No. 123182

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

In April 2009, a Will County jury convicted defendant Sylwester Gawlak of two counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse against his ten-year-old daughter, J.G. C103-05; *see also* R355-56, 412-13.[1] The Circuit Court of Will County sentenced him to an aggregate term of fifteen years of imprisonment. C246.

In May 2015, defendant filed a pro se motion for DNA testing pursuant to 725 ILCS 5/116-3 (2015). C1750-69. At a September 30, 2015 hearing, attorney Joel Brodsky appeared with defendant and sought leave to enter a Rule 13(c)(6) limited scope appearance in relation to the motion for DNA testing. R1504-13. The circuit court denied Brodsky leave to enter such an appearance, R1511-13, and on November 16, 2015, denied the motion for DNA testing, R1614; *see generally* R1590-1614.

On appeal, the Illinois Appellate Court, Third District, vacated the circuit court's judgment denying the motion for DNA testing and remanded for further proceedings, holding that in denying counsel leave to enter a limited scope appearance, the circuit court had violated defendant's due process right to be represented by privately retained counsel. *People v. Gawlak*, 2017 IL App (3d) 150861, ¶¶ 14-18.

No question is raised on the sufficiency of the pleadings.

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[1] "C__" denotes the common law record, and "R__" denotes the report of proceedings.

ISSUES PRESENTED

1. Whether the limited scope appearance that counsel attempted to enter in defendant's section 116-3 action failed to comply with Illinois Supreme Court Rule 13(c)(6).

2. Whether the denial of leave to enter a Rule 13(c)(6) limited scope appearance is not a violation of the due process right to be heard in court by privately retained counsel.

3. Whether the circuit court's denial of leave to enter a Rule 13(c)(6) limited scope appearance was harmless error.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612(b), 603, and 606. This Court allowed leave to appeal on March 21, 2018. *People v. Gawlak*, 95 N.E.3d 495 (Ill. Mar. 21, 2018) (Table).

STATUTE AND RULE INVOLVED

725 ILCS 5/116-3 (2015)

§ 116-3. Motion for fingerprint, Integrated Ballistic Identification System, or forensic testing not available at trial or guilty plea regarding actual innocence.

(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections, on evidence that was secured in relation to the trial or guilty plea which resulted in his or her conviction, and:

(1) was not subject to the testing which is now requested at the time of trial; or

(2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. Reasonable notice of the motion shall be served upon the State.

(b) The defendant must present a prima facie case that:

(1) identity was the issue in the trial or guilty plea which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence (i) materially relevant to the defendant's assertion of actual innocence when the defendant's conviction was the result of a trial, even though the results may not completely exonerate the defendant, or (ii) that would raise a reasonable probability that the defendant would have been acquitted if the results of the evidence to be tested had been available prior to the defendant's guilty plea and the petitioner had proceeded to trial instead of pleading guilty, even though the results may not completely exonerate the defendant; and

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.

* * *

Ill. S. Ct. R. 13(c)(6)

(6) *Limited Scope Appearance*. An attorney may make a limited scope appearance on behalf of a party in a civil proceeding pursuant to Rule of Professional Conduct 1.2(c) when the attorney has entered into a written agreement with that party to provide limited scope representation. The

attorney shall file a Notice of Limited Scope Appearance, prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article I Forms Appendix, identifying each aspect of the proceeding to which the limited scope appearance pertains.

An attorney may file a Notice of Limited Scope Appearance more than once in a case. An attorney must file a new Notice of Limited Scope Appearance before any additional aspect of the proceeding in which the attorney intends to appear. A party shall not be required to pay more than one appearance fee in a case.

STATEMENT OF FACTS

Defendant was convicted of two counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse after a four-day jury trial in April 2009. C103-05; *see generally* R339-835. The victim, J.G., was defendant's ten-year-old daughter. R355-56; R363-64; R373; R412-13.

Trial and Conviction

J.G. testified that on the evening of Friday, December 7, 2007, defendant vaginally penetrated her with his finger, performed oral sex on her, fondled her buttocks, forced her to fondle his penis, and fondled her chest while he masturbated. *See generally* R379-412; R363-64; R373. J.G. lived primarily with her mother but was sleeping over at defendant's home on the evening in question. *See* R365-66, 373-76. While at defendant's home, J.G. generally slept on a couch in a small, door-less room located off of a first floor hallway, approximately ten feet away from the first-floor living room; the rest of defendant's family — including defendant's wife and four other children — slept upstairs. *See* R368-71, 376-78, 381-87.

J.G. testified that on December 7, 2007, she went to sleep on the couch in a long-sleeved shirt and underwear but soon awoke to someone rubbing her buttocks inside of her underwear. R381-91, 393. She turned and saw defendant touching her while he lay next to her on the couch. R389-91. J.G. stated that her underwear had been partially pulled down, and despite her efforts to pull them up, defendant continued to forcibly pull them down. R393-94. Defendant then began rubbing J.G.'s "private spot" with his finger and eventually inserted his finger into her vagina. R391-95, 401.

Defendant proceeded to pull J.G.'s underwear down to her ankles, lift her legs up, and perform oral sex on her. R399-402, 406. He then returned to rubbing her vagina, before forcing J.G.'s hand open and making her fondle his penis for several minutes. R402-07. J.G. testified that defendant then turned J.G. onto her back, sat on top of her — facing her — lifted her shirt, and fondled her chest while he masturbated. R407-11. It was at this point that J.G. could see that defendant was completely naked. R408. Defendant continued masturbating for a while before dismounting and once again touching J.G.'s vagina. R410-11; *see also* R427 (J.G. stating that she did not see defendant ejaculate).

Only after J.G. pleaded with defendant that she "want[ed] to sleep normally" did defendant cease the assault, telling J.G. "[O]kay, I'll explain everything to you tomorrow." R411-12.

J.G. immediately went to the bathroom to clean herself up, washing both her hands and genitalia with soap and water. R413-14. The following morning, she alerted her mother to the assault via text message. R415-17 ("I told her like a really brief – like, my dad drank a couple beers and then he wanted to like have sex with me."); R443; R470-72, 534-36 (testimony of J.G.'s mother that she received text messages from J.G. that defendant had tried to have sex with J.G.); *see also* R374-75, 380, 437-48 (J.G. testifying that defendant had consumed alcohol on the night of the assault). J.G.'s mother, Jolanta Martin, called in response to her texts, spoke with defendant's wife Dorothy outside defendant's presence, and was assured that Dorothy would keep J.G. safe for the remainder of the weekend. R469-73. J.G. slept in her sisters' room the following night. R417-20. J.G. then recounted the entire assault to her mother on Sunday, December 9, 2007, when she returned from the weekend visit. R473-77, 503-05; *see also* R422.

A videotaped interview of J.G. by the Kendall County Child Advocacy Center corroborated J.G.'s trial account of the assault. R725-26; *see also* R582-85; R147-48 (admitting J.G.'s interview and text messages pursuant to 725 ILCS 5/115-10); C78-81.

Martin testified that after receiving the text messages from J.G. on December 8, 2007 and hearing J.G. describe the assault in person on December 9, 2007, she took J.G. to the police and then to the hospital for an

examination and sexual assault kit. *See* R466, 470-77, 503-10, 534-37. She also gave police J.G.'s shirt and underwear for analysis. R538-39.

Dr. Kevin Benfield examined J.G. in the early morning hours of December 10, 2007, and performed a sexual assault kit, R447-52, based on J.G.'s report to him that "her father touched her in her private parts," R451. Dr. Benfield found J.G.'s right labia minor to be "slightly reddened," which was consistent with the reported digital manipulation of the area by defendant. R453-54, 460-61, 464; *see also* R454-55 (noting that passage of time since alleged assault likely reduced visible indications of trauma because J.G.'s body had begun to heal). J.G.'s vaginal swabs did not contain any DNA other than her own; Dr. Benfield stated that he had not expected the sexual assault kit to produce any DNA to be tested because of the passage of time between the alleged assault and the examination, because J.G. had washed herself, urinated, and wiped in that interim period, and because no penile penetration had been reported. *See* R455-58, 460, 463.

Similarly, Christopher Webb, a forensic scientist who testified at trial as an expert in biology and DNA, R560-62, found that neither the vaginal swabs nor J.G.'s underwear contained any DNA to be tested. R563-68, 572-73. He agreed with Dr. Benfield that considering the passage of time and J.G.'s immediate washing of the area, it was unsurprising that no DNA was present. R567-70. Additionally, J.G.'s shirt was not tested for DNA because

there were no stains indicating that there was anything to test. R565-66, 572.

Defendant was taken into police custody for questioning on December 14, 2007, R587-92, and multiple police officers attested at trial to the inculpatory statements that defendant made in police interviews that day. Detective Mark Revis, accompanied by Deputy Chief Mark Wodka, interviewed defendant first. R587-92; R693. Detective Revis testified that defendant admitted to rubbing his daughter's back and buttocks as she slept and to "kissing her for over 10 minutes" while dressed in nothing but his underwear. R598-601. Revis stated that defendant appeared to become embarrassed over the course of the interview, R598-600, and when ultimately confronted with J.G.'s accusations, defendant stated that J.G. "was not lying but that he was too embarrassed to admit that anything had happened" — that "he couldn't admit to it" because "[i]t would embarrass himself and [his] family." R601; *see also* R602. Defendant also spoke of treating J.G. "wrong by treating her like an 18 year old instead of a 10 year old." R599; *see also* R601.

Deputy Chief Wodka corroborated Revis's account of the interview. *See generally* R698-702. Wodka recalled that when asked whether he had "touch[ed] her and kiss[ed] her and hug[ged] her like a 10-year-old or . . . like an adult," defendant responded that he "hugged and kissed her and showed his affection like he would to an 18-year-old, not to a 10-year-old girl that was

his daughter." R700. Wodka also stated that when defendant was asked about J.G.'s accusations, defendant responded that J.G. "wouldn't lie about what she would have told Detective Revis . . . [that] what she would have told us would have been the truth." R701.

Detectives Ken Simpson and Melissa Valentine conducted a follow-up interview that same day. R615-16; R678-79. Defendant did not explicitly admit any of the details of the assault to them, but he admitted that he was not wearing any clothes or underwear when he was kissing and hugging J.G. that evening. R616-18; R681-82. Defendant again admitted to engaging in behavior that was "improper" and referred to "treat[ing] [J.G.] more like a wife or a girlfriend as opposed to a child." R616, 618; *see also* R683 ("[H]e said he was treating her more like a wife [or a girlfriend] than his daughter, and that he was ashamed about the acts that had occurred between the two [of] them.").

Defendant did not testify, R732, or present any of his own witnesses, R730. Instead, he focused on discrediting the State's witnesses on cross-examination, calling into question whether the alleged assault took place. *See, e.g.*, R432-42; R459-63; R526-28, 533-40; R549-50; R570-79; R602-09, 611-13; R620-26; R684-88; R702-04. He then argued in closing that based on the "lack of physical evidence" (i.e., the lack of DNA evidence to support the claim that J.G. was sexually assaulted) and the "lack of corroboration" of

J.G.'s accusations, the State had failed to prove its case beyond a reasonable doubt. R787; *see generally* R786-99.

The jury found defendant guilty of two counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse. C103-05; R834. Defendant was sentenced to an aggregate term of fifteen years of imprisonment. C246; R984.

Motion for DNA Testing Under 725 ILCS 5/116-3 and Other Postconviction Proceedings

In May 2015, defendant filed a pro se motion for DNA testing pursuant to 725 ILCS 5/116-3. C1750-69. Defendant sought "certain DNA forensic testing of hair and clothing evidence" from the victim, C1750, 1752 — namely, "mitochondrial DNA testing of hair and clothing evidence" that he claimed was not "subjected to complete DNA testing as of the time of trial," C1753, as well as "PCR-STR" and "Y-STR" DNA testing of hair and sexual assault kit samples, C1754. *See generally* C1753-55. He argued that identity was at issue in his case by virtue of the fact that he had maintained his innocence throughout trial, C1751-52, and that the DNA testing was materially relevant to a claim of actual innocence because it would "undermine the credibility of the [S]tate's theory of the case," C1752. Defendant acknowledged that the State's case had not relied on "irrefutable physical evidence connecting defendant to the crime or the crime scenes." C1755. Yet, he maintained that the requested DNA testing had the potential to "exclude defendant as having been the source of cell material recovered

from the hair, clothing and rapekit [sic] evidence in [his] case," C1754, and "raise significant doubt at any re-trial as to defendant's involvement with the sexual assault in this case," C1756. *See also* C1761-62 (Webb laboratory report attached to section 116-3 motion noting removal of "apparent hair, fibers and debris" from J.G.'s pajama shirt and underwear). The State filed a response on July 21, 2015. C1839-49.

Defendant proceeded pro se on the section 116-3 motion until September 30, 2015, when attorney Joel Brodsky accompanied defendant to a court hearing and requested leave to enter a limited scope appearance in the section 116-3 proceeding, pursuant to Illinois Supreme Court Rule 13(c)(6). *See generally* R1504-13. Brodsky maintained that a Rule 13(c)(6) appearance was required to limit his representation to the section 116-3 motion for DNA testing; he would not be representing defendant in two separate collateral proceedings that defendant was also litigating at that time — a postconviction petition pursuant to 725 ILCS 5/122-1, *et seq.*, and a petition for relief from judgment pursuant to 735 ILCS 5/2-1401. R1505 ("[Defendant] has asked me to help assist him in the motion regarding the DNA testing, simply that limited issue just regarding . . . the post-conviction motion for DNA testing."); *id.* ("[J]ust to appear on his post-conviction motion for DNA testing and no other matter."); R1510 ("All [defendant] is asking me to do is assist him in this motion regarding the DNA testing and nothing else."); *see also* R1505 ("I am going to be asking for leave to file a limited scope

appearance."); *id.* ("[U]nder Supreme Court Rule 13 there is this new way of appearing called a limited scope appearance."); R1506, 1510 (counsel expressly and repeatedly referring court to Rule 13(c)(6)); *see generally People v. Gawlak*, 2018 IL App (3d) 160164-U, ¶¶ 11-24 (outlining procedural postures of defendant's multiple postconviction and section 2-1401 petitions). Defendant was represented by private counsel, Robert Caplan, who had entered a general appearance in the section 2-1401 proceeding. C1900; R1506-07; *see also* R1489-92; *Gawlak*, 2018 IL App (3d) 160164-U, ¶¶ 17-22. And in the postconviction action, defendant had been represented by an assistant public defender, Jason Strzelecki, until June 16, 2015, when he discharged Strzelecki and elected to proceed pro se. *See generally* R1401-21; C1809; *see also Gawlak*, 2018 IL App (3d) 160164-U, ¶¶ 12-14, 20.[2]

Brodsky gave the circuit court no indication that the scope of his representation of defendant in the section 116-3 action would be limited to any specific issue, proceeding, or aspect of a proceeding. He argued only that the postconviction and section 2-1401 actions were independent of the section 116-3 action, and that a Rule 13(c)(6) limited scope appearance would establish a "clear line[]" of his "very narrow and defined and succinct"

[2] The appellate court below mistakenly described defendant as being represented in the postconviction action by the Office of the State Appellate Defender (OSAD) at the time of Brodsky's request to enter a Rule 13(c)(6) appearance in the section 116-3 action. *Gawlak*, 2017 IL App (3d) 150861, ¶¶ 4, 14. The record reveals that by September 30, 2015, defendant was proceeding pro se in the postconviction action.

authority to represent defendant only in the section 116-3 proceeding. R1510; R1507 ("[T]he DNA motion is under 725 [ILCS] 5/116-3, which is a separate post-conviction motion by Statute. The post-conviction motion, the amended post-conviction motion, that [defendant] filed pro se . . . doesn't allege in it anything regarding DNA evidence.").

The circuit court denied Brodsky leave to enter the Rule 13(c)(6) appearance, stating that it would not "accept another limited appearance on this case" and that if Brodsky wanted to file an appearance, he was "welcome to do that on the post-conviction proceeding, period." R1512; R1511 ("[Y]ou will either file an appearance on the post-conviction, period, or you will not file one at all."); *see also* R1513 ("When this case comes up, only one [person] is going to be doing the talking, if it's not you, Mr. Brodsky, on every issue on the post-conviction, then it will be [defendant] with the exception of course to the 2-1401, which I maybe, just maybe mistakenly allowed another attorney to come in on."). The court reasoned that permitting Brodsky to appear would make the case "unwield[y]," as there would be "three different attorneys arguing parts of a single case" — "Mr. Caplan [on the 2-1401 petition], Mr. Brodsky [on the 116-3 motion], and the defendant who is representing himself [on the postconviction petition]." R1509-10.

Following the court's ruling, Brodsky made no further attempt to appear on behalf of defendant in any capacity. The circuit court denied the

motion for DNA testing on November 16, 2015. R1614; *see generally* R1590-1614.

Decision on Appeal

On appeal, the Illinois Appellate Court, Third District, vacated the circuit court's judgment denying the motion for DNA testing and remanded for further proceedings, holding that in denying counsel leave to enter the Rule 13(c)(6) limited scope appearance, the circuit court had violated defendant's due process right to be represented in court by privately retained counsel. *Gawlak*, 2017 IL App (3d) 150861, ¶¶ 14-18. Citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932), the appellate court determined that regardless of whether defendant had a right to appointed counsel (which he did not), he had a "constitutional due process right to retain private counsel to represent him on any matter he wishes." *Gawlak*, 2017 IL App (3d) 150861, ¶¶ 12-13. The court held that denial of Brodsky's request to enter a Rule 13(c)(6) limited scope appearance "solely on the DNA motion" violated that due process right, and "[t]he fact that defendant had other pending motions in which he was represented by other counsel [wa]s irrelevant." *Id.*, ¶ 14. The appellate court declined to address the State's harmless error argument, *id.*, ¶ 15, and "express[ed] no opinion as to the merits or the lack thereof of defendant's motion for DNA testing," *id.*, ¶ 16.

STANDARDS OF REVIEW

"A ruling on a motion for postconviction [DNA] testing under section 116-3 . . . is reviewed *de novo*." *People v. Stoecker*, 2014 IL 115756, ¶ 21 (citations omitted). Compliance with a Supreme Court rule is also reviewed *de novo*, *People v. Lloyd*, 338 Ill. App. 3d 379, 384 (1st Dist. 2003), as are issues concerning the proper interpretation of a Supreme Court rule, *People v. Henderson*, 217 Ill. 2d 449, 458 (2005).

ARGUMENT

Defendant suffered neither an erroneous denial of leave to enter a Rule 13(c)(6) limited scope appearance nor a violation of *Powell v. Alabama*'s rule that a court may not arbitrarily refuse to hear from privately retained counsel. 287 U.S. at 69. He simply failed to comply with the proper procedure by which his privately retained counsel might have been heard in his section 116-3 action.

Brodsky had two options for entering a proper appearance and representing defendant in his section 116-3 action: (1) he could have entered a general appearance to represent defendant in the entire section 116-3 action, or (2) if he wished to narrow his responsibilities within the section 116-3 action, he could have complied with Illinois Supreme Court Rule 13(c)(6) by filing a "Notice of Limited Scope Appearance, prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article I Forms Appendix, identifying each aspect of the

proceeding to which the limited scope appearance pertains." Ill. S. Ct. R. 13(c)(6).

Counsel did neither. Instead, he insisted on entering a limited scope appearance purporting to cover the entire section 116-3 matter (but not the separate postconviction and section 2-1401 matters), omitting any explanation or supporting documentation of how the scope of his representation *within* the section 116-3 matter would in fact be limited. *See id.* Rejection of this non-compliant limited scope appearance for non-compliance with Rule 13(c)(6)'s specific requirements was not error.

Moreover, in ruling that the rejection of counsel's non-compliant limited scope appearance violated due process — and expressly declining to address the People's harmless error argument — the appellate court elevated the limited scope appearance from a mere procedural mechanism to a constitutional right, the violation of which, it implied, warranted automatic reversal. But even if the rejection of the limited scope appearance was erroneous — which it was not — the Supreme Court of the United States has never found, in *Powell* or elsewhere, a due process right to be heard in court by privately retained counsel by way of a limited scope appearance, much less that an improper denial of leave to enter such an appearance constitutes structural error. To the contrary, because defendant's section 116-3 motion for DNA testing lacked any merit, the perceived rule violation — to the extent any such violation occurred — should have been deemed harmless.

This Court should therefore reverse the judgment of the appellate court and affirm the circuit court's denial of leave to enter the limited scope appearance and its subsequent denial of defendant's section 116-3 motion.

I. Counsel's Limited Scope Appearance Did Not Comply with Supreme Court Rule 13(c)(6); Accordingly, This Court Should Uphold the Circuit Court's Ruling Denying Leave to Enter It.

Under the plain language of Rule 13(c)(6), a limited scope appearance permits counsel to define and limit the discrete aspects *within* a particular case for which he and his client have agreed he will be responsible. It is neither necessary nor proper for counsel who wishes to enter an appearance in one case but not another to enter a limited scope appearance. The appellate court's reasoning below — that "the trial court should have allowed private counsel's request to enter a limited scope appearance solely on the DNA motion" because defendant's "section 2-1401 motion . . . [and] petition for postconviction relief . . . are separate and distinct proceedings that have no bearing on the DNA motion," *Gawlak*, 2017 IL App (3d) 150861, ¶ 14 — demonstrates a fundamental misunderstanding of the nature of a Rule 13(c)(6) limited scope appearance. The appellate court was correct that a motion for DNA testing pursuant to section 116-3 initiates a stand-alone cause of action — a "separate proceeding, independent of any claim for post-conviction or other relief" that results in its own appealable final judgment. *People v. Savory*, 197 Ill. 2d 203, 210-11 (2001); *People v. Kliner*, 203 Ill. 2d 402, 407-08 (2002); *People v. Permanian*, 381 Ill. App. 3d 869, 872-73 (1st

Dist. 2008); *cf. People v. Shum*, 207 Ill. 2d 47, 66-68 (2003). But the appellate court was incorrect in its conclusion that a limited scope appearance was available to an attorney who sought to provide comprehensive representation to his client in the section 116-3 action rather than limiting his representation to one or more "aspect[s] of the proceeding." Ill. S. Ct. R. 13(c)(6).

It does not matter whether Brodsky (a) intended to file a general appearance in defendant's section 116-3 matter (to the exclusion of defendant's other pending actions) but employed the wrong procedural vehicle for doing so or, instead, (b) intended to limit the scope of his representation within the section 116-3 matter but ignored Rule 13(c)(6)'s requirements, as denial of leave to enter a Rule 13(c)(6) limited scope appearance was proper either way.[3]

By its plain language, Rule 13(c)(6) permits an attorney to enter a "limited scope appearance on behalf of a party in a civil proceeding pursuant

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[3] To be sure, the circuit court's reasoning for rejecting Brodsky's limited scope appearance — that the motion for DNA testing was somehow intertwined with defendant's postconviction petition such that Brodsky was required to either enter a general appearance on the postconviction petition or not at all, *see* R1509-13 — reflects a misunderstanding of both the nature of a motion for DNA testing as an independent proceeding and the availability of a limited scope appearance pursuant to Rule 13. However, this Court "may affirm on any basis supported by the record" and is not constrained by the circuit court's reasoning. *People v. Durr*, 215 Ill. 2d 283, 296 (2005) (collecting cases). As described below, the record here demonstrates that counsel did not comply with Rule 13(c)(6), and this Court may therefore affirm the circuit court's denial of leave to enter the limited scope appearance on that basis.

to Rule of Professional Conduct 1.2(c) when the attorney has entered into a written agreement with that party to provide limited scope representation." Ill. S. Ct. R. 13(c)(6); *see also* Ill. S. Ct. R. of Prof. Conduct 1.2(c) (2015) (permitting lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent"). The rule mandates that the attorney "*shall* file a Notice of Limited Scope Appearance, prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article I Forms Appendix," which "*identif[ies] each aspect of the proceeding to which the limited scope appearance pertains*." Ill. S. Ct. R. 13(c)(6) (emphasis added). The form — entitled "Form for Limited Scope Appearance in Civil Action" — includes fields for (1) a case caption identifying the cause of action to which the limited scope appearance applies, (2) the attorney and party to attest that they "have entered into a written agreement . . . providing that the attorney will provide limited scope representation to the Party," and (3) the attorney to identify the precise "matter(s)" (such as particular court dates, trial dates, continuances, or depositions) that the appearance is limited to, as well as the "discrete issues within each proceeding covered by [the] appearance." Ill. S. Ct. Art. I Forms App'x, R. 13. Both the attorney and the party must sign the form. *Id.*

Here, the plain language of Rule 13(c)(6) and its corresponding Article I Appendix form — which is incorporated by reference — clearly and

unambiguously demonstrate the purpose of a limited scope appearance: to stipulate what an attorney's responsibilities will be *within* a civil case, not to initiate an attorney's representation in one civil case as opposed to others (which is the purpose of a general appearance). *See People v. Dominguez*, 2012 IL 111336, ¶ 16 (citation omitted) ("The rules of statutory interpretation are applied with equal force to supreme court rules.").

The June 14, 2013 Committee Comments to Rule 13 add that "[a]n attorney making a limited scope appearance in a civil proceeding *must first enter into a written agreement* with the party disclosing the limited nature of the representation." Ill. S. Ct. R. 13, Comm. Comments (emphasis added); *see also In re Estate of Burd*, 354 Ill. App. 3d 434, 437 (2d Dist. 2004) ("Committee comments to supreme court rules are not binding but they may be used to determine the application of a rule . . . [or to] interpret[] an ambiguous rule."); *Wright v. Desate, Inc.*, 292 Ill. App. 3d 952, 954 (3d Dist. 1997) (same). "The limited appearance *is then effected* by using the form Notice of Limited Scope Appearance appended to this Rule," the purpose of which is to "promote[] consistency in the filing of limited scope appearances, make[] the notices easily recognizable to judges and court personnel, and help[] ensure that the scope of the representation is identified with specificity." Ill. S. Ct. R. 13, Comm. Comments (emphasis added). Thus, the limited scope appearance allows an attorney to define the "aspects of the

case" the attorney will be responsible for, such as "specified court proceedings, depositions, or settlement negotiations." *Id.*

Brodsky failed to comply with these plainly delineated procedures. He neither presented nor filed a Notice of Limited Scope Appearance "identifying each aspect of the proceeding to which the limited scope appearance pertain[ed]," despite the rule's plain requirement that he do so. Ill. S. Ct. R. 13(c)(6) ("The attorney shall file a Notice of Limited Scope Appearance . . ."); *Dominguez*, 2012 IL 111336, ¶ 17 ("use of the word 'shall'" in a rule "means that it is mandatory"). He did not represent that he and defendant had entered into a "written agreement . . . to provide limited scope representation," much less attest to such an agreement in the required Notice. Ill. S. Ct. R. 13(c)(6); Ill. S. Ct. Art. I Forms App'x, R. 13; *see also* Ill. S. Ct. R. 13, Comm. Comments. And at no point in his brief court appearance on September 30, 2015, did counsel articulate how the scope of his representation of defendant within the section 116-3 action would be limited. *See generally* R1504-13. Counsel simply repeated that he sought to file a Rule 13(c)(6) appearance covering the entire section 116-3 action. *See, e.g.*, R1505 ("[Defendant] has asked me to help assist him in the motion regarding the DNA testing, simply that limited issue just regarding . . . the post-conviction motion for DNA testing."); *id.* ("[J]ust to appear on his post-conviction motion for DNA testing and no other matter."); R1510 ("All [defendant] is asking me to do is assist him in this motion regarding the DNA

testing and nothing else."); *see also* R1505 ("I am going to be asking for leave to file a limited scope appearance."); *id.* ("[U]nder Supreme Court Rule 13 there is this new way of appearing called a limited scope appearance."); R1506, 1510 (counsel expressly referring court to Rule 13(c)(6)).

But by its plain language, there is no such thing as a Rule 13(c)(6) limited scope appearance that extends to an entire case. If Brodsky intended to represent defendant through the section 116-3 proceeding, he should have sought to enter a general appearance in the section 116-3 action.[4] And if he intended to narrow the parameters of his appearance and representation *within* the section 116-3 matter, he was required to do so in accordance with Rule 13(c)(6). Counsel did neither, despite his understanding that defendant's motion for DNA testing was an independent cause of action. *See* R1507-08. Accordingly, the court properly denied Brodsky leave to enter a limited scope appearance.

To be clear, the People do not dispute that a Rule 13(c)(6) limited scope appearance may be available to a defendant pursuing a civil section 116-3 action.[5] However, if Brodsky wished to do so, it was incumbent upon him to

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[4] Indeed, this is precisely how attorney Caplan entered his appearance in defendant's separate section 2-1401 action. *See* C1900.

[5] The People argued otherwise below but, upon further research and consideration, concur that section 116-3 is civil in nature, as it is akin to a section 122-1 or section 2-1401 petition. Accordingly, the People do not challenge Rule 13(c)(6)'s applicability to section 116-3 proceedings generally — only defendant's compliance with Rule 13(c)(6) on the facts of this case. Although this argument was not raised below, an "appellee in [the appellate] court [that] brings the case [to this Court] for further review . . . may raise

adhere to the requirements of Rule 13(c)(6). *Roth v. Ill. Farmers Ins. Co.*, 202 Ill. 2d 490, 494-95 (2002). Supreme Court rules "are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995); *People v. Houston*, 226 Ill. 2d 135, 152 (2007). "Attorneys are not free to ignore [this Court's] rules." *Applebaum v. Rush Univ. Med. Ctr.*, 231 Ill. 2d 429, 447 (2008); *see also* Ill. S. Ct. R. 13, Comm. Comments ("[N]othing in the Rule restricts the ability of a court to manage the cases before it, including taking appropriate action in response to client or lawyer abuse of the limited scope representation procedures."). In fact, "strict compliance with supreme court rules is generally required." *Vill. of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 116 (2004); *see also id.* at 119 (party's "failure to strictly comply with the rule may result in waiver"); *People v. Foster*, 171 Ill. 2d 469, 471-74 (1996) (requiring strict compliance with Rule 604(d)'s written-motion requirement before appealing sentencing on guilty plea); *but see Dominguez*, 2012 IL 111336, ¶ 22 (requiring only substantial compliance with Rules 605(b) and (c)). And although no Illinois court has addressed whether Rule 13(c)(6) requires strict or substantial compliance, counsel here did not comply with Rule 13(c)(6) at all, obviating any need for this Court to resolve that question here.

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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).

Simply put, Brodsky's proposed limited scope appearance was either an improper vehicle by which to represent defendant in his entire section 116-3 action, or it was a proper vehicle that failed to conform to the requirements of the rule. Either way, the circuit court's ruling should be affirmed.

II. There Is No Constitutional Right to a Limited Scope Appearance, and Counsel's Failure to Either Enter a General Appearance in the Section 116-3 Action or a Valid Rule 13(c)(6) Limited Scope Appearance on Defendant's Behalf Did Not Violate Due Process.

The appellate court also erred in finding that a "denial of private counsel's request to enter a limited scope appearance . . . violate[s] defendant's due process rights." *Gawlak*, 2017 IL App (3d) 150861, ¶ 14. The right of a party to have his counsel enter a limited scope appearance cannot be equated with the broader due process right to be represented in court by privately retained counsel. Indeed, it is not a right of constitutional magnitude at all.

Article VI, § 16 of the Illinois Constitution vests this Court with "general administrative and supervisory authority over all courts," including the power to "promulgate procedural rules to facilitate the judiciary in the discharge of its constitutional duties." *People v. Peterson*, 2017 IL 120331, ¶ 29 (quotations omitted). This Court has long recognized its own "inherent power to make rules governing the practice in inferior courts," "make suitable rules consistent with constitutional safeguards," and impose rules that

regulate the manner in which such constitutional safeguards are afforded. *People v. Lobb*, 17 Ill. 2d 287, 299, 302 (1959) ("There is nothing in the constitutional guarantee of the right to a trial by jury which prevents reasonable regulation of the manner in which jurors shall be selected.").

Yet it is well established that not all rights established by Supreme Court Rule amount to constitutional rights — even where the rule is motivated by, or relates in some way to, a constitutional right. *See, e.g.*, *People v. Thompson*, 238 Ill. 2d 598, 609, 614-15 (2010) (although Rule 431(b) "was intended to help ensure a fair and impartial jury," violation of Rule 431(b) "does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules"); *People v. Glasper*, 234 Ill. 2d 173, 193, 196-97 (2009) (same). Rather, this Court may confer by rule a right beyond that which is afforded under the Constitution, without that right itself becoming one of constitutional magnitude. *See, e.g.*, *Rivera v. Illinois*, 556 U.S. 148, 157-58 (2009) (Illinois's provision of peremptory challenges under Rule 434(d) conferred benefit beyond minimum constitutional requirement of fair jury selection; violation of rule was mere error of state law, not violation of that constitutional right). Only where the rule-based right is "indispensable" to the enjoyment of a constitutional right does a violation of the rule establish the violation of a constitutional right. *Thompson*, 238 Ill. 2d at 609, 614-15 (rule-based right to voir dire questions in criminal cases under Rule 431(b), though intended to promote

constitutional right to fair and impartial jury, was not "indispensable" to fair trial and thus, was not itself a constitutional right); *Glasper*, 234 Ill. 2d at 196-97 (same); *see also People v. Rivera*, 227 Ill. 2d 1, 16-17 (2007); *cf. People v. McGhee*, 2012 IL App (1st) 093404, ¶¶ 23-26 (common law procedural right to poll jury upon request, though related to constitutional right to unanimous verdict, not indispensable to such constitutional right).

There is no question that under *Powell v. Alabama*, 287 U.S. 45, 69 (1932), "[i]f 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." *See also Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010) ("[I]f the 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."). However, Rule 13(c)(6) is not dispositive of *whether* an attorney may appear in court at all on behalf of a client — only *if* and *how* an attorney may make a specialized appearance. *Powell* and its progeny say nothing of a right to be represented by privately retained counsel in any particular, specialized fashion, such as by a limited scope appearance.[6]

[6] In fact, if they did, Rule 13(c)(6) itself would be unconstitutional, as it permits only civil litigants' attorneys to enter limited scope appearances.

Nor is a Rule 13(c)(6) limited scope appearance indispensable to a party's right or ability to have his attorney heard in court, as it is merely one particular vehicle by which an attorney with limited involvement in a cause of action may prefer to appear. Thus, even though Rule 13 relates to the manner in which a privately retained attorney may seek to be heard on behalf of his client in court — conferring a means of entering a limited scope appearance under specific circumstances — it does not follow that the ability to enter a Rule 13(c)(6) limited scope appearance is itself a constitutional right. *Rivera*, 556 U.S. at 157-58; *Thompson*, 238 Ill. 2d at 609, 614-15. Nor is it the case that in regulating the procedures by which appearances — limited or general — are made, Rule 13 somehow impinges upon the constitutional right to be represented in court by one's privately retained attorney. *Lobb*, 17 Ill. 2d at 299, 302. As noted, defendant had several means available to him to notify the circuit court that Brodsky would represent him in all or part of the section 116-3 action.

The unavailability of a *general* appearance, by contrast, may call into question whether an attorney has been impermissibly prevented from appearing at all. That is, 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, the precepts of *Powell* may have been violated. Indeed, under Illinois law, the court's leave is not even typically required for an attorney to enter a general appearance,

and such appearance should be accepted unless the trial court, in its discretion, has determined that the attorney's appearance will unduly prejudice the other party or interfere with the administration of justice. *Cf. Sullivan v. Eichmann*, 213 Ill. 2d 82, 90-91 (2004) (citations omitted) (addressing court's discretion to deny substitution of counsel); *but see In re Marriage of Milovich*, 105 Ill. App. 3d 596, 614-16 (1st Dist. 1982) (trial court did not abuse discretion in denying respondent's mid-trial addition of multiple attorneys, where "disruption of the proceedings would inhere from the very logistics involved in such 'multiple' representation"). But even an arbitrary refusal to accept a *limited scope* appearance, though it may offend Rule 13(c)(6), does not preclude an attorney from representing his client and cannot, by itself, violate *Powell*.

In this case, because a general appearance in the section 116-3 action was never properly attempted — let alone arbitrarily refused — the circuit court cannot be said to have violated due process. Defendant simply failed to avail himself of his constitutional right to retained counsel under *Powell* in accordance with this Court's procedural rules. *See, e.g.*, *People v. Nordstrom*, 37 Ill. 2d 270, 273 (1967) (failure to timely appeal judgment in accordance with applicable procedural rules not violation of constitutional right to direct appeal).[7]

[7] Even if there were some constitutional dimension to limited scope appearances under *Powell*, it would not be arbitrary to deny leave to enter a limited scope appearance for failure to comply with the requirements

The appellate court's holding that defendant's due process rights were violated by an arbitrary denial of leave to enter a limited scope appearance was therefore erroneous.

III. Should This Court Determine that a Violation of Rule 13(c)(6) Occurred But Did Not Violate Defendant's Due Process Right to Counsel, Any Such Error Was Harmless Because Defendant's Section 116-3 Motion Was Meritless.

Because the appellate court viewed the purported Rule 13(c)(6) violation as a deprivation of the right to counsel in violation of *Powell*, it wrongly refused to address the State's harmless error argument. *See Gawlak*, 2017 IL App (3d) 150861, ¶ 15. But whereas the total deprivation of trial counsel constitutes a recognized structural error, *People v. Shaw*, 186 Ill. 2d 301, 344-45 (1998), the deprivation of a limited scope appearance resulting from counsel's non-compliance with the procedural mechanism by which counsel may enter such specialized appearance does not, and the appellate court should have reviewed the alleged error for harmlessness. *Thompson*, 238 Ill. 2d at 609 ("A violation of a supreme court rule does not require

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promulgated by Rule 13(c)(6). That a court may not "arbitrarily" refuse to hear from a party's hired lawyer necessarily implies that a *non*-arbitrary refusal to hear from a party's hired attorney would *not* violate due process. Disqualification of counsel based on a conflict of interest, for example, would not be arbitrary and therefore, would not violate due process under *Powell*. *Cf. Burnette v. Terrell*, 232 Ill. 2d 522, 534 (2009) (summarizing grounds on which court may remove appointed defense counsel without violating Sixth Amendment right to counsel). Likewise, rejection of an attorney's appearance for failure to comply with this Court's rules governing appearances is not arbitrary; it derives from this Court's inherent power to regulate the procedures of the circuit courts. *Peterson*, 2017 IL 120331, ¶ 29; *Lobb*, 17 Ill. 2d at 299, 302.

reversal in every instance."); *Glasper*, 234 Ill. 2d at 193 (collecting cases); *People v. Davis*, 233 Ill. 2d 244, 273 (2009) (even "most constitutional errors are subject to harmless-error analysis"); *People v. Patterson*, 217 Ill. 2d 407, 423-24 (2005) (collecting cases); *People v. Daniels*, 172 Ill. 2d 154, 165 (1996) (expressing reluctance to hold that per se reversal is required for violation of right conferred only by Supreme Court rule). An error in a postconviction civil action, such as the section 116-3 proceeding here, is harmless where the underlying motion lacked merit. *Cf. People v. Addison*, 371 Ill. App. 3d 941, 945-46 (1st Dist. 2007) (errors in section 2-1401 and postconviction proceedings harmless where underlying petitions were meritless); *People v. Malloy*, 374 Ill. App. 3d 820, 824 (3d Dist. 2007) (same). Here, where (1) identity was not a central issue at trial, (2) DNA played no significant role in defendant's conviction, and (3) the requested DNA testing could not significantly advance a claim of actual innocence, any purported violation of defendant's Rule 13(c)(6) right in his section 116-3 action should be deemed harmless.

To succeed on a section 116-3 motion for DNA testing, a defendant must first make a prima facie showing that "(1) identity was the issue in the trial . . . which resulted in his or her conviction; and (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b)(1)-(2). "The trial court shall allow the testing

. . . upon a determination that[] (1) the result of the testing has the scientific potential to produce new, noncumulative evidence (i) materially relevant to the defendant's assertion of actual innocence when the defendant's conviction was the result of a trial, even though the results may not completely exonerate the defendant . . . and (2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3(c)(1)-(2).

Because defendant's section 116-3 motion could not satisfy these statutory requirements, regardless of any purported Rule 13(c)(6) violation, any error was harmless.

A. Identity was not a central issue at defendant's trial.

At trial, defendant challenged only whether the alleged sexual acts against J.G. occurred, not whether he was the perpetrator of those acts. *See, e.g.*, R432-42; R459-63; R526-28, 533-40; R549-50; R570-79; R602-09, 611-13; R620-26; R684-88; R702-04; R786-99. Defendant nevertheless has argued that he automatically satisfied section 116-3's requirement that "identity was the issue in the trial" by maintaining his innocence at trial. *Compare* C1751-52, *with* 725 ILCS 5/116-3(b)(1). This interpretation of subsection 116-3(b)(1) defies the plain and ordinary meaning of the statute.

"The cardinal principle of statutory construction is to ascertain and give effect to the intention of the legislature," the "language used by the legislature [being] the best indicator of legislative intent." *People v. Savory*,

197 Ill. 2d 203, 212-13 (2001) (citations omitted). Statutory language is to be given its "plain and ordinary meaning," *id.* at 213, and "every clause of a statute must be given a reasonable meaning, if possible, and should not be rendered meaningless or superfluous," *People v. Stoecker*, 2014 IL 115756, ¶ 25 (citation omitted).

Here, the plain and ordinary meaning of "identity" is unambiguous. It is "the condition of being the same with something described, claimed, or asserted or of possessing a character claimed." *Webster's Third New International Dictionary Unabridged* 1123. Therefore, in the context of a section 116-3 motion for DNA testing, "identity" means that the trial concerned whether the defendant was the individual who committed the criminal acts described, claimed, or asserted — not whether those criminal acts occurred at all.

If the legislature intended to expand DNA testing to any individual who simply challenged the veracity of allegations against him or claimed that the alleged crime never occurred at all, it would have done so explicitly, by using language that reflected such a broad intent. Instead, the legislature explicitly narrowed DNA testing to cases concerning "*identity*" — i.e., a dispute about *who* perpetrated the alleged acts. *Cf. People v. Urioste*, 316 Ill. App. 3d 307, 313-14 (5th Dist. 2000) ("When the legislature required a showing that identity was the issue at the trial . . . [it] limit[ed] the remedy [of DNA testing] to those cases where identity was truly at issue . . . [and]

exclude[d] from the statute's reach those defendants whose cases turned upon questions other than the question of who committed the acts charged.").

In defendant's case, there was no dispute that defendant was with J.G. on the first-floor couch in defendant's home on the evening of December 7, 2007. He simply contended that there was no sexual assault. Identity was not, therefore, the issue, and DNA testing is unavailable under section 116-3.

B. The requested DNA testing is not materially relevant to defendant's assertion of actual innocence.

Identity aside, any error was harmless for the additional and independent reason that the requested DNA testing would not significantly advance any claim of defendant's actual innocence.

As described, postconviction DNA testing is not warranted unless it is, *inter alia*, "materially relevant to the defendant's assertion of actual innocence." 725 ILCS 5/116-3(c)(1). Materially relevant evidence is "evidence which tends to *significantly advance* that claim" of actual innocence. *Savory*, 197 Ill. 2d at 213 (emphasis added). Whether evidence is materially relevant, however, necessarily "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. Importantly, where DNA evidence did not play a significant role in the case against a defendant, it is not materially relevant. *See id.* at 214-15; *see also People v. Bailey*, 386 Ill. App. 3d 68, 76-77 (1st Dist. 2008); *People v. Gecht*, 386 Ill. App. 3d 578, 582-84 (1st Dist. 2008).

In this case, DNA played no role at all in defendant's conviction. Both of the State's experts testified that no DNA was found in J.G.'s vaginal swabs, underwear, or pajama shirt (other than J.G.'s). *See* R455-58, 460, 463, 563-68, 572-73. Instead, defendant's conviction was founded on (1) J.G.'s detailed and consistent testimony that defendant woke her up in the middle of the night, fondled her buttocks, vaginally penetrated her with his finger, performed oral sex on her, forced her to fondle his penis, and fondled her chest while he masturbated, *see generally* R379-412; R363-64; R373; (2) J.G.'s videotaped Child Advocacy Center interview corroborating her trial testimony, R725-26; (3) testimony that J.G. sent text messages to her mother the day after the assault stating that her father had tried to have sex with her, R415-17, 443, 470-72, 534-36, and later told her mother in person exactly what had happened, R422, 473-77, 503-05; (4) Dr. Benfield's testimony that J.G.'s physical examination revealed a reddened right labia minor consistent with the reported digital manipulation by defendant, R453-55, 460-61, 464; (5) the consistent testimony of four interrogating officers that defendant had admitted to lying naked next to J.G. on the night in question, admitted to rubbing J.G.'s buttocks, described his interactions with J.G. as "improper" and referred to his treatment of J.G. as more appropriate for an adult woman who was his wife or girlfriend than for a child who was his daughter, R598-601, 616-18, 681-683, 700; and (6) testimony from Detective Revis and Deputy Chief Wodka that upon being confronted with J.G.'s accusations,

defendant stated that J.G. was telling the truth, but he was too embarrassed to admit what he had done, R601-02, 701.

Indeed, defendant's defense was predicated on the absence of DNA evidence that could corroborate J.G.'s accusations, *see, e.g.*, R786-99, and he readily acknowledged in his section 116-3 motion that his conviction was not predicated on any physical evidence, C1755. Thus, it cannot be argued that DNA evidence played a significant role in defendant's conviction, and the requested testing is not "materially relevant" as defined by section 116-3.

Nor would the evidence that defendant seeks to test — hair collected from J.G.'s shirt and underwear — significantly advance a claim of actual innocence. Unlike semen or saliva (neither of which was found in defendant's case, R563-68), hair, by itself, is not necessarily indicative of a sexual encounter and has little probative value in this sexual assault case. Indeed, it would be unsurprising to find hair matching defendant's on clothing that J.G. wore and slept in at defendant's home. Likewise, it would be unsurprising to find that J.G.'s clothing had picked up hair from some wholly unrelated source in the days before the clothing evidence was turned over to the police. In neither instance would defendant's actual innocence be any more or less likely, much less "significantly advanced." And as for the PCR-STR and Y-STR testing requested on the samples from J.G.'s sexual assault kit, no such DNA testing can be done where no DNA evidence was found in the first place. *See* R455-58, 460, 463; R563-68, 572-73.

For these reasons, this Court should find that because defendant's section 116-3 motion was meritless, any purported Rule 13(c)(6) violation was harmless.

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.

July 3, 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(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, is thirty-six pages.

/s/ *Evan B. Elsner*
EVAN B. ELSNER

RULE 342 APPENDIX

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Appellate Court

***People v. Gawlak*, 2017 IL App (3d) 150861**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SYLWESTER GAWLAK, Defendant-Appellant.
District & No.	Third District Docket No. 3-15-0861
Filed Rehearing denied	November 20, 2017 December 15, 2017
Decision Under Review	Appeal from the Circuit Court of Will County, No. 07-CF-2547; the Hon. Daniel J. Rozak, Judge, presiding.
Judgment	Judgment vacated; cause remanded.
Counsel on Appeal	Michael J. Pelletier and Yasemin F. Eken, of State Appellate Defender's Office, of Elgin, for appellant. James W. Glasgow, State's Attorney, of Joliet (Patrick Delfino, Lawrence M. Bauer, and Dawn D. Duffy, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE SCHMIDT delivered the judgment of the court, with opinion. Presiding Justice Holdridge and Justice Lytton concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Sylwester Gawlak, appeals the Will County circuit court's denial of his postconviction motion for deoxyribonucleic acid (DNA) testing under section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2014)). Specifically, he argues the court's denial of his motion "must be reversed and the case remanded for further proceedings" because the court (1) "denied [him] his constitutional right to retain counsel to represent him on his motion" and (2) "erred when it would not allow him to present an expert in DNA testing to testify at the hearing on the motion." We vacate the court's denial of his postconviction motion for DNA testing and remand for further proceedings.

¶ 2 FACTS

¶ 3 Following an April 2009 trial, a jury convicted defendant of two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2006)). Thereafter, the trial court sentenced defendant to mandatory consecutive terms of six years' imprisonment for each count of predatory criminal sexual assault and three years' imprisonment for aggravated criminal sexual abuse.

¶ 4 In August 2011, defendant, *pro se,* filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)), followed by a supplemental petition for postconviction relief in December 2013. The trial court appointed the Office of the State Appellate Defender (OSAD) to represent defendant on his postconviction petition.

¶ 5 In March 2015, defendant filed a *pro se* "petition for relief from void order" pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2014)). Defendant later retained private counsel to represent him on this motion.

¶ 6 In May 2015, defendant filed a *pro se* "motion for post-conviction forensic DNA testing" pursuant to section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3 (West 2014)). Specifically, he sought mitochondrial DNA and polymerase chain reaction short tandem repeat (PCR-STR) DNA forensic testing of hair and clothing collected by the State. He further requested that the hair and "rape kit" evidence be tested for DNA using the PCR-STR and mitochondrial testing method and that the clothing be tested for "touch DNA."

¶ 7 At a September 2015 hearing, different private counsel than the one representing defendant on his section 2-1401 motion appeared before the trial court and indicated his intent to file a "limited scope appearance" under Illinois Supreme Court Rule 13(c)(6) (eff. July 1, 2013) to represent defendant on his motion for DNA testing. The court denied private counsel's request to enter a limited scope appearance but informed counsel that he was "certainly welcome to [file an appearance] on the post-conviction proceeding." Following a November 2015 hearing in which defendant appeared *pro se*, the court denied defendant's motion for DNA testing.

¶ 8 This appeal followed.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant argues that the trial court's denial of his postconviction motion for DNA testing "must be reversed and the case remanded for further proceedings" because the

court (1) "denied [him] his constitutional right to retain counsel to represent him on his motion" and (2) "erred when it would not allow him to present an expert in DNA testing to testify at the hearing on the motion."

¶ 11 Rule 13(c)(6) provides that an attorney may make a limited scope appearance on behalf of a party in a civil proceeding by filing a notice of limited scope appearance in which he "identif[ies] each aspect of the proceeding to which the limited scope appearance pertains." Ill. S. Ct. R. 13(c)(6) (eff. July 1, 2013). The State maintains that the limited-scope-appearance rule does not apply here because the issue concerns a criminal proceeding, not a civil one. According to the State, "[a] motion for forensic DNA testing is available only to convicted criminal defendants pursuant to the Code of Criminal Procedure." We note, however, the fact that the motion for DNA testing at issue here may only be brought by a convicted criminal does not necessarily make the subsequent proceedings criminal in nature. In fact, even proceedings under the Act (725 ILCS 5/122-1 to 122-7 (West 2010)), which are brought only by convicted persons, are considered civil in nature. See *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (noting that postconviction proceedings are "not part of the criminal proceeding itself" and are "in fact considered to be civil in nature"); *People v. Johnson*, 191 Ill. 2d 257, 270 (2000) ("A post-conviction proceeding is not part of the criminal process. Rather, it is a collateral attack on the judgment of conviction and is civil in nature."). Similarly, a postconviction motion for DNA testing brought under the Code of Criminal Procedure is not part of the criminal process and, as such, is civil in nature.

¶ 12 The State also contends that defendant has no constitutional or statutory right to counsel in regard to his DNA motion. In particular, the State asserts that defendant has (1) no constitutional right to counsel because that right "applies during a defendant's trial and first appeal of right and no further" and (2) no statutory right to counsel because section 116-3 of the Code of Criminal Procedure does not convey such a right. While defendant may not have a constitutional or statutory right to *appointed* counsel, our review of relevant authority indicates that defendant does have a constitutional due process right to retain private counsel to represent him on any matter he wishes.

¶ 13 Notably, in *Powell v. Alabama*, 287 U.S. 45, 68 (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." The Court further stated that a hearing "has always included the right to the aid of counsel when desired and provided by the party asserting the right." *Id.* The Court concluded, "[i]f 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." *Id.* at 69. Thereafter, citing *Powell*, the Seventh Circuit Court of Appeals found that the right to retain counsel in a civil case was protected under the due process clause and that "if the 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." (Emphasis in original.) *Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010).

¶ 14 Based on our review of the record and the relevant authority as discussed above, we conclude that the trial court's denial of private counsel's request to enter a limited scope appearance on defendant's DNA motion was arbitrary and violated defendant's due process

rights. The fact that defendant had other pending motions in which he was represented by other counsel is irrelevant. The section 2-1401 motion (in which defendant is represented by private counsel) and the petition for postconviction relief (in which defendant is represented by OSAD) are separate and distinct proceedings that have no bearing on the DNA motion at issue here. In short, the trial court should have allowed private counsel's request to enter a limited scope appearance solely on the DNA motion.

¶ 15 We recognize the State also argues any error in the dismissal of defendant's DNA motion was harmless because its dismissal is inevitable. However, based on the facts of this case, we decline to address the State's contentions regarding harmless error. Simply put, defendant had a constitutional due process right to have private counsel represent him on his DNA motion.

¶ 16 Accordingly, we vacate the trial court's denial of defendant's postconviction motion for DNA testing and remand for further proceedings on the motion during which defendant may retain private counsel if he so chooses. As such, we need not address whether the trial court erred by denying defendant's request to allow expert testimony at the hearing on the DNA motion. Finally, we express no opinion as to the merits or the lack thereof of defendant's motion for DNA testing.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, we vacate the judgment of the circuit court of Will County as it pertains to the denial of defendant's postconviction motion for DNA testing and remand for further proceedings.

¶ 19 Judgment vacated; cause remanded.

THE COURT: Show I am turning that over to Mr. Gawlak. I think that is the extent of the subpoenas that I have.

MS. GRIFFIN: Judge, there is an attorney here for the Village of Oak Lawn who I believe filed their own motion to quash subpoenas served on certain officers of the Oak Lawn Police Department. I had filed a general motion to quash subpoenas in this case regarding the other subpoenas that were filed.

THE DEFENDANT: Once again, if I can address something. I intend to show the list of all the matters scheduled for today. I would like to give the copy to counsel and the Court and ask if we can follow this order. Of course the one just requested can be addressed any time. It was not included on my list.

THE COURT: Well, let's address these -- There are different issues in the two cases. Let's address them one at a time.

MR. BRODSKY: If I may, your Honor.

MS. GRIFFIN: Judge, Mr. Brodsky does not have an appearance filed in this case. If your Honor is aware, if you recall, last week, Mr. Gawlak represented that he was going to have an attorney on his post-conviction petition. However, I believe if I am correct Mr. Brodsky wants to file

an appearance on part of the post-conviction petition, that being the motion for DNA testing.

MR. BRODSKY: If I may, your Honor, I am going to be asking for leave to file a limited scope appearance. I have been corresponding and speaking with Mr. Gawlak for a couple -- on and off for a couple of years now. I certainly became over the years impressed with the way he's learned a lot about the legal system. He has self-educated himself regarding it.

Mr. Gawlak has asked me to help assist him in the motion regarding the DNA testing, simply that limited issue just regarding the motion, the post-conviction motion for DNA testing. Your Honor, I am proposing that I file a limited appearance. Your Honor may be aware under Supreme Court Rule 13 there is this new way of appearing called a limited scope appearance. I would ask for leave to file my limited scope appearance in this case for Mr. Gawlak-- that's the 07 CF 2547 case --just to appear on his post-conviction motion for DNA testing and no other matter.

I think that I will be of assistance to the Court and to the State in kind of narrowing the issues and getting this matter heard as I think -- for example all the subpoenas that were issued regarding the DNA motion perhaps in talking to Mr. Gawlak may be the result of his

misunderstanding about what the issues were involved. Things like that could be avoided if I was granted leave to file an appearance in that matter.

I know already another lawyer, Mr. Caplan, was granted leave to file a limited appearance regarding the 2-1401 petition. I think that is what I -- I would be asking the Court for leave to do that.

THE COURT: What's the Supreme Court Rule number?

MR. BRODSKY: 13. I believe, your Honor, 13(c)(6).

THE COURT: State?

MS. GRIFFIN: Judge, without having the benefit of having that Supreme Court Rule before me, I am guessing that it does not suggest that counsel can come in on part of a post-conviction petition. The Section of the Statute relating to DNA testing is to allow DNA testing basically for your post-conviction petition.

The post-conviction petition has been filed by Mr. Gawlak. Mr. Brodsky is not coming in on that petition. Now, we're going to have an attorney on the 2-1401 who I see has not even appeared today on that matter, an attorney on this motion. Are we going to have an attorney for his motion for special prosecutor? I think we are getting --

THE DEFENDANT: Judge, I would simply object. We had this conversation for three months. I have a problem to allow this Court and Mr. Caplan to represent me. It took me three months finally what the State actually confirmed that in the Court's discretion to appoint the lawyer, which Mr. Caplan was appointed. In this case, the Court already exercised its discretion to allow Mr. Caplan.

This is simply another request to this Court, if not under the Supreme Court Rule 13, at least in the discretion of this Court. Once again, as before, I am going to ask the Court to grant this request. Thank you.

THE COURT: Ms. Griffin?

MS. GRIFFIN: Judge, the State would continue to object to this basically limited scope appearance to argue a motion which relates to the post-conviction petition which is filed in this criminal matter and not a civil matter.

MR. BRODSKY: If I can quickly comment. This is a motion -- the DNA motion is under 725 I.L.C.S. 5/116-3, which is a separate post-conviction motion by Statute. The post-conviction motion, the amended post-conviction motion, that Mr. Gawlak filed pro se doesn't bring up any -- doesn't allege in it anything regarding DNA evidence. Obviously couldn't because we haven't received -- he hasn't been granted -- There's been no testing. I am thinking that -- My

opinion is, your Honor, is that this is really a separate matter of which I really do believe I could be of some assistance in helping streamline it both to my -- both to Mr. Gawlak who hopefully will be my client, the State, and the Court on this one particular issue.

MS. GRIFFIN: Your Honor, if the defendant is not seeking DNA testing to support his post-conviction petition, the People are somewhat perplexed as to why he is seeking this matter. There would be no proceeding before this Court that this would be helpful or harmful in anyway. If it's not part of the post-conviction petition, I am at a loss as to why it's being sought and what could be done with it afterwards if it's not going to be utilized for his post-conviction petition.

MR. BRODSKY: It would be depending on the result. If the result pointed towards innocence or exculpating Mr. Gawlak, obviously we would amend -- I am sure he would amend his post-conviction petition to add that allegation. The purpose of the Section 116-3 is to develop evidence for a post-conviction petition through the DNA.

THE DEFENDANT: And the actual innocent claim raised in the first issue without the DNA.

THE COURT: Anything else?

MR. BRODSKY: No.

THE COURT: From anybody?

MS. GRIFFIN: Just that he's filed this post-conviction petition. It's a briefing schedule. I don't know if we are supposed to dispense with that briefing schedule until -- I don't know.

THE COURT: Well, I previously allowed Mr. Caplan to file an appearance in the 2-1401 petition, which as I recall the Statute indicates is considered a separate proceeding. I don't know the exact language right off the top of my head. It's as I said somewhat civil in nature which would follow Supreme Court Rule 13 post-conviction -- Correct me if I'm wrong. But that's not a civil matter.

MR. BRODSKY: May I, your Honor.

THE COURT: If I allow your appearance, effectively I have three different attorneys arguing parts of a single case.

MR. BRODSKY: Yes, your Honor.

THE COURT: That's like in my way of thinking -- I'll give you a minute to correct me if you think I'm wrong. It's like having an attorney -- one attorney doing the motion to suppress the evidence, another attorney totally unrelated to the first doing a motion to suppress the statements, having another attorney who is not going to get involved in either of them but is going to handle the trial. It seems to

me it's getting a bit unwielding. Right now, if I allowed this, I would have three attorneys; Mr. Caplan, Mr. Brodsky, and the defendant who is representing himself.

MR. BRODSKY: Yes, your Honor.

THE COURT: How am I incorrect?

MR. BRODSKY: First of all, your Honor, post-conviction proceedings are civil in nature. You are allowed depositions and discovery and such. They are civil in nature. So Supreme Court Rule 13(c)(6) would apply because they are civil.

As far as the -- what you are talking about which has the potential of becoming unwielding because of so many lawyers, I certainly understand the issue that your Honor is saying, but I think that that's exactly why the Supreme Court did pass this or adopted this Rule 13(c)(6) so that everybody -- if you are going to do this, everybody's authority is very narrow and defined and succinct.

All Mr. Gawlak is asking me to do is assist him in this motion regarding the DNA testing and nothing else. When there's clear lines as provided for by the Supreme Court Rule, I don't see the danger of it becoming unwielding. It's just the fact that what we have is the clear lines of authority and people doing a specific job for -- Not unlike if you had one law firm or team of

lawyers -- one law firm representing a client and different lawyers in that firm were assigned to do different parts of the case. Nothing different than that.

THE COURT: Well, some of the language you just used is interesting because you didn't say you were going to represent him on the DNA issue, you said you were going to assist him in presenting the DNA issue. That's been part of the problem since day one here. Mr. Gawlak likes to have his say, sometimes over the say of his own attorney. We often have two people speaking at once, on occasion three speaking at once.

You can assist him all you want. I don't care. You can sit in the courtroom every day, every minute this case is before me, and you can file an appearance. But under the circumstances of this case, you are -- you will either file an appearance on the post-conviction, period, or you will not file one at all.

MR. BRODSKY: I understand, your Honor. Just one comment. Maybe I misspoke by using the word assist. What I mean is if I filed the limited appearance, I would be arguing it. Mr. Gawlak would not have any say in that part of the DNA motion. I would handle that. What I mean by assist is I think that -- not being -- not understanding a hundred percent of what was -- the issues were, may have issued

subpoenas that were unnecessary or addressed issues that were unnecessary. That's kind of what I meant by assist. In other words, help to streamline both the Court, prosecution, and my client in getting this matter resolved on the merits, not merely assist him to help talk to you. If I was granted leave, I would be the only one handling this. He would not be talking, if that makes a difference to the Court.

THE DEFENDANT: I would love to make the same agreement with the Court.

THE COURT: See what I said? Bingo.

THE DEFENDANT: What I'm saying right now --

THE COURT: There we go. He is off to the races and he wants to be heard.

THE DEFENDANT: I would like to say that I would not say a word the moment the attorney allowed --

THE COURT: I am not going to allow it. If you want to file an appearance, you are certainly welcome to do that on the post-conviction proceeding, period. I am not going to accept another limited appearance on this case.

MR. BRODSKY: Okay, your Honor.

THE COURT: You know, if you want to assist him, like I said, you're welcome to be here every single day. If he has questions about subpoenas, that's up to you if you want to answer them or not. If you want to serve as some

advisory -- in an advisory capacity without an appearance, you can certainly do that. That's really none of my business.

When this case comes up, only one is going to be doing the talking, if it's not you, Mr. Brodsky, on every issue on the post-conviction, then it will be Mr. Gawlak with the exception of course to the 2-1401, which I maybe, just maybe mistakenly allowed another attorney to come in on. That's where we're at.

MR. BRODSKY: Thank you, your Honor. Mr. Caplan by the way couldn't be here today because his mother who is a hundred years-old was being released from the hospital today. He asked me to tell you he's not available many dates in October. October 22nd would be good for him. October 30th would be good for him.

THE COURT: I'll tell you what we will do. Since you don't have an appearance in the file, let me go on to the other issues I have to deal with. There's apparently a slew of subpoenas that I have to deal with. I will take a break. If you want to advise Mr. Gawlak, then I will come back and he can address the Court since he is the one who is representing himself.

What other issues do we have to address?

THE DEFENDANT: Can we start at least from the top

STATE OF ILLINOIS)
S S
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS Plaintiff, -VS- SYLWESTER GAWLAK Defendant	)))))	Case No 2007 CF 2547 Honorable DANIEL J ROZAK Judge Presiding

DEFENDANT's MOTION FOR POST - CONVICTION
FORENSIC DNA TESTING PURSUANT TO 725 ILCS 5/116-3

Defendant SYLWESTER GAWLAK ("Defendant"), who is serving a 15 year sentence moves this Court pursuant to 725 ILCS 5/116-3, for entry of an order allowing certain DNA forensic testing of hair and clothing evidence, which evidence is in the State's custody, and which evidence was not subject to TOUCH DNA forensic testing at the time of trial Defendant, SYLWESTER GAWLAK hereby submits his Memorandum of Law in Support of Motion for Post-Conviction DNA Testing Pursuant to 725 ILCS 5/116-3 His motion is presented in good faith and premised on the following facts and points of authority

I.

INTRODUCTION

SYLWESTER GAWLAK is currently serving a sentence of 15 years for the alleged December 7th, 2007 predatory criminal sexual assault of Justyna Gawlak Sylwester Gawlak claims he is innocent and seeks DNA testing - pursuant to 725 Ill Comp Stat § 5/116-3 so he may possibly develop conclusive scientific evidence of his innocence Gawlak's case is a quintessential case for post-conviction DNA testing and he is entitled to DNA testing as a matter of State law because he satisfies § 5/116-3's statutory requirements

In support of this Motion, defendant states as follow

Section 116-3 Authorizes Post - Conviction Testing
Where Such Testing Would Possibly Show Actual Innocence

Section 116-3 of the Illinois Code of Criminal Procedure [725 ILCS 5/116-3] provides for post-conviction forensic testing of evidence that was secured in relation to the trial which resulted in the conviction, when the evidence was either

(a) not subject at the time of trial to the testing which is now requested,or,

(b) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood fo more probative results

Gawlak satisfies this request's requirement because the Court already determined - in its June 16,2010 order in People v McMillen, 90 CF 328 - that the aforementioned physical evidence "has been subjected to chain of custody sufficient to establish that it has not been substituted, tampered with replaced, or altered in any material aspect " Common sense and fundamental fairness dictate that the Court's "chain of custody" ruling in McMillen must be applied to Gawlak's case

This law applies to defendant as he contested his guilt at trial People v O'Connell 227 Ill 2d 31, 879 N E 2d 315 (2007) There are no time limits within which defendant must request relief People v Price,345 Ill App.3d 129,801 N E 2d 1187 (2nd Dist 2003)

Under Section 116-3(a), defendant must present a prima facie case that

(1) identity was the issue in the trial which resulted in conviction,and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect

Once that prima facie case has been met, this Court shall allow the testing under rasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that

(1) The result of the testing has the scientific potential to produce new, non-cumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant;

(2) The testing requested employs a scientific method generally accepted within the relevant scientific community

Identity As An Issue At Trial: Cases reviewing the element of whether identity was at issue in a deferdant's trial are discussed in Price,801 N E 2d at 1198-1199 These cases establish that where a defendant maintains that he did not commit the charged crime and that the post occurrence witnesses who testified that defendant did commit

the crime were lying, a defendant has established that identity was the central issue As discussed in more detail below, defendant has consistently maintained his innocence, denying his guilt, and challenging the veracity of the post occurrence witness against him

Chain of Custody With regard to establishing chain of custody, People v Travis, 329 Ill App 3d 280, 771 N E 2d 489 (4th Dist 2002), notes that "[i] tasks too much to require petitioning defendant in these cases to plead and prove proper chain of custody at the outset, for the evidence at issue will undoubtedly have been within the safekeeping of the State, not the defendant "

In People v Sanchez, 363 Ill App 3d 470, 842 N E 2d 1246 (2nd Dist 2006), the appellate Court, relying on Travis, held that the defendant's motion, which simply stated that the evidence to be tested had been in the continuous possession of the law enforcement agencies, "is facially sufficient with respect to the chain-of-custody requirement "

Material Relevance to a Claim of Actual Innocence "[E]vidence which is 'materially relevant' to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim " People v Savory, 197 Ill 2d 203, 756 N E 2d 804 (2001) The evidence does not have to have the potential to completely exonerate the petitioning defendant People v Gibson, 357 Ill App 3d 480(2003) Whether the requested DNA testing will provide materially relevant evidence of actual innocence "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 It does not matter that the result of the requested test will be favorable or not Price, 801 N E 2d at 1192 In addition, a court must be "cautious not to 'collapse' [its] consideration of a defendant's 116-3 motion and defendant's claim of actual innocence into a single analysis " Price, 801 N E 2d at 1193

As discussed in more detail in this Motion, given the lack of physical evidence connecting defendant to the crime, and the questionable testimony of the State's key witness J G and her mother Jolanta who was the only post occurrence witness, the DNA testing of hair, and clothing evidence from the victim, should it exclude defendant as the source, would materially relevant to defendant's continually professed claim at trial that he did not commit the crime, would tend to 'corroborate defendant's witnesses and would otherwise undermine the credibility of the state's theory of the case

Defendant's Requested DNA Testing

By this motion, defendant seeks to perform mitochondrial DNA testing of hair and clothing evidence (see attached for details) none of this evidence was subjected to complete DNA testing as of the time of trial

DNA profiling was developed in the 1980's and began being used as a forensic tool Various methods of DNA analysis have changed and improved over time, becoming more exacting and discriminating See Brandon L Garett, claiming Innocence, 92 Minn L Rev ' 1629,1658-59(2008) DNA technology has become a powerful tool for identifying offenders and eliminating innocent suspects According to the Innocence Project,as of 2009, post-conviction DNA testing has been used to exonerate 245 people in the United States, including 29 in cases in the State of Illinois

Illinois Courts have ruled thay DNA identification procedures and the FBI's method of calculating statistical probability of random match are generally accepted in the scientific community and not be subjected to Fry hearings See e g Inre Jessica M, 385 Ill App 3d 894,897 N E 2d 810 (2008), People v Rokita, 316 Ill App 3d 292,736 N E 2d 205(2000), People v Oliver, 306 Ill App 3d 59, 713 N E 3d 727(1999), People v Pope, 284 Ill App 3d 695,672 N E 2d 1321(1996), People v. Miller, 173 Ill 2d 167 670 N E 2d 721(1996), People v Mehlberg, 249 Ill App 3d 499,619N E 2d 1168(1993)

Mitochondrial DNA ('mtDNA') testing was introduced in the 1990's for testing biological samples that proved traditionally unsatisfactory for traditional testing of DNA from the nucleus of cells First used by the FBI in 1996, mtDNA testing makes it possible to obtain a n mtDNA type where only limited biological sample can be obtained for testing due to sample quantity, degradation or age Since human hair roots do not contain sufficient nuclear DNA for traditional DNA testing, mtDNA testing is deemed well suited for testing of DNA samples obtained from hair where no hair root sample is necessary

As reported by the FBI, Mitochondria 1 DNA analyses has been admitted into criminal trials in Australia, the United Kingdom, and several other European countries

A collection of State cases, as of 2008, in which mtDNA evidence has been admitted has been collected by the Denver, Colorado District attorney's office at the following website http:// www.denverda.org/DNA/MitochondrialDNA-Legal-Decisions htm

Feeral Courts are also recognizing mtDNA testing evidence See e g U S v. Beverly, 369 F 3d 516(6th Cir 2004)(extensive discussion of mtDNA testing) In Illinois, mitochondrial DNA evidence was admitted at trial in People v Sutlzerland,223 Ill 2d 187,860 N E 2d 178(2006) In that case, the Illinois Supreme Court affirmed a first degree murder, kidnaping and sexual assault conviction At the trial in the Suther-

land case, mtDNA evidence was explained and presented by two experts in the application of DNA and mtDNA techniques in forensic testing, and by Dr Terry Melton, whose lab, Mitotyping Technologies, performed the mtDNA analysis on the public hairs in that case See People v Gonzalez,379 Ill App 3d 941,884 N E 2d 228(2008)(conviction of first degree murder affirmed in case where Trial Court admitted evidence of mtDNA testing by Dr Constance Fisher, an expert in the field of forensic mtDNA analysis with the FBI) Mitochondrial DNA is not a unique identifier because all maternally related individuals(brothers/sisters or mother/daughters), absent evidence of mutation, have the exact same mtDNA, as mtDNA is inherited strictly from one's mother However, mtDNA typing can confirm that a known individual can be excluded as the donor of the questioned sample Thus mtDNA testing can exclude defendant as having been the source of cell material recovered from the hair, clothing and rape kit evidence in this case "Touch DNA" refers to the DNA that is left behind from cell material when a person touches or comes into contact with an item More broadly, "Touch DNA" is the term given to the collective process of recovering and testing trace amounts of DNA recovered from cell material. This trace evidence may be recovered from the fabric of clothing of a victim of a violent crime where the trace evidence has become embedded by reason of a perpetrator having touched the victim's clothing "Touch DNA" focuses on recovery of DNA samples from areas on the victim's clothing at locations where the crime file analysis would indicate where a perpetrator may have had contact For it is at those areas that there would be expected greater likelihood of finding cell material left by a perpetrator Once the trace evidence is recovered, it is analyzed for the presence of DNA in order to develop a DNA profile Standard recognized DNA testing techniques are then utilized to develop the DNA profile

Other PCR-STR DNA Testing Generally Accepted In the Scientific Community

Defendant also intends to have the hair and "rape kit" evidence subjected to standard PCR DNA testing by the Independent Forensic Services Laboratory and by Genetic Technologies, Inc , Glencoe, Missouri, a laboratory accredited by the American Society of Crime Laboratory Director and Laboratory Accreditation Board, the most stringent accreditation program for forensic laboratories in the United States This testing will include standard PCR-STR as well as Y-STR DNA testing PCR DNA testing, known more specifically as the polymerase chain reaction method of DNA testing is simply a technique in which amplifies (copies) a specific region of a DNA strand in order to develop a DNA profile to be compared against known DNA profiles PCR testing is accepted by the scientific community. People v Pope, 284 Ill App 3d 695, (1996)(collecting cases), People v Oliver, 306 Ill App 3d 59,713 N E 2d 727(1999)

Short tandem repeat ('sTR,') technology is a forensic analysis that evaluates by PCR testing 13 specific regions (loci) that are found on nucleat DNA which have been found to be highly variable among individuals, thus resulting in a more discriminating test result

In People v Rokita, 316 Ill App 3d 292, 736 N E 2d 205(2000), a case involving the issue of granting post-conviction DNA testing under Section 116-3, the fifth District noted the State's argument that the State did not dispute that STR-based DNA testing was now generally accepted in the relevant scientific community See also State v Jackson, 255 Neb 68,582 N W 2d 317,325 (Neb S.Ct ,1998)(PCRISTR testing has " 'been around several years now, and there is nothing unique about PCR-STR versus any PCR' ') See also A SHORT PRIMER ON STRs - Why do prosecutors Need to Learn About STRs ? Silent Witness Newsletter, Vol 4, No 9 (American Prosecutors Research Institute 1999) (sTR testing is based on the scientific principles of other generally accepted methodologies ") Y-STR DNA testing is simply standard STR-PCR testing that focuses on the DNA from cell material which is identified from the testing as coming from the male Y chromosome where DNA testing reveals a mixture of male and female DNA

The FBI recognizes and has issued standards for interpreting Y-STR DNA testing results PCR-STR testing methodology has been deemed by numerous States to be generally accepted in the scientific community so as to be admissible See e g State v Taylor, 656 N W 2d 885 (Minn S Ct 2003),State v DeLoatch, 354 N J Super 76, 804 A 2d 604(N J 2002), Lemour v State, 802 So 2d 402(Fla Dist ,Ct 2001), People v Sizreck, 22 P 3d 68 (Colo S Ct 2001)

The testing will produce new non- cumulative evidence relevant to Defendant's assertion of actual Innocence

Defendant stands convicted. Defendant has consistently maintained his innocence Defendant has been incarcerated since his arrest for crimes he claims he did not commit and since he has been serving a 15 year sentence in prison. Clearly allowing the requested testing is the utmost importance for it could result in physical evidence which is clearly relevant to defendant's claim of actual innocence

The forensic DNA testing requested by defendant would produce new, non-cumulative evidence which would significantly advance defendant's claim of actual innocence and would, if exculpatory, be so conclusive that it would probably change the result on retrial At trial the State presented no irrefutable physical evidence connecting defendant to the crime or the crime scenes other than the extremely circumstantial evidence of the post occurrence witness The hair, rape kit and clothing evidence collected during the case investigation was not fully forensically tested at all and thus

any such forensic DNA testing as now requested would be new and non-cumulative evidence The DNA evidence to be adduced by the requested forensic testing, if it ecludes defendant as the source of DNA, would raise significant doubt at any re-trial as to defendant's involvement with the sexual assault in this case

THE MODERN DNA TESTS THAT GAWLAK INTENDS TO USE ARE
GENERALLY ACCEPTED BY THE RELEVANT SCIENTIFIC COMMUNITY

Pursuant to section 5/116-3(c)(2), the testing requested must 'employ a scientific method generally accepted within the relevant scientific community "
Gawlak satisfies this requirement because he intends to test the aforementioned physical evidence with modern DNA testing, including STR,Y-STR, and mitochondrial DNA testing In his Motion for Post-Conviction Forensic DNA Testing Pursuant to 725 ILCS 5/116-3, McMillen also requested the same types of DNA testing See McMillen DNA Motion, at 44-52 More importantly, in its June 16,2010 Order in People v McMillen, No 90 CR 328, the court concluded that the "testing [McMillen] has requested employs a scientific method generally accepted within the relevant scientific community "
Common sense and fundamental fairness dictate that the Court's "general acceptance" ruling in McMillen must be applied to Gawlak's case

MODERN DNA TESTING HAS THE POTENTIAL TO IDENTIFY
A REDUNDANT DNA PROFILE ON J G.'s CLOTHING
WHICH WOULD SIGNIFICANTLY ADVANCE GAWLAK's INNOCENCE CLAIM

Due to the nature of J G 's alleged assault it is certain that offender grabbed, or repeatedly touched J G 's blue shirt and underwear Thus, if modern DNA tests identify the same male DNA profile on the J.G's underwear and blue shirt and the DNA profile is inconsistent with Gawlak's DNA profiles, this would significantly advance Cawlak's innocence claim.

MODERN DNA TESTING HAS THE POTENTIAL TO PRODUCE NEW,
NONCUMULATIVE EVIDENCE THAT COULD SIGNIFICANTLY ADVANCE
GAWLAK's ACTUAL INNOCENCE CLAIM

The court must find that Gawlak's requested DNA testing has the 'scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant " 5/116-3(c)(1)(emphasis added)
Materially relevant evidence is evidence "which tends to significantly advance a defendant's claim of actual innocence " People v Gibson, 828 N E 2d at 837, accord with People v. Savory, 756 N E 2d 804,(2001) Importantly, the DNA evidence need not

"completely exonerate a defendant to be materially relevant " People v Gibson, 828 N E 2d at 887, accord People v Hockenberry, 737 N E 2d 1088,1093 (Ill App Ct 2000) (the statute's language indicated no legislative intent to limit the use of scientific testing only to situations where the testing would result in total vindication ") In short, the "plain and ordinary meaning of this provision is that the Trial Court must order testing where there is a potential that the evidence [can significantly advance] the defendant's assertion of innocence " People v Hockenberry, 737 N E 2d at 1092 (emphasis added)

Gavlak satisfies this standard and is entitled to DNA testing, such a result would also significantly advance Gavlak's innocence claim

WHEREFORE , for all of the foregoing reasons, Defendant SYLWESTER GAVLAK prays that this Court enter its order

1 Granting this petition,

2 Ordering the Bolingbrook Police Department's Office to timely locate and properly secure and transfer the clothing of Justyna Gavlak, the "rape kit" evidence, including the hair therein, complete with all chain of custody paperwork related thereto, to facilitate DNA testing for the presence of cell material, by the qualified and accredited laboratories as agreed to by the State and the Defendant, all at the expense of the Defendant,

3 Ordering that all such evidence transferred to said laboratories be secured by a proper chain of custody and that all such evidence, so transferred to and tested by a laboratory, be returned with a proper chain of custody to the Bolingbrook Police Department

4 Granting such further relief as this Court deems warranted

Respectfully Submitted

Sylvester Gavlak

VERIFICATION

Under the penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true

Sylvester Gavlak
Affiant

SUNGARD
HTE INC

Bolingbrook Police

Incident Dispatch Detail Report

Date Ran 12/11/2007
Time 11 22 19
Page 1 of 1

RD Number 07-048065

Agency Code BB
Department Police Department

Dispatch Information

Location Address	9 HIDDEN VALLEY CT	LEONAKIS TIM
Nature Code / Desc	9071	Citizen Assist/Well Being Check
UCR Code / Desc	9071	Citizen Assist/Well Being Check
Service Code /Desc	NRC	
Caller Name / Phone	THOMAS LUISA / (815)666 6479	
Caller Address	DCFS	
Call Taken By	176 / CHURMA JANET	

Shift	Source	Priority	Beat / MRA	Dispatcher
2	Phone	Normal/Routine Pr	7 / 0734	KLOEPFER DIANE

Incident Timestamps

Received	12/10/07 21 33 22	Routed	12/10/07 21 37 15	Dispatched	12/10/07 21 42 48
Enroute	12/10/07 21 42 59	OnScene	12/10/07 21 54 46	Completed	12/10/07 22 11 [illegible]

Narrative Information

Citizen Assist/Well Being Check CHK WELL BEING OF 5 CHILDREN REF 07-47961 FATHER SHOULD NOT BE AT THE HOUSE FATHERS NAME SLYVESTER GOMEZ

Disposition Information

Dispo Star Number/Name 1139 MCRAY WILLIE

Date/Time	Remarks
12/10/07 22 11 10	UNABLE TO MAKE CONTACT DUE TO INCORRECT ADDRESS DCFS STATED THEY WILL RECALL WITH A CORRECT ADDRE

Unit Information

Unit	Beat	Star #	Dispatch Time	Enroute Time	On Scene Time	To Dest Time	At Dest Time	Completed Time	Dispatcher
CROW	X	1116	12/10/07 21 42 48	12/10/07 21 43 04	12/10/07 21 56 52			12/10/07 22 11 10	136
8	8	1151	12/10/07 21 42 48	12/10/07 21 43 00				12/10/07 21 51 52	136
7	7	1139	12/10/07 21 51 57	12/10/07 21 51 57	12/10/07 21 54 46			12/10/07 22 11 10	136

C0001758

SUNGARD
IITE INC

Bolingbrook Police

Incident Dispatch Detail Report

Date Ran 12/11/2007
Time 11 18 21

RD Number 07-047961

Agency Code BB
Department Police Department

Dispatch Information

Location Address	375 W BRIARCLIFF RD	POLICE DEPT/TOWN
Nature Code / Desc	1500	Sex Offenses
UCR Code / Desc	1585	All Other Sex Offenses
Service Code /Desc	CR	
Caller Name / Phone	MARTIN JOLANTA / (773)470 6346	
Caller Address	OAK LAWN	
Call Taken By	177 / PODGORSKI JACQUELYN	

Shift	Source	Priority	Beat / MRA	Dispatcher
2	Phone	Normal/Routine Pt	5 / 0620	KOMPERDA KRYSTYN

Incident Timestamps

Received	12/10/07 00 04 14	Routed	12/10/07 00 05 34	Dispatched	12/10/07 00 05 34
Enroute	12/10/07 00 05 34	On Scene	12/10/07 00 05 34	Completed	12/10/07 11 32 31

Narrative Information

Sex Offenses RP IN LOBBY * 5YO WAS SEXUALLY ASSULTED BY FATHER

Disposition Information

Dispo Star Number/Name 1162 BUITRON BRIGITTE

Date/Time	Remarks
12/10/07 03 45 55	(03 45 47 on 12/10/07) 1162 76 PD FROM BMC-JUV AND MOTHER FOLLOWING
12/10/07 03 50 02	(03 50 00 on 12/10/07) 1162 23 pd
12/10/07 04 09 00	(04 08 46 on 12/10/07) 1135 FOLLOWING RP TO RES AT 5621 W 104TH? ST OAKLAWN
12/10/07 05 11 59	(05 11 55 on 12/10/07)1135 10-6 PD
12/10/07 11 32 31	

Unit Information

Unit	Beat	Star #	Dispatch Time	Enroute Time	On Scene Time	To Dest Time	At Dest Time	Completed Time	Dispatcher
8	8	1162	12/10/07 00 05 34	12/10/07 00 05 34	12/10/07 00 05 34			12/10/07 05 49 49	595
CROV	X	1135	12/10/07 00 07 43	12/10/07 00 08 02	12/10/07 00 17 16			12/10/07 05 49 50	595
ZZ35	X	1135	12/10/07 05 50 23	12/10/07 05 50 23	12/10/07 05 50 23			12/10/07 06 19 07	595
ZZ62	X	1162	12/10/07 05 50 23	12/10/07 05 50 23	12/10/07 05 50 23			12/10/07 11 32 30	595

05/15/15 14:37:10 WC
05/12/15 14 23 06 WCCH

NARRATIVE/PROPERTY CONTINUATION

REPORTING AGENCY	SUPPLEMENTAL REPORTS	PAGE NO	INCIDENT REPORT NO
IL0990200	EVIDENCE TECHNICIAN REPORT	1 of 1	SR 07 - 47961

	DATE OCCURRED	DATE THIS REPORT	STATUS
Predatory criminal sexual assault of child	12/7/07	12/10/07	09

Evidence Technician Report
Predatory Criminal Sexual Assault of Child
9 Hidden Valley Court
Victim [redacted]

Item 1 Illinois State Police sexual assault evidence collection kit
Item 2 Illinois State Police patient consent/authorization to release information and evidence form
Item 3 Blue shirts
Item 4 Pink and blue underwear

On Monday 12/10/07 around 0330 hrs I responded to the Bolingbrook Police department to assist Ofc Buitron 1162 in report of a predatory criminal sexual assault of a child Upon arrival I met with Ofc Buitron 1162 in which I received from her the above listed sealed Illinois State Police sexual assault evidence collection kit that was collected at the Bolingbrook Medical Center The kit along with the consent/authorization to release information and evidence form was submitted into evidence at the Bolingbrook Police Department

I then proceeded with Juastyna's mother, Jolanta M Martin to their residence at 5621 W 104th Street Apt 3B Oak Lawn, IL on Monday 12/10/07 around 0430 hrs While at the residence I received from Jolanta the above listed blue shirt and pink and blue underwear Jolanta related to me that [redacted] had related to her that those were the clothes she was wearing at the time of the incident The two articles of clothing were submitted into evidence at the Bolingbrook Police Department

Nothing further at this time

SR 07 - 47961

OFFICERS AT SCENE - REPORTING OFFICER FIRST			
ET Nick Schmidt 1135			
COPY TO	OTHER AGENCIES INVOLVED	APPROVED	DATE
Evidence			12/11/07

ILLINOIS STATE POLICE
Division of Forensic Services
Joliet Forensic Science Laboratory
515 East Woodruff Road
Joliet, Illinois 60432-1260
(815) 740 3543 (Voice) * 1-(800) 255 3323 (TDD)

Rod R Blagojevich
Governor

Larry G Trent
Director

May 5, 2008

LABORATORY REPORT

JOHN MULYK
BOLINGBROOK POLICE DEPARTMENT
375 WEST BRIARCLIFF ROAD
BOLINGBROOK IL 60440

Laboratory Case #J07-011356
Agency Case #07-47961

OFFENSE Sexual Assault
SUSPECT Sylwester Gawlak
VICTIM [redacted]

The following evidence was submitted to the Joliet Forensic Science Laboratory by J Mulyk on December 21, 2007

EXHIBIT	DESCRIPTION	FINDINGS
1	Sexual assault evidence collection kit from [redacted] containing	
1A	Blood standard	No analysis necessary
1B	Vaginal swabs	No semen identified No saliva indicated
1C	Oral swabs	No semen identified
1D	Head hair combings	Apparent hairs, fibers and debris observed
1E	Fingernail scrapings	No apparent debris observed
1F	Paper bag reportedly containing one white pony-tail holder	Not examined
2	Blue shirt	No apparent stains noted This item was taped for removal of apparent hairs, fibers and debris
3	Pink and blue underwear	No semen identified No saliva indicated This item was taped for removal of apparent hairs, fibers and debris

BOLINGBROOK POLICE DEPARTMENT
Laboratory Case #J07-011356 -2- May 5, 2008

REQUESTS

If you have in your possession additional evidence that may be of significant value in this case, please advise

Microscopy evidence (hairs, fibers, debris) was collected in this case Please advise if comparisons are important to your investigation and ensure that all standards can be collected

If you have any questions regarding this report, please feel free to contact me

Respectfully submitted,

Christopher W Webb
Forensic Scientist

cc WILL COUNTY STATE'S ATTORNEY

05/15/15 14:37:10 WC
05/12/15 14 23 06 WCCH

"J07011356"

CSSC Number

ORIGINAL

Illinois State Police
Division of Forensic Services
Forensic Sciences Command
EVIDENCE RECEIPT

Laboratory Case Number
J07 - 011356

Agency Name	Agency Telephone	NCIC Number	Agency Case Number
BOLINGBROOK POLICE DEPARTMENT	(630) 226-0600	0990200	07-47961

Send report to	Agency address	City	Zip Code
JOHN MULYK	375 WEST BRIARCLIFF ROAD	BOLINGBROOK	60440-951

Offense	County of Offense	Date Offense Occurred
Sexual Assault	Will	12/07/2007

Victim(s) Name	Sex	Race	DOB
[redacted]	Female	White	[redacted]

Suspect(s) Name	Sex	Race	DOB
Sylwester Gawlak	Male	White	12/03/1967

Investigating officer	Officer delivering evidence
JOHN MULYK	J Mulyk

Lab Exhibit Number(s)	CSSC Exhibit Number(s)	Agency Exb/Inv Number(s)	Evidence Description
1		1	One sealed I S P sexual assault kit
2		3	One sealed paper bag containing one blue shirt
3		4	One sealed paper bag containing pink and blue underwear

Lab Exhibit Number(s)	Date	Time	Received From(Signature)	Received By(Signature)

Lab Exhibit Number(s)	Date	Returned By(Signature)	Released to(Signature and Agency)

Items submitted as evidence could be damaged during examination

05/15/15 14:37:10 WC
05/12/15 14 23 06 WCCH

C0001764

ILLINOIS STATE POLICE
Division of Forensic Services
Forensic Sciences Command

Case # JO1-11356
Initials
Date 4/15/08 4/21/08

SEXUAL ASSAULT EVIDENCE COLLECTION KIT FORM A

Version 5 Accepted Date 11/09/2007

Victim's Name [redacted]

Source/Date Received

EXHIBIT # 1 ☑ SEALED ☐ UNSEALED ☑ ISP ☐ OTHER

SUBEXHIBIT # Ox/subexhibited 4/15/08 & resealed with blue evidence tape 4/15/08

SUBEXHIBIT #

1A Blood Standard
No analysis necessary.

1B Vaginal ~~/ Penile Swab(s)~~ (L)
– Two swabs w/ rag & yellow stains
P30 (–) *No Sperm ID. No sperm
(–) KPPC (–)
(–) Phadebas (–)

1C Oral Swab(s) (–)
– Two swabs, no apparent stains
P30 (–) *No Sperm ID
(–) KPPC (–)
(–)

NS Anal (Rectal) Swab(s)

1D Head Hair Combings

NS Pubic Hair Combings

1E Fingernail Scrapings – Rt + Lft
No apparent stains obs

NS Miscellaneous / Debris Collection

NS Miscellaneous Stains/Bite Mark Swab(s)

1F Additional Item(s) in Kit
☐ SEE OTHER WORKSHEET(S)

wh bag "ponytail – white"
Ⓢ with blue evidence tape 4/15/08
– NOT EXAM

SUBEXHIBIT(S) SEPARATED FROM THE KIT N/A

☒ SLIDE(S) MADE PUT INTO KIT

MARK, WHEN APPROPRIATE		~~Phadebas Lot #~~	~~ABAcard Lot #~~
AP Std = +4	KM Std =	Amylase Std = +	ABAcard Blank = (–)
AP Blank = (–)	KM Blank =	Amylase Blank = (–)	

Repackaging Orig w/ BET Date 4/29/08 Analyst 3

C0001764

05/15/15 14:37:10 WC
05/12/15 14 23 06 WCCH

C0001765

STEP 2

MEDICAL/FORENSIC DOCUMENTATION FORM (4 PAGES)

Illinois State Police
Division of Forensic Services

Please print type or use a patient information stamp

(patient stamp)
003010767 12/10/2007 0007060986 [redacted]
BENFIELD MD KEVIN Outpatient

Patient Name [redacted]	DOB [redacted] 07 Age 10		
Race Caucasian	Sex	Arrival Date 12/10/07	Arrival Time
Address [redacted]		City [redacted]	
County Cook	State IL	Zip [redacted]	Phone [redacted]
Hospital Bolingbrook Medical Center			ER#
For Children Name of Guardian [redacted]			Relationship mother
Person providing history [redacted]		Relationship to patient mother	

For children Avoid multiple interviews Take time to establish rapport Avoid leading or yes/no questions Use direct quotes Avoid surprise or negative emotions, while still showing concern and support.

1 Patient's Description of what happened

2 days ago finger put in her vagina

2 Date of Assault 12/07/07 Time of Assault 0000 3 Location & geographical surroundings of assault

4 Patient's Description of Assailant(s)

5 Sexual acts described by patient/historian

Acts Described	Yes	No	Touched	Unsure	Acts Described	Yes	No	Touched	Unsure
Penetration of female sex organ by					Masturbation				
penis					of patient by assailant				
finger	x		x		of assailant by patient				
foreign object					Did ejaculation occur?				
describe object					inside body orifice				
Penetration of anus by					outside body orifice				
penis					If outside body orifice, describe location				
finger					Other sexual acts?				
foreign object					If yes, describe				
describe object					Did assailant use condom?				
Was oral sex performed					Kissing licking or sucking of breasts or other parts of patient s body?				
on patient by assailant?				x	☐ Yes ☐ No				
on assailant by patient?					If yes, Describe				

J07-11356

(White copy to hospital, yellow copy in kit)

ILSP502A

05/15/15 14:37:10 WC
05/12/15 14 23 06 WCCH

C0001766

MEDICAL/FORENSIC DOCUMENTATION FORM— PAGE 2

6 Post assault hygiene/activity	Yes	No
unnated	☑	☐
defecated	☑	☐
genital wipe/wash	☐	☐
bath/shower	☑	☐
douche	☐	☐
tampon or diaphragm removed/inserted (circle)	☐	☐
oral hygiene/intake/vomit	☐	☐
changed clothes	☐	☐

7 Pertinent medical history
a Date of LMP
b Sexual activity within 72 hrs of assault? (other than sexual assault)
Yes No
c Contraceptive used at time of assault?
d Communicable diseases of risk to lab personnel
(e g , hepatitis, TB, HIV, lice, etc)

Please print, type or use a patient information stamp

(patient stamp)

003010767 12/10/2007 0007060986
[redacted]
BENFIELD MD, KEVIN

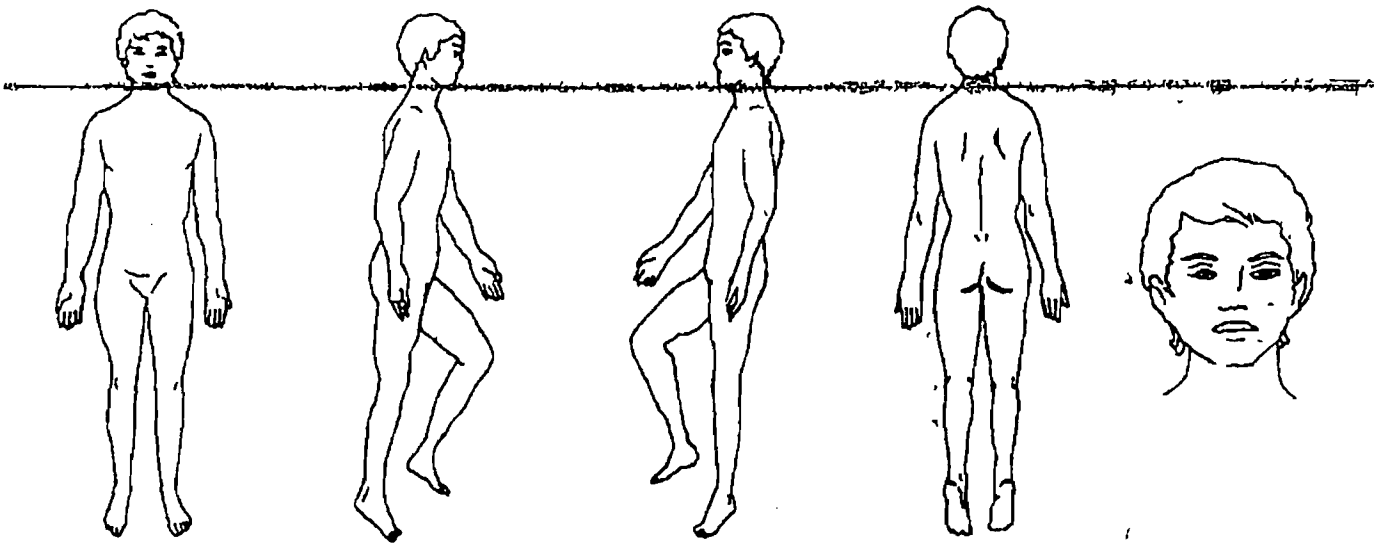
COMPLETE EVIDENCE COLLECTION STEPS 3, 4, AND 5

After STEP 5, obtain appropriate medical specimens from the mouth for clinical lab testing Patient may rinse out his/her mouth after specimens are obtained DO NOT INCLUDE MEDICAL SPECIMENS IN KIT)

GENERAL EXAM

Trauma should be recorded on the diagrams below which may be used in a criminal proceeding These include lacerations, scratches, bruises (detail size, shape color), erythema, bites, patterned injury burns, fractures and stains/foreign materials on body, swelling, tenderness Be sure to note even the most minor signs of trauma In children include anogenital or behavioral symptoms Note general appearance

Note abnormalities in diagram and/or text



TEXT

7

ILSP8028

(White copy to hospital, yellow copy in kit)

J07-11356

MEDICAL/FORENSIC DOCUMENTATION FORM — PAGE 3

Please print, type or use a patient information stamp

003010767 12/[illegible]/07 0007060986

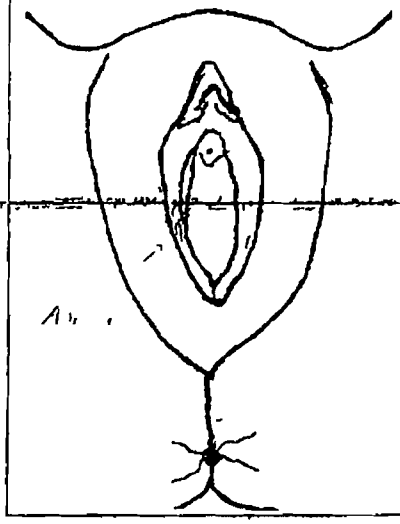
[illegible] MD KEVIN Outpatient

GENITAL AND ANAL EXAM

- For children Take time to establish rapport and proceed slowly Extent of examination, including physical as well as specimens, must be decided on a case by case basis by the attending health professional If the examination would be too physically or emotionally traumatic for the child, then specimens may need to be obtained by gently using a moist swab on the external genital and anal areas
- Note all discharge, stains, and foreign materials Note any bleeding
- Draw shape of hymen in diagrams, if trauma is found
- Use sterile non bacteriostatic water only for lubrication of speculum
- Record all acute trauma (lacerations, scratches, bruises [detail size, location and description], erythema, bites, patterned injury, burns, swelling, tenderness) and chronic trauma (scarring, notching, pigmentary changes) on diagrams below

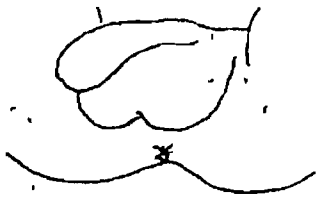
Vulva and Anus

• position during exam	lithotomy ✓	knee chest	supine
• labial maneuver?	if yes outward traction		lateral down separation



• circumcised? Yes ☐ No ☐

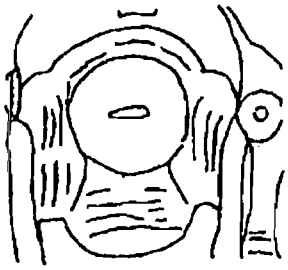
Penis/Scrotum and Anus



INTERNAL EXAM

• As noted above, most children require only vulvar specimens without speculum or bimanual exams Please individualize

Vagina and Cervix



• Note injuries on diagram and text

J07-11356

IL495502C

(White copy to hospital, yellow copy in kit)

05/15/15 14:37:10 WC
05/12/15 14 23 06 WCCH

MEDICAL/FORENSIC DOCUMENTATION FORM— PAGE 4

Please print, type or use a patient information stamp

(patient stamp)

003010767 12/10/2007 0007060986

[redacted]

COMPLETE EVIDENCE COLLECTION STEP 6

After Step 6 obtain appropriate medical specimens from the vagina/cervix or mate urethra for clinical lab testing (DO NOT INCLUDE MEDICAL SPECIMENS IN KIT)

ANAL EXAM
- Digital or anoscopic exam at discretion of physician
- Note abnormalities on above diagrams and/or text

COMPLETE EVIDENCE COLLECTION STEPS 7 - 13

After Step 7 obtain appropriate medical specimens from the anus for clinical lab testing (DO NOT INCLUDE MEDICAL SPECIMENS IN KIT) After Step 11 obtain appropriate blood specimens for clinical lab testing (DO NOT INCLUDE MEDICAL SPECIMENS IN KIT)

Photographs — may be taken and released for evidentiary purposes with the written consent of the patient if 13 years of age or older or the patient's parent or guardian if the patient is under 13 years of age If the parent/guardian is not immediately available, or refuses release photographs may be taken and released to the law enforcement agency and state's attorneys by the investigating law enforcement officer or the Department of Children and Family Services Photos should be taken using an adjustable focus camera with flash or other adequate lighting which will allow both close up views and longer overall views Bitemarks should be photographed using a scale in the view in order to facilitate accurate measurements during comparisons with known dentition of a suspect

SUMMARY OF FINDINGS

SIGNATURES

(Examining Health Professional Signature) (date)

(Please print)

(Assisting Health Professional Signature) (date)

(Please print)

COMPLETE EVIDENCE COLLECTION STEP 14

FINAL INSTRUCTIONS
1. Make sure all information requested on all sample envelopes and bag labels have been filled out completely
2. Separate all forms (Steps 1, 2, and 14) and follow distribution requirements on the bottom of each form
3. With the exception of the large sealed and labeled clothing bags and any urine sample collected, return all evidence envelopes/bags to the kit box Discard unused materials
4. Initial and affix red evidence tape on box top
5. Fill out information required on kit box top
6. Hand the sealed kit and sealed bags to investigating officer

NOTE If officer is not present at this time, place sealed kit and sealed bags in secure area *at room temperature*, and hold for pickup by investigating officer

COMPLETE EVIDENCE COLLECTION STEP 15

J07-11356

ILSP502D

(White copy to hospital, yellow copy in kit)

IN THE
CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

FILED
2015 MAY 12 AM 8:48
CLERK, CIRCUIT COURT
WILL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
Plaintiff/~~Petitioner~~)
)
Vs.) No. 2007 CF 814
)
SYLVESTER GAWLAK)
Defendant/~~Respondent~~)

PROOF/CERTIFICATE OF SERVICE

TO: PAMELA J. McGUIRE
Clerk of the Court
14 W. Jefferson St.
Joliet, IL 60432

TO: JAMES W. GLASGOW
WILL COUNTY STATE'S ATTORNEY
121 N. Chicago St.
Joliet, IL 60432

PLEASE TAKE NOTICE that on MAY 7th, 2015, I placed the documents listed below in the institutional mail at STATEVILLE Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service:

DEFENDANT'S MOTION FOR POST-CONVICTION FORENSIC DNA TESTING PURSUANT TO 725 ILCS 5/116-3

Pursuant to 28 USC 1746, 18 USC 1621 or 735 ILCS 5/1-109 I declare, under penalty of perjury that I am a named party in the above action, that I have read the above documents, and that the information contained therein is true and correct to the best of my knowledge and belief.

DATED: MAY 7th, 2015

/s/ Sylvester Gawlak
Name: SYLVESTER GAWLAK
IDOC No. M07576
STATEVILLE Correctional Ctr.
POB 112
Joliet, IL 60434, IL

DEAR CLERK
PLEASE SEND ME ONE STAMPED COPY BACK FOR MY PERSONAL RECORD. Thank You!

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 July 3, 2018, the foregoing **Brief and Appendix 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:

Michael J. Pelletier
Thomas A. Lilien
Yasemin F. Eken
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, Illinois 60120
2ndDistrict.eserve@osad.state.il.us
Counsel for Defendant-Appellee

Patrick Delfino
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James W. Glasgow
Colleen M. Griffin
Will County State's Attorney's Office
57 North Ottawa Street
Joliet, Illinois 60432
cgriffin@willcountyillinois.com

Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ *Evan B. Elsner*
EVAN B. ELSNER
Assistant Attorney General
eserve.criminalappeals@atg.state.il.us