

No. 122378

IN THE

## SUPREME COURT OF ILLINOIS

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

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**BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE**

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JAMES E. CHADD  
State Appellate Defender

THOMAS A. LILIEN  
Deputy Defender

FLETCHER P. HAMILL  
Assistant Appellate Defender  
Office of the State Appellate Defender  
Second Judicial District  
One Douglas Avenue, Second Floor  
Elgin, IL 60120  
(847) 695-8822  
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

**ORAL ARGUMENT REQUESTED**

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Carolyn Taft Grosboll  
SUPREME COURT CLERK

## POINT AND AUTHORITIES

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<b>Because Section 122-5 of the Post-Conviction Hearing Act explicitly grants a post-conviction petitioner the right to withdraw and “plead-over” a petition and file “further pleadings,”; and where the section grants the judge discretion to extend the due date of any filing other than an original petition, a judge has discretion to allow a petitioner to file a motion to reinstate a voluntarily withdrawn petition any time after he withdrew it. The judge in this case abused that discretion.....</b>	<b>3</b>
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**ISSUE PRESENTED FOR REVIEW**

Whether a trial judge has discretion to allow a post-conviction petitioner's motion to reinstate his petition after he has voluntarily withdrawn it.

**STATUTE INVOLVED**

**722 ILCS 5/122-5 (2014)** provides:

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.

## STATEMENT OF FACTS

The statement of facts in the State's brief adequately describes the proceedings in this case up until the petitioner's July, 2014, "motion for reinstatement and void judgment." (State's br. at 3-10) The following additional facts would assist this Court in considering the issue.

The petitioner filed his motion to reinstate his withdrawn post-conviction claims (motion to reinstate) on July 1, 2014, along with a new version of his petition. (C. 3823, 3842) The State filed a written objection to the motion to reinstate. (C. 3957) The State argued that the Appellate Court's holdings in *People v. English*, 381 Ill.App.3d 906 (3rd Dist. 2008), and *People v. Macri*, 2011 IL App. (2d) 100325, created a one-year limitations period for reinstating a withdrawn post-conviction petition. (C. 3957) The State argued that because the petitioner had attempted to reinstate his petition outside of that one-year period, his attempt must fail. (C. 3958) The petitioner filed a reply to the State's objection, in which he argued that his case was distinguishable from *English* and *Macri*. (C. 3964)

A hearing was held on the motion to reinstate on September 8, 2014. (R. 6879-81) At the hearing, the State argued that the Appellate Court's holding in *Macri* was "directly on point" and "says you have a year to reinstate the petition." (R. 6879) The judge noted the State's argument and stated, "I concur in that analysis." (R. 6880) The judge subsequently issued the written order referenced in the State's statement of facts, finding that *English* and *Macri* were "dispositive," and denying the petitioner's motion to reinstate. (C. 3971)

## ARGUMENT

**Because Section 122-5 of the Post-Conviction Hearing Act explicitly grants a post-conviction petitioner the right to withdraw and “plead-over” a petition and file “further pleadings,”; and where the section grants the judge discretion to extend the due date of any filing other than an original petition, a judge has discretion to allow a petitioner to file a motion to reinstate a voluntarily withdrawn petition any time after he withdrew it. The judge in this case abused that discretion.**

The petitioner in this case filed his amended post-conviction petition in 1997. (C. 1873) After the trial judge dismissed the petition and the petitioner appealed that dismissal, this Court held that three of the petition’s claims made substantial showings of violations of the petitioner’s constitutional rights, and remanded those three claims for an evidentiary hearing. (C. 2196) That evidentiary hearing was never held because in 2004, after then-governor George Ryan commuted the petitioner’s death sentence to one of natural life, the petitioner voluntarily withdrew his petition. (C. 2683; R. 6811) The petitioner subsequently made several filings in Illinois and federal courts, before filing a motion to reinstate his post-conviction petition in 2014, the motion which is at issue in this appeal. (C. 3842)

The trial judge denied the petitioner’s motion to reinstate. (C. 3971) Citing the Appellate Court’s holdings in *People v. English*, 381 Ill.App.3d 906 (3rd Dist. 2008), and *People v. Macri*, 2011 IL App (2d) 100325, the judge ruled that the petitioner was forbidden from reinstating his post-conviction petition more than one year after it had been withdrawn. (C. 3971; R. 6879) The judge misinterpreted *English* and *Macri*. More importantly, the judge failed to recognize the discretion vested in him by the Post-Conviction Hearing Act to allow the reinstatement of a withdrawn post-conviction petition at any time. 725 ILCS 5/122-5 (2014); *People*

*v. Pace*, 386 Ill.App.3d 1056, 1060-61 (4th Dist. 2008). The Appellate Court in this case correctly held that the judge abused his discretion, vacated the judge's order denying the motion to reinstate, and remanded the cause for further proceedings. *People v. Simms*, 2017 IL App (2d) 141251, ¶ 33. This Court should affirm the Appellate Court's judgment.

The issue in this case depends entirely on whether a trial judge has discretion to reinstate a post-conviction petition more than one year after the petition was voluntarily withdrawn. A trial judge abuses his discretion when he fails to exercise it. *People v. Queen*, 56 Ill.2d 560, 565 (1974); *People v. Partee*, 268 Ill.App.3d 857, 868-69 (1st Dist. 1994). The State makes no argument that the judge exercised his discretion in this case. (State's br. at 13-32) Therefore, if the judge had discretion, it is undisputed that he abused it.

The question of the judge's discretion involves interpretation of Section 122-5 of the Post-Conviction Hearing Act. 722 ILCS 5/122-5. The purpose of statutory interpretation is to ascertain the legislature's intent. *People v. Johnson*, 2017 IL 120310, ¶ 15. To accomplish that, this Court should consider the statute as a whole and, where possible, give its language its plain and ordinary meaning. *People v. Gutman*, 2011 IL 110338, ¶ 12. This Court should only deviate from that analysis to avoid "absurd, inconvenient, or unjust results." *Johnson*, 2011 IL 120310, ¶ 21.

The purpose of the Post-Conviction Hearing Act is to provide a remedy for any person who is imprisoned as a result of a violation of his constitutional rights. *People v. Eatmon*, 47 Ill.2d 90, 92 (1970); *People v. Jennings*, 41 Ill.2d 21, 26 (1952).

When the purpose of a statute is to achieve justice, the statute should be liberally construed toward that end. *People v. Lawton*, 212 Ill.2d 285, 298 (2004).

The Act provides a three-step procedure for adjudication of petitions for post-conviction relief. 725 ILCS 5/122-1, *et seq.* (2014). The first step requires that the judge examine the claim and dismiss the petition if it is frivolous or is patently without merit. 725 ILCS 5/122-2.1(a)(2) (2014); *People v. Edwards*, 197 Ill.2d 239, 244 (2001). If a petition is not frivolous, the judge must docket it for further consideration and appoint counsel to represent the petitioner. 725 ILCS 5/122-2.1(b) (2014); 725 ILCS 5/122-4 (2014). The petitioner then has an opportunity to amend the petition. The State is granted an opportunity to answer or move to dismiss the petition. 725 ILCS 5/122-5. If the petition survives the State's motion to dismiss, it progresses to a third and final stage where the court holds an evidentiary hearing. Relief is then granted or denied based on that hearing. 725 ILCS 5/122-6 (2014).

Within the framework outlined above, Section 122-5 allows the judge wide discretion in how to proceed on a petition. It expressly allows a judge to grant leave to withdraw a petition any time prior to entry of judgment. 725 ILCS 5/122-5; *People v. Wright*, 149 Ill.2d 36, 54 (1992). Beyond that, it authorizes the judge to allow the filing of any further pleading or "pleading over" in support of or opposed to the petition; to allow the amendment of the petition or any other pleading; and to set or extend time limitations for the filing or amendment of any pleadings other than the original petition. 725 ILCS 5/122-5; *Wright*, 149 Ill.2d at 54. The section instructs the judge to exercise that discretion, "as shall be appropriate,

just, and reasonable and as is generally provided in civil cases.” 725 ILCS 5/122-5.

When a judge is granted such discretion, his rulings should be reviewed for an abuse of that discretion. *People v. McKibbins*, 96 Ill.2d 176, 188 (1983). A trial judge abuses his discretion when he fails to exercise it because he fails to realize a matter is within his discretion. *Queen*, 56 Ill.2d at 565; *Partee*, 268 Ill.App.3d at 868-69.

Section 122-5 expressly allows the judge to accept the voluntary withdrawal of a post-conviction petition, but does not expressly allow the judge to “reinstate” a withdrawn petition. 725 ILCS 5/122-5. The districts of the Appellate Court have all held that a judge does have some ability to reinstate a withdrawn petition, but disagree concerning the origin and scope of that ability. *Simms*, 2017 IL App (2d) 141251, ¶ 33; *People v. York*, 2016 IL App (5th) 130579, ¶ 30; *People v. Harris*, 2016 IL App (1st) 141778, ¶¶ 18-19, 22; *Macri*, 2011 IL App (2d) 100325, ¶¶ 7-8; *Pace*, 386 Ill.App.3d at 1060-61 (4th Dist. 2008); *English*, 381 Ill.App.3d at 910.

In *English*, the Third District held that under a combined reading of Section 122-5 and Section 13-217 of the Code of Criminal Procedure [735 ILCS 5/13-217 (1994)], the trial judge has no discretion, but must allow a petitioner’s request to reinstate his withdrawn petition so long as the request occurs within one year of the withdrawal. 381 Ill.App.3d at 910.

In *Macri*, the Second District held that under the same combined reading of sections, a judge is not required to grant a request to reinstate a petition more than one year after it was withdrawn, but might have discretion to do so. 2011 IL App (2d) ¶¶ 8-9. In this case and in *York*, the Second District and the Fifth

District both held that under a combined reading of Section 122-5, Section 13-217, and the statute of limitations for post-conviction petitions found at Section 122-1(c) of the Act [725 ILCS 5/122-1(c) (2014)], a judge faced with a request to reinstate a petition that was withdrawn more than a year prior must consider whether the petitioner's failure to make his request within one year was the result of his culpable negligence. *Simms*, 2017 IL App (2d) 141251, ¶ 33; *York*, 2016 IL App (5th) 130579, ¶ 30.

In *Harris*, the First District held that neither Section 122-5 nor Section 13-217 grants the judge any authority to reinstate a withdrawn petition; however, the judge can still entertain a request to vacate his order allowing the withdrawal of a petition within 30 days of it being entered, and, under Section 13-217, the petitioner can “refile” the same petition within one year. 2016 IL App (1st) 141778, ¶¶ 18-19.

Finally, in *Pace*, the Fourth District held that under Section 122-5 alone, the judge has discretion to grant or deny any request to reinstate a withdrawn petition. 386 Ill.App.3d at 1060-61.

*Pace* is the best reasoned of the above-cited decisions. In *Pace*, the petitioner's appointed counsel voluntarily withdrew his petition and the judge entered an order dismissing it. 386 Ill.App.3d at 1057. Nine months later, the petitioner filed a *pro se* motion to reconsider the dismissal, which the judge denied after a hearing. 386 Ill.App.3d at 1058. The petitioner appealed, arguing that the judge was required to grant his request to reinstate his petition because he made it within a year of having withdrawn the petition. 386 Ill.App.3d at 1058. The State made the

same argument that it makes in this case: the judge had no ability to allow the reinstatement of the petition because neither Section 122-5 nor Section 13-217 expressly provided for any such reinstatement. 386 Ill.App.3d at 1060. The Appellate Court rejected the State's argument.

The Appellate Court in *Pace* found that Section 122-5 on its own granted the judge discretion to allow the reinstatement of a withdrawn petition. 386 Ill.App.3d at 1060. The court noted Section 122-5's language allowing the judge to “make such order as to amendment of the petition or any other pleading, or as to *pleading over, or filing further pleadings.*” (emphasis supplied) 386 Ill.App.3d 1060, *quoting* 725 ILCS 5/122-5. The Court held that reinstating a withdrawn petition was the same as “pleading over” and “filing further pleadings.” 386 Ill.App.3d at 1060. As such, the plain language of Section 122-5 granted the judge discretion to allow the reinstatement of a withdrawn petition, even if it did not use the exact term “reinstate.” 386 Ill.App.3d at 1061. The court held that under the circumstances of that case, the judge abused his discretion in refusing to reinstate the petition. 386 Ill.App.3d at 1063.

This Court should adopt the reasoning of *Pace*. That reasoning gives effect to the plain language of Section 122-5. A motion to reinstate a withdrawn petition is an attempt to “plead over” or file a “further pleading” as contemplated by Section 122-5. Section 122-5 grants the judge discretion to allow or deny such a motion. 725 ILCS 5/122-5. It also grants the judge discretion to “extend the due date” for any filing other than an original petition. 722 ILCS 5/122-5. As such, any time a petitioner files a motion to reinstate a previously-withdrawn post-conviction

petition, the trial judge has discretion to grant or deny that motion.

This interpretation of Section 122-5 is consistent with the overall purpose of the Post-Conviction Hearing Act. The purpose of the Act is to provide a remedy for people who are incarcerated as the result of violations of their constitutional rights. *Eatmon*, 47 Ill.2d 91. It is not, as the State suggests, to promote the finality of criminal convictions. (State's br. at 16) Finality is a legitimate concern, but it is far more important that constitutional violations be remediated. To that end, while the legislature has created time restrictions for the filing of petitions and prohibited the filing of successive petitions, it has always given the judge discretion to override those limitations when justice requires. *See* 725 ILCS 5/122-1(c) (2014) (judge has discretion to extend statute of limitations indefinitely if he finds the delay is not due to the petitioner's culpable negligence); 725 ILCS 5/122-1(f) (judge has discretion to accept a successive petition if he finds that cause and prejudice exist). Recognizing a judge's discretion to allow the reinstatement of a withdrawn petition in the interest of justice furthers the interests reflected in those provisions of the Act. Removing that discretion from the judge does not.

All of the above-cited Appellate Court decisions are compatible with *Pace's* interpretation of Section 122-5. *English* concerned whether a judge was required to accept a motion to reinstate a withdrawn petition that is filed within a year of the withdrawal - a question that is not at issue in this case. 381 Ill. App. 3d at 910. *Macri* recognized that Section 122-5 granted the judge "a great deal of discretion" with respect to the filing of pleadings during post-conviction proceedings, but did not consider the question further because it had not been briefed. 2011

IL App (2d) 100325, ¶ 9.

*Simms* and *York* both held that a judge does have discretion to allow a motion to reinstate a withdrawn petition, but arrived at that conclusion through an unnecessarily complicated process involving Section 122-5, Section 122-1(c) and Section 13-217 of the Code of Civil Procedure. *Simms*, 2017 IL App (2d) 141251, ¶ 33; *York*, 2016 IL App (5th) 130579, ¶ 30. *Simms* and *York* focused on Section 122-5's language allowing the judge to issue orders "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." *Simms*, 2017 IL App (2d) 141251, ¶ 32; *York*, 2016 IL App (5th) 130579, ¶ 27. Both courts noted that Section 13-217 allowed civil litigants to re-file any voluntarily withdrawn pleadings within one year of their withdrawal or the relevant statute of limitations, whichever was longer. *Simms*, 2017 IL App (2d) 141251, ¶ 32; *York*, 2016 IL App (5th) 130579, ¶ 27. Because Section 122-1(c) allows the judge to extend the limitations period for post-conviction petitions indefinitely if he finds that any late filing is not the result of the petitioner's culpable negligence, the judge must have the same discretion to extend the re-filing period under Section 13-217. *Simms*, 2017 IL App (2d) 141251, ¶ 32; *York*, 2016 IL App (5th) 130579, ¶ 27.

Though the courts in *Simms* and *York* reached their conclusions differently than did the court in *Pace*, their holdings ultimately were all the same. Whether it derives from Section 122-5 alone or from a combination of Sections 122-5, 122-1(c), and 13-271, the trial judge has discretion to allow a motion to reinstate a voluntarily withdrawn post-conviction petition even if a year has passed since the petition

was withdrawn. *Simms*, 2017 IL App (2d) 141251, ¶ 32; *York*, 2016 IL App (5th) 130579, ¶ 27; *Pace*, 386 Ill.App.3d at 1061.

Even *Harris* is compatible with *Pace*'s interpretation of Section 122-5. In *Harris*, the petitioner voluntarily withdrew his petition on June 8, 2012, and the judge entered an order dismissing the petition. 2016 IL App (1st) 141778, ¶ 8. On July 5, 2012, the petitioner filed a motion to vacate the judge's order, which the judge denied on July 27, 2012. 2016 IL App (1st) 141778, ¶ 8. The petitioner did not file timely notice of appeal from that July 27 order. Instead, over the course of the subsequent two-and-a-half years, he filed a series of motions seeking to reinstate the petition. 2016 IL App (1st) 141778, ¶¶ 9-11. Finally, the petitioner filed notice of appeal from an order the judge issued on January 9, 2015. 2016 IL App (1st) ¶ 11. The Appellate Court held that the notice was untimely because the judge lost jurisdiction to hear subsequent motions to reinstate the petition 30 days after he denied the motion to vacate on July 27. 2016 IL App (1st) ¶¶ 19-20. In *dicta*, the court noted that under Section 13-217 of the Code of Civil procedure, the petitioner could have "refiled" his petition within one year of withdrawing it. 2016 IL App (1st) 141778, ¶ 22.

Even though the court in *Harris* limited the judge's discretion to hear a motion to reinstate a withdrawn petition, it nevertheless held that a judge did have that discretion so long as the motion to reinstate was filed within 30 days. 2016 IL App (1st) 141778, ¶ 22. The court did not consider Section 122-5's language giving the judge discretion to "extend the time of filing of any pleading other than an original petition." 725 ILCS 5/122-5. When that language is combined with

the court's holding, even *Harris* stands for the proposition that a judge has discretion to consider a motion to reinstate filed long after the petition was withdrawn.

The State's argument unnecessarily complicates the issue. According to the State, the Post-Conviction Hearing Act does not allow for the reinstatement of a withdrawn petition under any circumstance. (State's br. at 13-14, 18) The State argues that the Act only authorizes the judge to consider four types of pleadings: initial petitions, successive petitions, motions to dismiss, and answers. (State's br. at 18) As such, a judge can only consider a motion to reinstate a withdrawn petition if the judge first re-characterizes the motion to be a successive petition. (State's br. at 18-19) A successive petition can only be filed if the petitioner establishes cause and prejudice. 725 ILCS 5/122-1(f). The State argues that because the petitioner in this case did not establish cause and prejudice, his motion to reinstate his original petition was properly denied as an improper successive petition. (State's br. at 22-32) This Court should reject the State's argument.

The central premise of the State's argument is that the Post-Conviction Hearing Act only authorizes trial judges to consider initial petitions, successive petitions, motions to dismiss, and answers. (State's br. at 18) That is demonstrably untrue. Section 122-5 explicitly authorizes judges to consider "pleading over," amended pleadings, and "further pleadings." This Court has held that a judge has authority to consider many other types of pleadings. In *People v. Owens*, 139 Ill.2d 351, 358 (1990), this Court held that a trial judge has discretion to consider a motion for a fitness evaluation in a post-conviction proceeding, and abuses that discretion when he fails to exercise it, even though such motions are not explicitly

provided for in the Act. *See also People v. Greer*, 212 Ill.2d 192, 207-08 (2004) (judge has discretion to consider post-conviction counsel's motion to withdraw); *People v. Coleman*, 208 Ill.2d 261, 287-88 (2002) (judge has discretion to consider motion for discovery in post-conviction proceedings).

Even the State admits that Section 122-5's authorization of the judge to consider "further pleadings" does not refer to initial and successive petitions. (State's br. at 18) That admission defeats the rest of the State's argument. If Section 122-5 authorizes the judge to consider pleadings other than the four listed in the State's brief, then the judge has discretion to consider those pleadings without re-characterizing them as successive petitions. Therefore, the judge has discretion to consider a motion to reinstate a withdrawn petition without re-characterizing it as a successive petition.

The State's claim that a motion to reinstate a withdrawn petition is really a successive petition is also incompatible with the requirements of the Post-Conviction Hearing Act. The Act forbids the filing of a successive petition unless the petitioner can establish cause and prejudice. 725 ILCS 5/122-1(f). Cause is defined as an external factor that prevented the petitioner from raising his claims in a previous petition. *People v. Pitsonbarger*, 205 Ill.2d 444, 462 (2002). By definition, a petitioner seeking to reinstate his previously-withdrawn petition cannot ever prove that an external factor prevented him from raising his claims in the previous petition because, by definition, that petitioner *did* raise those claims in that petition. The rule proposed by the State would effectively make it impossible for any post-conviction petitioner to ever reinstate any withdrawn petition,

regardless of circumstances.

The State's discussion of Section 13-217 of the Code of Civil Procedure is not relevant to the issue in this case. (State's br. at 20-21) Section 13-217 does not grant the judge any discretion with respect to motions to reinstate withdrawn pleadings. 725 ILCS 5/13-217. The section only limits the judge's discretion, making it impossible for the judge to deny an attempt to refile a pleading within a year of it being withdrawn. It may be, as the Appellate Court held in *English*, that Section 13-217 applies to a motion to reinstate a post-conviction petition filed within one year of the petition having been withdrawn. 381 Ill. App. 3d at 910. If that is the case, then a judge has no choice but to allow a petitioner to refile his petition within one year of it having been withdrawn. However, because the motion to reinstate in this case was not filed within one year of the petition being withdrawn, the judge had discretion to deny it.

The State further argues that the petitioner's motion to reinstate should have been denied as a successive post-conviction petition because his previous withdrawal of the claims constituted a final judgment. (State's br. at 22-32) That claim should not persuade this Court. The "final judgment denying forty-two claims" discussed in the State's brief does not exist. (State's br. at 22) The only final judgment issued on the merits in this case was the trial judge's 1998 order dismissing the entire petition. (C. 2196) This Court affirmed that order in part, but reversed it with respect to three claims of perjury by State's witnesses. *People v. Simms*, 192 Ill.2d 348, 430 (2000). This Court remanded the three perjury claims for an evidentiary hearing. 192 Ill.2d at 430. Neither of those orders could possibly

have rendered the three perjury claims *res judicata*.

The only order that could possibly be said to have rendered the three claims *res judicata* was the trial judge's 2004 order granting the petitioner's motion to withdraw the petition. (State's br. at 25-32) However, a judge's order accepting the withdrawal of a petition under Section 122-5 is not the same as a final order dismissing or denying a petition on its merits. A judge's authority to dismiss or deny a post-conviction petition on its merits is set forth in Sections 122-2.1 and 122-6 of the Act. 725 ILCS 5/122-2.1(a)(2) (2014); 725 ILCS 5/122-6. The authority to accept the voluntary withdrawal of a petition is set forth separately in Section 122-5, one sentence before the same section sets forth the judge's authority to accept the "pleading over" of, or filing further pleadings relating to, a petition. 725 ILCS 5/122-5. Under the Act, the acceptance of a motion to withdraw a petition is not the same as an order dismissing or denying the petition on its merits. The judge's authority to accept the withdrawal of the petition carries with it the authority to reinstate a withdrawn petition.

Finally, this Court should consider the practical implications of the arguments raised in this case. This Court has already found that the post-conviction petition at issue in this case made a substantial showing that the petitioner's constitutional rights had been violated during his sentencing hearing. *Simms*, 192 Ill. 2d at 430. It is not hyperbole to say that the petitioner withdrew that petition under a literal threat of death. (C. 2717); *People v. Morris*, 219 Ill.2d 373, 375 (2006). All the petitioner is asking is that this Court find that the trial judge has discretion to consider whether to allow him to reinstate his withdrawn post-conviction petition.

The State is asking this Court to hold that the judge has no such discretion - that no petitioner can ever reinstate a withdrawn petition, no matter how meritorious the petition or how excusable the delay. The petitioner's position is compatible with both the plain language and the overall purpose of the Post-Conviction Hearing Act. The State's position is not.

The Post-Conviction Hearing Act grants the judge wide discretion to allow "pleading over" and the filing further pleadings, and to extend deadlines for those filings. 725 ILCS 5/122-5. Though Section 5/13-217 of the Code of Civil Procedure is relevant to the interpretation of the Act, it only limits the judge's discretion to *deny* an attempt to refile a withdrawn pleading before the passage of a year. This Court should hold that the trial judge has discretion to consider a motion to reinstate a post-conviction petition filed more than one year after the petition is withdrawn.

The trial judge abused his discretion by refusing to consider the petitioner's motion to reinstate his post-conviction petition because the judge failed to recognize that he had discretion to do so. The petitioner respectfully requests that this Honorable Court affirm the Appellate Court's order.

**CONCLUSION**

For the foregoing reasons, Darryl Simms, defendant-appellee, respectfully requests that this Court affirm the Appellate Court's order reversing the trial judge's order denying the petitioner's motion to reinstate, and remanding the cause for further proceedings.

Respectfully submitted,

THOMAS A. LILIEN  
Deputy Defender

FLETCHER P. HAMILL  
Assistant Appellate Defender  
Office of the State Appellate Defender  
Second Judicial District  
One Douglas Avenue, Second Floor  
Elgin, IL 60120  
(847) 695-8822  
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

**CERTIFICATE OF COMPLIANCE**

I, Fletcher P. Hamill, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 17 pages.

/s/Fletcher P. Hamill  
FLETCHER P. HAMILL  
Assistant Appellate Defender

No. 122378

IN THE

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

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**NOTICE AND PROOF OF SERVICE**

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

Ms. Lisa Ann Hoffman, Supervisor of Appeals, DuPage County State's Attorney  
 Office, 503 North County Farm Road, Wheaton, IL 60187,  
 SAO.Appeals@dupageco.org;

Mr. Darryl Simms, Register No. N12255, Danville Correctional Center, 3820  
 East Main Street, Danville, IL 61834

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 26, 2018, the Brief and Argument of the Petitioner-Appellee was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Kimberly Maloney  
 LEGAL SECRETARY  
 Office of the State Appellate Defender  
 One Douglas Avenue, Second Floor  
 Elgin, IL 60120  
 (847) 695-8822  
 Service via email will be accepted at  
 2nddistrict.eserve@osad.state.il.us