnesses, and the allegations in defendant's amended petition pertaining to them. We will then summarize Mogavero's testimony and the allegations pertaining to him.

Mary Matas and Detective Mueller

At the death sentencing hearing, Matas testified that, on the evening of March 17, 1985, defendant entered her car without her knowledge. When she got into the car to drive home from work, defendant grabbed her from behind, cut her with a knife, hit her on the face and in the ribs, forced her to cut herself with a razor blade, and raped her. Defendant left her tied to the car's steering wheel. Three weeks later, on the evening of April 9, 1985, defendant attacked her as she exited her car in her garage. Defendant said he did not get enough the first time. He hit her in the face with a wrench, threw her to the ground and kicked her. Defendant was scared away when a family member turned the lights on in the back yard. Matas testified that she identified defendant, without hesitation, in a photo lineup on July 18, 1985.

Mueller investigated the Matas incidents. He testified that, in July of 1985, he became aware of the circumstances of the LaCrosse murder and sexual assault. He obtained a photograph of defendant from the Addison police department. He included the photograph, along with photographs of defendant's brothers, Sherrod and Troy Simms, in a photo lineup he showed Matas. When Matas viewed the photographs, she became emotionally upset. She told Mueller she recognized her assailant, and positively identified defendant.

In 1997, defendant's post-conviction counsel subpoenaed the records of the Hillside police department and the Bellwood police department regarding the Matas incidents. He received a 39–page report from the Hillside ***385** police department (the 1997 report), and a two-page report from the Bellwood police department. In 1985, at the guilt phase of defendant's trial, defense counsel, now Associate Judge Eugene Wojcik, had also requested the Hillside police department reports regarding ****1119** *****681** the Matas incidents. In an affidavit attached to the amended petition, Judge Wojcik states that he received a 13–page report from the Hillside police department (the 1985 report). Judge Wojcik also states his belief that "*all* the documents set forth in Exhibit 'S,' [the 1997 report] and *all* the information contained therein were not disclosed to [him] by either the Hillside Police Department or the State." (Emphasis in original.) Of the two sets of reports from the Hillside police department, only two pages are identical.

A comparison of the 1985 and 1997 reports reveals certain inconsistencies. The 1985 report shows that Mueller had Matas view a photo lineup on July 18, 1985. The photo lineup contained pictures of defendant's brothers, Troy and Sherrod. Matas readily identified defendant as her assailant. The 1997 report seems to indicate that Mueller conducted two photo lineups in connection with the Matas incident prior to July 1985. At the first lineup on May 17, 1985, Matas indicated that defendant's picture "looked close," but she needed a better photograph. At the second lineup on June 1, 1985, Matas stated that defendant looked like her assailant, but she would have to hear him speak to be sure. The two lineups did not include photographs of defendant's brothers.

In the 1997 report, Mueller states that Matas felt she knew her assailant from a prior contact and might recognize his voice. The offender had called Matas by her middle name, Sue, when he raped her. Notes from another police officer indicate that Matas believed she had heard her assailant's voice before but was not sure she would be able to recognize his face if she saw him again. ***386** The 1997 report also contains extensive notes on the course of the investigation. In particular, Mueller interviewed various members of Matas' family and her former spouse because Matas believed the rape was a setup.

The 1985 report supports Matas' testimony at the death sentencing hearing. The 1997 report bespeaks the hesitancy in her identification of defendant as her assailant. Defendant maintains that the State's failure to disclose the 1997 report earlier was in violation of *Brady, Giglio* and *Kyles.* He argues that, had the State disclosed the 1997 report, he would have been able to attack Matas' tentative identification and the course of the investigation. He would also have been able to circumvent the alleged perjury at the death sentencing hearing. Lastly, defendant maintains the State should have disclosed the Bellwood police department report because it indicates that Matas could not positively identify her assailant in the garage attack, although she believed her assailant was the person who had previously raped her.

Joseph Mogavero

Prior to the commencement of the death sentencing hearing, defendant filed a motion *in limine* to bar the introduction of gang-related evidence. The trial court granted the motion as to any evidence that defendant possessed gang paraphernalia or signs. The trial court also forbade mention of gangs in front of the jury, unless the State obtained a ruling that testimony from a specified witness showed a connection between defendant's gang affiliation and an aggravating factor.

In compliance with this ruling, the State made an offer of proof prior to Mogavero's testimony. Outside the presence of the jury, Mogavero testified regarding defendant's gang affiliation, defendant's attempts to intimidate other inmates, and defendant's attempts to solicit sexual acts from Mogavero. Mogavero also testified ***387** that the State had not offered to reduce his forgery sentence; he had finished his jail sentence; he did not have any pending cases; and he was not currently on bond. The trial court allowed Mogavero to testify at the sentencing hearing.

At the sentencing hearing, Mogavero testified that he served time in the Du Page County jail in 1993 for forgery. Although he had been released from jail, he ****1120** *****682** was still on probation for the forgery. In March 1993, he was housed in the same cell pod as defendant. Defendant told him defendant was a high-ranking member of a gang, and defendant used his affiliation with the gang and other tactics to intimidate the inmates in the cell pod. Defendant also "bragged about how he can get any kind of dope he wanted and free coke." Mogavero testified further that defendant made a pass at him, which he refused. Defendant also solicited sex from another inmate. Mogavero did not know whether defendant had sex with the other inmate.

On cross-examination, Mogavero stated that he was a recovering cocaine addict. Defense counsel then quizzed him on his motives for testifying:

> "Q. With regard to your testimony today, have you been assured any consideration from the State?
>
> A. No, I haven't, and I didn't ask for any.
>
> Q. You are testifying today out of your interest in justice?
>
> A. Yes, I am."

In his amended petition, defendant states that, in 1993, Mogavero was in jail for burglary in addition to forgery.

Defendant also states that Mogavero was promised a favor in return for his testimony. Defendant attached to his amended petition an affidavit in which Lee Smith, a defense investigator, avers that, on January 22, 1997, he asked Mogavero whether the prosecutors offered any type of deal if Mogavero testified against defendant. Mogavero replied: "Joseph Birkett told him that by looking at his record he would be getting in trouble again ***388** and if he testified against Darryl Simms [Birkett] would owe him a favor if he got in any more trouble with the law."

Defendant also claims the State withheld evidence that Mogavero pled guilty to burglary on May 10, 1993, and was sentenced to six months' imprisonment, to be served concurrently with his forgery sentence, followed by 30 months of probation; that Mogavero was required to participate in a drug and substance abuse program as a condition of probation for the forgery and burglary offenses; that Mogavero pled guilty to domestic battery on June 1, 1993, and was placed on one year of probation; and that Mogavero violated the terms of his probation by failing to report to probation on three occasions and refusing to submit to a drug test. Defendant attached affidavits from defense counsel Baker and Ost, in which each states the first time he recalls receiving any information concerning the Mogavero matters was in October 1996. Defendant maintains that the State had an obligation under *Brady, Giglio* and *Kyles* to disclose the information regarding Mogavero.

Having reviewed the witnesses' testimony and the post-conviction claims[2] in defendant's amended petition, we turn to a consideration of the applicable law. We find our opinion in *Coleman,* 183 Ill.2d 366, 233 Ill.Dec. 789, 701 N.E.2d 1063, to be instructive.

2 Defendant also sought relief for these claims under section 2–1401 of the Code of Civil Procedure. Because of our resolution of defendant's post-conviction claims, we will not consider this alternate ground for relief.

In *Coleman,* this court summarized federal and Illinois jurisprudence regarding the use of perjured testimony and the disclosure of favorable evidence to the defense, and, in particular, detailed the evolution of the United States Supreme Court's *Brady* decision. See *Coleman,* 183 Ill.2d at 391–92, 233 Ill.Dec. 789, 701 N.E.2d 1063. The court noted that, in ***389** *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342, 349 (1976), the Supreme Court identified "three quite different situations" to which *Brady* applies. In the first situation, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. The second situation is characterized by a pretrial ****1121** *****683** request for specific evidence followed by the prosecution's noncompliance with the request. In the third situation, the defense makes either no discovery request or only a general request for "*Brady* " material and exculpatory matter is withheld by the prosecution. This court pointed out, however, that in *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Supreme Court abandoned the distinction between the second and third situations, *i.e.,* the "specific request" and the "general or no request" situations.

[55] **[56]** **[57]** The court then outlined the corresponding tests the Supreme Court requires that we use in determining whether a defendant's conviction must be reversed. In the first situation, the defendant's conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. In the second and third situations, favorable evidence is material and constitutional error results from its suppression by the government, if the evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Finally, the cumulative effect of the suppressed evidence also informs the materiality determination. See *Coleman,* 183 Ill.2d at 392–93, 233 Ill.Dec. 789, 701 N.E.2d 1063.

[58] Lastly, recognizing that a particular case may involve both the use of perjured testimony and the failure to disclose *Brady* material, the court then held:

> "[W]here undisclosed *Brady* material undermines the credibility of specific testimony that the State otherwise knew to have been false, the standard of materiality applicable to ***390** the first [*Brady* situation] applies. In such circumstances, the failure to disclose is 'part and parcel of the presentation of false evidence to the jury and therefore "corrupt[s] * * * the truth-seeking function of the trial process," [citation] and is a far more serious act than a failure to disclose generally exculpatory material.' [Citation.] Therefore, the standard of materiality in this case is whether there is any reasonable likelihood that the false testimony could

have affected the judgment of the jury." *Coleman,* 183 Ill.2d at 394, 233 Ill.Dec. 789, 701 N.E.2d 1063.

[59] **[60]** With *Coleman* firmly in mind, we turn to defendant's post-conviction claims of perjury and *Brady* violations. At the outset, we note that *Coleman* is applicable even though the alleged perjury in the present case took place at a death sentencing hearing and not at trial. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment * * *." *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196–97, 10 L.Ed.2d at 218. We also note that the State's alleged conduct with respect to Matas and Detective Mueller falls within both the first and the second/third *Brady* situations. It is within the first situation because Detective Mueller's testimony regarding the course of his investigation and Mary Matas' testimony that she did not have any hesitation when she identified defendant in the lineup were known by the State to be false. It is within the second/third situation because the 1997 report and the Bellwood police department report revealed inconsistencies in Mary Matas' description of her assailant; hesitancy in her identification of defendant; and the existence of other suspects, with varying motives, in the Matas incidents. Likewise, the State's alleged conduct with respect to Mogavero falls within both the first and the second/third *Brady* situations. It is within the first situation because Mogavero's testimony that the State had not made any promises to him and that he did not have any pending cases was known by the State to be false. It is within the ***391** second/third situation because the State failed to disclose that Mogavero had pled guilty to burglary and domestic battery, and Mogavero was in violation of the terms of probation, information ****1122** *****684** that could have been used for impeachment. Thus, the standard of materiality to be used is whether there is any reasonable likelihood that the allegedly false testimony could have affected the outcome of the death sentencing hearing. Accordingly, we can affirm the circuit court's decision to dismiss these claims without an evidentiary hearing only if we can conclude, as a matter of law, that the allegedly false testimony (which we must assume is true for purposes of the motion to dismiss) does not fall within this strict standard of materiality. See *Coleman,* 183 Ill.2d at 394, 233 Ill.Dec. 789, 701 N.E.2d 1063.

Matas was a prominent witness at the death sentencing hearing. As set forth above, she testified that defendant raped her and battered her a few weeks before he sexually assaulted and murdered Lillian LaCrosse. Matas testified that she identified defendant in a photo lineup on July 18, 1985, and she had no doubt in her mind back in 1985 that defendant was her assailant. We recognize that two other women, Sandra Sender and Sharon Williams, testified that defendant had sexually assaulted them. Their testimony, however, was not as effective because defendant was charged with a misdemeanor in connection with the assault on Sharon Williams, and pled guilty to aggravated battery in connection with the assault on Sandra Sender.

Detective Mueller's testimony supported Matas' testimony. Detective Mueller testified that Matas positively identified defendant in a photo lineup which allegedly contained photographs of defendant's brothers. Her ability to discern differences between the photographs of defendant and his brothers would surely have weighed in the jury's mind.

Mogavero was also a prominent witness at the death ***392** sentencing hearing. His testimony contained the first mention of defendant's involvement in a gang. Mogavero's testimony reflected defendant's attempts to intimidate, and to obtain sexual favors from, other prisoners, and defendant's disregard for prison regulations. Had the defense known that Mogavero had pled guilty to two other offenses and that the State had, as alleged, made a promise to Mogavero in return for his testimony, the defense might have effectively impeached him.

Having reviewed the entire transcript, we are unable to conclude there exists no reasonable likelihood that the allegedly false testimony would not have affected the jury's determination to impose the death penalty. Accordingly, we hold that the allegations in defendant's amended petition were sufficient to make a substantial showing of a constitutional violation and to require an evidentiary hearing to determine if the violation did in fact occur. The circuit court's dismissal of these claims without an evidentiary hearing was improper. We, of course, express no opinion on the actual merits of defendant's claims. Rather, we reverse and remand with instructions for the circuit court to proceed to the evidentiary stage on these claims.

IX. Testimony Regarding Prior Death Sentence

In proceedings leading to the death penalty hearing, the trial court granted a motion *in limine* barring the State from eliciting testimony regarding defendant's prior death sentences for the murder of Lillian LaCrosse or the fact that defendant was on death row. At the death penalty hearing, the State solicited testimony from Dr. Wahlstrom, a psychiatrist and medical doctor who testified on defendant's behalf, that defendant had told other people he had a loving, caring family. The State then asked Dr. Wahlstrom the following questions:

"Q. And at the time that he made those statements to other people, he was not facing the death penalty. Is that right?

***393** A. (No response).

Q. Correct?

A. I am not sure of the dates."

****1123** *****685** The trial court sustained trial counsel's objection and instructed the jury to disregard the answer.

[61] In the amended petition, defendant contends that the State violated the motion *in limine* by questioning Dr. Wahlstrom as noted above. Trial counsel did not include this issue in a post-trial motion. Further, appellate counsel did not raise this issue on direct appeal although the facts needed to raise the issue were present in the record and available to counsel. Waiver applies. *Guest,* 166 Ill.2d at 390, 211 Ill.Dec. 490, 655 N.E.2d 873. Defendant maintains, however, that appellate counsel was ineffective in failing to raise the issue on appeal. Defendant also maintains that, in light of numerous instances of prosecutorial misconduct in this case, this court need not assess the prejudicial effect of the alleged violation of the motion, but should find that defendant is entitled to a new death sentencing hearing. Given that we find error only with respect to the perjury allegations, we reject defendant's contention that we need not determine whether he was prejudiced by appellate counsel's inaction. Instead, we find that defendant has failed to show prejudice under the *Strickland* test.

[62] As noted above, trial counsel objected to the testimony elicited from Dr. Wahlstrom, and the trial court instructed the jury to disregard the testimony. We must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *Simms II,* 143 Ill.2d at 174, 157 Ill.Dec. 483, 572 N.E.2d 947. Moreover, we do not believe the jury would have viewed the testimony as a reference to defendant's prior death sentences or to defendant's presence on death row. Thus, we conclude that appellate counsel was not ineffective for failing to raise the matter on direct appeal.

X. Admission of Defendant's Statements

[63] Defendant contends that he suffered prejudice from ***394** the admission, at the death sentencing hearing, of a statement he made to Detective Mueller regarding the aggravated criminal sexual assault of Mary Matas. Although the statement is a denial of any involvement with the aggravated criminal sexual assault, the State used other remarks defendant made to Detective Mueller as evidence of defendant's untruthfulness.

This issue was considered by this court on direct appeal. There, defendant argued that the admission of the statement at the death sentencing hearing violated his sixth amendment right to counsel. The State argued that defendant had waived this claim since trial counsel made only a general objection to the statement. This court agreed, finding that "[a] general objection results in a waiver of the claim of error unless (1) the grounds for the objection were clear from the record, (2) trial counsel's assistance was ineffective [citation], or (3) there was plain error." *Simms III,* 168 Ill.2d at 193, 213 Ill.Dec. 576, 659 N.E.2d 922. The court determined that "[a]n objection based on the sixth amendment right to counsel was not clear from the record since, at the time of the general objection, the testimony did not reflect that the defendant was unrepresented by counsel during the statement." *Simms III,* 168 Ill.2d at 193, 213 Ill.Dec. 576, 659 N.E.2d 922. Next, the court rejected defendant's claim of ineffective assistance, observing that "[i]n light of the minor role played by the challenged statement, there was no reasonable probability that admission of defendant's statement changed the outcome of defendant's sentencing hearing." *Simms III,* 168 Ill.2d at 194, 213 Ill.Dec. 576, 659 N.E.2d 922. Lastly, the court declined to review the issue as plain error because the evidence was not closely

balanced, and admission of the challenged statement did not deny defendant a fair sentencing hearing. *Simms III,* 168 Ill.2d at 194–95, 213 Ill.Dec. 576, 659 N.E.2d 922.

In these proceedings, defendant maintains that the court in *Simms III* should ****1124** *****686** not have held the issue waived. Further, defendant maintains that trial counsel was ineffective ***395** to the extent that he failed to make the record clear regarding the basis for the objection, and appellate counsel was ineffective in failing to argue that trial counsel was ineffective. Defendant's arguments on waiver and ineffective assistance of trial counsel were fully addressed in *Simms III.* The court's resolution of these contentions is *res judicata. Williams,* 186 Ill.2d at 62, 237 Ill.Dec. 112, 708 N.E.2d 1152.

Since the challenged statements did not prejudice defendant (*Simms III,* 168 Ill.2d at 194, 213 Ill.Dec. 576, 659 N.E.2d 922), it follows that appellate counsel was not ineffective for failing to argue ineffective assistance of trial counsel (*Griffin,* 178 Ill.2d at 82, 227 Ill.Dec. 338, 687 N.E.2d 820).

XI. State's Closing Argument

[64] Defendant next argues he was denied a fair hearing because of certain inflammatory and improper remarks made by the prosecution during closing arguments at the second stage of the death sentencing hearing. Defendant cites 22 separate remarks that he believes are, either individually or cumulatively, sufficiently prejudicial to require a new death sentencing hearing. One remark is said to be misstatement of the law on the issue of mitigation. We reviewed this remark on direct appeal, and our determination that the remark was proper is *res judicata* to defendant's renewed challenge. *Simms III,* 168 Ill.2d at 196–97, 213 Ill.Dec. 576, 659 N.E.2d 922. The remaining remarks are to the effect: that there was insufficient mitigation to preclude the imposition of the death penalty; that the only punishment supported by the law and the evidence was the imposition of the death penalty; that defendant lacked remorse; that defendant could have had witnesses testify that he was sorry for the crimes; that defendant would be a "gang banger" until executed; that defendant was hoping for a very short sentence; that the only thing defendant cared about was getting off; that defendant's case was a "bunch of garbage"; that defendant had committed aggravated ***396** battery upon a prison guard; that the jury had an obligation to consider the victim impact evidence presented; that defendant knew Lillian LaCrosse's children would suffer as a result of the murder; that defendant had decided what he would do in the event the children woke up; that Lillian LaCrosse would trade places with defendant; and that, in the opinion of the prosecutors, there were no mitigating factors sufficient to preclude the imposition of the death penalty.

[65] **[66]** **[67]** **[68]** **[69]** **[70]** **[71]** Every defendant has the right to a trial free from improper prejudicial comments or arguments by the prosecutor. *Pasch,* 152 Ill.2d at 184, 178 Ill.Dec. 38, 604 N.E.2d 294. Whether a prosecutor's comments or arguments constitute prejudicial error is evaluated according to the language used, its relation to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial. *Pasch,* 152 Ill.2d at 184, 178 Ill.Dec. 38, 604 N.E.2d 294, citing *People v. Bivens,* 163 Ill.App.3d 472, 482, 114 Ill.Dec. 583, 516 N.E.2d 738 (1987). On the other hand, a prosecutor is allowed a great deal of latitude in presenting closing argument. *People v. Buss,* 187 Ill.2d 144, 244, 240 Ill.Dec. 520, 718 N.E.2d 1 (1999); *People v. Ramey,* 151 Ill.2d 498, 554, 177 Ill.Dec. 449, 603 N.E.2d 519 (1992). The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant. *People v. Smith,* 177 Ill.2d 53, 80, 226 Ill.Dec. 425, 685 N.E.2d 880 (1997). Because the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks made, the regulation of the substance and style of the argument is within the trial court's discretion. *Pasch,* 152 Ill.2d at 184–85, 178 Ill.Dec. 38, 604 N.E.2d 294, citing *People v. Smothers,* 55 Ill.2d 172, 176, 302 N.E.2d 324 (1973). The trial court may cure errors by giving the jury proper instructions on the law to ****1125** *****687** be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark. *People v.* ***397** *Kidd,* 175 Ill.2d 1, 221 Ill.Dec. 486, 675 N.E.2d 910 (1996); *Pasch,* 152 Ill.2d at 185, 178 Ill.Dec. 38, 604 N.E.2d 294. The trial court's determination of the propriety of the remarks will not be overturned absent an abuse of discretion. *Buss,* 187 Ill.2d at 244, 240 Ill.Dec. 520, 718 N.E.2d 1; *Smith,* 177 Ill.2d at 80, 226 Ill.Dec. 425, 685 N.E.2d 880.

[72] **[73]** In evaluating a defendant's claim that the prosecutor's remarks in closing argument were erroneous, a reviewing court must consider the remarks in the context of the parties' closing arguments as a whole. *Buss,* 187 Ill.2d at 244, 240 Ill.Dec. 520, 718 N.E.2d 1; *People v. Brown,* 172 Ill.2d 1, 53, 216 Ill.Dec. 733, 665 N.E.2d 1290 (1996). Moreover, the reviewing court must indulge in every reasonable presumption that the trial judge properly exercised the discretion vested in him. *Ramey,* 151 Ill.2d at 554, 177 Ill.Dec. 449, 603 N.E.2d 519. The reviewing court will not disturb the verdict unless it can be said that the remarks resulted in substantial prejudice to the accused (*Buss,* 187 Ill.2d at 244, 240 Ill.Dec. 520, 718 N.E.2d 1), such that absent those remarks the verdict would have been different (*Pasch,* 152 Ill.2d at 185, 178 Ill.Dec. 38, 604 N.E.2d 294).

[74] **[75]** In the present case, as to each remark, either trial counsel failed to preserve the alleged error for review or appellate counsel failed to challenge the remark on direct appeal. Waiver applies. However, defendant maintains that trial counsel was ineffective in failing to preserve the errors for review and appellate counsel was ineffective in failing to argue that trial counsel was ineffective. Consequently, the challenged remarks must be reviewed in the context of a *Strickland* ineffective assistance of counsel claim.

[76] Applying these legal principles, we find that defendant has failed to establish prejudice from the remarks. Some of the challenged remarks were based on reasonable inferences from the evidence. See *Smith,* 177 Ill.2d at 80, 226 Ill.Dec. 425, 685 N.E.2d 880. Other remarks were forceful argument that the State had proven its case, and not misstatements of the law. See *Simms III,* 168 Ill.2d at 196–97, 213 Ill.Dec. 576, 659 N.E.2d 922. Yet other remarks were brief and isolated comments, which did not affect the overall fairness of the sentencing hearing. ***398** See *People v. Emerson,* 189 Ill.2d 436, 509–10, 245 Ill.Dec. 49, 727 N.E.2d 302 (2000); *People v. Terrell,* 185 Ill.2d 467, 513, 236 Ill.Dec. 723, 708 N.E.2d 309 (1998); *People v. Spreitzer,* 123 Ill.2d 1, 37–38, 121 Ill.Dec. 224, 525 N.E.2d 30 (1988). The remarks which might be considered improper were cured by the trial court's sustaining defense objections, informing the jury that arguments are not evidence and must be disregarded if not supported by the evidence, or giving the jury proper instructions on the law to be applied. We conclude defendant has not shown that trial counsel was ineffective in failing to preserve the alleged errors for review, or that appellate counsel was ineffective in failing to challenge the remarks on appeal.

XII. Abandonment of Defense

Citing *People v. Hattery,* 109 Ill.2d 449, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985), defendant maintains that trial counsel failed to subject the prosecution's case to meaningful adversarial testing and, consequently, ineffective assistance of counsel can be presumed without application of the *Strickland* test. At the second stage of the death sentencing hearing, trial counsel made the following statements:

> "*The horror of the acts Darryl committed is beyond dispute.* And I won't take exception to them, I won't cheapen this process by attempting to make excuses. ****1126** *****688** By trying to say that they are anything less than they are.
>
> The fact that Darryl sits here before you, he takes responsibility. He takes responsibility for every single thing he's done in his life. Regardless of what he said, regardless of the things he denied, regardless of how he may have manipulated, regardless of how he's lied, and surely—he has lied—there are no excuses today. Today he sits here before you in judgment. He sits here in judgment for his acts, and possibly final judgment.
>
> * * *
>
> The power you have is awesome, if you think about it. And the circumstances you are in, it is almost irresistible for you to use it. You only have really one choice of what you can do here today. You can put Darryl to death, or you ***399** can do nothing. The way the law works, the way it is presented to you, and what I am asking you to do is nothing. And it is almost inconceivable for me to have to ask you to do that, to sit there and do nothing. After what we have all been through for these last three or four weeks. How can you do nothing? As was Mr. Birkett, as was I am sure everybody in this courtroom, or anybody who has been touched by these proceedings, *we have been moved by what has happened to the LaCrosse family.* I am

sure some of you felt rage. *I myself have felt it. It is mind boggling.* The last three weeks, especially for you because you are not a part of this process the way we are, has to be a very, very disorienting experience. We read about these things in the newspaper, we see them on TV. We hear about violence, we hear about the problems we have in this world, but we don't get a view of them like we have in this courtroom.

* * *

And I stand here before you now with the greatest humility, but with utmost sincerity, and tell you not to kill Darryl in this case. In this case it is not right. *And I have very little to put in front of you to ask that.* I have very, very little to put in front of you to make that request. All I have is what is left of Darryl's humanity.

* * *

My task I think is the virtual impossibility of trying to get you to understand something about Darryl. Trying to understand something about his life. About his crimes. About the crimes from where he's coming from. The drugs in his life. The hatred, the fear, the despair.

> It is easy, and almost natural, almost natural to want to kill what we hate, and what we fear, and what we don't understand. One of the things you promised us at the beginning of this trial is to keep an open mind. And I ask you to maintain that for a few more moments.

* * *

I ask you please, keep your minds open for a few more minutes. And please, let me try to explain to you something about this process. Let me try to explain to you why Darryl ***400** does have some worth as a human being. And Darryl should not be put to death.

* * *

You have all been qualified that you believe in the death penalty, and under appropriate circumstances you will give the death penalty. You have also been qualified to say that you will not give the death penalty automatically. That you will listen to everything that's been said. No matter how horrible the crime, no matter how disturbing the evidence, you will keep your minds open and listen and determine whether or not you feel you should kill one of your fellow human beings.

> You know, coming in here and going through this process, the process we have gone through for the last three or ****1127** *****689** four weeks, is almost in a way like basic training.

* * *

But unlike what we try to accomplish with basic training, even though there are so many similarities in the process, the whole point of why we question you, the whole point of why we bring you here, give you instructions of law, is that when you go into that room to deliberate, we don't just say kill. Irresistible urge. It has to be. But I ask you to think about that. We instruct you by means of the law on how you are to discharge your duty. What are some of your duties in this case? Certainly Darryl has to be punished. Certainly the man has to be punished. And we don't look today for anything other than that. Certainly society needs to be protected from Darryl. Certainly as citizens you want to serve justice. And as the mandate you took when you were sworn as jurors, you must follow the law. To do those duties, ladies and gentlemen, you don't have to kill Darryl.

* * *

I agree with Mr. Birkett, the aggravation in this case speaks for itself. I agree with Mr. Birkett, just on the basis of what you heard, the initial hearing, the qualification hearing, on the basis of what happened to Lillian LaCrosse, *do we have sufficient aggravation to impose the death penalty? No question about it.*

> ***401** The question is, is there a sufficient mitigating factor. Not an excuse, not a justification, but a sufficient mitigating factor. A reason not to put Darryl to death. And that's why we call you. And this mitigating factor is a personal decision. Each and every one of you who has to decide this case has to decide in your mind if there is a mitigating factor that precludes Darryl being killed.

* * *

> But the thing is, if what you see is a mitigating factor, if that's enough, regardless of how much aggravation there is if you see a sufficient reason not to kill Darryl, that is enough. One of you.

* * *

> The death penalty is an absolute punishment. Absolute punishment. To give the death penalty we need to be absolutely sure a person is absolutely guilty, and absolutely deserves it. *Of guilt there's no question.* I am not trying to turn cute phrases here. A person has to be absolutely guilty. So we look to mitigation. Reasons why or a reason why Darryl shouldn't be put to death. In 1985, maybe I would have had nothing to say to you. It is eight years later. We know more than we did then." (Emphasis added.)

Defendant complains of the italicized statements. He maintains that trial counsel shouldered part of the State's case and joined the State in its effort to have the jury impose the death sentence. He argues that he was effectively abandoned by trial counsel at a crucial time in the death sentencing hearing, and concludes that he was denied the right to effective assistance of counsel.

[77] **[78]** Defendant concedes this issue has been waived. All the facts needed for consideration of the issue were available on direct review, yet appellate counsel failed to argue that trial counsel was ineffective in representing defendant. In this appeal, defendant contends that appellate counsel was ineffective in failing to argue that defendant had been effectively abandoned by trial counsel at the sentencing hearing. We consider then whether trial and appellate counsel were ineffective.

[79] **[80]** **[81]** **[82]** ***402** In *Hattery,* this court considered the defendant's claim that defense counsel's actions at trial were totally inconsistent with the defendant's plea of not guilty and thus constituted a *per se* denial of the right to effective assistance of counsel. Initially, the court observed that defense ****1128** *****690** counsel's strategy at trial is entitled to deference:

> "Although the sixth amendment guarantees criminal defendants the right to the effective assistance of counsel [citation], courts ordinarily will not second-guess defense counsel's judgment and trial strategy. It is recognized that the independence of defense counsel is essential to a fair trial. Moreover, it is also recognized that no two defense attorneys will necessarily agree on the same strategy for a particular case. Therefore, when evaluating ineffectiveness claims, courts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *.' " *Hattery,* 109 Ill.2d at 460–61, 94 Ill.Dec. 514, 488 N.E.2d 513.

However, citing *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the court explained that there are some circumstances so likely to harm the defense that prejudice need not be shown under the *Strickland* test of ineffective assistance of counsel, but will be presumed:

> "In * * * [*Cronic*], the court emphasized that the sixth amendment requires, at a bare minimum, that defense counsel act as a true advocate for the accused. Where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.' " *Hattery,* 109 Ill.2d at 461, 94 Ill.Dec. 514, 488 N.E.2d 513.

The court then found that defense counsel had failed to subject the prosecution's case to meaningful adversarial testing, noting that defense counsel conceded the defendant's guilt in opening statement, advanced no theory of defense during the guilt-innocence phase of the trial, presented no evidence of their own, chose not to ***403** make a closing statement to the jury, conceded that the defendant was truthful when he confessed to the murders, and told the jury that the trial was a "death penalty case." *Hattery,* 109 Ill.2d at 459–60, 94 Ill.Dec. 514, 488 N.E.2d 513.

[83] In *People v. Johnson,* 128 Ill.2d 253, 131 Ill.Dec. 562, 538 N.E.2d 1118 (1989), this court explained when it is appropriate to use the *per se* ineffectiveness of counsel rule set forth in *Hattery* and when it is appropriate to require that a defendant show prejudice under the *Strickland* test:

> "Though *Hattery* condemned the practice [of conceding guilt after a not-guilty plea was entered], we did not in that case hold that it is *per se* ineffectiveness whenever the defense attorney concedes his client's guilt to offenses in which there is overwhelming evidence

of that guilt but fails to show on the record consent by defendant. This would be especially true when counsel presents a strong defense to the other charges. [Citation.] The examples given in *Cronic* and *Strickland* for when ineffectiveness was established without an inquiry into prejudice were clearly instances where the defendant's sixth amendment right to counsel was violated and such violation could not be tolerated regardless of prejudice. Likewise, in *Hattery* it was clear that the representation fell below acceptable standards and prejudice need not have been established.

* * * [T]he rule in *Hattery* must be narrowly construed. [Citation.] Thus, if a concession of guilt is made, ineffectiveness may be established; however, the defendant faces a high burden before he can forsake the two-part *Strickland* test." *Johnson,* 128 Ill.2d at 269–70, 131 Ill.Dec. 562, 538 N.E.2d 1118.

See also *People v. Chandler,* 129 Ill.2d 233, 246, 135 Ill.Dec. 543, 543 N.E.2d 1290 (1989).

[84] Trial counsel's actions in the present case stand in sharp contrast to the actions of defense counsel in *Hattery* and do not support a finding of *per se* ineffectiveness ****1129 ***691** of counsel. Trial counsel presented both opening and closing arguments; cross-examined all of the State's witnesses; objected to certain testimony; presented several defense witnesses; and argued successfully that certain evidence should be excluded. Accordingly, we reject ***404** defendant's claim of *per se* ineffective assistance of counsel.

[85] We must, then, consider, in light of the *Strickland* test, whether defendant received ineffective assistance of trial counsel. We conclude that he did not. In arriving at this conclusion, an important factor is that trial counsel did not concede defendant's guilt either during the guilt-innocence phase of defendant's trial or during the eligibility stage of the death sentencing hearing. Indeed, during the eligibility stage, trial counsel maintained that defendant was not eligible for the death penalty; he informed the jury that the State had the burden to prove defendant eligible for the death penalty; and he asked the jury to hold the State strictly to its burden of proof. Furthermore, trial counsel moved for a directed finding regarding eligibility; submitted jury instructions and objected to the State's instructions; presented testimony; and argued in closing that the jury should not find defendant eligible for the death penalty because the evidence did not support a finding that defendant killed Lillian LaCrosse during the course of a felony. Trial counsel even argued there was no evidence of forced entry into the apartment and that testimony that a witness had seen defendant and Lillian LaCrosse speak on several occasions in the three months preceding the murder supported defendant's assertion that he was having an affair with Lillian LaCrosse and they had consensual sex the afternoon of the murder.

The statements defendant complains of were made by trial counsel in closing argument at the second stage of the death sentencing hearing. It is appropriate that we take into consideration the phase of the proceedings at which the challenged conduct takes place. At the second stage of defendant's death sentencing hearing, no question remained of defendant's guilt, his eligibility for the death penalty, and the brutal nature of the murder. The ***405** jury had determined that defendant was over the age of 18 when he committed the crimes, and the State had met its burden of proof by showing, beyond a reasonable doubt, the existence of a statutory aggravating factor. What remained to be done was for the jury to consider the aggravating and mitigating factors to determine whether defendant should be sentenced to death.

Again, trial counsel presented a strong challenge to the State's case. Trial counsel cross-examined the State's witnesses; asked the court to suppress identification testimony and defendant's statements to Officer Mueller and Detective Gorniak; moved for the exclusion of testimony regarding gang-crime evidence and defendant's gang affiliation; and presented mitigation evidence, including the testimony of Dr. Wahlstrom and a mitigation expert, Dr. Sturman. Trial counsel then made an impassioned plea for defendant's life. He argued that the jury should take into consideration defendant's background, including his difficult childhood; the neighborhood in which he grew up; his exposure to gangs at an impressionable age; his alcohol and drug use; and his mental condition at the time of the murder. He argued that defendant had changed for the better during the years spent in prison. He highlighted defendant's relationship with his sons and with his new wife and her daughter, defendant's attempts to complete his education, and defendant's participation in the "scared-straight" program. Trial counsel argued forcefully that defendant could be rehabilitated, that his humanity could be salvaged, and that defendant did not deserve to die.

The statements of which defendant complains, when taken in isolation, as set forth in defendant's brief on appeal, may suggest that trial counsel was ineffective in **1130 ***692 the closing argument. However, the statements are part of an argument which, transcribed, numbered 65 pages. We have attempted to put the statements in a fuller context. *406 Our conclusion, upon close examination of the statements, the argument in its entirety, and trial counsel's actions at the death sentencing hearing, is that trial counsel exposed the State's case to the "crucible of meaningful adversarial testing." *Cronic,* 466 U.S. at 656–57, 104 S.Ct. at 2045–46, 80 L.Ed.2d at 666. He conceded no more than what was beyond question, and attempted to humanize defendant in an effort to have the jury spare defendant's life. We will not second-guess trial counsel's judgment and strategy.

In light of our conclusion, we also reject defendant's contention that appellate counsel was ineffective in failing to argue on direct review that defendant was denied the effective assistance of trial counsel at the death sentencing hearing.

XIII. Jury Instruction on Life Imprisonment

Defendant signed a waiver of sentencing alternatives in which he requested that the trial court sentence him to natural life in prison in the event the jury should choose not to sentence him to death. Defendant believed that the jury might not sentence him to death if the jury knew that the trial court would sentence defendant to natural life in prison, without possibility of parole. Defendant proposed that the trial court instruct the jury regarding the waiver of sentencing alternatives. The trial court refused the proposed instruction.

[86] In *Simms III,* defendant claimed that the trial court abused its discretion when it refused to instruct the jury that defendant would be sentenced to natural life in prison if he was not sentenced to death. Defendant argued that a waiver of lesser sentences is a form of mitigation, and, since relevant mitigation evidence cannot be barred, he was entitled to make such a waiver. Defendant argued further that, since he had waived his eligibility for any sentence less than natural life in prison, he was entitled to a *Gacho* instruction. See *407 *People v. Gacho,* 122 Ill.2d 221, 262, 119 Ill.Dec. 287, 522 N.E.2d 1146 (1988). This court stated that a *Gacho* instruction is required in a capital sentencing hearing where a sentence of natural life in prison is the only available alternative to the death penalty. However, a *Gacho* instruction is unavailable where, as here, a defendant is statutorily eligible for a sentence less than natural life in prison. *Simms III,* 168 Ill.2d at 198–99, 213 Ill.Dec. 576, 659 N.E.2d 922; see *People v. Macri,* 185 Ill.2d 1, 73–74, 235 Ill.Dec. 589, 705 N.E.2d 772 (1998); *People v. Simpson,* 172 Ill.2d 117, 150–51, 216 Ill.Dec. 671, 665 N.E.2d 1228 (1996); *Howard,* 147 Ill.2d at 169–70, 167 Ill.Dec. 914, 588 N.E.2d 1044. Thus, the court concluded the trial court did not commit error in refusing defendant's proposed instruction. *Simms III,* 168 Ill.2d at 198–99, 213 Ill.Dec. 576, 659 N.E.2d 922.

[87] In his amended petition, defendant highlights the State's argument at the death sentencing hearing that defendant was hoping for a short sentence. Defendant maintains that he was entitled to rebut the State's argument by informing the jury that he would receive a sentence of natural life in prison, without possibility of parole. Defendant also argues that a waiver of lesser sentences is mitigation because it may serve as a basis for a sentence less than death. Defendant concludes the trial court should have allowed the proposed instruction.

We reject this argument, finding that it is a rephrasing of the argument decided adversely to defendant in *Simms III.* A post-conviction petitioner may not avoid the bar of *res judicata* simply by rephrasing issues previously addressed on direct appeal. *Williams,* 186 Ill.2d at 62, 237 Ill.Dec. 112, 708 N.E.2d 1152. As this court held in *Simms III,* a waiver of lesser sentences is not mitigation. Further, defendant was not entitled to a *Gacho* instruction. It matters not that, in support of his contentions, defendant makes the **1131 ***693 additional argument he was entitled to the instruction because the waiver of lesser sentences could have been used to rebut the State's argument regarding a short sentence. See *Macri,* 185 Ill.2d at 75, 235 Ill.Dec. 589, 705 N.E.2d 772 (rejecting defendant's argument that he was constitutionally entitled to *408 a *Gacho* instruction because the State argued that defendant's future dangerousness was a reason to impose a sentence of death); *People v. Simpson,* 172 Ill.2d at 150–51, 216 Ill.Dec. 671, 665 N.E.2d 1228 (1996) (rejecting defendant's argument that he was entitled to a *Gacho* instruction because the State raised the issue of defendant's prior criminal record and his commission of crimes after being paroled).

We also reject defendant's contention that appellate counsel was ineffective because he failed to argue on direct appeal that the waiver of lesser sentences was mitigation evidence. Since this court held in *Simms III* that a waiver of lesser sentences is not mitigation, appellate counsel was not ineffective for failing to argue that a waiver of lesser sentences is mitigation.

XIV. Jury Instruction on Alternate Sentences

In a related argument, defendant maintains he was denied a fair, reliable and accurate death sentencing hearing because the trial court failed to instruct the jury about the other possible sentences defendant could have received if not sentenced to death, thus depriving defendant of an opportunity to rebut the State's argument that defendant was hoping for a very short sentence. Trial counsel submitted, but later withdrew, an instruction listing the other possible sentences, setting forth information regarding good-conduct credit and advising the jury that parole was unavailable. Defendant contends that trial counsel was ineffective because he withdrew the proposed instruction, and appellate counsel was ineffective because he failed to argue on direct appeal that trial counsel was ineffective.

[88] All of the facts needed to raise this issue were present in the record and available on direct appeal. The issue is thus waived. *Evans,* 186 Ill.2d at 92, 237 Ill.Dec. 118, 708 N.E.2d 1158. However, we consider the merits of the issue because defendant maintains that trial and appellate counsel were ineffective. *Lear,* 175 Ill.2d at 278, 222 Ill.Dec. 361, 677 N.E.2d 895.

[89] ***409** In *Simms II,* defendant argued the trial court should have instructed the jury that, if not sentenced to death, defendant would receive either a fixed term of 20 to 80 years' imprisonment or a life sentence without the possibility of parole. The trial court had refused defendant's proposed instruction and instead instructed the jury that, if it determined a death sentence was inappropriate, the court would impose a sentence other than death. Citing *People v. Albanese,* 102 Ill.2d 54, 81, 79 Ill.Dec. 608, 464 N.E.2d 206 (1984), this court held that, where a defendant's eligibility for death is not predicated upon multiple murder convictions, it is proper for the trial court to instruct the sentencing jury that the alternative to death is a prison term, without specifying that the term is life imprisonment. *Simms II,* 143 Ill.2d at 180, 157 Ill.Dec. 483, 572 N.E.2d 947. The court explained that the sentencing jury is responsible for determining only whether the death penalty is warranted, not the severity of the prison sentence if the death sentence is found inappropriate. *Simms II,* 143 Ill.2d at 180, 157 Ill.Dec. 483, 572 N.E.2d 947.

The court then considered defendant's argument that, without information regarding the other possible sentences, the jurors could have believed defendant would be released in a few years and, thus, be more inclined to sentence him to death. The court rejected this argument, observing:

> "[T]he trial court would have to explain our State's entire determinate sentencing system before the jury would be fully informed about the alternative sentences ****1132** *****694** the defendant could receive if not sentenced to death. The jury could fairly and accurately compare the death sentence to alternative sentences of imprisonment only if it was instructed that the defendant could be released from prison before he served the full sentence imposed, either [through] executive clemency or by earning good-conduct credits provided for by the rules of the Department of Corrections. [Citations.] We have repeatedly held, however, that it is improper to inform a jury about the possibility that a defendant may be paroled before serving his full sentence. ***410** Such information diverts the jury's attention from the character of the offender and the circumstances of his offense and focuses it upon a speculative possibility that may or may not occur." *Simms II,* 143 Ill.2d at 181–82, 157 Ill.Dec. 483, 572 N.E.2d 947.

In these proceedings, defendant maintains that *Simms II* is not controlling. He reasons that the court in *Simms II* did not consider whether a jury instruction on other possible sentences must be given where, as here, it is necessary to rebut the State's contention that the defendant is trying to obtain a short sentence. We must disagree. This court held in *Simms II* that a defendant is not entitled to an instruction on the possible terms of imprisonment he might receive if not sentenced to death. In particular, this court rejected defendant's argument that such an instruction was needed to dispel the jurors' belief that defendant would be released after serving a short sentence. Defendant's current argument, that the instruction was

needed to counter the inference he sought a short sentence, is a mere rephrasing of his argument in *Simms II.*

In addition, we note that the trial court sustained trial counsel's objection to the State's remark regarding the sentence defendant hoped to receive. We must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *Simms II,* 143 Ill.2d at 174, 157 Ill.Dec. 483, 572 N.E.2d 947.

We also doubt that defendant could have used the jury instruction to effectively refute the argument he was seeking a short sentence. The instruction would have informed the jury that the trial court might sentence defendant to 20 years' imprisonment. Further, the instruction would have informed the jury that defendant would be entitled to one day of good-conduct credit for each day in prison, and an award of 90 days' additional good-conduct credit for meritorious service. Assuming defendant received a sentence of 20 years' imprisonment, and the maximum credit for good conduct and meritorious ***411** service, the instruction would have informed the jury that defendant could be released from prison in less than 10 years. Far from refuting the argument regarding a short sentence, such an instruction might lead the jury to harbor serious misgivings regarding the imposition of a sentence other than death.

For the reasons discussed above, we reject defendant's contention that trial counsel was ineffective because he withdrew the proposed instruction on the available sentences. Defendant was not entitled to such an instruction. Further, there is no reasonable probability that, but for trial counsel's alleged error in withdrawing the jury instruction, the result of the death sentencing hearing would have been different. We also reject defendant's contention that appellate counsel was ineffective because he failed to argue on direct appeal trial counsel's ineffectiveness. Since defendant was not prejudiced by the withdrawal of the jury instruction, he could not have been prejudiced by appellate counsel's failure to raise this issue on direct review. See *Griffin,* 178 Ill.2d at 82, 227 Ill.Dec. 338, 687 N.E.2d 820.

XV. Jury Instruction on Unanimity, Mitigating Factors

In his amended petition, defendant argues that he was denied a fair and reliable sentencing hearing because the trial court ****1133** *****695** refused to instruct the jury as defendant proposed. The proposed instructions were as follows:

> "[No. 5] If you are not persuaded either that there are no mitigating factors sufficient to preclude imposition of a death sentence or that there are mitigating factors sufficient to preclude imposition of a death sentence, you are required to sign the verdict form directing the court to impose a sentence other than death."
>
> "[No. 7] If one or more of you believe that the death penalty should not be imposed then sign the appropriate verdict form."

The trial court refused to give these instructions. Instead the trial court instructed the jury as follows:

> ***412** "Under the law, the defendant shall be sentenced to death if you unanimously find that there is not a mitigating factor sufficient to preclude imposition of a death sentence.
>
> If you are unable to find unanimously that there is not a mitigating factor sufficient to preclude imposition of a death sentence, the Court will impose a sentence other than death." See Illinois Pattern Jury Instructions, Criminal, No. 7C.05 (3d ed. 1992) (hereinafter IPI Criminal 3d).
>
> "If you do not unanimously find from your consideration of all the evidence that there is not a mitigating factor sufficient to preclude imposition of a death sentence, then you should sign the verdict requiring the Court to impose a sentence other than death." See IPI Criminal 3d No. 7C.06.

At the outset, we note that appellate counsel did not raise this issue on direct review. Waiver applies. *Evans,* 186 Ill.2d at 92, 237 Ill.Dec. 118, 708 N.E.2d 1158. However, defendant argues that appellate counsel was ineffective in failing to raise this issue on appeal. Consequently, we must determine whether appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced defendant. *West,* 187 Ill.2d at 435, 241 Ill.Dec. 535, 719 N.E.2d 664.

[90] **[91]** A defendant is entitled, as is the State, to the submission of appropriate jury instructions on the law that applies to his theory of the case if there is evidence in the record to support that theory. However, it is for the

trial court to determine, after considering the facts and the governing law, whether the jury should be instructed on a particular subject. If an appropriate IPI instruction exists, it must be used. *Gilliam,* 172 Ill.2d at 519, 218 Ill.Dec. 884, 670 N.E.2d 606.

[92] **[93]** **[94]** The decision whether to give a non-IPI instruction rests within the sound discretion of the trial court. The trial court abuses its discretion in refusing a non-IPI instruction only where there is no IPI instruction that applies to the particular subject. Conversely, a trial court does not abuse its discretion by refusing to give a non-IPI instruction if there is an applicable IPI instruction or the essence of the refused instruction is covered by other ***413** given instructions. *Gilliam,* 172 Ill.2d at 519, 218 Ill.Dec. 884, 670 N.E.2d 606. See also *Buss,* 187 Ill.2d 144, 240 Ill.Dec. 520, 718 N.E.2d 1.

[95] Defendant's Instruction No. 5 and Instruction No. 7 are non-IPI instructions. The trial court properly submitted to the jury IPI Criminal 3d No. 7C.05 and IPI Criminal 3d No. 7C.06, which accurately state the law. Thus, the trial court did not abuse its discretion in refusing defendant's Instruction No. 5 and Instruction No. 7. It follows that appellate counsel was not ineffective in failing to raise this issue on appeal. See *Macri,* 185 Ill.2d at 70–71, 235 Ill.Dec. 589, 705 N.E.2d 772.

Next defendant complains that the trial court should have given defendant's Instruction No. 8: "A juror may consider a mitigating factor even though all or some of the other jurors do not believe that the mitigating factor exists." Once more, appellate counsel did not raise this issue on ****1134** *****696** direct review. However, defendant maintains appellate counsel was ineffective in failing to raise the issue. We disagree.

In *People v. Hope,* 168 Ill.2d 1, 44–46, 212 Ill.Dec. 909, 658 N.E.2d 391 (1995), the trial court had refused a similar defense instruction and, instead, given the jury IPI Criminal 3d No. 7C.06. On appeal, this court rejected the defendant's contention that the trial court erred in refusing his requested instruction. The court opined that the jury instruction given did not convey the impression that unanimity was required before a mitigating factor could be considered. Rather, the instruction and argument in the case adequately informed the jury that unanimity was not required to find a mitigating factor sufficient to preclude death. *Hope,* 168 Ill.2d at 45, 212 Ill.Dec. 909, 658 N.E.2d 391; see also *People v. Miller,* 173 Ill.2d 167, 197–98, 219 Ill.Dec. 43, 670 N.E.2d 721 (1996); *Brown,* 172 Ill.2d at 58–59, 216 Ill.Dec. 733, 665 N.E.2d 1290; *Fields,* 135 Ill.2d at 70, 142 Ill.Dec. 200, 552 N.E.2d 791.

In the present case, the jury was given IPI Criminal 3d No. 7C.06, the same instruction given in *Hope.* The instruction adequately informed the jury that unanimity ***414** was not required to find a mitigating factor sufficient to preclude death. In addition, during closing argument, trial counsel repeatedly stressed that each juror had the power to prevent the imposition of the death penalty and spare defendant's life. Thus, we conclude that the jury was given appropriate information regarding the consideration of mitigating factors. The trial court did not err in refusing defendant's Instruction No. 8, and appellate counsel was not ineffective for failing to raise this issue on direct appeal.

[96] Lastly, defendant maintains that the trial court erred in refusing defendant's Instruction No. 6 and Instruction No. 4b. Defendant's Instruction No. 6 stated: "You may consider as a mitigating factor the defendant's background and the facts surrounding the offense even though the mitigating factor is not specifically listed in these instructions. You should not give less weight to a mitigating factor merely because it is not specifically listed in these instructions." Defendant's Instruction No. 4b defined the term "aggravating factor" and contained a list of aggravating factors. The instruction also defined the term "mitigating factor" and contained a list of statutory mitigating factors and nonstatutory mitigating factors. The nonstatutory mitigating factors were that defendant was physically abused in his life, lived in poverty, did good deeds in his life, has an improving prison record, and has a good school record; and any other reason supported by the evidence why defendant should not be sentenced to death.

As noted above, the trial court refused to give defendant's Instruction No. 6 and Instruction No. 4b. Instead, the trial court gave an instruction to the jury which contained the same definitions of aggravating factors and mitigating factors, and the same list of aggravating factors and statutory mitigating factors as found in defendant's Instruction No. 4b. In addition, the instruction ***415** stated that mitigating factors include: "[a]ny other reason supported by the evidence why the defendant should not be sentenced to death." Defendant maintains that the trial

court should have given to the jury his list of nonstatutory mitigating factors noted above.

As with the other instruction issues, appellate counsel failed to argue on direct review that the trial court erred in refusing to give defendant's Instruction No. 6 and Instruction No. 4b. However, defendant argues that appellate counsel was ineffective in failing to raise the issue on direct appeal. Thus, we consider whether counsel's representation was ineffective.

[97] This court has previously held that nonstatutory mitigating factors need not be specified in an instruction so long as the jury is instructed that it may consider all potential mitigating circumstances. ****1135 ***697** *Brown,* 172 Ill.2d at 58, 216 Ill.Dec. 733, 665 N.E.2d 1290; *Hope,* 168 Ill.2d at 43–44, 212 Ill.Dec. 909, 658 N.E.2d 391; *Fields,* 135 Ill.2d at 74, 142 Ill.Dec. 200, 552 N.E.2d 791. Here, the trial court instructed the jury that mitigating factors included any other reason supported by the evidence. Consequently, the trial court did not err in refusing to include a list of nonstatutory mitigating factors in the instructions to the jury. It follows that defendant was not prejudiced by appellate counsel's failure to raise this issue on direct appeal.

XVI. Right of Allocution

At the death sentencing hearing, the trial court denied defendant's request to address the jury in allocution. Defendant notes that noncapital defendants have the right to speak in allocution. Defendant also notes that the trial judges in *Smith,* 177 Ill.2d 53, 226 Ill.Dec. 425, 685 N.E.2d 880, and *People v. Shatner,* 174 Ill.2d 133, 220 Ill.Dec. 346, 673 N.E.2d 258 (1996), allowed capital defendants to speak in allocution at their bench trials. Defendant concludes that he has been denied the equal protection of the laws.

In his post-trial motion, defendant challenged the trial court's denial of his request to speak to the jury in ***416** allocution. However, appellate counsel did not raise this issue on direct appeal. Since all the facts needed to raise the issue were of record, waiver applies. *Guest,* 166 Ill.2d at 390, 211 Ill.Dec. 490, 655 N.E.2d 873. Defendant contends, however, that appellate counsel was ineffective in failing to raise this claim on appeal. Consequently, we consider the merits of the issue.

[98] **[99]** This court has held consistently that a capital defendant does not have either a statutory or a constitutional right to address the judge or jury in allocution in a capital sentencing hearing. *People v. Brown,* 185 Ill.2d 229, 259, 235 Ill.Dec. 626, 705 N.E.2d 809 (1998); *People v. Oaks,* 169 Ill.2d 409, 470, 215 Ill.Dec. 188, 662 N.E.2d 1328 (1996); *People v. Fair,* 159 Ill.2d 51, 94, 201 Ill.Dec. 23, 636 N.E.2d 455 (1994); *People v. Childress,* 158 Ill.2d 275, 307–08, 198 Ill.Dec. 794, 633 N.E.2d 635 (1994); *People v. Tenner,* 157 Ill.2d 341, 382, 193 Ill.Dec. 105, 626 N.E.2d 138 (1993); *People v. Kokoraleis,* 132 Ill.2d 235, 280–82, 138 Ill.Dec. 233, 547 N.E.2d 202 (1989); *People v. Szabo,* 113 Ill.2d 83, 95, 100 Ill.Dec. 726, 497 N.E.2d 995 (1986). In addition, this court has held that allowing allocution in noncapital sentencing proceedings (see Ill.Rev.Stat.1985, ch. 38, par. 1005–4–1(a)(5)) while disallowing it in capital sentencing proceedings does not deny capital defendants equal protection. *Brown,* 185 Ill.2d at 259–60, 235 Ill.Dec. 626, 705 N.E.2d 809; *People v. Christiansen,* 116 Ill.2d 96, 127–29, 107 Ill.Dec. 198, 506 N.E.2d 1253 (1987); *People v. Gaines,* 88 Ill.2d 342, 374–80, 58 Ill.Dec. 795, 430 N.E.2d 1046 (1981).

We recognize that capital defendants have sometimes been allowed to speak in allocution at their bench trials. However, this court has not endorsed the actions of the trial judges who have allowed capital defendants to speak in allocution. To the contrary, in *Brown,* 185 Ill.2d at 260, 235 Ill.Dec. 626, 705 N.E.2d 809, this court rejected the defendant's argument that the trial judge should have allowed him to speak in allocution at the conclusion of his bench trial because the trial judge had allowed a codefendant to speak in allocution at the conclusion of the codefendant's separate death sentencing hearing. The court expressed its belief that the judge's apparent inconsistency in allowing allocution in another case did not unfairly penalize the defendant, ***417** and held that the judge acted properly in denying the defendant's request to address the court.

Consistent with this line of authority, we cannot find appellate counsel ineffective for failing to raise this issue on direct appeal.

XVII. Death Sentence Excessive

[100] Next, defendant maintains that his death sentence is excessive and should be vacated. At the outset, we note that ****1136 ***698** appellate counsel did not raise this issue on direct appeal. Thus, waiver applies. Defendant maintains, however, that appellate counsel was ineffective in failing to raise this issue on appeal. Consequently, we consider this issue on the merits.

[101] [102] In determining whether a death sentence is proper in a particular case, we must consider the character and record of the individual offender. *Shatner,* 174 Ill.2d at 161, 220 Ill.Dec. 346, 673 N.E.2d 258; *People v. Towns,* 182 Ill.2d 491, 519, 231 Ill.Dec. 557, 696 N.E.2d 1128 (1998). Each capital case is unique and must be evaluated on its own facts, focusing on whether the circumstances of the crime and the character of the defendant are such that the deterrent and retributive functions of the ultimate sanction will be served by imposing the death penalty. *Johnson,* 128 Ill.2d at 280, 131 Ill.Dec. 562, 538 N.E.2d 1118. As such, this court has determined that, when reviewing a death sentence, it will make a separate evaluation of the record, but it will not lightly overturn the jury's findings made during the aggravation and mitigation phase of the death sentencing hearing when they are amply supported by the record. *Pasch,* 152 Ill.2d at 201, 178 Ill.Dec. 38, 604 N.E.2d 294; *Christiansen,* 116 Ill.2d at 122, 107 Ill.Dec. 198, 506 N.E.2d 1253.

[103] The record shows that Lillian LaCrosse had complained that, over a two-month period preceding her death, defendant had been harassing her by asking her for dates. She was afraid of defendant. On the evening of April 17, 1985, the outer door to Lillian LaCrosse's apartment building was open because Commonwealth Edison personnel were working on restoring the electricity. Defendant ***418** entered Lillian LaCrosse's apartment without authorization. Bloodstains on the front door of the apartment and defense wounds on her hands evinced a struggle between Lillian LaCrosse and defendant. Defendant, armed with two different weapons, stabbed Lillian LaCrosse at least 25 times in the ear, shoulder, throat, chest, arms and back. Defendant also strangled and sexually assaulted Lillian LaCrosse. She died from a loss of blood.

Defendant, thereafter, stole Lillian LaCrosse's purse, a movie camera she had borrowed from her parents and a pair of her jeans. Lillian LaCrosse's husband discovered her body on the dining room floor when he returned home from work. Her three children, ranging in age from 2 to 4 years, were crying in their bedroom; the phone had been taken off the hook.

The State also introduced evidence of defendant's criminal record at the aggravation-mitigation stage of the hearing. He had twice been adjudicated delinquent and his juvenile criminal history included theft from school lockers after cutting the locks off; setting his school on fire; residential burglary; auto theft; burglary of a church; and possession of a firearm. His adult criminal activity included burglary of a laundromat in May 1980; a second burglary in May 1981; attempted auto theft; possession of a stolen motor vehicle; and unlawful possession of a weapon.

On behalf of the State, two women [3] testified regarding previous contacts with defendant. Sharon Williams was 16 years old in August 1980 when she agreed to go on a date with defendant, then 19 years old. Defendant, along with two male friends, picked her up. She got into the backseat of the car with defendant, who subsequently ***419** forced her, at knifepoint, to have sexual intercourse. Defendant was charged with contributing to the delinquency of a minor.

3 We have omitted all references to testimony given by Matas, Detective Mueller and Mogavero in light of our holding on the perjury issue.

Sandra Sender stated that defendant, a friend of her ex-husband, came to her apartment on May 26, 1983, on the pretext of talking with her about her car. After she let him inside, he pulled a knife and strangled her. She passed out. When she ****1137 ***699** regained consciousness, defendant took her to the bedroom, threw her onto the bed and strangled her again. She passed out once more. When she regained consciousness, defendant was having sexual intercourse with her. Subsequently, she distracted defendant long enough to flee the building and obtain help. Defendant was charged with attempted murder and unlawful restraint and pled guilty to aggravated battery.

The State also presented evidence regarding defendant's behavior in prison. Several witnesses testified regarding defendant's gang affiliation and various infractions of prison regulations. Attorney Zellner testified that, while meeting with a client at Pontiac in the fall of 1991, she observed defendant hit his wife in the face and force her to perform oral sex on him in the prison visiting room. Defendant's prison behavior also included beating

another inmate, and throwing hot liquid on the head, face and forearm of a prison guard.

In mitigation, defendant presented evidence of his difficult childhood. His natural father left the house when he was a child. His mother remarried when he was 10 years old. Defendant was beaten by his stepfather, and not disciplined by his mother. He grew up in a low-income, high-crime neighborhood in Chicago and began to use drugs and alcohol at a relatively young age. When defendant was about 16 years old, his mother moved and he then lived with an older sister.

Several witnesses testified regarding the laundromat burglary on May 6, 1980. Defendant was bitten by a police ***420** dog when police responded to the burglary. Defendant suffered a tear to the foreskin of his penis, and a puncture wound to his thigh. Defendant married Lydia Smith on June 14, 1980. She testified that defendant did not have normal intercourse with her for several months after the dog-bite incident. He became very aggressive, short-tempered, subdued, and his drug use increased. Lydia Smith stopped living with defendant in 1983, when he was incarcerated for a burglary. She divorced defendant in 1985. Although defendant did not pay child support, he maintained regular contact with his two children. Defendant and his current wife, Christine Simms, married while he was in prison. According to her, defendant has changed for the better in the past few years and is very loving and supportive of her and her daughter. Christine Simms denied that defendant hit her on any of her visits to the prison, or forced her to perform oral sex in the visiting room.

Defendant also presented mitigation evidence that he had assisted in a program for juvenile delinquents. On four occasions, he spoke to groups of youth offenders and encouraged the youths to stay out of trouble. According to the program director and a juvenile who heard him speak, defendant's participation has had a positive influence on the juveniles. While in prison, defendant got his GED and showed interest in taking college courses.

Dr. Wahlstrom examined defendant in September 1993. He testified that in 1985 defendant suffered from an antisocial personality disorder, as well as from post-traumatic stress disorder, in partial remission, stemming from the dog-bite incident. Defendant also suffered from drug and alcohol dependence. Finally, Dr. John Sturman testified that defendant had changed for the better while in prison.

In light of the mitigation presented, defendant maintains that his sentence must be vacated, consistent ***421** with this court's holding in *Johnson,* 128 Ill.2d 253, 131 Ill.Dec. 562, 538 N.E.2d 1118, *People v. Buggs,* 112 Ill.2d 284, 97 Ill.Dec. 669, 493 N.E.2d 332 (1986), and *People v. Carlson,* 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d 233 (1980). We disagree. The decisions to vacate the defendants' death sentences in those cases were based on mitigating factors that are not present in this case. Thus, in *Johnson,* the defendant returned to his place of employment nine days after ****1138** *****700** he was fired to collect his final paycheck. The defendant was told that there was no paycheck for him. The defendant shot the supervisor who had fired him, shot and stabbed one of his former coworkers, and shot and killed another former coworker. On the day of the offenses, the defendant had used alcohol, cocaine, and marijuana laced with the drug "PCP." This court vacated the defendant's death sentence because of his good character, steady employment history, and insignificant criminal record. The court found that an isolated stressful event led to the crimes, concluding that the crimes had occurred only because the defendant had just been fired and believed that he had been deprived of his final paycheck. See *Johnson,* 128 Ill.2d 253, 131 Ill.Dec. 562, 538 N.E.2d 1118.

In *Buggs,* the defendant and his wife argued after she received a telephone call from one of her boyfriends. During the argument, she told the defendant that he was not the father of two of her sons. The defendant became outraged; poured gasoline on his wife, the hallway and the stairway; threw a lit match on the stairs; and fled. The defendant's wife and son died in the fire. This court vacated the defendant's death sentence because he had served 21 years in the military and been honorably discharged; he had no history of serious criminal activity; he had a drinking problem; and he had been experiencing marital difficulties which, in fact, triggered the dispute leading to the murders. *Buggs,* 112 Ill.2d at 293–95, 97 Ill.Dec. 669, 493 N.E.2d 332.

In *Carlson,* the defendant, recently divorced, had ***422** moved out of the marital home, but continued seeing his former wife with a view to remarriage. The defendant had not contested the divorce upon his former wife's agreement not to entertain men at the marital home.

On the day of the murders, the defendant and his former wife argued over her relationship with other men. The defendant shot his former wife, poured gasoline throughout her house, and set the house on fire. The defendant then went to a bar and tried to contact his daughter by telephone so he could give her money for his son's support. Since he was unable to contact her, he gave a coworker a large sum of money in an envelope with instructions to give the envelope to the daughter for the son's use. When the police arrived to arrest him at the bar, the defendant killed one of the officers. This court found that the defendant had no significant history of prior criminal activity, and had acted under an extreme emotional disturbance exacerbated by his very poor physical and emotional health. This court also stated that the defendant's concern for his son was a mitigating factor. *Carlson,* 79 Ill.2d at 587–91, 38 Ill.Dec. 809, 404 N.E.2d 233.

The mitigating factors in *Johnson, Buggs,* and *Carlson* are absent in the present case. Thus, we are not inclined to vacate defendant's death sentence. Instead, we find ample support for the jury's verdict in the brutal nature of the murder; defendant's generous criminal record; his negative sexual contacts with Sandra Sender and Sharon Williams; his gang affiliation; his violent behavior in prison; and the many infractions of prison regulations. In addition, the record contains evidence contradicting some of the mitigation testimony. For example, Lydia Smith testified that defendant drank alcohol in moderation; was not addicted to any particular drug; and chose when to use drugs. Defendant's sexual contact with Sharon Williams occurred a scant three months after the dog-bite incident, which, allegedly, prevented him from ***423** having normal sexual intercourse with Lydia Smith. Various psychiatrists who examined defendant found no evidence of psychopathy, and a report prepared by one psychiatrist noted that defendant denied any psychiatric problems. Lastly, Dr. Wahlstrom could not testify to a direct correlation between the disorders he diagnosed and the murder of Lillian LaCrosse. In light of the record, we decline to overturn the jury's findings ****1139 ***701** made during the aggravation-mitigation stage of the death sentencing hearing. Accordingly, we find that appellate counsel was not ineffective for failing to raise this issue on direct appeal.

Defendant next argues that the Du Page County State's Attorney acted arbitrarily in seeking the death penalty in the present case but not in the case of *People v. Hernandez,* 204 Ill.App.3d 732, 149 Ill.Dec. 755, 562 N.E.2d 219 (1990). Defendant invites a comparison of the facts of his case with the facts in *Hernandez,* and suggests that this court vacate his death sentence in order to rectify "the arbitrariness" evinced by the Du Page County State's Attorney in seeking the death penalty against him.

We note, at the outset, that defendant did not raise this argument in the trial court or on direct appeal. Defendant acknowledges the waiver, but posits that trial counsel was ineffective for failing to raise this claim in the trial court and appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness. Consequently, we consider the issue on its merits.

[104] We have repeatedly rejected the argument that the Illinois death penalty statute is unconstitutional because of the discretion it gives the prosecutor in deciding whether to seek the death penalty in a particular case. *People v. Heard,* 187 Ill.2d 36, 89, 240 Ill.Dec. 577, 718 N.E.2d 58 (1999); *People v. Cloutier,* 178 Ill.2d 141, 173–74, 227 Ill.Dec. 448, 687 N.E.2d 930 (1997); *Kidd,* 175 Ill.2d at 55, 221 Ill.Dec. 486, 675 N.E.2d 910; *Kokoraleis,* 132 Ill.2d at 291, 138 Ill.Dec. 233, 547 N.E.2d 202. Furthermore, the very fact that the prosecutor is afforded a measure of discretion ***424** under the death penalty statute entails that the prosecutor will seek the death penalty in one case and not in another. The prosecutor may decide to do so based upon the strength of the evidence, the circumstances of the crime, the accused's rehabilitative potential, the availability and credibility of witnesses, and any number of legitimate factors.

[105] In the present case, there was a statutory aggravating factor, murder committed in the course of an armed robbery and aggravated criminal sexual assault, to warrant a request for a death penalty hearing. Defendant has not shown that the Du Page County State's Attorney's decision to seek the death penalty against him was based on circumstances other than the presence of the statutory aggravating factor, the strength of the evidence against him, his substantial criminal history, and his demonstrated lack of rehabilitative potential as evidenced by numerous prison infractions. Moreover, our review of the record has not uncovered any evidence to support the contention that the State's Attorney considered impermissible factors in arriving at his charging decision.

The only support advanced by defendant for the contention that the State's Attorney acted improperly is the State's Attorney's decision not to seek the death penalty against Hernandez. Such is insufficient, however, to support an inference that the State's Attorney was improperly motivated in seeking the death penalty in the present case. See *McCleskey v. Kemp,* 481 U.S. 279, 306–07, 107 S.Ct. 1756, 1774–75, 95 L.Ed.2d 262, 287–88 (1987); *People v. Stewart,* 121 Ill.2d 93, 110–12, 117 Ill.Dec. 187, 520 N.E.2d 348 (1988); *People v. Foster,* 119 Ill.2d 69, 90–93, 115 Ill.Dec. 557, 518 N.E.2d 82 (1987); *People v. Free,* 112 Ill.2d 154, 160–63, 97 Ill.Dec. 396, 492 N.E.2d 1269 (1986).

Defendant has failed to supply this court with evidence that the State's Attorney acted improperly in seeking the death penalty against him. Absent such proof, we ***425** will not assume that the State's Attorney's decision in seeking the death penalty against defendant was "based on whim or caprice or otherwise invoke[d] impermissible considerations." *Stewart,* 121 Ill.2d at 112, 117 Ill.Dec. 187, 520 N.E.2d 348. Accordingly, we conclude that defendant's death sentence was not imposed arbitrarily or capriciously. Furthermore, we conclude ****1140 ***702** that defendant's death sentence was not excessive. In light of these conclusions, we find that trial and appellate counsel were not ineffective for failing to argue that the State's Attorney acted arbitrarily in seeking the death penalty against defendant, and appellate counsel was not ineffective for failing to argue that defendant's death sentence was excessive.

XVIII. Multiple Death Sentences and Delay in Execution

Defendant next raises constitutional objections to his death sentence and its implementation. In *Simms II,* this court vacated defendant's death sentence and remanded for a new death sentencing hearing because the jury had been instructed erroneously that residential burglary could be the predicate felony for the imposition of the death penalty under section 9–1(b)(6) of the Criminal Code of 1961. *Simms II,* 143 Ill.2d 154, 157 Ill.Dec. 483, 572 N.E.2d 947. On May 27, 1992, defendant filed a motion asking the trial court to bar the death sentencing hearing pursuant to the fifth, eighth and fourteenth amendments to the United States Constitution (U.S. Const., amends.V, VIII, XIV). Defendant maintained that principles of double jeopardy applied to bar a new death sentencing hearing. Defendant also argued that the trial court should bar the death sentencing hearing because of the State's misconduct in submitting erroneous instructions to the court. The trial court denied the motion, and defendant appealed to this court.

On September 16, 1992, this court dismissed defendant's appeal "as patently without merit," and remanded the cause to the trial court with directions to proceed ***426** with the death sentencing hearing. This court thus determined that a new death sentencing hearing should not be barred on principles of double jeopardy, and rejected defendant's argument that the State should forgo the hearing because of prosecutorial misconduct.

In the present appeal, defendant contends that sentencing him to death on three occasions is a violation of the double jeopardy clause and permits the State to continue to engage in continuing prosecutorial misconduct to secure a sentence of death. Defendant also argues that the delay in carrying out the death sentence constitutes cruel and unusual punishment. We have heretofore addressed defendant's double jeopardy and prosecutorial misconduct claims and will not reconsider these claims.

We turn, then, to the additional argument that the delay in the execution of the death sentence constitutes cruel and unusual punishment. As noted above, in 1985, defendant was sentenced to death for the murder of Lillian LaCrosse. This court affirmed defendant's convictions but vacated defendant's death sentence and remanded for a new death sentencing hearing. See *Simms I,* 121 Ill.2d 259, 117 Ill.Dec. 147, 520 N.E.2d 308. Thereafter, defendant was twice resentenced to death. In 1995, this court affirmed defendant's death sentence. See *Simms III,* 168 Ill.2d 176, 213 Ill.Dec. 576, 659 N.E.2d 922. The post-conviction proceedings have caused an additional delay of five years in the execution of the death sentence.

Defendant concedes that this claim has been waived. However, defendant argues that trial counsel was ineffective in not raising this claim and appellate counsel was ineffective in failing to argue the ineffectiveness of trial counsel.

[106] [107] This court has not previously considered whether, in general, executing a defendant after a delay occasioned by the appeal process and/or post-

conviction proceedings ***427** constitutes cruel and unusual punishment.[4] However, this issue has ****1141** *****703** been considered, and rejected by several other courts. We agree with the reasoning of these courts.

4 This issue was raised in *Emerson,* 189 Ill.2d at 515, 245 Ill.Dec. 49, 727 N.E.2d 302. There, we stated that the defendant had failed to persuade us we should decide that the passage of time between the offense and the imposition of the death penalty in his case caused his punishment to be cruel and unusual. Given the fact that a second defendant is raising this same issue, and others are likely to adopt this argument, we have decided to consider at this time whether the issue presents a valid constitutional challenge.

In *Chambers v. Bowersox,* 157 F.3d 560 (8th Cir.1998), the court discussed the origins of the delay argument and its success since 1993 in commonwealth countries. The court then distinguished our legal system and observed that the delays generated by our system of appeals are a function of our courts' desire to address any argument that might save the defendant's life:

> "The essential point for our purposes, of course, is whether or not the Eighth Amendment is being violated. We believe that delay in capital cases is too long. But delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life. Chambers's strongest argument is that the State has had to try him three times before getting it right. That is true, but there is no evidence, not even a claim, that the State has deliberately sought to convict Chambers invalidly in order to prolong the time before it could secure a valid conviction and execute him. We believe the State has been attempting in good faith to enforce its laws. Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully." *Chambers,* 157 F.3d at 570.

The reasoning of the Ninth Circuit is also instructive:

> "In *Richmond v. Lewis,* 948 F.2d 1473 (9th Cir.1990), *rev'd on other grounds,* ***428** 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992), *vacated,* 986 F.2d 1583 (9th Cir.1993), we rejected a very similar argument. We reasoned that:
>
> > A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates—less successful in their attempts to delay—would be forced to face their sentences. Such differential treatment would be far more 'arbitrary and unfair' and 'Cruel and unusual' than the current system of fulfilling sentences when the last in the line of appeals fails on the merits. We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution.
>
> *Id.* at 1491–92. Although the opinion was subsequently vacated, *Richmond* remains persuasive authority, and we adopt its analysis of this issue as our own." *McKenzie v. Day,* 57 F.3d 1493, 1494 (9th Cir.1995) (*en banc*).

See also *Stafford v. Ward,* 59 F.3d 1025 (10th Cir.1995); *Fearance v. Scott,* 56 F.3d 633 (5th Cir.1995); *McKinney v. State,* 133 Idaho 695, 701–03, 992 P.2d 144, 150–52 (1999).

We conclude that a delay in the execution of the death sentence occasioned by the appeal process and/or post-conviction proceedings does not constitute cruel and unusual punishment.

[108] In this case, was trial counsel ineffective in failing to argue at the third death sentencing hearing that the delay in the execution of the death sentence constituted cruel and unusual punishment? We think not. Defendant has not cited, nor are we aware of, any cases in our jurisprudence ****114** ***429** *****704** supporting the argument that a delay in execution of a death sentence occasioned by the appeal process and/or post-conviction proceedings is cruel and unusual punishment. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard

of reasonableness." *Strickland,* 466 U.S. at 687–88, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. Given the lack of support for defendant's position, we cannot agree that trial counsel's performance was deficient. We also conclude that appellate counsel was not ineffective in failing to raise this issue on appeal given the lack of support for defendant's position and our determination that such a delay does not constitute cruel and unusual punishment.

XIX. Constitutionality of Death Penalty

Defendant challenges the constitutionality of the Illinois death penalty. He argues that the death penalty statute (Ill.Rev.Stat.1985, ch. 38, par. 9–1(g)) is unconstitutional because the State does not carry a burden of persuasion at the second stage of the death penalty hearing. He asserts that a defendant who is convicted and then proved beyond a reasonable doubt to be eligible for the death penalty will mandatorily receive the death penalty if he chooses to stand idly by. He maintains that the result of this statutory scheme is to place a burden on the defendant which has not been authorized by the legislature, in violation of the defendant's constitutional rights.

We have previously considered and rejected this argument. *Brown,* 172 Ill.2d at 62–63, 216 Ill.Dec. 733, 665 N.E.2d 1290; *Simpson,* 172 Ill.2d at 152, 216 Ill.Dec. 671, 665 N.E.2d 1228; *Terrell,* 132 Ill.2d at 227, 138 Ill.Dec. 176, 547 N.E.2d 145; *Christiansen,* 116 Ill.2d at 130, 107 Ill.Dec. 198, 506 N.E.2d 1253; *Williams,* 97 Ill.2d at 265–66, 73 Ill.Dec. 360, 454 N.E.2d 220. We adhere to our prior decisions.

XX. Cumulative Effect of Errors

As evidenced by the length of this opinion, defendant's ***430** amended post-conviction petition contains allegations of numerous errors at his death sentencing hearing. Defendant claims that he was deprived of a fair trial and reliable sentencing hearing because of the cumulative effect of these errors. We have examined each allegation, and, with the exception of one, have found no error where so claimed. We do not believe we should assign any weight to these allegations of error. Consequently, there remains only the allegation that certain witnesses committed perjury at the death sentencing hearing. Since we are remanding this cause for a hearing on the allegations of perjury, the trial court will determine whether this claim is meritorious and should lead to a new death sentencing hearing.

CONCLUSION

For the aforementioned reasons, the judgment of the circuit court of Du Page County dismissing defendant's post-conviction petition without an evidentiary hearing is affirmed in part and reversed in part. The circuit court is instructed to hold an evidentiary hearing with respect to the allegations of perjury. As to the dismissal of the remaining allegations, the circuit court's order is affirmed.

Judgment affirmed in part and reversed in part; cause remanded.

Chief Justice HARRISON, dissenting:

The murder for which defendant was convicted took place over 15 years ago. During the decade and a half between then and now, the State has repeatedly attempted to have defendant sentenced to death. Its efforts have repeatedly failed. Although death sentences have been imposed, our court has had to set them aside based on trial error. *People v. Simms,* 121 Ill.2d 259, 117 Ill.Dec. 147, 520 N.E.2d 308 (1988) (*Simms I*); *People v. Simms,* 143 Ill.2d 154, 157 Ill.Dec. 483, 572 N.E.2d 947 (1991) (*Simms II*). ***431** Depending on what the evidentiary hearing discloses on remand, our court may have to do so again. If the State's witnesses lied, as defendant alleges, defendant's present ****1143** *****705** death sentence is invalid and cannot be allowed to stand.

The process which has brought this case to where it is today has been extraordinarily protracted. Defendant was first convicted and sentenced to death in late 1985. He was placed on death row and remains there today, a decade and a half later. By the standards in effect when the United States Constitution was ratified, such a delay would have been rare, if not unheard of. See *Lackey v. Texas,* 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (Stevens, J., mem. op. on denial of *cert.*); *Elledge v. Florida,* 525 U.S. 944, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998) (Breyer, J., dissenting). Even by contemporary norms, the delay is exceptional. According to the most recent bulletin published by the United States Department of Justice's Bureau of Justice Statistics, the average elapsed

time from sentence to execution for defendants of all races between 1977 and 1998 was 113 months. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Capital Punishment 1998,* at 12 (December 1999). With a death row tenure of approximately 175 months, the defendant in this case has been facing the executioner for nearly 50% longer.

The courts of the British Commonwealth have ruled that imposition of capital punishment would be cruel and unusual punishment where the defendants have sat on death row for only a fraction of the time that this defendant has. Similarly, the European Court of Human Rights has held that holding an inmate on death row for six to eight years would contravene article 3 of the European Convention on Human Rights, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Chambers v. Bowersox,* 157 F.3d 560, 570 (8th Cir.1998).

***432** I am unpersuaded by the suggestion that United States courts must tolerate greater delays than the courts of Europe because the American judicial system is more concerned with addressing meritorious claims and achieving correct results. In Illinois at least, the system for handling capital offenses has become notoriously unreliable. After matters degenerated to the point where our court no longer felt any compunction about illegally dismissing a death row inmate's appeal and having him summarily put to death (*People v. Kokoraleis,* M.R. 15833, Official Reports Advance Sheet No. 11, at 4–7 (June 2, 1999)), the Governor was forced to invoke his constitutional authority to grant reprieves (Ill. Const.1970, art. V, § 12) and declared an indefinite moratorium on future executions. The moratorium remains in effect today.

I am likewise unpersuaded by the argument that capital defendants must suffer inordinate delays because it is they who initiate the legal proceedings which postpone their executions. Such an argument may carry some force where a defendant's claims are frivolous and initiated solely for purposes of delay, but few, if any, of the capital cases coming before us are subject to that criticism. In nearly every instance where an execution remains to be carried out after a decade or more, the additional litigation has been necessary to address errors occasioned by the prosecution or attributable to incompetent representation. It has not been the fault of the defendant.

So long as double jeopardy principles are not violated, the State must normally be given the opportunity to correct its mistakes and retry a defendant whose trial was found to be flawed. There must be a point, however, at which the court steps in and says enough is enough. Beyond a certain number of years and a certain number of failed attempts by the State to secure a constitutionally ***433** valid sentence of death, the litigation becomes a form of torture in and of itself. It is as if the State were holding a defective pistol to the defendant's head day and night for years on end and the weapon kept misfiring. It may eventually go off, but then again, it may not, and the defendant has no way to be sure.

As the United States Supreme Court recognized more than a century ago, the ****1144** *****706** suffering inherent in a prolonged and uncertain wait for execution is undeniable. See *In re Medley,* 134 U.S. 160, 172, 10 S.Ct. 384, 388, 33 L.Ed. 835, 840 (1890) ("when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it"). It is a dehumanizing experience known to precipitate mental illness and even suicide. See *Knight v. Florida,* 528 U.S. 990, ——, 120 S.Ct. 459, 462, 145 L.Ed.2d 370, 373 (1999) (Breyer, J., dissenting); *Lackey,* 514 U.S. at 1045–46, 115 S.Ct. at 1421–22, 131 L.Ed.2d at 305 (Stevens, J., mem. op. on denial of *cert.*). While some may find this just and fitting, I consider it to be inconsistent with "the evolving standards of decency" which inform eighth amendment jurisprudence. See *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630, 642 (1958).

In my view, any delay of the magnitude present here caused by trial error for which defendant is not responsible raises compelling eighth amendment concerns. What makes this case particularly abhorrent, and what sets it apart from *Chambers v. Bowersox,* 157 F.3d 560 (8th Cir.1998), cited by the majority, is the possibility of deliberate wrongdoing by the government. If defendant's charges are true, as we presume them to be for purposes of the present proceeding, the State responded to its previous failures to secure a valid death sentence by knowingly employing perjured testimony. By so doing, ***434** the prosecution and the prosecution alone

condemned defendant to untold additional time on death row. At a minimum, additional time will be needed to conduct the hearing ordered by our court today. If defendant's allegations prove meritorious, the entire sentencing process will have to begin again. Defendant's case will then be no closer to resolution that it was when he was first sentenced in 1985.

No reasonable claim can be made that such a delay is an inherent and inevitable byproduct of our capital justice system. Nothing in our system of capital punishment requires the knowing use of perjured testimony by the State. That decision was the responsibility of the State and the State alone. Its unilateral act of wrongdoing cannot be allowed to serve as the predicate for exacerbating defendant's death watch.

With each attempt by the State to secure defendant's death, the integrity of the process degrades. The passage of time brings an ever-greater likelihood that witnesses will disappear, memories will fade, and evidence will be lost. Retribution and deterrence, the two principal social purposes of capital punishment, carry less and less force. See *Lackey,* 514 U.S. at 1045–46, 115 S.Ct. at 1421–22, 131 L.Ed.2d at 304–05 (Stevens, J., mem. op. on denial of *cert.*). Eventually, "an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary justification for the death penalty." *Elledge,* 525 U.S. at 945, 119 S.Ct. at 367, 142 L.Ed.2d at 303 (Breyer, J., dissenting). By the time these proceedings are concluded, that point will have been reached here.

I continue to adhere to the view set forth in my partial concurrence and partial dissent in *People v. Bull,* 185 Ill.2d 179, 235 Ill.Dec. 641, 705 N.E.2d 824 (1998), that the Illinois death penalty law violates the eighth and fourteenth amendments to the United States Constitution (U.S. Const., amends. VIII, ***435** XIV) and article I, section 2, of the Illinois Constitution (Ill. Const.1970, art. I, § 2). The result in every death case in Illinois is suspect, and no sentence of death should be allowed to stand. *People v. Davis,* 185 Ill.2d 317, 353, 235 Ill.Dec. 918, 706 N.E.2d 473 (1998) (Harrison, J., concurring in part and dissenting in part). Even if the law were not otherwise invalid, however, I would nevertheless hold, for the reasons set forth above, that enforcement of the death penalty under the facts of this case would violate the eighth amendment's proscription against cruel and unusual punishment. Defendant's sentence of death should ****1145** *****707** therefore be vacated, and the matter should be remanded for imposition of a term of imprisonment. Ill.Rev.Stat.1985, ch. 38, par. 9–1(j).

Even if the death penalty were constitutional and could be applied here without violating the eighth amendment, I still could not concur in this court's judgment. Although my colleagues are correct in concluding that the circuit court committed reversible error when it dismissed defendant's post-conviction claims of perjury without an evidentiary hearing, I believe that this case presents an even more fundamental problem. Under the constitution, it is "impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi,* 472 U.S. 320, 328–29, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231, 239 (1985). This is precisely what happened here.

A majority of the jurors in the case before us were misled regarding their responsibility for defendant's death sentence. As the majority points out, the trial judge told them during *voir dire* that their role was to "recommend" whether defendant should be sentenced to death. Any reasonable juror would understand this instruction to mean that the jury's decision to impose the death ***436** sentence would not be binding and that ultimate responsibility for imposing capital punishment would rest with the trial judge. Such is not the case. Under section 9–1(g) of the Criminal Code of 1961, when a capital sentencing jury returns a sentence of death, the trial court is *required* to follow the decision of the jury and impose a death sentence. Ill.Rev.Stat.1985, ch. 38, par. 9–1(g).

Because responsibility for imposing the death penalty rests solely with the jury, any implication that the responsibility is shared by, or delegated to, the trial court is improper. *People v. Johnson,* 146 Ill.2d 109, 147, 165 Ill.Dec. 682, 585 N.E.2d 78 (1991). The majority's attempt to mollify the effects of the trial judge's remarks is unpersuasive. Rather than revealing statements taken out of context, the quoted colloquy between the trial judge and juror Slager corroborates defendant's claim.

Defendant's claim is further supported by the affidavit of the defense investigator, who stated under oath that juror Jekkals had told him that she believed that she was merely making a recommendation to the trial judge regarding

imposition of the death penalty. Contrary to the majority's analysis, the investigator's statements do not constitute an improper attempt to impeach the jury's verdict. Rather, they provide direct corroboration that the harm addressed by *Caldwell v. Mississippi* was present in this case.

Defendant's attorneys were ineffective for failing to raise this claim. At a minimum, the matter should therefore be remanded to the trial court for a new sentencing hearing. Accordingly, I respectfully dissent.

All Citations

192 Ill.2d 348, 736 N.E.2d 1092, 249 Ill.Dec. 654

IMAGED 09/02/2004

STATE OF ILLINOIS)
) ss
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent,	)	Capital Post-Conviction Proceeding
- vs -	)	NO. 85 CF 707
DARRYL SIMMS, Defendant-Petitioner.	)	Hon. Robert Anderson, Presiding

FILED
04 JUL -7 PM 3:01
CLERK OF THE 18TH JUDICIAL CIRCUIT DU PAGE COUNTY, ILLINOIS

WITHDRAWAL OF CLAIMS

1. I, DARRYL SIMMS, Petitioner herein, state that I am withdrawing Claims III, IV and V of the Amended Petition for Post-Conviction and Post-Judgment Relief filed in this cause on May 21, 1997;

2. I am aware that by withdrawing these claims there will be no evidentiary hearing on them, as was ordered by the Illinois Supreme Court in *People v. Darryl Simms* (192. Ill.2d 348, 736 N.Ed.2d 1092, 249 Ill.Dec. 654);

3. I am withdrawing these claims freely and voluntarily, and after having consulted with Post-Conviction counsel, Joan L. Pantsios, Staff Attorney, Capital Litigation Division, Office of the State Appellate Defender.

SIGNED: Darryl Simms
DARRYL SIMMS
Petitioner

JUL 8 2004

Date: 6-22-04

C0002670

1040 (Rev. 05/00)

STATE OF ILLINOIS — UNITED STATES OF AMERICA — COUNTY OF DU PAGE

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

-VS-

Darryl Simms

DEFENDANT(S) Petitioner

CASE NUMBER

85CF707

FILED

04 JUL -7 PM 3:01

CLERK OF THE 18TH JUD. CIR. CT. DU PAGE COUNTY, ILLINOIS

Joel Kagann

File Stamp Here

ORDER

This cause coming before the Court; the Court being fully advised in the premises, and having jurisdiction of the subject matter;

The Court finds: Petitioner wishing to withdraw Claims III, IV and V of Amended Petition for Post-conviction & post-Judgment Relief

IT IS HEREBY ORDERED: Claims III, IV & V are withdrawn, no further proceedings remain pending in this Court

JUL 8 2004

Name: Joan L. Pantsios

DuPage Attorney No.: 10077

Attorney For: D. Simms

Address: 600 W. Jackson Ste 600

City/State/Zip: Chicago IL 60661

Telephone: 312-814-5100

ENTER:

JUDGE

Date: 7-7-04

JOEL A. KAGANN, CLERK OF THE 18TH JUDICIAL CIRCUIT COURT ©
WHEATON, ILLINOIS 60189-0707

IN THE
CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

PLAINTIFF,

V.

DARRYL SIMMS

DEFENDANT,

MOTION FOR REINSTATEMENT
AND
VOID JUDGMENT

Now comes, Darryl Simms, pro se, and respectfully moves this court to reinstate the evidentiary hearing ordered by the Illinois Supreme Court in the above captioned cause, pursuant to §122-5 of the Illinois Post-Conviction Act. And, make void, the judgment of Judge Anderson, entered on July 7, 2004, in support he states as follows:

¶1. "When a court allows a defendant to voluntarily withdraw an initial postconviction petition, the defendant can refile and reinstate the petition and have it treated as the original." People v. English 871 N.E. 2d 927 (Ill. App. 3d Dist. 2007) (however, the act does not state WHEN a defendant may refile a voluntarily withdrawn petition.)

¶2. On July 7, 2004, defendant withdrew his petition during a remand proceeding ordered by the Illinois Supreme Court. No one advised defendant, nor admonished him that he can refile his petition and that he should do so within a specified time. 725 ILCS §122-5 does not state that a person must refile within an alloted time or lose his opporntunity to have his petition reinstated. There is a clear paradox here. . . for defendant to know that he had to refile

within an alloted time, he would have to KNOW that a statute of limitation existed. §122-5 doesn't provide a limitation clause thus, silent as to when a defendant is required to refile, making the provision's §122-5, void for vagueness, i.e., A coupon or rebate is valid in definitely if the coupon or rebate doesn't make clear mention of an expiration date. It would NOT occur to a person to ask the issuer, how much time the coupon or rebate is valid.

¶3. The fact that §122-5 is silent as to when a defendant can refile a voluntarily withdrawn petition, nakes it unconstitutionally vague under the due process clause. "Statute or regulation is considered unconstitutionally vague under due process clause of the fifth and fourteenth amendment if it forbids of requuires doing of act in terms so vague that men of common intelligence must necessarily guess at its meaning and defer as to its application." Georgia Pacific Corp. v. Occupational Safety and Health Review Com'n 25 F3d 999 (11th Cir. 1994) The lack of both, an admonishment clause and a limitation clause in §122-5 of the Act, renders the provision void-for-vagueness. "Void for vagueness doctrine is rooted in due process and concerned with fair and reasonable warning." U.S. v. Pitt. Des Moines, Inc. 168 F3d 976 (7th Cir. 1999) Also see, Karlin v. Foust, 188 F3d 446 (7th Cir. [Wis] 1999) (Void for vagueness doctrine rests on the basic principle of due process that a law is unconstitution if its prohibitions are not clearly defined.) The court in People v. English's holding agrees with defendant, that §122-5 of the Act does not clearly define what is forbidden or required as to refiling, nor does it give "fair and reasonable

warning". "due process clause requires that laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them" Inturri v. City of Hartford Conn. 365 F Supp. 2d 240 (in an "as-applied" vagueness challenge under the due process clause, a court must evaluate the challenged regulation in light of the specific facts of the case at hand.) Here, the results of the initial, and the remand proceeding was fundamentally unfair.

THE JUDGMENT IS VOID BECAUSE IT WAS UNAUTHORIZED BY BOTH THE MANDATE RULE AND THE PROVISION IT WAS PURSUANT TO

¶4. Judge Anderson acted outside the scope of both, the Mandate of the Illinois Supreme Court and the Statute (§122-5), when he granted leave to withdraw defendant's petition during a stage #3 remand proceeding. The Illinois Supreme Court gave specific instructions, which advanced the case, on remand, to stage #3 (§122-6) Thus, through exercise of its authority over court below it, its mandate is binding, and any order entered outside the scope of it mandate is unauthorized. The scope of the mandate is clear, "we, of course express no opinion on the actual merits of defendant's claim. Rather we reverse and remand with instructions for the Circuit Court to proceed to the evidentiary stage on these claims." People v. Simms 736 N.E. 2d. at 1122 (2000) Nothing in the high Court's opinion or clearly stated mandate order, authorized the trial Court to reach back to and proceed under the responsive pleading stage [§122-5], to grant leave to withdraw a petition. The Illinois Supreme Court's

opinion and mandate bars both, defendant AND judge from litigation under §122-5, under the principles of res judicata.

¶5. The Illinois Supreme Court charged the trial court to ensure that the alleged facts are resolved, and if the trial court, in resolving the claims, must assess the credibility, weigh facts, draw inferences, fact find and resolve factual disputes [components of stage #3] then, the application of those principles, as the basis for a stage #2 leave to voluntarily withdraw petition; a second filing of a State's motion to dismiss, and a subsequent ruling on the legal sufficiency of the claims, are prohibited by both, the clear language of the Post-Conviction Hearing Act, and the mandate and opinion of the Illinois Supreme Court. "having reviewed the entire transcript, we are unable to conclude there exist no reasonable likelihood that the allegedly false testimony would not have affected the jury's determination to impose the death penalty. Accordingly, we hold that the allegations in defendant's amended petition were sufficient to make a substantial showing of a constitutional violation did in fact occur. The circuit court's dismissal of these claims without an evidentiary hearing was improper." People v. Simms 736 N.E. 2d at 1122. This conclusion by the Illinois Supreme Court establishes the law of the case, and reversal of those claims does not again subject defendant's surviving claims to previously adjudicated stages of the Post-Conviction hearing Act.

¶6 The Illinois Supreme Court's mandate IS a statutory impediment while on remand, as to the surviving claims. . . and much more. To show that the statute can be read to restrict or unauthorize the trial court from granting a withdrawal during stage #3 of the proceeding, The Illinois Supreme Court's opinion and mandate has to be considered

in the analysis. To show how the mandate and §122-5 together makes a withdrawal of claims unauthorized during stage #3 defendant reads the provision and the mandate literally.

¶7. section 122-5 is clearly a provision of the ACT with a built in time limitation mechanism. §122-5 sets a time table for the receipt of a responsive pleading, "within 30 days after the making of an order pursuant to subsection (b) of section 122-2.1, or within such further time as the court may set, the state shall answer or move to dismiss." (725 ILCS 5/122-5), and the provision continues to set further limits as it gives the State 20 days to file and answer if the motion to dismiss is denied. these clauses clearly implies that, responsive pleadings presented to the trial court after the expiration of the set time for filing them, are not statutorily authorized, and this logically extends to the trial court having the discretion to grant leave to withdraw a petition "any tim4 prior to entry of judgement", since, a request by a defendant for leave to withdraw is, by definition, a responsive pleading.

¶8. In stage #2, the entry of judgement concludes that stage of the process. In fact, at the close of each of the three stages in the Post-conviction Hearing Act, there is a judgement entered. I.e. stage #1, a summary judgement dismissing the petition, or a finding of non-frivolesness, and advancement of the petition to stage #2. At stage #2, the appointment of counsel, and at closing a finding that the petitioner had not made a substantial showing of a constitutional violation or, that he HAS made a substantial showing of a constitutional violation and a subsequent advancement of the petion t stage #3, where a finding, (after the weighing of credibility of facts and other evidence) the trial court rules

for or against the petition. By comparative interpretation, §122-5 and §122-6 sets forth very separate procedures e.g. stage #2 consist of:

1. Appointment of counsel [122-4]
2. Filing of counseled (amended) petition.
3. Filing a responsive pleading by the State.
4. Filing o fany further pleading (including leave to withdraw the petition) or amendments to pleadings that the court, in its discretion finds "appropriate" just, and reasonable as generally provided in civil cases. [§122-5]
5. Ruling on legal sifficiency of the petition.[122-5]

Comparatively, stage #3 consist of:

1. The production or proof by affidavit by defendant
2. Discovery depositions, oral testimony or other evidence.
3. In the court's discretion, the petitioner being brought into open court for the hearing.
4. Judgment for or against the defendant, followed by an appropriate order with respect to judgment or sentence in the former proceedings or supplimentary orders ranging from arraignment to discharge, as the court deems proper.

Each stage is designed to resolve a very specific area of the process, and certainly, the Illinois Supreme Court interpreted the trial court's ruling on the legal sufficiency o defendant's initial petition and reversed the judgment with specific instructions as to what act the trial court is to take on remand. The trial Court did not act withing the spirit and letter of authority conferred by the Illinois Supreme Court's instruction on remand when it entered an unauthorized order, outside the scope of §122-6 of the Act, which the trial court was charged to proceed under.

¶9. §122-5 sets a broad time frame for when a judge can grant leave of court to withdraw a petition but, it limits the court's discretion, nevertheless. The clause "prior to entry of judgment" isn't superfluously thrown into the provision, nor is it discretionary. just as a stage #1 dismissal of a petition after the 90 day deadline is statutorily unauthorized, the stage #2's withdrawal of a petition after the entry of a judgment is statutorily unauthorized. "Statutory provision setting forth 90 day deadline for summary dismissal of petition for postconviction relief is mandatory rather than discretionary." People v. Vasquez 718 N.E. 2d 356 [2d Dist 1999].

¶10. Law of the case doctrine precluded the trial court from reconsidering issues decided prior to appeal of judgment on the legal sufficiency of the petition, other than issues which the Illinois Supreme Court's opinion and mandate ordered reconsideration of when it remanded the case. In this case, nothing was ordered to be reconsidered. The case was advanced to an intirely new posture and stage of the three stage process. The high court's mandate completely governed the remand proceeding, making it mandatory, not discretionary, to operate within the parameter of §122-6 only. "When a court of review issues a mandate, it vest a trial court with jurisdiction only to take such action that coforms with the mandate, and a trial court has no authority to act beyond its scope." People v. Abraham 753 N.E. 2d 1219. see People v. Abata 518 N.E. 2d 1056 (If judgment is reversed and cause remanded, under law of the case doctrine, the trial court must proceed in a manner that conforms to appellate court's judgment. Abata at 1065 (Once an issue is decided so as to become law of the case, it is error for ~~the trial court to~~ hold new hearing and rule on the same issue, and

anu such ruling will be considered nullity.) see Bosley 598 N.E. 2d at 355 (any order issued by the trial court outside scope of mandate is void for lack of jurisdiction and must be reversed and vacated.)

Conclusion, lots of common law history on topic, supports defendant's position that revisitiing §122-5 on remand, in direct opposition of a reviewing court's mandate which specifically ordered the trial court to proceed with an evidentiary stage, is unauthorized and prohibited. (directions in a mandate from a court of review that are precise and unambiguous must be obeyed by the trial court.) This court should void the judgment of Judge Anderson entered on July 7, 2004 and reinstate the petition for Post-Conviction Relief.

If this Court finds that Judge Anderson was statutorily authorized to grant leave to defendant to withdraw his petition under §122-5 while on remand, then, this court should also give defendant the same benefit of the statute's [§122-5] right to refile the petition at a later time, where the provision is silent as to WHEN the defendant has to refile the voluntarily withdrawn petition.

Respectfully,

Darryl Simms

Darryl Simms pro se.

AFFIDAVIT

I, DARRYL SIMMS, DECLARE UNDER PENALTY OF PERJURY PURSUANT TO §1-109 OF THE CODE OF CIVIL PROCEDURE, THAT THE FACTS STATED IN THIS POST-CONVICTION RELIEF PETITION ARE TRUE AND CORRECT.

Signed on 24 day of JUne 2014

Darryl Simms

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

FILED
2015 FEB 17 PM 5:13

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

-vs-

DARRYL SIMMS, Defendant.

No. 85 CF 707

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the HONORABLE DANIEL P. GUERIN, Judge of said court, on the 8th day of September, 2014.

PRESENT:

MR. ROBERT BERLIN,
State's Attorney of DuPage County, by
MR. EDWARD PSENICKA,
Assistant State's Attorney,

appeared on behalf of The People of the State of Illinois.

THE CLERK: Darrell Simms.

MR. PSENICKA: People. Good morning, your Honor.

THE COURT: Good morning.

MR. PSENICKA: Randy Psenicka, P-s-e-n-i-c-k-a, on behalf of the People.

THE COURT: Okay.

MR. PSENICKA: It's up for -- as far as I understand it -- ruling on Defendant's motion to reinstate his postconviction petition. We filed an objection, and he filed a reply.

THE COURT: Yes.

MR. PSENICKA: This is Ms. Hoffman's case. But she appears to have cited a case directly on point, I believe, Macri. It says you have a year to reinstate the petition. Several years have passed for this defendant.

THE COURT: I am not sure I have his response. Can you show that to me. Yes, I did get this.

All right. Having considered the People's motion objecting to the reinstatement of the defendant's postconviction petition and the defendant's original filing -- it was file stamped July 1st of this year. It was entitled a pro se

petition for postconviction relief in a former capital case and a motion for appointment of counsel.

It's my understanding, on Page 18 of that petition, the defendant writes "this petition should be reinstated" -- he is referring to the first one he filed back in 1995. "This petition should be reinstated and treated as the original and grant Defendant a new sentencing hearing because Defendant's sentence was procured by the State's corruption of the truth-seeking process."

So, he is asking to reinstate that petition that was originally filed. And he's got another motion in here file stamped the same date that says motion for reinstatement and void judgment, again asking to reinstate his postconviction petition that he filed originally, treat that as the original, and void Judge Anderson's ruling when Judge Anderson granted him leave to withdraw that petition.

I feel -- and the State's objection citing, among other matters, People versus English at 381 Ill. App. 3d 906, Third District from 2008 and People versus Macri, M-a-c-r-i, 2011 Ill. App. 2d 100325 are on point. And I concur in that analysis.

So, the defendant's motion to reinstate his

original postconviction petition to be treated as the original and void the judgment is denied. Okay?

MR. PSENICKA: Thank you, your Honor. A copy of the order to the defendant?

THE COURT: Yes.

MR. PSENICKA: Okay.

(Which were all the proceedings had at the hearing of the above-entitled cause, this date.)

CRIMINAL ORDER

1985CF000707-2704

STATE OF ILLINOIS **UNITED STATES OF AMERICA** **COUNTY OF DU PAGE**

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

VS

DARRYL SIMMS

1985CF000707

CASE NUMBER

FILED

14 Sep 08 AM 09: 27

Chris Kachiroubas

CLERK OF THE
18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

File Stamp Here

ORDER

This cause coming before the Court; the Court being fully advised in the premises, and having jurisdiction of the subject matter:

IT IS ORDERED, based on the COURT'S motion:

FOR THE REASONS STATED ON THE RECORD AND THE PEOPLE'S OBJECTION, DEFENDANT'S MOTION TO REINSTATE HIS POST-CONVICTION PETITION IS DENIED. IN PARTICULAR, THE COURT FINDS PEOPLE V. ENGLISH, 381 ILL.APP.3D 906 (3D DIST. 2008) AND PEOPLE V. MACRI, 2011 IL APP (2D) 100325 DISPOSITIVE. THE CLERK IS DIRECTED TO SEND A COPY OF THIS ORDER TO DEFENDANT AT IDOC.

Submitted by: PSENICKA EDWARD

DuPage Attorney Number

Attorney for PEOPLE OF THE STATE OF ILLINOIS

File Date : 09/08/2014

Daniel P Guerin

JUDGE DANIEL P GUERIN

Validation ID : DP-09082014-0927-25848

Date : 09/08/2014

STATE OF ILLINOIS **UNITED STATES OF AMERICA** **COUNTY OF DUPAGE**

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS
-VS-
DARRYL SIMMS

Case Number 1985CF000707

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CERTIFICATE OF FILING AND SERVICE

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 April 11, 2018, the foregoing **Brief and Appendix of Respondent-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system; and (2) served on counsel in this case electronically by transmitting a copy from my e-mail address to counsel's e-mail addresses, listed below:

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

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
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