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.

REPLY BRIEF OF RESPONDENT-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

E-FILED
5/30/2018 10:46 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ARGUMENT

I. Petitioner's Proposed Rule that a Withdrawn Postconviction Petition May Be Reinstated at Any Time Plainly Undermines the Finality Interests that the Act Protects.

Petitioner asserts, as he must to prevail here, that a postconviction petitioner may seek "the reinstatement of a withdrawn post-conviction petition *at any time*." Pet. Br. 3 (emphasis added).[1] Such a rule is flatly inconsistent with the General Assembly's clear directive that postconviction petitioners comply with strict time limits, *see People v. Johnson*, 2017 IL 120310, ¶ 21, and petitioner does not (and cannot) contend otherwise.

In petitioner's view, "[f]inality is a legitimate concern, but it is far more important that constitutional violations be remediated." Pet. Br. 9. But the General Assembly has struck a different balance. *See People v. Flores*, 153 Ill. 2d 264, 274-75 (1992) (noting that the Act balances these competing interests). To promote finality, the Post-Conviction Hearing Act ("the Act") imposes strict time limitations on petitioners who seek to litigate claims that their constitutional rights were violated at trial, and bars most successive petitions. Underscoring the importance of finality, the legislature has amended the Act repeatedly to decrease the time for filing initial petitions, from as much as twenty years to the current six months. *Johnson*, 2017 IL 120310, ¶ 21; *Flores*, 153 Ill. 2d at 275. The General Assembly has

[1] "Pet. Br." refers to petitioner's appellee's brief; "State Br." refers to the People's opening brief.

determined that the imperative of finality must give way in only one circumstance: when petitioners raise a colorable claim that they are actually innocent. *See* 725 ILCS 5/122-1(c) (exempting innocence claims from statute of limitations); *see also People v. Edwards*, 2012 IL 111711, ¶ 24 (holding successive petitions raising colorable claims of innocence are not barred). Petitioner is not innocent. Therefore, he is subject to the provisions of the Act that promote finality.

Petitioner suggests that his proposed rule will have minimal impact, emphasizing that "[a]ll [he] 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." Pet. Br. 15. This argument appears to recognize, at least implicitly, that the trial court would be unlikely to allow reinstatement here, given that petitioner waited a decade before seeking reinstatement, has no conceivable argument that he was not culpably negligent, and seeks to raise only moot sentencing claims. But petitioner's proposed rule would require the State to litigate this issue in every case in which a petitioner seeks to resuscitate long-abandoned claims, and of course such litigation itself undermines the finality of convictions — as this case illustrates.

Petitioner's thirty-year-old convictions and his executively imposed life sentence should be final. The trial court properly rejected his dilatory reinstatement request without further inquiry, and the appellate court erred

by ordering another hearing to determine whether petitioner's lengthy delay should be excused.

II. 725 ILCS 5/122-5 Does Not Authorize Reinstatement, and Petitioner Has Not Even Argued, Much Less Shown, that 735 ILCS 5/13-217 (1994) Applies to Postconviction Petitioners.

Petitioner does not defend the reasoning of the appellate court in its opinion below or in most of its cases addressing reinstatement of withdrawn petitions. He argues only that the language of 725 ILCS 5/122-5 referring to "pleading over" and filing "further pleadings" permits motions to reinstate, and urges this Court to follow *People v. Pace*, 386 Ill. App. 3d 1056 (4th Dist. 2008). Petitioner does not argue, even in the alternative, that 735 ILCS 5/13-217 (1994) applies to postconviction petitioners. Notwithstanding petitioner's insistence that "Section 13-217 of the Code of Civil Procedure is not relevant to the issue in this case," Pet. Br. 14, that provision is dispositive — and shows why petitioner's motion is unauthorized.

In every case but *Pace* in which the appellate court has permitted reinstatement of withdrawn petitions, it has held that postconviction petitioners may invoke the civil provision, *see People v. York*, 2016 IL App (5th) 130579, ¶ 27; *People v. English*, 381 Ill. App. 3d 906, 909-10 (3d Dist. 2008), which confers on civil plaintiffs a right to refile a voluntarily dismissed complaint either within a one-year grace period or the remaining limitations period, 735 ILCS 5/13-217 (1994). Building on that reasoning, in both this case and *York*, the appellate court held that a postconviction petitioner may

seek reinstatement of a withdrawn petition at any time because the limitations provision of the Act, 725 ILCS 5/122-1(c), allows petitioners to file late petitions upon showing that their delay was not due to "culpable negligence." A8-9; *York*, 2016 IL App (5th) 130579, ¶ 27.

Petitioner deems this analysis "unnecessarily complicated," Pet. Br. 10, preferring to rely on a single paragraph in *Pace*, in which the Fourth District reasoned as follows:

> While the Act does not use the term "reinstate" or explicitly refer to the reinstatement of a voluntarily withdrawn petition, it does grant 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*." (Emphases added.) 725 ILCS 5/122-5 (West 2006). A petition is a pleading. See Black's Law Dictionary 1191 (8th ed. 2004) (defining pleadings as "[a] formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses"); see also 725 ILCS 5/122-5 (West 2006) (allowing the amendment of the "petition or any *other* pleading" (emphasis added)). Asking the court to reinstate a voluntarily dismissed or withdrawn petition is the same as asking the court to allow "pleading over" or to permit the "filing [of] further pleadings." 725 ILCS 5/122-5 (West 2006). The last sentence of section 122-5 applies to defendant's reinstatement request.

386 Ill. App. 3d at 1060-61 (cited at Pet. Br. 8).

This approach is indeed simpler, but it is simply wrong. To begin with, the *Pace* court truncated the pertinent sentence of section 122-5, which states in full:

> 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*.

725 ILCS 5/122-5 (emphasis added). As the concluding clause of this sentence makes clear, "pleading over" and filing "further pleadings" are permissible under the Act only if such actions comport with civil practice.

In light of that express statutory condition, the appellate court (other than in *Pace*) has relied on 735 ILCS 5/13-217 (1994) to provide the requisite civil analogue for motions to reinstate. Notwithstanding petitioner's attempt to sidestep the issue, motions to reinstate would be authorized by 725 ILCS 5/122-5 only if (1) motions to reinstate were authorized in civil cases, and (2) applying that civil rule were consistent with the Act. *See People v. Bailey*, 2017 IL 121450, ¶ 29 ("[G]eneral civil practice rules and procedures apply only to the extent they do not conflict with [the Act]."). As the People have argued, both premises are wrong, *see* State Br. 20-21 (noting that civil statute authorizes refiling rather than reinstatement); *id.* at 26-32 (arguing that applying civil statute is inconsistent with Act, especially to the extent it permits refiling after the expiration of the one-year grace period), and petitioner offers no reason to dispute that analysis.

The Fourth District in *Pace* also misconstrued the part of 725 ILCS 5/122-5 that it did quote. The statute's references to "plead[ing] over" and "filing further pleadings" do not authorize motions to reinstate.

On the first point, "pleading over" is a term of art that does not apply to reinstatement or refiling. By definition, to "plead over" means "to fail to notice a defective allegation in an opponent's pleading before responding to the pleading." *Black's Law Dictionary* 1271 (9th ed. 2009). For example, this Court has used the terminology to refer to a party's waiver of alleged pleading defects by answering a complaint. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 155 (1983) ("'if a party wishes to have the action of the court in overruling his demurrer reviewed, he must abide by his demurrer'"; "'[b]y pleading over, he waives his demurrer and the right to assign error upon the ruling'") (quoting *Cottrell v. Gerson*, 371 Ill. 174, 179 (1939)). Thus, to the extent 725 ILCS 5/122-5 applies to proceedings under the Act, it means that the State waives any argument that a petition was inadequately pleaded by filing an answer.

The statutory language referring to "further pleadings" also does not encompass motions to reinstate. Indeed, the *Pace* court appeared to accept that a motion to reinstate a petition is itself, in substance, a petition, stating that "[a] petition is a pleading" for purposes of the statutory language. 386 Ill. App. 3d at 1060. And petitions are pleadings governed by express provisions of the Act. As such, they cannot also constitute "further pleadings"

under the catch-all language of section 122-5, and a petitioner cannot evade the Act's requirements by renaming a petition a "motion to reinstate."

Contrary to petitioner's claim, the People have not argued that the Act "only authorizes trial judges to consider initial petitions, successive petitions, motions to dismiss, and answers." Pet. Br. 12. The Act's reference to "further pleadings" must permit filings other than those expressly set forth in the Act. Thus, this Court has considered, in postconviction cases, motions for fitness examination, *People v. Owens*, 139 Ill. 2d 351 (1990); withdrawal of an attorney, *People v. Greer*, 212 Ill. 2d 192 (2004); and discovery, *see People v. Coleman*, 208 Ill. 2d 261 (2002). Notably, however, none of those filings sought relief on the merits of a postconviction claim. As People have argued, "further pleadings" cannot encompass *petitions* that fail to conform to the strictures of the Act, including its bar on successive petitions. State Br. 18. Because petitioner's motion to reinstate is a petition — and not just an ancillary motion — it is subject to the statutory limitations on petitions.

III. The Petition that Petitioner Seeks to File Is Barred as Successive.

Petitioner does not appear to contest that if the civil statute applied in the postconviction context (a question he fails to address), postconviction petitioners would need to "refile" rather than "reinstate" withdrawn petitions. Indeed, petitioner refers to the deadline set by Section 13-217 as "the re-filing period." Pet. Br. 10; *see also* Pet. Br. 14 (if civil provision applies to postconviction petitioners, "then a judge has no choice but to allow a

petitioner to *refile* his petition within one year of it having been withdrawn") (emphasis added).

It follows that any refiled petition must comply with the restrictions on initial or successive petitions, depending on whether that petition qualifies as successive. The People have not argued that a new petition is *always* successive, as petitioner suggests, *see* Pet. Br. 13-14; only that the petition at issue here is successive. Specifically, there are two prior judgments in this case resolving postconviction claims: (1) the trial court's judgment dismissing petitioner's initial petition, which this Court affirmed in large part; and (2) the trial court's judgment dismissing the withdrawn claims in 2004.

To be sure, neither judgment adjudicated petitioner's three withdrawn claims on their merits, as petitioner notes, *see* Pet. Br. 14-15. But the Act does not require that an earlier petition be denied on the merits for a second petition to be barred. Instead, the Act prohibits the *filing* of two petitions, stating that "[o]nly one petition may be filed under this Article without leave of the court." 725 ILCS 5/122-1(f). In any event, even if an adjudication on the merits were required, forty-two of the claims in petitioner's initial postconviction petition were denied on the merits, and this Court affirmed those portions of the trial court's judgment on appeal. That judgment has *res judicata* effect with respect to petitioner's withdrawn claims even though it did not resolve them. *See Hudson v. City of Chicago*, 228 Ill. 2d 462, 473 (2008); *People v. Jones*, 191 Ill. 2d 194, 198 (2000).

The 2004 judgment dismissing petitioner's withdrawn claims also renders the petition that petitioner attempted to file in 2014 successive. Contrary to petitioner's claim, this conclusion does not "make it impossible for any post-conviction petitioner to ever reinstate any withdrawn petition." Pet. Br. 13. As the People have noted, *see* State Br. 25 n.4, a postconviction petitioner may seek to vacate a judgment of dismissal through a motion filed pursuant to 735 ILCS 5/2-1203, *see People v. Harris*, 2016 IL App (1st) 141778, ¶¶ 17-19, or a petition filed under 735 ILCS 5/2-1401.

Moreover, this Court need not hold that a judgment dismissing a withdrawn petition instantly renders any new petition successive. This Court could adopt a doctrine similar to that in the civil context governing dismissals for failure to prosecute; such judgments become final after the plaintiff's period for refiling under 735 ILCS 5/13-217 (1994) has expired. *See S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 502 (1998). At that point, the plaintiff is barred from refiling his claims, even though they have not been adjudicated on the merits. Petitioner's failure to refile his withdrawn claims in a timely fashion — even within the generous one-year grace period allowed by the civil statute — constitutes a failure to prosecute that should bar his present attempt to refile his withdrawn claims.

Petitioner could pursue postconviction relief only if he satisfied the criteria for filing a successive petition. Because petitioner concedes that he cannot do so, Pet. Br. 13, the trial court's judgment should be affirmed.

CONCLUSION

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

May 30, 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(c) certificate of compliance, and the certificate of service, is ten pages.

/s Erin M. O'Connell
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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 May 30, 2018, the foregoing **Reply Brief 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.

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