No. 123182

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- SYLWESTER GAWLAK Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0861. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 07-CF-2547. Honorable Daniel J. Rozak, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether the appellate court properly held that the circuit court committed reversible error by denying Sylwester Gawlak his due process right to retain counsel to represent him on his motion for DNA testing.[1]

[1]In addition to the issue presented for review in this Court, Gawlak raised an issue in the appellate court below which the court did not address in its opinion: "Whether the trial court erred when it denied Gawlak's request to present an expert witness to testify at the hearing on the motion for DNA testing." If this Court reverses the judgment of the appellate court, he requests that the case be remanded to the appellate court with directions to decide that issue.

STATEMENT OF FACTS

Following a jury trial, Sylwester Gawlak was convicted of two counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse against his 10-year old daughter J.G. (R. 834) The defense theory at trial was that the State's evidence failed to prove beyond a reasonable doubt that Gawlak committed the offenses and that Gawlak did not in fact commit them.

Trial

At trial, J.G. testified she was 11 years old and lived in Oak Lawn with her mother Jolanta Martin. (R. 355-6) Gawlak was J.G.'s father. (R. 365) He had been "in and out" of her life since she was born, and in the summer of 2007, he "came back into her life." (R. 364-5) Gawlak lived in Bolingbrook and J.G. began visiting him at his home there. (R. 366) Gawlak was married to "Dorothy," and they had two daughters who were five and six years old and two sons who were teenagers. (R. 369-70) J.G. enjoyed playing with her step-siblings and one time, accompanied Gawlak and his family to Florida for a vacation. (R. 367-70)

J.G. spent the weekend of Friday, December 7, 2007, to Sunday, December 9, 2007, at Gawlak's home. (R. 369, 370) She slept on a couch downstairs from the bedrooms in a room with no door. (R. 382-386) She said she was awakened by Gawlak rubbing "her butt." (R. 391) At the same time, he was pulling at her underwear to take it off. (R. 394) She tried to hold her underwear up, but he pulled it down to above her knees. (R. 394) She said

Gawlak digitally penetrated her vagina, put his mouth on her vagina, placed his penis in her hand, and fondled her breasts. (R. 392-409) J.G. told her mother what happened. (R. 422, 473) She was also interviewed at the child advocacy center and her description of what happened was substantially the same as her testimony at trial. (St. Ex. 7) She repeated that during the incident, she did not see anything come out of Gawlak's penis, but she did not know for sure. (DVD at 15:15) Something might have been on her shirt, but she did not feel any wetness or anything on it. (DVD at 15:15)

After the police station, Martin took J.G. to the hospital where she was examined by Dr. Kevin Benfield. (R. 424) Before going to the hospital, J.G. had used the bathroom and wiped with toilet paper. (R. 426-27) J.G. told the doctor her father had touched her in her private parts. (R. 451)

Dr. Benfield testified that based on his visual examination, "there was a slightly reddened area to the right labia minor," which was closer to the internal part of the vagina and was consistent with digital manipulation or fingering of that area. (R. 453-54) But it was also consistent with other possible causes. (R. 464) In his written report, he described his observation as "redness to the labia, minor possible abrasion," and "very superficial redness." (R. 460-61) Because a few days had passed since the alleged incident, Benfield believed J.G. was in the healing stage and at her age, a person would heal "pretty quickly." (R. 454) Benfield swabbed the vaginal area, but because of the passage of time and J.G.'s using the washroom, urinating, and wiping herself prior to the examination, it was less likely that any evidence would be

obtained from the swabbing. (R. 458) On the other hand, Benfield could not say with an "absolute degree of medical certainty" that no DNA would have been present. (R. 459)

Christopher Webb was the forensic scientist who analyzed the vaginal swab and J.G.'s shirt and underwear. (R. 560) The underwear had a stain in the crotch area, but Webb found no semen or saliva on it or the vaginal swab. (R. 566, 568) He did not test the shirt for the presence of semen or saliva, because he did not visually observe any stains on it that could be tested. (R. 565-66) According to Webb, the passage of time, washing of the vaginal area, and using the bathroom could have affected the possibility of saliva still being on those two items. (R. 567-68, 569-570) On the other hand, if an individual had saliva present on her vagina, put her underwear on, and then washed her vagina, there was a higher probability of finding a trace element of saliva on the underwear. (R. 571) Webb agreed that if DNA was present at one point, it would not have necessarily all been rubbed or washed away. (R. 578)

Gawlak voluntarily accompanied the police to the police station where they interviewed him. (R. 590-91) Detective Revis read Gawlak the *Miranda* warnings and Gawlak waived his rights and proceeded to speak to the police. (R. 592-93) Gawlak explained how he had only recently had contact with J.G. and was building a relationship with her. (R. 596) On the evening of the alleged offense, Gawlak said he and his son had picked up J.G. from her home and brought her back to his house in Bolingbrook. (R. 597) They watched a

movie and spent the evening together. (R. 597) Revis then noticed Gawlak's demeanor began to change. (R. 597) He told Revis that after everybody else had gone to bed, Gawlak went to J.G's room and began to rub her back and her butt. (R. 598) As Revis asked more about the "crux of the situation," he said Gawlak "showed remorse, hung his head, and was embarrassed by it." (R. 598) Gawlak said he realized he treated his daughter like an 18-year-old instead of a 10-year-old and it was wrong. (R. 598, 700) He also said he should not have kissed and hugged her for over 10 minutes and should not have been wearing only his underwear. (R. 599)

Revis confronted Gawlak with J.G.'s allegation that he touched her vagina and asked Gawlak why his daughter would make up or lie about such an allegation. (R. 601) Gawlak responded he was "probably sure," J.G. was not lying but he was too embarrassed to admit anything had happened. (R. 601, 701) It would embarrass him and his family and he could not admit to it. (R. 601, 702) At the end of the interview, Revis said Gawlak repeated he was "too embarrassed" to tell Revis what happened. (R. 602) Gawlak did not admit he inserted his finger into or licked J.G.'s vagina. (R. 602)

On cross-examination, Revis acknowledged that Gawlak denied doing anything inappropriate with J.G. multiple times during his three-hour interview with him. (R. 609, 623) During the course of the interview, Gawlak explained he felt it necessary to show particular attention to J.G., but Revis did not ask him why. (R. 608) Revis also said the interview room was equipped to video or audio record the interview, but the police did not record it

or ask Gawlak if he would like to memorialize his statement in writing. (R. 605-6)

Detective Simpson testified that Revis told him what Gawlak had said and then Simpson and Detective Melissa Valentine interviewed him again. (R. 616) Simpson asked Gawlak to "tell him about what happened with J.G." (R. 616) Gawlak said his actions were "improper" and he treated J.G. "more like a wife or girlfriend as opposed to a child." (R. 616, 683) Gawlak indicated he was showing love and affection to her, because he did not have the opportunity to see her as much as his other children. (R. 616) He kissed J.G. on her face, on her nose, on her arm, and hugged her. (R. 617) When asked what he was wearing at the time, Gawlak said "there were hardly any clothes," and then according to the detectives, he corrected himself and said, "No, there were no clothes." (R. 617, 681) Simpson was surprised by this statement, and that Gawlak just "volunteered it on his own." (R. 617) Gawlak said he could not say anything else about what happened, he was embarrassed and it was an embarrassment to the family. (R. 619) Detectives Revis and Simpson both described Gawlak as being very cordial, respectful, and not evasive about answering any of the questions posed to him. (R. 604, 621)

Over defense counsel's objection, the State also presented a letter written by Gawlak to J.G.'s mother, Jolanta Martin, while he was in jail awaiting trial. (R. 511-25) The letter was confiscated by officials at the jail and therefore, was never sent to Martin. (R. 512, 642-44) The letter stated: 1) "If anything that they accuse me of doing is true, I'm awfully ashamed with it

and will have to live with it until the end of my life"; 2) Is there any chance that you could send J.G. to Poland for a couple of months so it would be easier for me to leave this place?"; and 3) "If you have a Bible, please read about love and forgiveness." (R. 670-71)

The trial court admonished Gawlak about his right to testify and he confirmed he did not wish to testify. (R. 730-31) Both parties rested. (R. 733) The theory advanced by the defense during closing argument was that the State's evidence did not prove Gawlak guilty beyond a reasonable doubt and that Gawlak "repeatedly for over three and a half hours, [told police] I didn't do this, I didn't do this, I didn't do this." (R. 786-799) The jury found Gawlak guilty on all counts. (R. 834)

At the sentencing hearing, the pre-sentence investigation report showed that when given the opportunity to provide his version of the offense, Gawlak stated, "I didn't do it. Her grandparents were mad that I didn't marry their daughter so they told her to say it. She was guided." (IC. 72) Additionally, when Gawlak exercised his right of allocution, Gawlak said he was "not guilty of those charges presented by the State against me." (R. 854) He said he was "sorry for my daughter, [J.G.] and her mom Jolanta," and that "[J.G.] was manipulated by other members of the family and used by the State to lie against me." (R. 864) The court sentenced Gawlak to mandatory consecutive terms of six-year sentences for each predatory criminal sexual assault conviction and a three-year sentence for the aggravated criminal sexual abuse conviction. (R. 984)

Motion for DNA testing and Other Post-Conviction Proceedings

In 2011, Gawlak filed a *pro se* post-conviction under the Post-Conviction Hearing Act ("Act"). His petition was summarily dismissed by the circuit court but on appeal, his case was reversed and remanded for second-stage proceedings, because the court had failed to rule on Gawlak's petition within 90 days. (C. 879) On remand, Assistant Public Defender ("APD") Jason Strzelecki was appointed to represent Gawlak. (R. 1141)

On March 10, 2015, Gawlak filed a section 2-1401 "Petition for Relief from Void Hearing." (C. 1693-1701) He later retained private attorney Robert Caplan to represent him on this petition. (R. 1486-1489)

On May 12, 2015, Gawlak filed a motion for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963. (C. 1750-58) He sought mitochondrial DNA and PCR-STR DNA testing for any hair recovered from J.G.'s clothing. He also requested that the clothing itself be tested for "touch DNA" using the method of PCR-STR and Y-STR testing. (R. 1753-55) He alleged that none of the evidence was subject to this DNA testing. (R. 1753)

On June 16, Gawlak advised the court that he wished to represent himself on his post-conviction petition and after he waived his right to post-conviction counsel, the court granted APD Strzelecki's motion to withdraw from the case. (R. 1404-1416) Gawlak also presented his DNA motion for the first time. He asked to present a letter written by Karl Reich, a forensic scientist with a DNA testing company called Independent Forensics. (C. 1821;

R. 1385) Gawlak explained that the letter was in response to Gawlak sending Reich a copy of his DNA motion and requesting Reich's advice on it. (R. 1385) Gawlak said that Reich's letter "talk[ed] about possible new testing according to his opinion that, for example, Y-STR S [*sic*] [testing] of all the items collected by the State will bring some new data for the post-conviction relief." (R. 1386) The court continued the hearing on the DNA motion for the State to find out whether the evidence was still available for testing. (R. 1393)

On July 21, 2015, the State filed a written objection to Gawlak's DNA motion. (C. 1839-1849) The State indicated that the evidence Gawlak was requesting to have tested was still available. (C. 1841) However, the State alleged *inter alia* that identity was not an issue at trial and that Gawlak's request for DNA testing failed because he could not show that the testing had "the scientific potential to produce new noncumulative evidence relative to his assertion of actual innocence." (C.1841)

On September 30, 2015, private attorney Joel Brodsky appeared and indicated he intended to file a "limited scope appearance" under Supreme Court Rule 13(c)(6) and represent Gawlak on his motion for DNA testing. (R. 1502-1506) Brodsky explained that a "limited" appearance would serve the purpose of "narrow[ing]" his representation to only the DNA motion and not Gawlak's pending post-conviction petition. (R. 1505-1506) Gawlak also asked the court that Brodsky be allowed to represent him on his DNA motion, "if not under the [*sic*] Supreme Court Rule 13, at least in the discretion of this court." (R. 1507)

The prosecutor objected to Brodsky filing a limited appearance in the post-conviction proceedings, "a criminal matter and not a civil matter." (R. 1507) Brodsky responded that the DNA motion was a "separate post-conviction motion," and that Gawlak's *pro se* post-conviction petition did not raise an issue about DNA testing. (R. 1507)

The court denied Brodsky's request to enter a limited scope appearance. (R. 1512) The court ruled that Brodsky could represent Gawlak in all of his pending post-conviction proceedings but not on his DNA motion alone. (R. 1512)

On November 16, 2015, a hearing was held on Gawlak's DNA motion. During his argument, Gawlak advised the court that he was "not asking for a new trial or release." (R. 1612-1613) He was only asking to be allowed to test the evidence, and he indicated he was willing to pay for the testing himself. (R. 1613) Gawlak also argued that he should be allowed to present the testimony at the hearing. He explained, "I'm expecting to have Mr. Carl Rasae (phonetic) [Karl Reich] to testify in respect to the – actually the last step which this Court is obligated to find which is that the evidence I'm looking to be tested has the scientific potential to produce new and non-cumulative evidence materially relevant to the defendant's assertion of actual innocence and that the testing employs a method generally accepted in the scientific community." (R. 1598)

The prosecutor argued that an evidentiary hearing was unnecessary because Gawlak could not present a *prima facie* case that identity was an

issue at trial. (R. 1600) The prosecutor maintained that DNA material was not found on any of J.G.'s clothing and therefore, Gawlak did not establish that any further testing was possible. (R. 1600-1601) The court denied Gawlak's motion. (R. 1614)

Appellate Court's Decision

The appellate court found that the circuit court's denial of Brodsky's request to enter a limited scope appearance on Gawlak's DNA motion violated Gawlak's due process rights. *People v. Gawlak*, 2017 IL App (3d) 150861, ¶ 14. Based on these facts, the court declined to address the State's argument that any error in dismissing the motion was harmless. *Gawlak*, ¶ 15. The court held that "[s]imply put, defendant had a constitutional due process right to have private counsel represent him on his DNA motion." *Id.* In its petition for leave to appeal, the State's "point relied upon in seeking review" stated that "[t]he Appellate Court's holding that Illinois Supreme Court Rule 13(c)(6) establishes a constitutional right to counsel is without support in the law." (State's Petition for Leave to Appeal, 1)

ARGUMENT

The appellate court properly held that the circuit court committed reversible error by denying Sylwester Gawlak his due process right to retain counsel to represent him on his motion for DNA testing.

Sylwester Gawlak retained private counsel to represent him on his section 116-3 motion for DNA testing. His attorney requested leave to enter a limited scope appearance under Supreme Court Rule 13(c)(6) for purposes of representing Gawlak only on his DNA motion and not his other pending post-conviction cases. (R. 1505) The circuit court refused to allow counsel to enter his appearance on the DNA motion alone. (R. 1512) The appellate court held that the court erred because although Gawlak did not have a sixth amendment or statutory right to representation in section 116-3 proceedings, he had "a constitutional due process right to retain private counsel to represent him on any matter he wishes." *People v. Gawlak*, 2017 IL App (3d) 150861, ¶ 12.

The State has never squarely addressed Gawlak's argument and the appellate court's holding that a litigant has a due process right to retain counsel in a discrete action. In the circuit court and on appeal, the State claimed that Gawlak had no statutory or constitutional right to counsel on his DNA motion and that Rule 13(c)(6) applied only in civil proceedings and not the section 116-3 proceedings here. (R. 1507); *Gawlak*, 2017 IL App (3d) 150861, ¶¶ 11, 12. Now the State has reversed course and mainly argues that Gawlak was not entitled to retain counsel in this case because his attorney failed to file the correct paperwork for entering his appearance under Rule

13(c)(6). The State's form-over-substance argument is unavailing because it fails to address the due process concerns involved here.

Where, as here, there are no disputes of fact, whether a defendant's right to counsel has been violated is an issue of law that is reviewed *de novo*. *People v. Abernathy*, 399 Ill. App. 3d 420, 426 (2nd Dist. 2010)

In this case, Gawlak filed his section 116-3 motion for DNA testing on May 12, 2015. (C. 1750-1768) On June 16, he appeared in court for both a hearing on his motion and for a status hearing on his separate second-stage post-conviction petition, for which Assistant Public Defender Strzelecki had been appointed to represent him. (R. 1141) Later during the hearing, Gawlak advised the court that he wished to represent himself on his post-conviction petition and subsequently waived his right to counsel in that case. (R. 1403-1416) Separately, Gawlak also filed a *pro se* section 2-1401 "petition for relief from void order." (R. 1484-1489) On August 28, 2015, the trial court allowed private attorney Robert Caplan leave to enter his appearance on the section 2-1401 petition. (R. 1489)

On September 30, 2015, private attorney Joel Brodsky appeared with Gawlak before the court. (R. 1502) Brodsky stated he intended to file a "limited scope appearance" under Supreme Court Rule 13(c)(6) in the DNA case. (R. 1504-1505) Under that rule, "an attorney has entered into a written agreement with [the] party to provide limited scope representation." Ill. S. Ct. R. 13(c)(6)(eff. July 1, 2013). The purpose of Rule 13(c)(6) is to "help insure that the scope of the representation is identified with specificity." Ill. S. Ct. R.

13(c)(6), Committee Comments (adopted June 14, 2013). Brodsky maintained that filing a "limited" appearance would serve the purpose of "narrow[ing]" his representation to only the DNA motion and "no other matter." (R. 1505) Gawlak also addressed the court, asking for Brodsky to represent him, "if not under the [*sic*] Supreme Court Rule 13, at least in the discretion of this court." (R. 1507)

The State objected to Brodsky entering a "limited scope appearance" on a motion "which was filed in this criminal matter and not a civil matter." (R. 1507) Brodsky responded that post-conviction proceedings were civil in nature and that the DNA motion was a "separate, post-conviction motion by statute." (R. 1507, 1510)

The circuit court denied Brodsky's request to enter an appearance. (R. 1512) The court was bothered by Gawlak having "three different attorneys arguing parts of a single case." (R. 1509-1510) The court stated that it would allow Brodsky to enter an appearance in "the post-conviction proceeding period," but not solely on Gawlak's DNA motion. (R. 1512)

On appeal, Gawlak argued that the trial court denied him his constitutional right to retain counsel to represent him on his motion. *Gawlak*, 2017 IL App (3d) 150861, ¶ 10. The State responded that the plain language of Rule 13(c)(6) provided for limited scope appearances in only civil cases. *Id.* ¶ 11. The State maintained that a motion for DNA testing involved criminal proceedings and that therefore, Rule 13(c)(6) did not apply. *Id.* The State also argued that Gawlak was not entitled to an attorney because there

was no sixth amendment right to counsel in post-conviction proceedings and section 116-3 did not convey a statutory right to counsel. *Id.* ¶ 12. Finally, the State claimed that any error in the dismissal of Gawlak's petition was harmless. *Id.* ¶15.

The appellate court first rejected the State's argument that motions for DNA testing involved criminal proceedings. The court found that like petitions filed under the Post-Conviction Hearing Act, a motion for DNA testing was "civil in nature." *Id.* ¶ 11. The court also found that because the post-conviction proceedings were "separate and distinct" proceedings, the circuit court erred in ruling that Brodsky was required to represent Gawlak on both his DNA motion and his post-conviction petition. *Id.* ¶¶ 14-15. The appellate court held that Gawlak had a "constitutional due process right to have private counsel on his DNA motion" and that the circuit court's denial of Brodsky's request to enter "a limited scope appearance" on the motion was "arbitrary and violated [Gawlak's] due process rights." *Id.* ¶ 14. Based on these facts, the court declined to address the State's harmless-error argument. *Id.* ¶ 15.

In this Court, the State now agrees that "there is no question" that Gawlak had a constitutional due process right to be represented by retained counsel on his DNA motion. (St. Br. 26) It also concedes that the circuit court's reasons for refusing to allow Brodsky to represent Gawlak were wrong. (St. Br. 18 n.3) Having made these concessions, which undermine its posture throughout this litigation, the State instead asks this Court to affirm the

circuit court's denial of Gawlak's constitutional right to counsel on an entirely different basis: that counsel failed to comply with the procedural requirements of Supreme Court Rule 13 for entering a general appearance or a limited scope appearance under Rule 13(c)(6). (St. Br. 17-24) The State did not raise this issue in the circuit court, on appeal, or in its petition for leave to appeal. Therefore, there is no factual basis for the State's argument and it should be considered forfeited.

The State also misconstrues the appellate court's holding and contends that the court erroneously established a "constitutional right" to a limited scope appearance by counsel under Rule 13(c)(6). (St. Br. 24-29) This was not the court's holding. The court found that Gawlak's right to retain counsel derived from his constitutional right to due process, not from this Court's rule. *Gawlak*, 2017 IL App (3d) 150861, ¶¶ 12-15.

The State's harmless error argument is similarly unavailing. (St. Br. 29-35) It is based on its unfounded allegation that the error here was counsel's failure to comply with Rule 13(c)(6), rather than a denial of Gawlak's right to retain counsel. As will be shown below, because of its fundamental misinterpretation of the issue, the State fails to meaningfully address Gawlak's argument or the appellate court's holding. For all these reasons, this Court should affirm the appellate court's decision.

A. The State misconstrues the appellate court's holding as establishing a constitutional right to a limited scope appearance by counsel.

A defendant who has a Sixth Amendment right to counsel has a

corresponding right to counsel of one's choice. U.S. Const., amends. VI, XIV; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006); *People v. Green*, 42 Ill. 2d 555, 557 (1969); *People v. Childress*, 276 Ill. App. 3d 402 (1st Dist. 1995). However, "it is well settled that the constitutional right to counsel (U.S. Const., amends. VI, XIV) applies during a defendant's trial and first appeal of right, and no further." *People v. Love*, 312 Ill. App. 3d 424, 426 (2nd Dist. 2000), citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *People v. Morgan*, 187 Ill. 2d 500, 529 (1999). Furthermore, unlike the Post-Conviction Hearing Act, section 116-3 does not convey a statutory right to counsel. 725 ILCS 5/122-4 (West 2015); 725 ILCS 5/116-3 (West 2015). Therefore, in this case, Gawlak did not have a constitutional or statutory right to counsel on his motion for DNA testing. *Love*, 312 Ill. App. 3d at 426-27.

At the same time, Gawlak did have a due process right to *hire* an attorney to represent him on his DNA motion. In *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), the United States Supreme Court explained that "notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law." *Powell*, 287 U.S. at 68. *Powell* also found that "historically and in practice, in our own country at least," a hearing "has always included the right to the aid of counsel when desired and provided by the party asserting the right." *Id. Powell* stated:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel employed by and

> appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore of due process in the constitutional sense. *Powell*, 287 U.S. at 68-69.

Thus, *Powell* recognized that a civil litigant has a constitutional right to retain counsel.

The Seventh Circuit Court of Appeals has also found that although a prisoner "does not have a constitutional right to a lawyer in a civil case [or] even a civil case such as a habeas corpus proceeding that challenges a criminal judgment," under *Powell*, the right to retain counsel was still protected under the due process clause. *Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010). The Seventh Circuit concluded that "if a prisoner *hires* a lawyer – or a lawyer is willing to work for the prisoner for free – the judge may not refuse to accept filings from the lawyer." *Guajardo-Palma*, 622 F. 3d at 803 (emphasis in the original). Relying on these cases, the appellate court correctly found that Gawlak had a "constitutional due process right to have private counsel represent him on his DNA motion" and that the circuit court erred in denying him this right. *Gawlak*, 2017 IL App (3d) 150861, ¶¶ 12-14.

The State ignores the appellate court's conclusion that Gawlak had a constitutional due process right to retain counsel. Instead, the State claims the court improperly found that Rule 13(c)(6) created a "constitutional right" of counsel to enter a limited scope appearance. The State maintains that Rule 13(c)(6) concerns the "rule-based right" to have counsel enter a limited scope appearance and is "not a right of constitutional magnitude." (St. Br. 24-25)

There is no such thing as a Rule 13(c)(6) "rule-based" right to counsel. And nowhere in the appellate court's opinion does it hold that Rule 13(c)(6) establishes a "constitutional right" to counsel. The appellate court specifically found that Gawlak's right to retain counsel arose from his constitutional right to due process of law. *Gawlak*, 2017 IL App (3d) 150861, ¶¶ 12-13. Rule 13(c)(6)'s procedural mechanism for entering an appearance is irrelevant to possessing that right. For this reason, the State's comparison of Rule 13(c)(6) to this Court's other rules such as Rule 431(b), which governs jury selection, is inapt. (St. Br. 25-29); Ill. S. Ct. R. 431(b)(eff. July 1, 2012). Rule 431(b) is only "related to" constitutional protections (St. Br. 25), while Gawlak's claim involves the direct denial of a core constitutional right.

Accordingly, the State's challenge to the correctness of the appellate court's decision fails because it is based on the false premise that there is a Rule 13(c)(6) "right to counsel." No such right exists. Instead, the appellate court properly held that Gawlak had a due process right to retain counsel and that he was denied that constitutional right. *Id.* ¶¶ 12-14.

B. The State has forfeited its argument that Gawlak's attorney failed to comply with Supreme Court Rule 13(c)(6).

In its brief, the State contends that the plain language of Rule 13(c)(6) required that Brodsky enter into a written agreement with Gawlak, disclosing the limited nature of his representation, and that he file a "Notice of Limited Scope Agreement" with the court. (St. Br. 20-21) The State argues that because Brodsky "failed to comply with these plainly delineated procedures,"

the circuit court properly denied his request to enter an appearance on Gawlak's DNA motion. (St. Br. 24)

The State makes this argument for the first time in this Court. In the circuit court, the prosecutor objected to Brodsky entering his appearance based on her belief that Rule 13(c)(6) did not apply to DNA motions filed by criminal defendants and that Brodsky should not be allowed to represent Gawlak on only the DNA motion. (R. 1506, 1507, 1508) She did not raise any issue about Brodsky's alleged non-compliance with Rule 13(c)(6).

Likewise, the circuit court did not refuse to allow Brodsky's appearance based on his non-compliance with Rule 13(c)(6). Instead, the court decided that counsel was required to either represent Gawlak both on his DNA motion and his second-stage post-conviction petition or not at all. (R. 1511-1512) Thus, the court never gave Brodsky an opportunity to comply with the rule, presuming he did not fill out the paperwork, because it believed that Brodsky could not represent Gawlak solely on the DNA motion under any circumstances.

The State now admits that the circuit court's reasons for denying Gawlak his right to retain his counsel of choice were wrong. (St. Br. 18 n.3) It attempts to get around this fact by invoking the principle that this Court "'may affirm on any basis supported by the record.'" (St. Br. 18 n.3, quoting *People v. Durr*, 215 Ill. 2d 283, 296 (2005)) However, "any points advanced in support of the trial court's ruling [must] have a sufficient factual basis before the trial court." *People v. Monroe*, 118 Ill. 2d 298, 300 (1987). Here, no

evidence was presented about whether Brodsky complied with Rule 13(c)(6). Therefore, there is no factual basis upon which this Court could conclude that the circuit court correctly denied Gawlak his right to counsel on those grounds. See *Burnette v. Terrell*, 232 Ill. 2d 522, 536 (2009) (cited in St. Br. 29 n.7)(because the trial judge made no record of his reasons for removing an attorney from appearing before him, this Court found it "impossible" to determine whether the judge's reasons were proper); see also *People v. White*, 2011 IL 109689, ¶ 143 (declining to address the issue raised in the defendant's petition for leave to appeal and opening brief because the record had not been fully and fairly developed for resolution of the issue).

The State also acknowledges that it did not raise an issue about counsel's failure to comply with Rule 13(c)(6) in the appellate court. (St. Br. 22 n.5) Nevertheless, the State contends that this Court may review "'any questions properly presented by the record to sustain the judgment of the trial court.'" (St. Br. 22-23 n.5, quoting *In Re R.L.S.*, 218 Ill. 2d 428, 437 (2006)) However, this principle does not apply because as noted above, the question of whether Brodsky complied with the procedures of Rule 13(c)(6) was not "properly presented by the record."

Finally, the State did not raise an issue about non-compliance with the procedural requirements of Rule 13(c)(6) in its petition for leave to appeal. The State's "point relied upon in seeking review" stated that "[t]he Appellate Court's holding that Illinois Supreme Court Rule 13(c)(6) establishes a constitutional right to counsel is without support in the law." (St. Petition for

Leave to Appeal, 1) Because the State never argued that Brodsky failed to comply with Rule 13(c)(6) in the circuit court, on appeal, or in its petition for leave to appeal, this Court should find it has forfeited this argument. *People v. Carter*, 208 Ill. 2d 309, 318 (2003) (State forfeited issue where it did not make the argument in the appellate court or include it in its petition for leave to appeal); *People v. Robinson*, 223 Ill. 2d 165, 174-175 (2006) (defendant forfeited issue where the only claim that he argued in this Court was not raised in his post-trial motion, in the appellate court, or in his petition for leave to appeal); *People v. Cherry*, 2016 IL 118728, ¶ 30 ("it is well settled that arguments raised for the first time in this [C]ourt are forfeited").

C. The State is incorrect that counsel's method of entering an appearance justified denying Gawlak his constitutional right to counsel.

The State maintains that Brodsky had two options for representing Gawlak in his section 116-3 action; he could either enter a general appearance for that case or if he wished to "narrow his responsibilities" under Rule 13(c)(6), he could file a "Notice of Limited Scope Appearance" and "identify each aspect of the proceeding to which the limited scope appearance pertains." (St. Br. 15-16) The State asserts that Brodsky did neither, thereby failing to comply with either rule. The State claims that for this reason, the circuit court did not err in denying Brodsky's request to represent Gawlak. (St. Br. 16)

As noted, Brodsky's failure to comply with the procedural requirements for entering an appearance was never at issue in this case. However, even if it was, the State's construction of Rule 13 is untenable because it creates an

unconstitutional scenario where non-compliance with the rules could result in the denial of a person's due process right to hire an attorney to represent him.

This Court's rules are construed in same manner as statutes. Therefore, the rules must be interpreted in such a way as to avoid an unjust or unconstitutional result. *In Re Loss*, 119 Ill. 2d 186, 194 (1987). Supreme Court Rule 13 is a general rule governing the procedures for an attorney entering an appearance in a case. Ill. S. Ct. R. 13 (eff. July 1, 1982). It was enacted in 1982 to deal with the problem of when and under what circumstances an attorney for a party can withdraw. *In re Marriage of Pitulla*, 202 Ill. App. 3d 103, 120 (1st Dist. 1990). Rule 13 serves the purpose of informing the court and the parties of who was properly representing each party and where the person may be served with notice. *Pitulla*, 202 Ill. App. 3d at 120, citing *Tobias v. King*, 84 Ill. App. 3d 998, 1001 (1st Dist. 1980).

Supreme Court Rule 13(c)(6) was enacted in 2013 and "addresses the provision of limited scope representation to clients under Rule of Professional Conduct 1.2(c)." Ill. S. Ct. R. 13, Committee Comments (adopted June 14, 2013). Rule 1.2(c) provides that "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Ill. R. Prof'l Conduct (2010) R. 1.2 (eff. Jan. 1, 2010).

The State claims that because this Court's rules "have the force of law" and because the "presumption is that they will be obeyed and written as enforced," it was "incumbent" upon Brodsky to adhere to their requirements.

(St. Br. 22) First, to the extent that the rules seek to clarify the scope of an attorney's representation and to ensure the client's consent, the purposes of the rule were met here. Brodsky identified himself to the court, sought leave to enter his appearance, and advised the court that his representation would be limited to the DNA motion. (R. 1504-1504) Gawlak consented to this limited representation and asked the court to allow Brodsky to enter his appearance on the motion either "under the [*sic*] Supreme Court Rule 13" or "in the discretion of the court." (R. 1507)

Second, putting aside that the circuit court would not allow Brodsky to represent Gawlak solely on the DNA motion regardless of his compliance with Rule 13 or 13(c)(6), neither provision provides for any sanction for noncompliance. The lack of any particular consequence for failing to comply with the rule supports the conclusion that its requirements are directory and not mandatory as the State suggests. See e.g., *People v. Delvillar*, 235 Ill. 2d 507, 515 (1990)("statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision" and "[i]n the absence of such intent the statute is directory and no particular consequence flows from noncompliance").

Based on the State's construction of the rule, if an attorney fails to comply with the procedures for entering an appearance, the circuit court may properly prevent the attorney from representing his client. (St. Br. 28-29, n.7) This construction has no basis in the law. The circuit court has the discretion to recognize an attorney's entry of appearance even if the formal appearance

requirements of this Court's rules are not met. See e.g., *Pitulla*, 202 Ill. App. 3d at 120 (despite attorney's failure to file his appearance, the trial court properly recognized him as the attorney of record where the case proceeded "without any apparent objection, inconvenience or confusion on the part of the court or the parties as to who was properly representing who and without any claim or evidence of prejudice to the petitioner"); *Ebert v. Dr. Scholl's Comfort Shops, Inc*., 137 Ill. App. 3d 550, 554-555 (1st Dist. 1985) (plaintiff's attorney's failure to file a notice of appearance until two months after the plaintiff's motion to vacate summary judgment was denied did not render the motion a nullity, nor did it prejudice the defendant or substantially inconvenience the trial court); see also, *Larson v. Pederson*, 349 Ill. App. 3d 203, 205-206 (2nd Dist. 2004)(attorney's failure to file a notice of appearance did not render his subsequently-filed motion a nullity). As the State itself notes, absent a showing of prejudice to the other party or interference with the administration of justice, the trial court should accept the appearance of counsel. (St. Br. 27-28, citing *Sullivan v. Eichmann*, 213 Ill. 2d 82, 90-91 (2004)). Without such a showing, failing to comply with the procedural requirements for entering an appearance does not warrant the drastic measure of disqualifying the attorney from representing his client. See *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 178 (1997) (disqualifying retained counsel is a "drastic measure" under any circumstances; "it destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing"); see also *People v. Childress*, 276 Ill. App. 3d 402, 413 (1st Dist. 1995) (recognizing that the

right to hire counsel of one's own choosing "is absolute and limited only where abuse exists").

In fact, the State recognizes that "where an attorney's general appearance is arbitrarily refused, despite complying with all of the court's rules regulating the procedures by which general appearances are permitted," a person's due process right to retain counsel "may have been violated." (St. Br. 27) That is exactly what happened here. Brodsky essentially attempted to enter a general appearance on Gawlak's DNA motion. He called it a "limited scope appearance" because he and Gawlak agreed that Brodsky would only represent him on the DNA motion and not Gawlak's post-conviction petition. (R. 1505-1506) Given these circumstances, the circuit court had no basis for refusing to allow Brodsky to represent Gawlak on the DNA motion alone. Thus, as the appellate court found, the court's ruling was arbitrary and violated Gawlak's due process rights. *Gawlak*, 2017 IL App (3d) 150861, ¶ 14.

Finally, the committee comments for Rule 13(c)(6) state that it "is not intended to regulate or impede appearances made pursuant to other types of limited engagements by attorneys, who may appear and withdraw as otherwise provided by Rule 13." Ill. S. Ct. R. 13, Committee Comments (adopted June 14, 2013). On the contrary, the rule "serves the important purpose of broadening access to representation" because "it allows clients on a tight budget to pay for some services even if full representation is out of financial reach." David Holtermann, *Increasing Access and Opportunity*, 27-

SEP CBA Rec., 2 (2013). Because the intent of the rule is not to impede an attorney from entering an appearance in a case and in fact, to broaden access to representation, disqualifying an attorney based on non-compliance with its technical requirements contravenes its purpose.

In sum, the State's construction of Rule 13 would render its provisions unconstitutional by allowing the circuit court to deny a person his due process right to retain counsel simply because the attorney failed to comply with the rule's procedural requirements. This construction has no basis in the facts or the law. Therefore, the State's argument that the circuit court properly refused Brodsky's request to enter his appearance based on an alleged failure to comply with the rule is without merit.

D. The State's harmless-error argument is without merit.

The appellate court acknowledged the State's argument that any error in dismissing Gawlak's DNA motion was harmless. However, "based on the facts of the case," the court declined to address the argument, finding that "[s]imply put, defendant had a constitutional due process right to have private counsel represent him on his DNA motion." *Gawlak*, 2017 IL App (3d) 150861, ¶ 15.

The appellate court was correct that a harmless-error analysis does not apply here. The circuit court's error resulted in a complete denial of Gawlak's right to retain counsel. The error here is analogous to the denial of a sixth amendment right to counsel of choice. In those cases, "a choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied." *United*

States v. Gonzalez, 548 U.S. 140, 150-151 (2006). Denying the right to counsel constitutes automatic reversible error because "its effects are too hard to measure." *McCoy v. Louisiana*, ___ U.S. ___, 138 S. Ct. 1500, 1511 (2018). It would require speculation "upon what matters rejected counsel would have handled differently" and "what effect those different choices or different intangibles might have had." *Gonzalez-Lopez*, 548 U.S. at 151. Given these circumstances, a showing of prejudice is not required. *People v. Childress*, 276 Ill. App. 3d 402, 413 (1st Dist. 1995) ("because the issue is the right of counsel of choice, we reject the State's contention that a showing of prejudice is necessary").

Having counsel's assistance in this case would have been particularly helpful given the complexity of the law and science involving motions for DNA testing. Notably, Gawlak lamented the difficulty in presenting his motion, stating, "I have no idea about DNA. I cannot even pronounce some of those names or numbers. . .." (R. 1598-1599) Evaluating the merits of Gawlak's motion before he has the opportunity to present it with the assistance of counsel would be premature and deprive him of his right to counsel and a fair hearing on the motion.

Additionally, the State's harmless-error argument centers on its mischaracterization of the error as a failure to comply with Rule 13(c)(6), rather than the denial of Gawlak's due process right to retain counsel. (St. Br. 29-30) For this reason, the State's reliance on *People v. Addison*, 371 Ill. App. 3d 941, 945-946 (1st Dist. 2007), and *People v. Malloy*, 374 Ill. App. 3d 820,

824 (3rd Dist. 2007) is misplaced. (St. Br. 30) Both cases found that the circuit court's errors in dismissing the defendant's post-conviction petitions were harmless. But neither case involved a violation of the defendants' due process rights. *Addison*, 371 Ill. App. 3d at 946 (error in treating the defendant's first post-conviction petition as a successive petition was harmless because the postconviction petition was frivolous and patently without merit); *Malloy*, 374 Ill. App. 3d at 824 (error in dismissing a section 2-1401 petition as untimely was harmless).

In contrast, this Court has held that,"[t]he protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance." *People v. Kitchen*, 189 Ill. 2d 424, 435 (1999). Similarly, *Powell* explained that arbitrarily refusing to "hear a party by counsel employed by and appearing for him," as in Gawlak's case, constitutes the "denial of a hearing and therefore of due process in the constitutional sense." *Powell*, 287 U.S. at 68-69. Where post-conviction petitioners' due process rights to a fair hearing are violated, this Court has reversed circuit court orders dismissing the petitions without addressing the petitions' merits. *Kitchen*, 189 Ill. 2d at 434-435; *People v. Bounds*, 182 Ill. 2d 1, 5 (1998).

Even if the error in denying Gawlak his right to retain counsel was subject to a harmless error analysis, the State's argument still fails. The State initially contends that Gawlak's DNA motion was meritless because he failed to make a *prima facie* showing that identity was at issue in his case. 725 ILCS 5/116-3(b)(1) (West 2015); (St. Br. 31-32) The gist of the State's argument is

that identity was not at issue because there was no dispute that Gawlak was "with J.G." at the time of the alleged offenses and that he "challenged only whether the alleged sexual acts against J.G. occurred." (St. Br. 31, 33) Yet, in its appellate court brief, the State did not contest the issue of identity. It recognized that under *People v. Grant*, 2016 IL App (3d) 140211, ¶¶ 18-22, "when a defendant denies committing the charged offense he puts identity at issue." (State's Appellee Brief 5 n.1)[2]

Here, Gawlak contested his guilt by proceeding to a jury trial. The defense theory was that the State's evidence did not prove his guilt beyond a reasonable doubt and as defense counsel pointed out during closing arguments, when questioned by police, Gawlak "repeatedly for over three and a half hours," told them, "I didn't do this, I didn't do this, I didn't do this." (R. 799) Furthermore, in statements from his pre-sentence investigation report and at sentencing, Gawlak maintained he was innocent. (IC. 72, R. 852-866) Given these facts, Gawlak made a *prima facie* showing that identity was at issue. *People v. Shum*, 207 Ill. 2d 47, 64-66 (2003)(identity was an issue at trial where notwithstanding the identification of the defendant by a victim who was familiar with him, the defendant had "consistently denied involvement in the crimes"); *People v. Perez*, 2016 IL App (3d) 130784, ¶¶ 23-25 (the defendant's denial that he committed the offense was sufficient to put identity at issue despite the victim's positive identification of him as the

[2]The appellate court briefs have been made part of the record pursuant to Supreme Court Rule 318(c).

perpetrator); *People v. Price*, 345 Ill. App. 3d 129, 141 (2nd Dist. 2003) (identity was at issue where occurrence witnesses testified that defendant had sexually assaulted the victim but the defendant maintained that they were lying and that he did not commit the alleged offense).

The State also claims that the requested DNA testing was not materially relevant to Gawlak's assertion of actual innocence. (St. Br. 33-36); 725 ILCS 5/116-3(c)(1)(West 2015); see *Perez*, 2016 IL 130784, ¶ 35 ("[s]ection 116-3(c)(1) makes clear that forensic testing need only have the potential to produce relevant evidence; it is not required that any potential new evidence completely exonerate a defendant"). The State notes that at trial, its experts testified that no DNA was found on J.G.'s clothing. The State concludes that therefore, DNA played no role in Gawlak's conviction. (St. Br. 34-35)

The State ignores that in support of his motion, Gawlak had obtained a letter from Karl Reich, a forensic scientist specializing in DNA testing, who had reviewed Gawlak's DNA motion. (R. 394; C. 1821) Reich discussed the possibility of subjecting J.G.'s clothing to DNA testing that was not requested at the time of trial. (C. 1821-1822) He acknowledged "the lack of identified stains" on J.G.'s clothing but indicated that "Y-STR" DNA testing had the potential to detect whether Gawlak's own profile or "touch DNA" was on the clothing of J.G. who had alleged that Gawlak had grabbed and pulled down her underwear before sexually assaulting her. (C. 1821-1822) Reich recommended that "considering the source of the evidence, clothing worn by a female . . . the best approach would be to perform Y-STRs on as many sections

of clothing as practical." (C. 1821) He explained, "In other words to use Y-STR analysis for any male contributors that may have handled, touched, grabbed or pulled on the clothing." (C. 1821) Reich further advised that he "would try to essentially consume the entire evidence section by section – [Gawlak] [would] need to prove that [his] DNA is nowhere to be found and therefore, the allegations cannot be supported by the physical evidence." (C. 1822)

Reich's conclusions about Gawlak's DNA motion showed that "touch DNA" and more advanced DNA testing could produce results materially relevant to Gawlak's actual innocence claim. It had the potential to detect whether Gawlak's own profile was on J.G.'s underwear. Because J.G. testified that Gawlak allegedly grabbed and pulled down her underwear before sexually assaulting her, its absence would significantly advance his claim that he did not commit the offenses in this case. See *People v. Kines*, 2015 IL App (2d) 140518, ¶¶ 8, 15, 35 (testing for "touch DNA" had the potential to produce new, non-cumulative evidence materially relevant to the defendant's assertion of innocence despite an eyewitness's testimony that the defendant committed the crime).

The State also refers to Gawlak's request to have tested the hair and debris collected from J.G.'s clothing and asserts that it would be "unsurprising to find hair matching defendant's on clothing that J.G. wore and slept in at the defendant's home." (St. Br. 35) But given J.G.'s testimony that Gawlak was allegedly on top of her during the incident, it would be surprising *not* to find his hair on her clothing. Furthermore, the State offers no factual or legal

support for its conclusory statement about the value of this evidence. Notably, at trial, the State's forensic scientist did not testify about this evidence or explain why it was not tested. (R. 560-579)

Finally, the relief for denying Gawlak's right to retain counsel is remanding the case for a new hearing on the motion during which he may retain counsel to help present his motion. As *Powell* explained, a hearing "has always included the right to the aid of counsel when desired" because "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 68-69. Consistent with *Powell*, the circuit court should only rule on the merits of Gawlak's DNA motion after he is given the opportunity to present it with the assistance of counsel. For all these reasons, this Court should reject the State's argument that the error in denying Gawlak his right to retain counsel and dismissing his petition was harmless.

Conclusion

The appellate court correctly found that the circuit court denied Gawlak's due process right to retain counsel. The State fails to address this issue. Instead, the State presents a straw-man argument that Gawlak's attorney did not properly comply with this Court's rules for entering his appearance and asks this Court to affirm the circuit court's ruling on this basis. The State forfeited this argument by failing to raise this issue in the circuit court, the appellate court, or its petition for leave to appeal. The State's arguments also fail on their merits where its interpretation of this Court's

rules raises serious constitutional concerns and where it fundamentally misconstrues the appellate court's holding. Finally, the State's harmless-error argument is misplaced given the complete denial of counsel that occurred here. Accordingly, this Court should affirm the appellate court's decision and remand this case for a new hearing on Gawlak's DNA motion.

CONCLUSION

For the foregoing reasons, Sylwester Gawlak, respectfully requests that this Court affirm the ruling of the appellate court.

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Yasemin Eken, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 35 pages.

/s/Yasemin Eken
YASEMIN EKEN
Supervisor

No. 123182

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- SYLWESTER GAWLAK Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0861. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 07-CF-2547. Honorable Daniel J. Rozak, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 12, 2018, the Brief and Argument of the Defendant-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.

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