

131360

No. 131360

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee -VS- ROGER CARROLL Defendant-Appellant .	Appeal from the Appellate Court of Illinois, Fourth District No. 4-23-1207 There Heard on Appeal from the Circuit Court of Jersey County No. 18-CF-68 Honorable Allison Lorton, Judge Presiding.

REPLY BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

ARGUMENT

I:

THE APPELLATE COURT ERRED BY FAILING TO REMAND FOR REPRESENTATION BY CONFLICT FREE COUNSEL

In his opening brief, Roger Carroll maintained that the appellate court erred by failing to reverse and remand for the appointment of unconflicted counsel where the court held that every single post-conviction claim had been waived by counsel’s failure to raise any of these claims on direct appeal. *People v. Carroll*, 2024 IL App (4th) 231207, ¶¶ 51-57, ¶¶ 67-81 *appeal allowed*, 260 N.E.3d 76 (Ill. 2025).

In response, the State argues that both the circuit court and the appellate courts were wrong because, in fact, the post-conviction claims depended upon evidence outside the record and thus had not been waived. The State admits that they argued in both the circuit court and in the appellate court that the claims were in fact waived but maintains that, as appellee, they may raise any argument of record to support the judgment below.

The State is wrong.

The State cites *People v. Castleberry*, 2015 IL 116916, ¶ 21 for the proposition that as the appellee, the State could, without filing a cross-appeal, raise any argument of record in support of the circuit court's judgment. But *Castleberry* is not on point. (St. Br., at 34, n. 1).

In *Castleberry*, this court held that an appellee who does not cross-appeal may not “attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.” *Castleberry*, 2015 IL 116916, ¶ 21. Here, the State is seeking to enlarge its own rights by having the appellate court affirmed without consideration of the issue of whether Roger Carroll received conflict-free counsel, and is seeking to lessen Roger Carroll’s right to receive representation

by conflict free counsel.

The State has not cited any case in which this court allowed to

Moreover, the State's decision to contradict the positions it took in the circuit court and in the appellate court violates the principle of judicial estoppel.

Judicial estoppel is an equitable doctrine invoked by the court at its discretion. *Seymour v. Collins*, 2015 IL 118432, ¶ 36. As the United States Supreme Court has observed, the uniformly recognized purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from "deliberately changing positions" according to the exigencies of the moment. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Judicial estoppel applies in a judicial proceeding when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding. *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi*, 342 Ill. App. 3d 453, 460 (1st Dist. 2003).

This court has identified five prerequisites as "generally required" before a court may invoke the doctrine of judicial estoppel. "The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." If all prerequisites have been established, the court must then determine whether judicial estoppel should be applied.. Multiple factors may affect that decision, including the significance or impact of the party's action in the first proceeding and " 'whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake.' " *Duniver v. Clark Material Handling Co.*, 2021 IL App (1st) 200818, ¶ 14.

Here, all of the requirements for judicial estoppel have been met. In both the circuit court and

the appellate court, the State took the position that *all* of the post-conviction claims had been waived by the failure to raise them on direct appeal, and, therefore, the post-conviction petition was a virtual nullity. The State benefited from that position by avoiding any consideration of the merits of the petition. In a separate proceeding before this court the State has now taken the position that none of the post-conviction petition claims were waived, because they all depended upon evidence outside the record.

This contradiction cannot stand. The State is stuck with the position it took in the appellate court, that all of the claims had been waived, and can therefore not evade the inevitable consequence: attorney Kuehn suffered from an actual conflict of interest because he would have had to raise his own ineffectiveness to avoid waiver.

Therefore, the decision below should be reversed and remand for new second stage proceedings where Roger Carroll may be represented by conflict-free counsel.

II:

THE APPELLATE COURT ERRED BY FAILING TO REVERSE WHERE POST-CONVICTION COUNSEL FAILED TO RENDER REASONABLE ASSISTANCE BY FAILING PROPERLY TO SUPPORT THE PETITION WITH LEGAL ARGUMENT AND EVIDENTIARY SUPPORT

On appeal from the denial of his post-conviction petition at the second stage, Roger Carroll argued that, in addition to the actual conflict, post-conviction counsel failed to render reasonable assistance by failing to provide the post-conviction petition with legal and factual support. \

Carroll claimed that post-conviction counsel did not render reasonable assistance by: (a) failing to shape the surviving claims into proper legal form; (b) failing to provide complete

evidentiary support; (c) not being completely familiar with the record; and (d) failing to factually support and timely respond to the State's motion to dismiss.

The appellate court refused to consider the substance of these claims on the basis that a defendant who is represented by retained counsel, not appointed counsel, cannot claim the benefit of Supreme Court Rule 651 (c) and therefore is not entitled to a remand when his attorney identifies claims worth pursuing but then fails to shape them into proper form. *People v. Carroll*, 2024 IL App (4th) 231207, ¶¶ 61-65. The appellate court was wrong.

The general rule is that the standards for ineffective assistance of retained and appointed counsel are the same. *People v. Royse*, 99 Ill.2d 163, 170 (1983). And while Rule 651(c) establishes a specific procedure for determining whether appointed counsel has fulfilled his obligations to a post-conviction petitioner, the rationale for Rule 651 (c) mandates that where retained counsel similarly fails to perform his basic duties, an automatic remand is required so that the contentions can be shaped into proper legal form and properly supported with evidentiary and legal support.

The State argues that this court should hold that the distinction between appointed and retained counsel should be maintained and that the 651 (c) requirement should only be applied to appointed counsel. But this distinction makes no sense.

This court has already said that Rule 651(c) applies where a petition has initially been filed pro se, regardless of whether petitioner is subsequently represented by appointed or retained counsel. *People v. Cotto*, 2016 IL 119006, ¶ 31. To exempt an initially retained counsel from the requirement makes no sense. And to the extent that Rule 651(c) is currently ambiguous on this point, this court has the power to amend the Rule in the context of this case.

In *People v. Johnson*, 2022 IL App (1st) 190258-U, ¶¶ 30, the petitioner argued that privately retained counsel failed to provide reasonable representation. where his retained

postconviction counsel failed to attach affidavits or any other evidence to support the claims in his petition, failed to explain the significance of proposed witnesses, and demonstrated a complete unfamiliarity with the record and the requirements outlined in the Act. The appellate court held that although the specific requirements of Rule 651 (c) did not apply, and although normally petitioner alleging lack of reasonable assistance would have to demonstrate *Strickland* type prejudice, see *People v. Zareski*, 2017 IL App (1st) 150836, ¶¶ 58-61, the *Zareski* rule did not apply where counsel did not provide evidentiary support for the claims and did not appear to be familiar with the record or the basic requirements of the Post-Conviction Hearing Act. *Johnson*, 2022 IL App (1st) 190258-U, ¶ 39.

In *Johnson*, post-conviction counsel failed to provide evidentiary support outside the trial record to demonstrate how trial counsel's failures prejudiced the defendant's rights and impacted the outcome of the trial. By relying on the trial record itself, retained post-conviction "walked petitioner right into the State's argument that every issue raised in the postconviction petition was barred because it could have been raised on direct appeal." *Johnson*, 2022 Ill. App. 190258, ¶ 39. Since it could not be determined from the record whether the unsupported claims had merit, the proper cause was to remand under Rule 615(b) for further proceedings. *Johnson*, 2022 IL App (1st) 190258-U, ¶¶ 39.-41.

Here, similarly, retained counsel's performance was riddled with multiple failures with respect to both the law and the facts.

With respect to the claim that trial counsel was ineffective for failing to move to suppress Carroll's statement, post-conviction counsel provided no legal support when he: (1) failed to argue that the unrecorded interview in the squad car violated the exclusionary rule of 725 ILCS 5/103-2.1(d), (2) did not argue case law finding the legislature expected police to have equipment

by 2005 or holding that police cannot evade the recording requirement by conducting the interview in a room without equipment, (3) did not argue case law that Carroll was “accused” because he was facing first degree murder charges at the time the State sought to introduce the statement, and (4) did not argue that a squad car was a place of detention. (C.1106).

With respect to the bones, post-conviction counsel failed to present any legal arguments as to why the bones were inadmissible and irrelevant. (C. 894).

With respect to factual support for the suppression claim, post-conviction counsel made a number of claims which he failed to support, such as that Carroll had been detained by three detectives for seven hours (C. 1125-26) and that Carroll had invoked his right to counsel on July 5, 2010. (C. 1034). Post-conviction counsel also provided no argument as to whether it was sound trial strategy not to move to suppress the statement. (C. 1135).

With regard to factual support for the bones claim, post-conviction counsel offered statistical probabilities as to when the individuals died but attached no documentation. (C. 903-904, 1135). Kuehn also claimed the bones which Cherkinsky did not test were destroyed but attached no proof. (C. 903-904, 1135).

With respect to the remaining claims, post-conviction counsel failed to attach evidentiary support, such as affidavits from the non-interviewed witnesses, an affidavit from the reporter who wrote the news report, an affidavit from a fingerprint expert, and evidentiary support for the contention that the trial judge would have presided over the case had there been a change of venue.

These significant failures on the part of post-conviction counsel, particularly in combination with the conflict of interest under which he labored, required the appellate court to reverse and remand for new second stage proceedings.

The State has failed to distinguish *Johnson*, which is dispositive. There is no way to

determine from the record whether these claims have merit or not, because the requisite affidavits were simply not attached. And since there is no 651 (c) certificate, the court has no assurance that retained counsel even attempted to fulfill his obligations with respect to those claims. The State's argument that these claims have been forfeited places defendant in an impossible Catch-22: He cannot argue that the claims have merit because the materials have not been attached, and he cannot argue that he was deprived of reasonable assistance because the claims supposedly have no merit.

Therefore, the case should be remanded for representation by new counsel who can appropriately amend the petition at the second stage to flesh out these claims.

III:

THE APPELLATE COURT ERRED BY AFFIRMING THE SECOND STAGE DISMISSAL OF ROGER CARROLL'S CLAIM THAT HE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO SUPPRESS HIS CUSTODIAL STATEMENTS

In his opening brief, Roger Carroll argued that his claim of ineffective assistance of counsel for failure to file a motion to suppress should have been moved on to third stage proceedings. The State maintains that counsel made a strategic decision not file the motion and that even had the statement been suppressed, the outcome of the trial would have been no different. The State is wrong.

Although the trial court found that Roger Carroll's claim that he was deprived of effective assistance of trial counsel by the failure to file a motion to suppress was not forfeited by the failure to raise this issue on direct appeal, the appellate court found that the issue was in fact forfeited. *People v. Carroll*, 2024 IL App (4th) 231207, ¶¶ 53- 55. In addition, the appellate court found that since counsel might have decided as a matter of strategy that the exculpatory portions of Carroll's statement were beneficial, the claim of ineffectiveness was properly dismissed at the second stage. *Carroll*, 2024 IL App (4th) 231207, ¶ 92. The appellate court was wrong on both counts.

A claim of ineffective assistance of counsel is analyzed under the two-pronged, performance-prejudice test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Patterson*, 217 Ill.2d 407, 438 (2005). To prevail, a defendant must show (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defendant to the extent he was deprived of a fair proceeding. *Patterson*, 217 Ill.2d at 438.

The general rule is that where a post-conviction claim relies upon affidavits or other evidence outside of the record, the claim could not have been raised on direct appeal and is not waived.

See, e.g., *People v. Hall*, 157 Ill. 2d 324, 336 (1993). In this case, Roger Carroll’s claims that his trial counsel was ineffective for failing to move to suppress his statement because he was not given Miranda warnings and asked to speak to his attorney depends upon his affidavit to this effect, which was attached to his post-conviction petition. The appellate court concluded that this claim could have been raised on direct appeal because these were facts “derived from the record or were known by the defendant and thus available to counsel on direct appeal.” *Carroll*, 2024 IL App (4th) 231207, ¶ 53. This conclusion ignores the fact that appellate counsel had no ability to attach Carroll’s affidavit to the appeal.

The appellate court also concluded that since counsel might have decided as a matter of strategy that the exculpatory portions of Carroll’s statement were beneficial and therefore that the statement should not be suppressed. *Carroll*, 2024 IL App (4th) 231207, ¶ 92. This conclusion conflicts with case law which establishes that questions of counsel’s strategy should generally be addressed at the third, and not the second, stage of post-conviction proceedings. See *People v. Cabrera*, 326 Ill. App. 3d 555, 564-65 (3d Dist. 2001). The State provides no principled distinction between this case and *Cabrera*.

The State argues that there is no showing of a reasonable probability of a different outcome because, even if the motion had been filed and the statement suppressed, the result of the trial would have been the same.

The State’s argument ignores the general principle that the admission of a defendant’s statements can rarely be considered harmless error. the erroneous admission of a confession elicited in violation of *Miranda* can only be deemed harmless when it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *Neder v. United States*, 527 U.S. 1, 18 (1999). In making that assessment, a reviewing court should “(1) focus on

the error to determine whether it might have contributed to the conviction, (2) examine the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence.” *People v. Salamon*, 2022 IL 125722, ¶ 12. And, as the appellate court noted, and as the State concedes, , “[c]onfessions carry 'extreme probative weight,' and therefore the admission of an unlawfully obtained confession rarely is harmless error.” *People v. St. Pierre*, 122 Ill.2d 95, 114 (1988).

The same principle applies, a fortiori, to the question of whether the failure to suppress a statement undermines confidence in the outcome. The evidence in this bizarre case was far from overwhelming, particularly where the key evidence came from an immunized witness who had every reason to lie.

Therefore, this case should be reversed and remanded for third stage proceedings.

IV:**THE APPELLATE COURT ERRED BY AFFIRMING THE SECOND STAGE DISMISSAL OF ROGER CARROLL'S CLAIM THAT HE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO CONDUCT RADIO CARBON DATING OF THE BONE FRAGMENTS**

Roger Carroll rests upon the arguments and authorities cited in his opening brief.

V:**THE APPELLATE COURT ERRED BY AFFIRMING THE SECOND STAGE DISMISSAL OF ROGER CARROLL'S REMAING CLAIMS THAT HE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL**

Roger Carroll rests upon the arguments and authorities cited in his opening brief.

CONCLUSION

For the reasons given in Points I, II, and V, the decision of the appellate court should be reversed and the cause remanded for second stage proceedings. For the reasons given in Points II and IV, the decision of the appellate court should be reversed, and the cause remanded for third stage proceedings on those claims.

Respectfully submitted,

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C

CERTIFICATE UNDER RULE 341 (c)

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 and the Rule 341(c) certificate of compliance is 12 pages.

Respectfully submitted,

/s/ Stephen L. Richards

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct:

The undersigned, an attorney, certifies under 735 ILCS 5/1-109 under penalty of perjury that we filed the attached **REPLY BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT**

on December 8, 2025 in the above-entitled cause to the Clerk of the above Court and served all parties by service through the Odyssey efile system.

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