No. 123182

IN THE
SUPREME COURT OF ILLINOIS

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

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

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ARGUMENT

At the heart of this appeal is a simple and well-established principle: the State is entitled to place reasonable regulations on the way in which parties may exercise their courtroom rights, including rights that are constitutionally guaranteed. When a party fails to comply with such a regulation, that doesn't mean the underlying right has been denied; it just means the relevant procedural rule was not observed.

That is what happened here. Rule 13(c)(6), like other rules governing appearances, is a presumptively valid regulation of one way in which a party may seek to assert the right to be represented by retained counsel. If defense counsel Joel Brodsky wished to limit the scope of his representation to particular aspects of defendant's DNA testing motion, then he failed to comply with the requirements of Rule 13(c)(6), which are designed to specify that scope, and his motion was appropriately denied. If Brodsky meant to enter a general appearance, as defendant now claims, Def. Br. 26, then he simply used the wrong procedural vehicle to do so, and again his motion was appropriately denied. Either way, a holding that this sequence of events amounted to a constitutional violation would call into question a whole range of unremarkable procedural regulations, from rules governing notices of appeal to those governing procedural default.

Instead of minimizing these radical implications of his argument, defendant embraces them. He argues that "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." Def. Br. 27. But there is nothing unconstitutional about the People's literal reading of Rule 13's plain terms. To the contrary, this Court has repeatedly recognized that when trial courts violate this Court's rules—let alone when they merely *enforce* those rules, as happened here—the parties' constitutional rights remain undisturbed.

The constitutional right that the appellate court held was violated here is the due process right to be represented by retained counsel under *Powell v. Alabama*, 287 U.S. 45 (1932), which holds that a state court may not "arbitrarily … refuse to hear a party by counsel employed by and appearing for him," *id*. at 69. There was no *Powell* violation here because the circuit court did not refuse to hear from counsel; rather, defendant never properly sought to exercise the right that *Powell* protects. And even if the circuit court could be thought to have refused to hear from counsel, that refusal was not "arbitrar[y]," *id*., because it was consistent with this Court's presumptively valid rules governing general and limited scope appearances.

Because defendant's constitutional right to retained counsel was not violated, any error committed by the trial court in its application of Rule 13(c)(6) is subject to harmless error analysis. And, indeed, any such error was harmless, because defendant's section 116-3 motion for DNA testing had no

merit. The appellate court's judgment should be reversed.

I. Defendant Was Not Deprived of His Due Process Right to Retained Counsel.

As the People's opening brief explained, this Court often promulgates rules dictating the procedures by which constitutional rights may be exercised. Peo. Br. 24-26. When those rules are violated, it does not follow that the underlying constitutional right has been denied. *See*, *e.g.*, *People v. Thompson*, 238 Ill. 2d 598, 614-15 (2010) (rules governing voir dire); *People v. Glasper*, 234 Ill. 2d 173, 196-97 (2009) (same); *People v. Hickey*, 204 Ill. 2d 585, 628 (2001) (rules governing capital cases); *People v. Nordstrom*, 37 Ill. 2d 270, 273 (1967) (rules governing notices of appeal); *People v. Lobb*, 17 Ill. 2d 287, 302 (1959) (rules governing jury selection).

Rule 13(c)(6) is a neutral, generally applicable regulation prescribed by this Court in the exercise of its "power to promulgate procedural rules to facilitate the judiciary in the discharge of its constitutional duties." *People v. Peterson*, 2017 IL 120331, ¶ 29 (quotation omitted). The purpose of a limited scope appearance is to specify, with the client's informed consent, the scope of an attorney's representation within a particular matter pursuant to Rule of Professional Conduct 1.2(c) so that the extent of the attorney's ethical obligations is clear to both attorney and client. *See* Rule of Professional Conduct 1.2, comment 7 ("Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal

knowledge, skill, thoroughness and preparation reasonably necessary for the representation.") In furtherance of this purpose, the rule requires the attorney, among other things, to enter into a written agreement with the client describing the limited scope of the representation, Ill. S. Ct. R. 13(c)(6), and to file a Notice of Limited Scope Appearance "identifying each aspect of the proceeding to which the limited scope appearance pertains," *id*.

This Court has made clear that a violation of this kind of reasonable, presumptively valid procedural rule establishes a constitutional violation only when the procedures established by the rule are "indispensable" to the enjoyment of a constitutional right. *See*, *e.g.*, *Thompson*, 238 Ill. 2d at 615. That test is not satisfied here, for three reasons. First, as mentioned, the circuit court did not *violate* Rule 13(c)(6) but merely *enforced* it by rejecting Brodsky's attempt to enter a limited scope appearance that met none of the rule's procedural requirements. R 1509-11.

Second, even if the trial court had violated Rule 13(c)(6), that rule is not indispensable to a party's ability to be represented by retained counsel because other avenues exist by which an attorney may be heard. Indeed, the circuit court here indicated its willingness to allow Brodsky to represent defendant through a general appearance in his postconviction action. R 1511. Moreover, a limited scope appearance under Rule 13(c)(6) is not the only way an attorney may make an appearance that is restricted to one or more issues or proceedings within a case. As the Committee Comments explain, the rule "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, Comm. Comments.

Third, even if Rule 13(c)(6) were the only way for an attorney who wishes to have limited responsibilities to appear in a case, there is no constitutional right to such a circumscribed appearance. To be sure, the parties agree that, under the federal Due Process Clause, a state court may not "arbitrarily … refuse to hear a party by counsel employed by and appearing for him." *Powell*, 287 U.S. at 69. For that reason, *Powell* may be implicated where counsel's attempt to properly enter a *general* appearance is arbitrarily denied. But defendant has cited no case, and the People have found none, in which a court has recognized a constitutional right to a *limited scope* appearance.

Lack of precedent aside, there was no *Powell* violation here. For one thing, far from "refus[ing] to hear a party by counsel," *id*., the circuit court expressed its willingness to hear from Brodsky by way of a general appearance in defendant's postconviction action. R 1511. And even if the circuit court's actions could be viewed as a refusal to hear from counsel, it did not act "arbitrarily," *id*., in denying Brodsky leave to enter a limited scope appearance that was either an improper procedural vehicle (if Brodsky really intended a general appearance) or satisfied none of the requirements of Rule 13(c)(6) (if he intended a limited scope appearance). Defendant's argument to the

contrary (Def. Br. 27-29) overlooks that the trial court expressly invited Brodsky to enter a general appearance in defendant's postconviction action, R 1511, and that Brodsky was free to enter a general appearance in the section 116-3 action without leave of court. *Powell* does not place the onus on the trial court to divine counsel's true intentions or to construe a motion as seeking something other than what it purports to seek.

Defendant now suggests that Brodsky "essentially attempted to enter a general appearance on Gawlak's DNA motion." Def. Br. 26. But if that was his intent, he could have easily done so by entering a general appearance in the section 116-3 action. Indeed, Brodsky appeared to be aware that a section 116-3 action qualifies as a separate civil proceeding. *See* R 1507-08. Instead of filing a general appearance in that stand-alone action, however—an action he could have taken without seeking leave from the court—Brodsky sought leave to enter a limited scope appearance without specifying the aspects of the action in which he planned to provide representation or otherwise complying with Rule 13(c)(6). Hence, defendant now in effect concedes that his counsel sought to use an inappropriate procedural vehicle, a limited scope appearance, to achieve the end of entering a general appearance. The denial of that improper motion did not deprive defendant of the ability to be represented by counsel.

II. The Circuit Court's Judgment Should Be Affirmed Because the Record Reveals that Brodsky Failed to Comply with Rule 13(c)(6).

Defendant contends that the People are foreclosed from asserting

Brodsky's failure to comply with Rule 13(c)(6) as a ground for affirmance of the circuit court's judgment. That contention is meritless. As noted in the People's opening brief, Peo. Br. 18 n.3 & 22-23 n.5, "[w]here the trial court is reversed by the Appellate Court and the appellee in that court brings the case here for further review, he may raise any questions properly presented by the record to sustain the judgment of the trial court, even though those questions were not raised or argued in the Appellate Court." *In re R.L.S.*, 218 Ill. 2d 428, 437 (2006) (quotation omitted). The record plainly shows, and defendant does not seriously dispute, that Brodsky failed to comply with any of the requirements of Rule 13(c)(6). Specifically, he failed to (1) file a Notice of Limited Scope Appearance, (2) identify orally or in writing the aspects of the proceeding in which he planned to participate, (3) represent that he had entered into a written agreement with defendant to provide limited scope representation, or (4) attest to such an agreement. *See* Peo. Br. 21-22. And while defendant complains that "no evidence was presented about whether Brodsky complied with Rule 13(c)(6)," Def. Br. 20-21, that lack of evidence came about because Brodsky failed to satisfy his affirmative obligation to comply with the rule's requirements.

In addition, defendant asserts that the People forfeited the issue of Brodsky's compliance with Rule 13(c)(6) by not raising it in their petition for leave to appeal (PLA). This assertion fails for two reasons. First, the PLA did raise the issue of Brodsky's noncompliance, noting that he "submitted neither

an appearance on defendant's behalf, nor a written agreement as required by the Rule." PLA at 4. This Court and defendant were thus both on notice that counsel's noncompliance with the rule was at issue in this appeal. Second, even if the issue were deemed forfeited, this Court has made clear that "the failure to raise an issue in a petition for leave to appeal is not a jurisdictional bar to this court's ability to review a matter," *People v. McKown*, 236 Ill. 2d 278, 310 (2010), and that issues which are "inextricably intertwined" with matters properly before the Court may be reviewed, *id*. The petition's central argument—that the appellate court improperly held that defendant had a constitutional as opposed to a rule-based right to a limited scope appearance—is closely intertwined with the contention that Brodsky's motion was properly denied on rule-based, rather than constitutional, grounds. Put another way, the argument that Brodsky's motion was appropriately denied for failure to comply with this Court's rules is subsumed within the argument in the PLA that defendant's *Powell* rights were not violated. *Cf. People v. Alcozer*, 241 Ill. 2d 248, 253-54 (2011) (reviewing question of statutory interpretation not specifically raised in PLA because issue was inextricably intertwined with constitutional issue raised there).

It is true that both the circuit court and the parties below misunderstood the nature of a motion for DNA testing under 725 ILCS 5/116-3. The circuit court seems to have treated the motion as part of defendant's action under the Post-Conviction Hearing Act, while the State contended that it was

part of defendant's criminal case. In fact, a section 116-3 motion is a separate civil proceeding. *See People v. Savory*, 197 Ill. 2d 203, 210 (2001) (motion for DNA testing under section 116-3 "seeks to initiate a separate proceeding, independent of any claim for post-conviction or other relief"); *see also Price v. Pierce*, 617 F.3d 947, 952–53 (7th Cir. 2010) (if court grants section 116–3 motion, defendant may choose to use ensuing DNA test results in separate postconviction petition claiming actual innocence). But despite this misunderstanding, Brodsky's motion for leave to enter a limited scope appearance was still properly denied, because the record reveals that he failed to comply with any of the requirements of Rule 13(c)(6).

Finally, Defendant argues that Rule 13(c)(6) is directory rather than mandatory because it does not dictate any sanction for noncompliance. Def. Br. 24. But the mandatory/directory distinction applies only to procedural rules that regulate *government* action. *See*, *e.g.*, *People v. Delvillar*, 235 Ill. 2d 507, 516 (2009) (cited at Def. Br. 24) ("the mandatory/directory dichotomy simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating *the governmental action to which the procedural requirement relates*") (emphasis added; citation omitted). For procedural rules like Rule 13(c)(6) that apply to private parties, the relevant question is whether strict or substantial compliance is required. *See*, *e.g.*, *People v. Janes*, 158 Ill. 2d 27 (1994). And although "strict compliance with supreme court rules is generally required," *Vill. of Lake Villa v. Stokovich*, 211

Ill. 2d 106, 116 (2004), as the People noted in their opening brief, Brodsky did not comply with Rule 13(c)(6) *at all*. Peo. Br. 23. Under these circumstances, the circuit court acted well within its discretion when it denied his motion for leave to enter a limited scope appearance.

III. Any Error in Applying Rule 13(c)(6) Was Harmless Because Defendant's Section 116-3 Motion Had No Merit.

As explained above, the trial court's denial of Brodsky's attempt to enter a limited scope appearance action was proper because Brodsky either used an improper procedural vehicle to enter a general appearance or failed to comply with the requirements of Rule 13(c)(6). And even if the trial court did commit error, that error did not arbitrarily prevent defendant from being represented by retained counsel, and therefore did not offend the principle of *Powell v. Alabama*.

Because there was no *Powell* violation, the appellate court should have reviewed the circuit court's judgment for harmless error. *See*, *e.g.*, *Glasper*, 234 Ill. 2d at 193-94 (explaining that violation of Supreme Court rules generally calls for harmless-error review). Here, any error in the circuit court's application of Rule 13(c)(6) was harmless because defendant's section 116-3 motion for DNA testing had no merit. In particular, defendant cannot meet the statute's requirements (1) that "identity was an issue in the trial … that resulted in his … conviction," 725 ILCS 5/116-3(b)(1), or (2) that DNA testing would have "the scientific potential to produce new, noncumulative evidence … materially relevant to the defendant's assertion of actual

innocence," 725 ILCS 5/116-3(c)(1).

Identity was not an issue at defendant's trial. On the contrary, there is no dispute that defendant was present at the scene of the charged sexual assault. Moreover, defendant admitted to rubbing his daughter's back and buttocks while she slept and to "kissing her for over 10 minutes" dressed in nothing but his underwear, R598-601; to acting "wrong by treating her like an 18 year old instead of a 10 year old," R599, 601; to kissing and hugging his daughter while not wearing any clothes, R 616-18, R681-82; and to engaging in behavior that was "improper" and treating his daughter "more like a wife or a girlfriend as opposed to a child," R616, 618. His only defense was that these actions did not amount to predatory criminal sexual assault or aggravated criminal sexual abuse. If such a defendant is entitled to DNA testing on an identity theory, then so is every defendant. That cannot be what the General Assembly intended when it limited the circumstances under which section 116-3 testing would be available.

Defendant's argument that identity is at issue whenever a defendant denies committing the charged offense, Def. Br. 30, proves too much. If that were the law, then every defendant who contests liability and goes to trial would be entitled to DNA testing under section 116-3, rendering superfluous the statute's requirement that "identity was the issue in the trial." 725 ILCS 5/116-3(a)(1). That statutory language should be given its plain and ordinary meaning: a defendant is entitled to DNA testing under section 116-3 only if he

proceeded to trial on the theory that someone else committed the offense. Indeed, the very case defendant relies on recognizes that "in the context of a section 116–3 motion, a defendant must make a *prima facie* showing that there was an issue at trial as to whether *the defendant or somebody else* committed the crime." *People v. Grant*, 2016 IL App (3d) 140211, ¶ 18 (emphasis added; internal quotation omitted). In *Grant*, the defendant was entitled to DNA testing because he testified that it was not he but the victim's brother who had committed the charged sexual assault. *Id*. at ¶¶ 20, 22. Similarly, in *People v. Johnson*, 205 Ill. 2d 381 (2002), the only direct evidence of guilt was the surviving victim's testimony, and the defendant never admitted to being at the crime scene. *Id*. at 391, 396. The same was true in *People v. Shum* (cited at Def. Br. 30), whose facts were described by this Court as "nearly identical to those of *Johnson*," 207 Ill. 2d at 66.

In addition, defendant cannot make the requisite showing that DNA testing here would have "the scientific potential to produce new, noncumulative evidence … materially relevant to the defendant's assertion of actual innocence," 725 ILCS 5/116-3(c)(1). Still less would such testing tend to "significantly advance" an innocence claim, as this Court has required. *Savory*, 197 Ill. 2d at 213. This Court has held that whether evidence is materially relevant to an innocence claim "requires a consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Id*. at 214. Here, DNA evidence played no role

at defendant's trial. Indeed, defendant's counsel emphasized the *absence* of DNA evidence in his closing statement. *See*, *e.g.*, R793-94 ("There is no semen. There is no saliva and there is no DNA.").

As a result, there is no DNA for defendant to test. Defendant argues that new "Y-STR" DNA testing could detect "touch DNA" (presumably skin cells or hair fibers) that might reveal who had handled or grabbed J.G.'s clothing. Def. Br. 31-32. But even if such testing could be performed, the resulting evidence would not "significantly advance" defendant's claim of actual innocence. *Savory*, 197 Ill. 2d at 213. Many people could have innocently touched or grabbed J.G.'s clothing in the period before that evidence was turned over to police. "Touch DNA" evidence would therefore have no bearing on whether defendant committed the sexual assault in question.

CONCLUSION

This Court should reverse the appellate court's judgment and affirm the circuit court's denial of leave to enter a Rule 13(c)(6) limited scope appearance, as well as its denial of defendant's section 116-3 motion for DNA testing.

October 11, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 14 pages.

/s/ *David L. Franklin*
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PROOF 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. The undersigned deposes and states that on October 11, 2018, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided service to the following e-mail addresses of record:

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