2019 IL App (2d) 170037-U
No. 2-17-0037
Order filed August 6, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALFONSO GALLARDO, a/k/a Oscar Garcia, a/k/a Grande, a/k/a Papa, Defendant-Appellant.	)	Appeal from the Circuit Court of Lake County. No. 13-CF-733 Honorable George D. Strickland, Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The application for wire surveillance of the defendant was not signed by the elected State's Attorney or another person duly authorized to act for the elected State's Attorney during his or her absence or disability. As a result, the wiretap evidence should have been suppressed. Defendant's trial counsel was therefore ineffective for failing to move to suppress the wiretap evidence on that basis; defendant's convictions based on the improper wiretap evidence are vacated and the cause is remanded.

¶ 2 Defendant, Alfonso Gallardo, a/k/a Oscar Garcia, a/k/a Grande, a/k/a Papa, following a jury trial, stands convicted of streetgang criminal drug conspiracy (720 ILCS 570/405.2(a) (West 2012), calculated criminal drug conspiracy (720 ILCS 570/405(b) (West 2012), criminal drug

conspiracy (720 ILCS 570/405/1(a) (West 2012), and possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2012), for which he was sentenced to a 24-year term of imprisonment. Defendant challenges his convictions in a number of ways; the dispositive issue, however, is his claim that his trial counsel was ineffective for failing to move to suppress recordings of his and his codefendants' phone conversations gathered through several wiretaps pursuant to an application that was not signed by the elected State's attorney or a duly authorized person acting during the State's attorney's absence or disability. We agree that the applications were facially invalid and vacate defendant's convictions and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Defendant, along with codefendants Noe Perez-Delgado, Carlos Matamoros, Adrian Salgado, Arturo Palma, Saul Flores-Avina, and Adalberto Gallardo, were charged with engaging in a drug-trafficking business that obtained, processed, and distributed over a kilogram of cocaine during the early months of 2013. The conduct was encompassed by the four charges of which defendant was convicted. During the run-up to trial, the State moved *in limine* to introduce and admit the recordings of the phone conversations between defendant and the codefendants. The conversations were generally in Spanish, so the State also sought and received leave to admit the translation transcripts of the Spanish-language conversations as substantive evidence. In general, defendant objected to the recordings on foundational grounds, and these objections were generally overruled. We note that, during the pretrial proceedings, defendant did not challenge the wiretaps on the basis that the applications had not been signed by the elected State's attorney. Ultimately, the State used far fewer of the conversations at trial than were allowed by the trial court's judgment on the State's motion *in limine* regarding the wiretaps.

¶ 5 Several of the codefendants pleaded guilty and testified against defendant during the trial. Specifically, Perez-Delgado, Matamoros, Salgado, and Palma all reached plea agreements with the State in exchange for their testimony. The State's evidence, based significantly on the overheard phone conversations from defendant's phone and others involved in the trafficking network showed that defendant was the mastermind and hub of the network. He communicated to Perez-Delgado when he wished to obtain cocaine for sale. Perez-Delgado and his roommate, Flores-Avina, would obtain the cocaine and would be instructed to drop it off at Matamoros's home. In turn, defendant would notify Matamoros, his son-in-law, when a delivery was imminent. Defendant's brother, Adalberto Gallardo, would visit Matamoros and process the cocaine into smaller parcels for sale. Adalberto Gallardo would use Matamoros's bathroom, and Matamoros did not witness the processing. Defendant would inform Salgado when the drugs were ready for sale, and Salgado would pick them up. He and Palma would sell the drugs on defendant's behalf pursuant to defendant's instructions, and they would also sell some of the drugs to their own customers. Palma, a member of the Latin Kings street gang, would occasionally sell the drugs in local bars considered to be part of the gang's territory. Finally, defendant was the hub of all of the communications and instructions—none of the recordings portrayed the codefendants calling each other without defendant's involvement; likewise, they testified that they spoke with defendant and not each other. The evidence also indicated that the enterprise was selling up to approximately nine ounces (roughly a quarter of a kilogram) of cocaine each week of the surveillance.

¶ 6 When the codefendants were arrested, the police recovered 498 grams of cocaine from the home of Perez-Delgado and Flores-Avina, 6.85 grams of cocaine from Palma's home, and an amount of cannabis from the home of Perez-Delgado and Flores-Avina. The State also presented

evidence about the hierarchy and purpose of the Latin Kings, noting that gangs exist to make money through the selling of drugs and guns.

¶ 7 This recitation is sufficient to place into context the issues lying at the heart of this appeal. Upon his arraignment, defendant was represented by appointed conflict counsel due to the fact that the public defender's office was representing a codefendant. Defendant's trial counsel was contracted by the county to provide representation to defendants who would have caused conflicts among the attorneys of the public defender's office. During the pretrial activity, the county apparently changed its practices shortly before this matter was finally scheduled to go to trial in December 2015; defendant's counsel's appointment was specially continued through the end of December unless the trial finished before then. Once the trial had been completed, trial counsel was immediately discharged and an attorney from the public defender's office was ultimately appointed to represent defendant for posttrial motions and sentencing.[1]

¶ 8 Apparently on December 22, 2015, defendant filed a handwritten motion for new trial; however, as the posttrial attorney had not yet been finalized or received copies of the transcripts of the trial, this filing was ignored. We also note that the motion left blanks for the posttrial attorney's name for when the appointment was finalized.

¶ 9 For most of 2016, posttrial counsel worked on an unrelated drug-possession trial of defendant (No. 2-17-0039, proceeding concurrently in this court). While the report of proceedings of defendant's trial in that cause is included in the record on appeal in this case, none of the common law record related to case No. 2-17-0039 was included in the record on

[1] This appointment occurred after it was determined that representation of defendant no longer created any conflicts with other attorneys in the public defender's office.

appeal in this case. Moreover, the issue in case No. 2-17-0039 did not involve the recorded phone conversations pursuant to the wiretap applications; it was simply possession of cocaine found within defendant's home plus a larger amount found outside of the home in the woods behind the home; these activities occurred before the wiretaps were sought in this case. The trial court in a bench trial found defendant guilty of possession of the cocaine inside the house, but could not determine beyond a reasonable doubt that defendant possessed the larger amount of cocaine found in the woods due to the access of all of the homes abutting the woods. This conviction and the issues attendant to it are not before us in this case; rather, it was anomalously included in the record for this appeal, apparently explaining the lengthy gap between the judgment of conviction in this case and the filing of the posttrial motion.

¶ 10 On November 4, 2016, posttrial counsel filed a motion for a new trial or judgment notwithstanding the verdict. On December 9, 2016, posttrial counsel filed an amended motion for a new trial or judgment notwithstanding the verdict. In pertinent part, defendant alleged that trial counsel was ineffective for failing to move to suppress the recorded phone conversations because the application for eavesdropping was not signed by the elected State's attorney and was only authorized by an assistant State's attorney, contrary to the requirements of section 108B-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/108B-3 (West 2012)). On January 6, 2017, the posttrial motion was argued. Posttrial counsel argued that trial counsel was ineffective for failing to challenge the facial validity of the application for eavesdropping because it had not been signed by the elected State's attorney, only by an assistant State's attorney. In its response argument, the State did not address defendant's section 108B-3 argument. (We also note that the State's response to the posttrial motion addressed only the initial and not the amended posttrial motion; it wholly ignored the improper-eavesdropping-

application argument even though it was filed on the date of the hearing, nearly a month after the filing of the amended posttrial motion.)

¶ 11 The trial court denied defendant's amended posttrial motion. In its oral ruling, the court held, in pertinent part:

> "[Defendant argues] that [trial counsel] is ineffective for failing to file a Motion to Suppress regarding the non-consensual overhear, what [posttrial counsel] is referring to—is, in another case, that was subsequent to this case, I guess, probably, close to a year later, I ruled on a—on this issue and in that case, which was a RICO case, I suppressed all of the wiretap information the State had obtained because the State's Attorney of Lake County, Mr. Nerheim, had not sought the overhear personally.
>
> It was my finding both under State and federal law it is required in a no consent overhear that the State's Attorney, or one to act authorized fully in his absence [*sic*], seek the overhear, and the RICO case that I had, that was not what took place, and so I suppressed the evidence.
>
> For the Defense to succeed in an ineffective assistance of Counsel argument, they have to show the standards or fulfill the standards that are set forth in [*Strickland v. Washington*, 466 U.S. 668 (1984)] that—and going to the second of the two standards, really the result would have been different.
>
> I do find that the result very likely would have been different, because, and, once again, I'm not saying the facts supported it, although I don't quibble with what [posttrial counsel] said who signed the overhears.
>
> I never had a factual basis for it. Very possibly, had I found that Mr. Nerheim did not seek these, or one for who could act in his absence [*sic*], I very possibly might have

> suppressed the evidence but, really, the first prong of [*Strickland*] is really the deciding factor here, and that is whether or not [trial counsel's] conduct of the case fell below a reasonable level of representation.
>
> And I would note, once again, that I decided this well after the trial was done in this case, well after the time for pre-trial motions.
>
> My ruling based on extensive research that I've done is the first ruling in Illinois on this issue and there is no case law, no published case anywhere in the State of Illinois that [trial counsel] would have been able to rely on to indicate that he would have prevailed on such a motion and, in fact, despite the fact that this Statute has been in effect for many years, there is no published case here.
>
> There are cases in other jurisdictions, Kansas and New Jersey and Minnesota and Florida, for instance, but not in Illinois.
>
> So, and, obviously, [trial counsel] could not have necessarily foreseen my ruling in the other case, so I find that [trial counsel] was not ineffective for failing to raise an argument that it had never been decided in the State of Illinois before."

The trial court denied defendant's posttrial motion for a new trial or for a judgment notwithstanding the verdict.

¶ 12 The trial court then proceeded to sentencing. It first determined that it would enter judgment on one count of streetgang criminal drug conspiracy, with the remaining convictions to be merged into that one. Next, following argument, the trial court sentenced defendant to a 24-year term of imprisonment (required to be served at 75%), assessed $3,716 in fines and fees, and levied a $100,000 street-value fine (based on the conviction of over 900 grams of cocaine at a value of $100 a gram). Defendant timely appeals.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant raises five issues, including challenges to the sufficiency of the evidence and to the propriety of aspects of his sentence. However, the dispositive issue here, and the issue that obviates the consideration of defendant's other issues, is whether trial counsel was ineffective for failing to move to suppress the recorded conversations based on the fact that the wiretap applications were not signed by the elected State's attorney or a properly authorized substitute in the absence of the elected State's attorney. Before we can address that issue, however, we must first recount the relevant appellate procedural history that brings us to this point.

¶ 15 A. Appellate Procedural History

¶ 16 Before substantively addressing defendant's issue, we note that the record on appeal as initially submitted did not include the wiretap applications at issue. The State called this defect to defendant's attention in the response brief, seeking to have the issue forfeited and the inferences from the incomplete record drawn against defendant (see *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984)). Defendant promptly moved to supplement the record in this court to include the copies of the applications that had been produced to defendant during discovery.

¶ 17 The State objected on the grounds that the applications were never before the trial court and, pursuant to *Foutch*, the incomplete record required forfeiture of the issue. The State also argued that granting the motion would set a dangerous precedent of allowing a piecemeal creation of the record and the necessary supplement briefing and rebriefing would detrimentally impact the appellate process. See *People v. Pertz*, 242 Ill. App. 3d 864, 905 (1993). These are not insubstantial concerns, but *Pertz* did not hold that supplementing the record can never be appropriate. See Ill. S. Ct. Rs. 329 (eff. July 1, 2017) (supplementing the record on appeal); 366

(eff. Feb. 1, 1994) (appellate court's powers include amending of the record on appeal); see also *People v. Salgado*, 263 Ill. App. 3d 238, 244-45 (1994). Indeed, we have an obligation to "never sacrifice justice at the altar of expedient procedure." *Salgado*, 263 Ill. App. 3d at 245. Disallowing defendant's motion to supplement could easily result in more appeals, chewing up scarce judicial resources and doing more violence to appellate practice than any delay and inconvenience caused by allowing the supplementation of the record. See *id.* Balancing these concerns, we allowed defendant's motion. We also allowed the State to file a surreply brief.

¶ 18 The State filed a motion to reconsider. The State maintained that the wiretap applications were never before the trial court. The State further insisted that, because the documents were not included in the record on appeal, we are required to follow the dictates of *Foutch*, and resolve any issues resulting from the incompleteness of the record against defendant. See, *e.g.*, *Foutch*, 99 Ill. 2d at 391-92; *People v. Smith*, 106 Ill. 2d 327, 334-35 (1985).

¶ 19 We disagree that the applications were never before the trial court. Indeed, the record reflects that the original trial court, who recused because her spouse represented a potential witness in this case, signed the applications. The applications were maintained apart from the court's file in this case, but to say they were never before the trial court simply misstates the record. Moreover, we note, emphatically, that the State has never disagreed, below or in this court, that the applications were not signed by the elected State's attorney or otherwise signed by a duly empowered alternate in the absence of the elected State's attorney. This is significant because it is a tacit agreement that defendant's central point is not controverted by the documents in this matter. We believe that, as an officer of the court, the State would appropriately represent that it had evidence showing that the applications were signed by the elected State's attorney, if, in fact, they were; likewise, the State would not challenge defense counsel's representation (also

as an officer of the court) that they were not signed by the elected State's attorney if the actual documents reflected that fact. Moreover, our belief is supported by counsels' ethical obligations of candor to the tribunal: the attorneys representing the State below and in this court as well as the attorneys representing defendant below and in this court were required not to make a false statement concerning a material fact as well as to correct a false statement of a material fact. Ill. R. Prof'l Conduct R. 3.3(a) (eff. Jan. 1, 2010); see also Model Rule of Prof'l Conduct R 3.3(a) (2002) (same). This means that, regardless of defendant's intention, if the State had information controverting defendant's claim that the wiretap applications, based on the documents defendant received in discovery, were not signed by the elected State's attorney, then the State had an ethical obligation to advise the trial court or this court of that fact. Ill. R. Prof'l Conduct R. 3.3(a) (eff. Jan. 1, 2010). In this court, the State has repeatedly argued only that the documents were not initially part of the record, not that defense counsel's representation as to what they contained was in error. In light of the above-mentioned ethical obligations, we view the State's contentions as a tacit concession that the wiretap applications were not signed by the elected State's attorney.

¶ 20 The State also decried our order allowing defendant's motion to supplement as a circumvention of appropriate procedure (namely, requiring a postconviction petition and attendant appeals) in favor of the expedient of allowing the supplementation of the record. While we understand the State's frustration, we remind the State that it invited defendant to request to supplement the record in its response brief and defendant did so. In our discretion, we allowed the supplementation and the State's arguments to justify reconsideration were only amplifications of the arguments offered originally in the state's objections to the motion to

supplement and nothing showing that, factually, defendant's representations were in error. Accordingly, we denied the State's motion to reconsider.

¶ 21 We note that our ruling on the motion to supplement does not necessarily close the matter, as motions made in the reviewing court are open for further consideration. *Pertz*, 242 Ill. App. 3d at 905. However, upon due consideration of the motions and objections, we decline to disturb our judgment, believing that we properly balanced considerations of substantial justice and efficient appellate practice.

¶ 22 The upshot of the motion practice before us is that the copies of the applications were placed into the record. The copies were apparently drawn from the files of the Lake County public defender, not the court file. The copies also contained a number of redactions (which we presume were to prevent the disclosure of the identities of confidential informers and undercover officers to all of the codefendants and defendant and their associates). However, the applications appear to be authorized by an assistant State's attorney and they do not state that the elected State's attorney was disabled or not present and do not state that the assistant was designated to sign the applications. The applications were approved by the original trial court in this matter, Judge Rossetti. Defendant represents that the form in which the applications appear in the supplemental record are exactly the form in which defendant received them during discovery.

¶ 23 B. Ineffective Assistance

¶ 24 Defendant's substantive argument centers on trial counsel's ineffectiveness. A claim of ineffectiveness of counsel is governed by the familiar *Strickland* standard. *People v. Murray*, 2017 IL App (2d) 150599, ¶ 65, *appeal allowed*, No. 123289 (May 30, 2018). In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that, as a result of the deficient performance, the defendant was

prejudiced. *Id.* Deficient performance is established by showing that counsel's performance fell below an objective standard of reasonableness. *Id.* Prejudice is established by showing that, but for counsel's unprofessional errors, a reasonable probability exists that the outcome of the proceeding would have been different. *Id.* In turn, a reasonable probability means a probability sufficient to undermine confidence in the outcome, so that counsel's deficient performance rendered the trial result unreliable or the proceeding unfair. *Id.* The defendant must prove both deficient performance and prejudice; failure of proof of either will preclude a determination of ineffective assistance of counsel. *Id.*

¶ 25 Defendant specifically argues that trial counsel was ineffective for failing to move to suppress the recorded conversations overheard pursuant to the wiretap applications where the applications, on their faces, were not signed or authorized by the elected State's attorney. The wiretap applications at issue were sought and issued under section 108B-3 of the Code (725 ILCS 108B-3 (West 2012). Section 108B-3(a)(i) provides, pertinently:

> "The State's Attorney, or a person designated in writing or by law to act for him and to perform his duties during his absence or disability, may authorize, in writing, an ex parte application to the chief judge of a court of competent jurisdiction for an order authorizing the interception of a private communication when no party has consented to the interception and (i) the interception may provide evidence of, or may assist in the apprehension of a person who has committed, is committing or is about to commit, a violation of *** Section 401, 401.1 (controlled substance trafficking) [or] 405, 405.1 (criminal drug conspiracy) *** of the Illinois Controlled Substances Act [(720 ILCS 570/401, 570/401.1, 570/405, 570/405.1 (West 2012)]." 725 ILCS 5/108B-3(a)(i) (West 2012).

Defendant argues that the applications were not signed by the "State's Attorney or a person designated in writing or by law to act for him and to perform his duties during his absence or disability." Defendant further contends that had counsel moved to suppress the recordings based on the lack of a proper authorization or signature, the trial court would have suppressed them. Defendant concludes that trial counsel's failure to do so constituted deficient performance, and the fact that the recordings were not suppressed constitutes prejudice, thus trial counsel provided ineffective assistance of counsel. We agree.

¶ 26 Turning first to the deficient performance element, we note that the trial court held that trial counsel's performance was not deficient because until 2016, no Illinois court had apparently ruled on the issue of whether the elected State's attorney had to sign the wiretap application, when the same trial judge, Judge George D. Strickland, suppressed recordings because the elected State's attorney had not signed and authorized the applications for wiretaps in *People v. Allard*, 2018 IL App (2d) 160927, ¶ 17. The trial court in this case reasoned that, because there was no Illinois appellate or supreme court case on the issue, trial counsel could have had no inkling that a trial court would suppress the recorded conversations pursuant to a wiretap application that had not been authorized by the elected State's attorney.

¶ 27 At oral argument, the State amplified the trial court's reasoning by directing our attention to *People v. Henry*, 2016 IL App (1st) 150640. In that case, the court framed the deficient-performance inquiry as determining whether counsel's performance "fell below an objective standard of reasonableness 'under prevailing professional norms.' " *Id.* 43 (quoting *People v. Colon*, 225 Ill. 2d 125, 135 (2007)). The State explained that, in its view (and the trial court's), we should look to see whether Lake County had a practice of allowing wiretap applications pursuant to article 108B to be signed by assistant State's attorneys. The State reasoned, much

like the trial court, that where there was no case on point regarding the issue, it would not have been against the local prevailing professional norms to fail to file a challenge to the wiretap evidence based on how the wiretap applications were prepared.

¶ 28 This reasoning does not accurately capture the legal principles regarding the ineffective-assistance analysis of an attorney's deficient performance. The focus of the inquiry is not simply on the timing and whether there is a reported case on point; rather, the focus is on the state of the law at the relevant time and whether a reasonable attorney should have raised a challenge on the issue. *People v. Cathey*, 2012 IL 111746, ¶ 26. Viewed through this lens, it is apparent that a reasonable attorney should have challenged the facial validity of the wiretap applications.

¶ 29 First, in *People v. Coleman*, 227 Ill. 2d 426, 433-34 (2008), our supreme court held that federal legislation had preempted the area of the nonconsensual interception of oral and wire communications in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510 *et seq.* (2012)). States were allowed to adopt more stringent standard than those set forth in Title III, but could not adopt less stringent standards. *Id.* In turn, section 2516(2) (18 U.S.C. § 2516(2) (2012)) provides that only "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications" may apply for a wiretap. Likewise, section 108B-3 provides that only "[t]he State's Attorney, or a person designated in writing or by law to act for him and to perform his duties during his absence or disability" may apply for a wiretap under Illinois law. 725 ILCS 5/108B-3 (2012). A reasonable attorney would note the similarity in language and intent of the sections and, noting the absence of Illinois case law on point, turn to other jurisdictions to see

how the similar language had been interpreted. A quick search of foreign authority would reveal that, for nearly 50 years, the federal language had limited wiretap application authority to the principal prosecuting attorney of the relevant political subdivision. *E.g.*, *State v. Cocuzza*, 301 A.2d 204, 207-08 (N.J. Super. Ct. Law Div. 1973) (section 2516(2) limits to the county prosecutor the authority to make an application for a wiretap); *State v. Daniels*, 389 So. 2d 631, 635-36 (Fla. 1980) (assistant State's attorneys not included in State's attorney's authority to apply for a wiretap); *State v. Bruce*, 287 P.3d 919, 923-24 (Kan. 2012) (State attorney general could not delegate authority).[2]

¶ 30 Based on the longstanding and uniform interpretations of the federal provision and the limits it placed on state provisions, a reasonable attorney would have concluded that challenging the facial validity of the applications at issue here had a reasonable probability of success. Moreover, despite the fact no attorneys in the locale had raised a challenge to how wiretap applications had been prepared in Lake County, it was still reasonable in light of the clear state of the law to pursue a motion to suppress based on facial invalidity even though no case had yet decided the issue. See 725 ILCS 5/108B-12(c)(2) (West 2012) (a motion to suppress may be made on the grounds that the wiretap application "is insufficient on its face"). Accordingly, under the state of the law at the time of defendant's trial, there was a reasonable basis to

[2] We also note that the entire federal counterpart, section 2516(1) (18 U.S.C. § 2516(1) (2012)) was initially interpreted to limit the authorizing officer to the Attorney General or to an Assistant Attorney General specially designated by the Attorney General. *United States v. Giordano*, 416 U.S. 505, 508 (1974). Later amendments to the provision have widened the scope of authorizing officers, but the principle remains the same and remains readily discernible.

challenge the wiretap applications, and there was also a reasonable likelihood of success. Indeed, the trial court recognized this, noting that, had the attorney challenged the authority of the attorney to make the wiretap applications, it very likely would have suppressed the recordings as it did in *Allard*, which postdated the trial in this case.

¶ 31 We further note that, on review, this court affirmed the trial court's judgment in *Allard*. We held that the elected State's attorney's failure to sign the applications himself did not comply with the requirements of article 108B of the Code (725 ILCS 5/108B-1 *et seq.* (West 2012). *Allard*, 2018 IL App (2d) 160927, ¶ 30. *Allard* was decided during the pendency of this appeal. Considering the foreign authority as well as the reasoning of *Allard*, we see no reason to depart from our holding in *Allard*. Accordingly, we hold that, had trial counsel moved to suppress the recorded conversations here based on the failure of the elected State's attorney to properly authorize the applications for wiretaps, the trial court would have suppressed the recorded conversations. Thus, defendant has demonstrated prejudice. By demonstrating both deficient performance and prejudice, defendant has established that his trial counsel provided him with ineffective assistance of counsel.

¶ 32 The State argues that the ineffective-assistance issue is forfeited because of defendant's failure to prepare a complete record. The grant of defendant's motion to supplement the record obviates this argument.

¶ 33 The State addresses the elements of the ineffective-assistance analysis: first the State argues, similarly to the trial court, that the fact that *Allard* was decided after the pretrial phase of this case, means that trial counsel was not required to file a motion to suppress based on the facial invalidity of the wiretap applications. As noted above, that is not an accurate characterization of the law and, based on the actual state of the law at the time, it was clearly

discernable that such a motion had a substantial likelihood of success. See *supra*, ¶¶ 28-30. Thus, we reject the State's contention.

¶ 34 Regarding prejudice, the State argues that the incomplete record prevents an accurate assessment of whether defendant's motion would have succeeded. Again, the supplementation of the record obviates this line of argument. We reject the State's contentions regarding prejudice.

¶ 35 We also note that, in its surreply brief, the State does not analyze the legal effect of the supplemental record; rather, it aptly notes issues that exist with the supplemental record and then insinuates that appellate counsel may have fabricated the information contained in the supplemental record. We note that the trial court accepted posttrial counsel's representations and that the supplemental record is in accord with those representations; moreover, appellate counsel's representations fully track those of posttrial counsel. The State's insinuation strikes to the very heart of our adversarial legal system. We do not say that the State flatly accused appellate counsel of lying; but the State has approached that line and, much like a batter obscuring the inside line of the batter's box by kicking dirt over it, has obscured the boundaries of propriety, making an assessment of whether the line has been crossed nigh impossible. We are not prepared to claim an ethical violation on the part of the State, but we admonish the State to provide actual evidence if it wishes to even insinuate that opposing counsel has breached her ethical obligations and abjured her role in our adversarial system. Future instances of unfounded rhetorical hyperbole, invective, and accusative insinuation cannot and will not be tolerated. Moreover, we find it telling that, while pointing out appropriate issues with the supplemental record, the State does not challenge the legal import, tacitly conceding the point because what is

contained in the supplemental record is sufficient to enable the State to construct an argument on the merits.

¶ 36 C. Remedy

¶ 37 The State has aptly observed that we are not a court of original jurisdiction. Nevertheless, we are confident that the supplemental record demonstrates that trial counsel was ineffective for failing to challenge the facial validity of the wiretap applications. The other issues on appeal are raised as a result of the trial in this matter and are unlikely to recur. We also observe that the evidence produced at trial was sufficient to prove defendant guilty of the charged offenses beyond a reasonable doubt and further proceedings, including a retrial, are not barred by the principles of double jeopardy. *People v. Drake*, 2019 IL 123734, ¶ 29. Accordingly, we vacate defendant's convictions and remand for further proceedings consistent with this order.

¶ 38 III. CONCLUSION

¶ 39 For the foregoing reasons, we vacate the judgment of the circuit court of Lake County and remand the cause.

¶ 40 Judgment vacated and cause remanded.