No. 127946

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CARL SMITH JR., Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 5-19-0066. There on appeal from the Circuit Court of the First Judicial Circuit, Jackson County, Illinois, No. 18-CF-303. Honorable Ralph R. Bloodworth, III, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

ADRIENNE E. SLOAN
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

E-FILED
7/13/2022 12:30 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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ARGUMENT

I. A consistent reading of Illinois Rules of Evidence 1003, 1004, and the best evidence rule necessitates a finding that the surveillance "clips" from Smith's apartment complex are inadmissible under both the duplicate exception of Rule 1003 and the other evidence exception of Rule 1004 and are barred by the safeguards of the best evidence rule. *(Responding to State's Arg. I)*

Illinois Rules of Evidence 1003 and 1004 "establish a policy favoring the admission of all reliable evidence regarding writings, recordings, and photographs" (St.Br.12). The State and Carl Smith agree on this point. Where the parties deviate is as to whether non consecutive, 20-second clips, taken off of a lay person's iPhone, and failing to include the entire time period during which this offense was alleged to have been committed, should qualify as "reliable" under these rules. The clips are not reliable and "in the circumstances, it would be unfair to admit" the clips. IL R. EVID R. 1003.

A. The clips are not duplicates under Rule 1003 (responding to State's Arg. II.A).

In order to maintain the integrity of the Illinois Rules of Evidence, this Court should hold that the clips are inadmissible under Rule 1003. Most centrally, this finding can and should be based on the requirement that a duplicate is inadmissible if "in the circumstances it would be unfair to admit the duplicate in lieu of the original." IL.R.EVID. Rule 1003. Secondarily, this Court should not find that the clips constitute "duplicates," under the rule because: a) to do so would go beyond any other Illinois court's conceptualization of "duplicate" in admitting incomplete evidence, and b) for policy reasons, a finding that these clips are duplicates under the rule encourages the admission of unfair evidence.

The State argues that "videos of a video" generally can constitute duplicates, but it cites cases where the "videos of a video" in question are all full copies of the original (St.Br.13). In *Hamilton v. State,* 182 N.E.3d 936 (Ind.Ct.App. 2022), the State sought to admit a copy of surveillance footage, and the omission the defendant complained of was that cropping excluded

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the time and date stamp: "the copy was, in all other substantive respects, the same as the original recording". *Id.* at 940-941. Likewise in *State v. Brown*, 739 N.W.2d 716 (Minn.2007), the issue was whether a "real time" copy of "time lapse" surveillance footage was admissible. The copy depicted all of the events of the original, just at a slower speed. *Id.* at 721. These complete copies bear no resemblance to the clips in *Smith*, which omitted not only the time period between the clips, but also any helpful footage from throughout the day of the offense.

The State contests Smith's assertion that these clips are not an "accurate reproduction of the original" as Rule 1003 mandates, by arguing that "accurate" does not mean "complete" (St.Br.15). But even in the cases that the State cites, the duplicates admitted were deemed accurate because they fully and completely captured, at the very least, all of the material information from the original. For example, in *United States v. Sinclair*, 74 F.3d 753 (7th Cir. 1996), the defendant argued that copies of expense account reports were inadmissible because the omissions deprived him of useful information. *Id.* at 760. The court found, "Although the cases support [the defendant's] argument, the record does not." *Id*. In other words, while the copies would have been inadmissible if they **actually** omitted useful information, no useful information was removed, so the deletions did not reduce the accuracy in that specific case. Significantly, the court in *Sinclair* "undertook a detailed examination of the omitted portions of the originals before finding that the omissions would not have affected the usefulness of the duplicates" *Id*. at 760. In *Sinclair*, the court and the parties viewed the original, and a finding was made that the copies did not omit anything relevant. Here, of course, none of the parties–the court, the State's attorney, even the arresting officer–viewed the original footage. *Sinclair* confirms the premise that "incomplete duplicates should not be admitted when the omissions deprive the defense of useful information" *Id*. at 760. This is precisely what happened here.

The State also incorrectly contends that *State v. Jones*, 2015-Ohio- 4694, 2015 WL

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7078756 (Ct. App.) is "substantively identical" to the instant case (St.Br.15). In *Jones*, the clips were created by a forensic video specialist, who "reviewed the entirety of the video" which encompassed footage from several camera angles, and created two movies. *Id*. ¶18. The first movie depicts the offense in its entirety–an individual exits a SUV, walks up to the victim, shoots him, and flees. *Id*. The second video, beginning earlier, shows a male enter a dark SUV. *Id*. On appeal, the defense argued that the videos admitted were unfair because the investigating officers only viewed portions of the video that the apartment manager directed them to; however, those portions **depicted the crime**. This cannot be overstated–in *Jones*, the apartment manager, the forensic video specialist, and the jury viewed the crime being committed on the duplicate video. Here, only Schmidt viewed the original surveillance footage, and the clips did not show a crime being committed. Contrary to the State's contention, *Jones* is in no way identical to Smith's case. Critically, in *Jones*, unlike in this case, there is no allegation that any material evidence was missing from the video admitted.

The State faults Smith for failing to cite a case where an incomplete copy is found not to qualify as a duplicate under Rule 1003. Critically for the State, it claims that incomplete copies with material omissions are admissible, but fails to cite a case where evidence with portions missing anywhere near the magnitude of what is missing in Smith's case is allowed. The State asks this Court to extend the meaning of "duplicate" under Rule 1003 to include "copies" omitting materially relevant evidence that could be useful to the party it is being admitted against. To do so would be to endorse the admission of unfair evidence.

The State characterizes Smith's argument regarding the prejudicial effect of deeming the clips in question Rule1003 duplicates as "incorrect or misplaced" because it goes to the "separate question" of whether the duplicates are fair (St.Br.16). But the prejudicial effect of this evidence is precisely why this Court should not classify this evidence as a 1003 duplicate.

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The non-consecutive, non-complete nature of this purported duplicate was prejudicial to Smith. For policy reasons, this Court should not deem evidence of this nature "duplicate," as such a holding will encourage parties to admit unreliable evidence.

Finally, the State argues that if "edited duplicates categorically fall outside the scope of Rule 1003" juries would be forced to sit through long recordings at trial (St.Br.16). This is purposely obtuse. Smith does not argue that edited duplicates are never admissible in court. Smith argues that the incomplete evidence admitted here was unfairly admitted where the defense never had a chance to see the original. Editing for clarity is not a problem where the parties have been able to view original footage, and agree to edits that are fair, and helpful to the jury. *See generally State v. Brown* 739 N.W. 2d at 723 (trial court may exclude digital copies where defense counsel is not provided with adequate notice and opportunity to participate in editing process). In this case, where the defense never got a chance to view the footage or determine whether the edits were fair and accurate, this edited "duplicate" should fall outside of 1003.

B. Even if this Court finds that the clips are duplicates, they are inadmissible under Rule 1003, because their admission would be unfair in the circumstances (responding to State's Arg. II.B).

The State argues, citing Wright & Miller, that "Rules 1002, 1003, and 1004 reflect the goal of "secur[ing] the most reliable information in disputes over the contents of writings and recordings" (St.Br.20). This is true. However, the State misunderstands the rules' goal of securing the "most reliable information" as permission to admit unreliable evidence where there is no other alternative. At its core, the State's argument regarding the clips is that they're better than nothing. This is not the premise that Wright & Miller espouses, or that the rules of evidence stand for. Under Rule 1003, evidence is not admissible when it is unfair.

The State is correct that the rules provide courts flexibility to admit secondary evidence (St.Br.12), relaxing the common law best evidence rule. This is because, in modern times,

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generally, duplicates are very accurate. Wright, Charles A., et al., *Federal Practice and Procedure,* 31 Fed. Prac. & Proc. Evid. § 8002 Policy (2d ed. 2021)("...the reliability of certain types of copies frequently is high while the exclusion of that evidence sometimes presents the greater danger to accurate fact-finding"). The rules, however, are still centrally concerned with accuracy, and the rules direct that evidence that threatens accurate fact finding is inadmissible. *Id.* (secondary evidence can present "several threats to accurate fact-finding" including risk of fabrication to "intentionally deviate from the contents of the original" or re-recording to "alter who is depicted or what is said"). Under the rules, misleading evidence is not admissible. *Id*. (Rule 1003 does not extend preferred treatment to duplicates that might mislead the trier of fact.).

The Illinois Rules of Evidence modified the best evidence rule because, increasingly, technological advances mean that duplicates represent evidence in the same way as an original. However, where, as here, secondary evidence is misleading and threatens accurate fact finding, Rule 1003's provision that evidence is inadmissible where it would be unfair in the circumstances kicks in. The clips were not better than nothing–they were misleading to the fact finder, meaning Rule 1003 does not allow for their admission.

The advisory committee note on Federal Rule 1003 states, "Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party." Fed. R. Evid. 1003(advisory committee note). This perfectly describes the circumstances here. Only part of the original was reproduced and the remainder was needed to disclose matters helpful to Smith, and would be helpful for cross examination. Thus, the original was needed and the "duplicate" was not admissible under the rule.

The State says that the potential unfairness of the clips has been eliminated by the defense's chance to exploit the gaps in the footage via cross examination (St.Br.19). Correspondingly,

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the State faults trial counsel for failing to ask Schmidt what else was on the surveillance "presumably because he could think of no credible basis on which to impeach Schmidt's testimony that no one else had approached or exited Whittington's apartment" (St.Br.19). This ignores the obvious–defense counsel never saw the original video. *See generally Brown,* 739 N.W. 2d at 723 (trial court may bar secondary evidence where defense did not have knowledge and participation in copying process). So effective impeachment based upon it would have been difficult or impossible. Any defense attorney knows the cardinal rule of cross examination, "never ask a question for which you do not know the answer." The State suggests that defense counsel's adherence to this principle somehow indicates an assent to the State's theory of the case, or shows that the information in the gaps would not have been useful. In reality, the defense was severely impaired by his inability to know what the video truly did depict.

The gaps in the video allowed the State to suggest that, outside of the camera's view, Smith entered through the window of the apartment. Were it not for the gaps, counsel could have asked about other ways or times Smith could have entered. Counsel also would have known the times that other people, including Whittington, entered and exited. This is precisely why the clips are so unfair. For the State, the clips were perfect. The State theorized that Smith visited the apartment in the morning, Whittington left after Smith did, Smith returned via the window, and exited at 2:14 pm. The clips comported exactly to this theory. But the information on the clips was so limited that it left the defense without the means to fully formulate its own theory. And now, on appeal, without the full footage, Smith still does not have the means to explain exactly why the admission of the clips was unfair.

The surveillance would potentially align with many theories. Perhaps Whittington was mistaken as to when Smith cleaned his apartment and when he went to the bar. Perhaps Smith was only leaving at 2:14pm to take out trash while cleaning, and would reenter later. Perhaps

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others entered or left the apartment. Perhaps Whittington never left at all. The favorable possibilities for Smith were eliminated by the State's utilization of the clips instead of the original. Based on the State's incomplete evidence, we simply do not know what happened, and the defense at trial could not present a complete theory.

The State's response brief faults Smith because the above arguments are "speculative and unsupported" (St.Br.21). But this places Smith in an impossible situation. The State contends that a challenge to the incomplete clips, where the original has never been seen by any party, cannot be successful unless Smith is able to identify what from the original footage would materially advance his case. By this standard, no party could ever successfully challenge incomplete evidence that it had not had the opportunity to see. The State's position faults Smith for a problem the State caused. The State's introduction of the clips instead of the original that had never been seen by any party is the reason for the lack of clarity as to what happened on the full surveillance footage.

To support its claim that a party cannot speculate on the contents of an original to argue that a duplicate is unfair, the State cites *United States v. Leight*, where copies of an x- ray were introduced over the destroyed original. 818 F.2d 1297, 1305 (7th Cir. 1987)(abrogated on other grounds). The *Leight* court found the copies admissible, reasoning that the parties only "speculated" rather than provided real evidence of a difference between the copies and the original x-ray. *Id.* In other words, the defendant in *Leight* was baselessly asserting that something went wrong in the copying process leading to unspecified differences between the duplicate and the original. This is not the case here. Something indisputably went wrong in this copying process. And there are absolutely differences between the copy and the original–even by the State's theory, the original would have shown Smith entering the apartment permissibly at some point, Whittington exiting at some point and returning, and other people throughout

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the hallway and near Whittington's door. *Compare United States v. Benedict*, 6 F.2d 928 47, 932-33 (9th Cir. 1981)(copy of a false passport was admissible over the defense's argument that the original might have revealed a customs stamp that the copy did not, because defense had no basis or corroboration for this assertion). Information as to what time these things happened would have been helpful to the defense. Thus, the vast differences between the information conveyed by the clips and what would have been conveyed by the original makes this case nothing like *Leight*, where the defendant did not even identify what could have been missing from the ostensibly identical copy.

Also, notably, the court in *Leight* found the error harmless–the x-ray was not "pivotal" to the government's case. It can not be overstated how much Smith's case differs from *Leight* in this respect. This case "rises an falls" on the clips. *People v. Smith*, 2021 IL App (5th) 190066 ¶ 103 (Cates, J., dissenting). Without them the State cannot prove unauthorized entry, meaning, without them, there is no residential burglary conviction. The error here is absolutely not harmless.

The State faults Smith's claim that, "the admission of a duplicate is only permissible when there is no detriment to either party in doing so" by arguing "after all most evidence is admitted because it's detrimental to one party" (St.Br.22). This, again, is obtuse. Of course, evidence admitted against a party is normally not advantageous to the party it is admitted against. That is not the problem Smith is identifying. Rather, Smith argues that a "duplicate" should not be admitted against a party when the duplicate potentially hurts the party **more** than the original would have, or where it is possible there was exculpatory evidence in the full video. The partial, fragmented nature of the duplicates here make them more prejudicial than the full original surveillance would have been. The State repeatedly faults Smith for failing to identify a case stating that incomplete duplicates are inadmissible, or that partial copies are not "duplicates" under Rule 1003. But the State contends that copies such as the clips admitted

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against Smith–that are incomplete, make prejudicial suggestions, and harm the defense more than the original–are admissible. Yet, it does not identify a case where a copy that omits materially relevant information is admitted. This Court should decline the State's invitation to make such a finding for the first time.

C. If this Court finds that the clips are inadmissible under Rule 1003, they should not move on to a Rule 1004 analysis (Responding to State's Arg. III.A).

"If admission [of evidence] is 'unfair' under Rule 1003, it is unlikely the evidence will qualify for admission under Rule 1004." Wright & Miller, supra, § 8013 Scope. "This is because admissibility under Rule 1004 frequently is determined by circumstances that bear upon fairness of admission." *Id*. This is the crux of Smith's argument. Both rules are primarily concerned with fairness, so it would be nonsensical for unfair duplicates under Rule 1003 to be admissible under Rule 1004. The State's main claim to the contrary is that there is no case that explicitly states this (St.Br.25). But Wright & Miller, repeatedly cited by the State (St.Br. 13, 14, 16, 20, 23, 27, 29, 35), espouses this principle, and Smith has identified cases showing that, generally, Rule1004 is used to admit evidence unlike what was admitted here–an unfair purported copy (Open Br.19-26). The fact that there is a common, more fair use of Rule 1004–to admit other forms of evidence when copies are not available–shows that this is probably the purpose the legislature contemplated.

Smith cited *Hale v. Mayor & City Council of Baltimore City*, No.20-cv-00503, 22 WL 374512 (D.Md. Feb. 8, 2022), to demonstrate an alternative use of Rule 1004–to admit testimony about text messages where the messages no longer existed. The State counters that *Hale* is unpersuasive because it also discussed the admissibility of hypothetical screen shots of the text messages. The State then baselessly asserts that the hypothetical screen shots, if admitted, "would have depicted only the portions of the messages that the party deemed relevant" (St.Br.25-26). But in *Hale*, there is no indication that, were these hypothetical screen shots admitted,

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they would have omitted evidence helpful to the defense, nor is there evidence that the defense was unable to view the complete text conversation. The contention that the *Hale* plaintiff could have presented text messages that only she "deemed" relevant is unfounded. Indeed, if the messages had been examined by both parties and included all material information, the defendant would not have had a meaningful argument that they were not fair under 1003. Here, the clips were unfair under 1003, which should bar them under 1004.

If Rule 1004 was meant to admit evidence that failed under Rule 1003, why would the legislators have included a fairness requirement in Rule 1003 at all? The State does not answer this question. Instead, it contends that rules 1003 and 1004 are "complementary" and identifies cases that analyze evidence based on both of the rules (St.Br.26). This misses a key point: in none of these cases was evidence considered **unfair** under 1003. The State does not identify a case where evidence was found inadmissible because it was unfair under Rule 1003 and then found admissible under Rule 1004. This Court should not be the first to make this holding. If it does so, Rule 1003's fairness requirement will be rendered entirely meaningless.

The State points to situations where "evidence that *could* have been admitted under Rule 1003 may also be admitted under Rule 1004" (St.Br.26, emphasis in original).This is a misunderstanding of Smith's argument. Indeed, Smith argues that evidence that is unfair under Rule 1003 should not be admissible under 1004 because this enables a party to bypass Rule 1003's fairness requirement. Whether evidence that is fair under 1003 is admissible under 1004 is beside the point, because here, the evidence was not fair.

For example, the State contends that *United States v. Condry*, 2021 WL 5756385, which analyzed evidence under both Rules 1003 and 1004, "refutes" Smith's argument that evidence that fails under Rule 1003 should not be admitted under Rule 1004 (St.Br.26-27). But *Condry* is inapposite, because, in that case, the evidence was found **admissible** under both rules. 2021 WL 5756385 at *4. Smith's point is that if evidence is **inadmissible** under Rule 1003 for

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being unfair, it should likewise be inadmissible under Rule 1004. In *Condry*, the evidence was **admissible** under Rule 1003, and, correspondingly, **admissible** under Rule 1004, because both rules depend on fairness principles. The evidence was an accurate reproduction of the original and the circumstances were fair, where the substitute video depicted the entirety of the original video and was authenticated by the officers who created it and the complainant herself. *Id*. at * 3. Where Rule 1003 would allow the evidence for these reasons, it would follow that it would also qualify as Rule 1004 other evidence. The converse is also true. If evidence is found unfair under Rule 1003, it should be expected to be found unfair under Rule 1004. Wright & Miller, supra, § 8013 Scope.

The State also relies upon *Wise v. State*, 26 N.E. 3d 137 (Ind.Ct.App.2015), which, again, does not present a circumstance where inadmissible Rule 1003 evidence was admitted under Rule 1004. In *Wise*, the defense argued that the substitute evidence in question was inadmissible under Rule 1003 and the court found that the defense's argument was flawed because it overlooked Rule 1004 entirely. *Id* at. 143. However, in undergoing a Rule 1004 analysis, the court went on to find: "[The] handheld camera recording of the videos on Wise's cellular phone display no evidence of tampering or other alteration, let alone loss of the content of the videos themselves." *Id*. at 143. Significantly, the court's findings regarding the evidence–that it was not altered, and accurately represented the original–indicates that the court found that the evidence was, indeed, fair. Moreover, these findings factually distinguish the case from Smith's, where the key problem with the clips was "loss of the content of the videos itself." *Id*. As with *Condry*, *Wise* does not present a scenario where evidence was deemed unfair under Rule 1003, but was still admitted under Rule 1004. Thus, it is inapposite.

Again, if evidence is inadmissible because it is unfair under Rule 1003, it would rarely be admissible under 1004. Wright & Miller, supra, § 8013 Scope. However, as argued in opening, if evidence is inadmissible as a duplicate under Rule 1003 for being unfair, and the proponent

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has another mode of providing evidence of the unavailable original–testimony, reproductions, notes–Rule 1004 may allow for the admission of such evidence. The State claims there is no "principled basis" for this suggestion and argues that Smith "identifies no reason why witness testimony should generally be preferred over a partial duplicate of the original" (St.Br.27). Again, the State misunderstands Smith's argument. Smith does not claim that partial duplicates are always worse than other forms of secondary evidence. Nor does he attempt to create "degrees" of secondary evidence types (St.Br.27). Rather, Smith argues that where, as here, a duplicate is unfair and misleading, and inadmissible under Rule 1003 for that reason, Rule 1004 may allow other, fair, forms of evidence to describe the original. *See* Wright & Miller, supra, § 8012 Policy. (Explaining that secondary evidence such as testimony as to the terms of a written contract may be admissible under Rule 1004 when the risks of mistake and fraud are low while the cost of excluding the evidence may be high). However, 1004 may not allow the same purported duplicate that Rule 1003's safeguards bar. Certainly, there is a "principled reason" for this. If evidence has been found unfair under one of the rules, a party should not be allowed to use Rule 1004 as a back door means of getting in that same evidence. This is nonsensical and renders the rules incongruous. The State does not have a response. This Court should find, because the evidence is unfair under Rule 1003, Rule 1004 likewise does not allow it.

D.& E. *The Best Evidence Rule is still applicable in Illinois and its principles favor inadmissibility of the clips/ The diligence factor under the Best Evidence rule does not conflict with Rule 1004's bad faith requirement (Responding to State's Arg. IV. A).*

In opening, Smith argued that the best evidence rule, including its requirement that the proponent be diligent in attempting to procure original evidence, is applicable in Illinois, and, further, that this requirement compliments, rather than conflicts with, Rule 1004 (Open.Br.31-34). This is because Rule 1004 bars substitute evidence when the original was destroyed in bad faith, and a lack of diligence in attempting to procure the original is, itself, an indicia of

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bad faith. The State counters that *Electric Supply Corp. v. Oscher,* 105 Ill.App 3d 46 (2d Dist. 1982) has been abrogated, that the diligence factor is alternatively inapplicable to this case, and that Officer McCrary was diligent (St.Br.35-40). All of these arguments are incorrect.

Contrary to the State's contention, *Electric Supply Corp. v. Oscher* is still good law. In arguing that it is not, the State points to the committee comment: "It is no longer necessary to show that reasonable efforts were employed beyond judicial process or procedure" (St.Br.37). The State contends that this invalidates the diligence requirement; however, it does not address the point Smith made in opening: the circumstances here had nothing to do with judicial process or procedure (Open.Br.31-32). Indeed, diligence in attempting to procure the original, in the case of the clips, would not have required any judicial involvement. For McCrary to have been diligent, he would simply have had to make a full copy the surveillance footage when he found out about it. It remains unclear how the State can contend that the commentary stating that "efforts beyond judicial process" are not required means that the diligence requirement of the best evidence rule is wholly invalidated (St.Br.35). Were the diligence requirement eliminated by the rules, the commentary would simply have stated as much. As the State points out, the drafters of the Illinois Rules of Evidence generally intended to incorporate into the Rules the current law of evidence in Illinois if this Court or the appellate court had clearly spoken on a principle of evidentiary law within the last 50 or so years. (St.Br.37). *Oscher* came down in 1982, under 30 years prior to the enactment of the Rules.

The State next says that even if *Oscher* was not overruled, its requirement is not relevant here, as a diligent search for the original is only relevant to whether the original was lost (St.Br.39). It cites a number of federal cases, asserting that these cases show that a diligent search for an original is relevant "only" to this purpose, and not the purpose of demonstrating good or bad faith (St.Br.39). Contrary to the State's understanding, these two questions–whether a document is lost, and whether the proponent is advancing the substitute in bad faith–are

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interrelated. *See Monyoya v. Romero* 956 F.Supp.2d 1268 (Rule 1004 requires the court to take two related inquiries: whether the document was actually lost or destroyed and whether the party offering the document has acted in bad faith). In other words, a reason courts want to know whether the original was actually destroyed or lost is, indeed, because it is a means of determining whether there is some improper purpose for advancing the secondary evidence.

This inquiry is relevant here. The substitute clips invited the jury to make unfair inferences and excluded evidence potentially helpful to the defense. Thus, the fact that Officer McCrary was entirely unconcerned with timely retrieval of the original, or attempting to recover the original once he undoubtedly realized the clips would provide key inculpatory evidence in the case, indicates a best evidence rule violation, and, in turn, potential bad faith. *See* Wright & Miller, supra, § 8014 Subdivision (a)–Originals lost or destroyed (circumstances suggesting that the searcher did not want to discover the original permits the inference that an apparently vigorous search was, in fact, inadequate).

Finally, the State argues that Officer McCrary was diligent (St.Br.39). To recap, McCrary never watched the original footage. He did not collect the footage when he became aware of it on the 29th (R.508-511). He did not collect the footage when he met with Schmidt about it on the 30th(R.508-511). And he did not collect the footage even though he must have realized on the 31st that what Schmidt had for him were merely iPhone clips instead of the actual footage(R.508-511). And, on the 31st, McCrary may have still had time to gather the best evidence. Based on the record, there is a distinct possibility that McCrary made the decision to rely on the prejudicial clips and not recover the original prior to its destruction. *See Id*. And even if not, this Court should not hold that McCrary's actions were diligent. If this Court holds that an officer is not required to obtain footage once he becomes aware of it, or ask a surveillance owner when footage is due to delete, or do anything to attempt to obtain the original once he realizes that the substitute is incomplete, and can still be said to have acted in good faith, this

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holding would encourage poor police work.

The question of whether the proponent is diligent in attempting to procure the original, based on the common law best evidence rule, is a facet of determining the admissibility of evidence under Rule 1004. In undergoing a Rule1004 analysis, this Court should consider whether the State attempted to obtain the original surveillance video (it did not) and whether the State was at fault that the original was destroyed (it was). This circumstance–this complete lack of diligence–would bar the evidence under the best evidence rule, and in turn, would favor inadmissibility under Rule 1004.

F. Even if this Court chooses to analyze the admissibility of the clips under Rule 1004, their admission should be barred because the destruction of the original was in bad faith (Responding to State's Arg. III.B).

To be clear this case need not turn on bad faith. This Court should find the clips unfair in the circumstances, and hold, pursuant to the spirit and intent of the rules, that its unfairness renders it inadmissible under 1004. Wright & Miller, supra, § 8013 Scope. That is the equitable result in this case, and that is the easiest way to preserve the value of these rules. However, even if this Court declines to make that finding, it should still not admit the evidence, because the conduct here constitutes bad faith.

As previously stated, the most important aspect of both Rules 1003 and 1004 is fairness:

> Admissibility under Rule 1004 frequently is determined by circumstances that also bear upon fairness. However, the scope of what is "unfair" under Rule 1003 is left somewhat vague, while Rule 1004 more clearly describes the circumstances controlling admissibility under that provision. Thus, it is possible that evidence would be inadmissible under Rule 1004 yet still qualify for admission as a duplicate under Rule 1003. Wright &Miller, supra, § 8013 Scope.

This commentary–this suggestion that evidence could be inadmissible for unfairness under Rule 1004 but still qualify under Rule 1003–indicates that 1004's fairness requirements may be even **more** stringent than those of Rule 1003. By this calculus, unfair Rule 1003 evidence is certainly not admissible under Rule 1004. Even disregarding this comment, the State has

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failed to provide any support for the claim that it is less rigorous. The purpose of both of these rules is to admit evidence that is fair. This evidence is not, and Rule 1004 does not favor its admission.

Initially, the State argues that it did not "destroy" the video because it automatically lapsed, and cites Wright & Miller, supra, § 8014 Subdivision (a)–Originals Lost or Destroyed (a common example of non-culpability under Rule 1004(1) involves the automatic overwriting of a surveillance video) (St.Br.29-30). While it may be the case that, often, when a surveillance video automatically overwrites, it is not indicative of bad faith, that is not the case here, where the officer knew this would happen, and knew the value of the evidence. The State should not be allowed to escape culpability for the destruction of the video via the claim that it was automatically overwritten instead of affirmatively deleted. *See Bistrian v. Levi* 448 F. Supp. 3d 454, 474-5(E.D.PA.2020) (where litigation was foreseeable, the government had the duty to take steps to prevent automatic overwriting).

Next, the State asserts that the quality of the secondary evidence does not answer whether its proponent acted in bad faith in losing or destroying the original evidence (St.Br.34). This is untrue. While we can never definitively know whether McCrary's actions constituted a conscious effort to unfairly prosecute Smith, this is why we look to circumstantial evidence. *Bistrian*, 448 F. Supp. 3d at 475 (Because courts are unable to "examine [a party's] head" to "confirm [whether they] acted in bad faith," courts look to circumstantial evidence to determine intent). Here, as argued in opening, the circumstances–the State's knowledge of the footage but lack of recovery, the State's lack of effort to recover the original, the State's knowledge of the potential exculpatory value of the clips, and the unfair character of the substitute evidence advanced–are indicative of bad faith (Open Br. 34-42).

The State faults Smith for making an inference of bad faith based on the circumstances, but makes its own inference–one of good faith, when it argues (with absolutely no basis) that

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"Schmidt was…a private citizen making a good-faith effort to provide information to the police" (St.Br.34). The claim that Schmidt made an honest effort to provide the tribunal with quality evidence is no less speculative than a claim Schmidt produced the incriminating clips because he wanted Smith incarcerated. This is the problem with relying on evidence this shoddy in character–we can never know if Schmidt's actions were taken with ill intent. While we may not know much about Schmidt, what we do know about McCrary's actions is that they were at least willfully neglectful in a circumstance where he must have realized the importance of the surveillance footage and the value of the clips to State. And bad faith is often necessarily determined circumstantially. *Eckman v. Encompass Home & Auto Ins. Co.*, 2021 WL 2371051 at *6-7(diligent search for a document evidences lack of bad faith because it shows the loss was genuine); *United States v. Beal*, 2021 WL 2517837 (bad faith turns on government's knowledge of apparent exculpatory value of evidence at the time it was destroyed). Accordingly, under Rule 1004, this evidence is inadmissible because the bad faith abundantly (albeit circumstantially) apparent here indicates that the evidence is unfair.

II. Pursuant to Supreme Court 341(j) Smith did not waive arguing that the clips lacked an adequate foundation, where he thoroughly responded to the State's foundation argument on reply. *(Responding to State's Arg. IV.B)*

Smith argued in opening that he did not waive the claim that the clips lacked a proper foundation (Open.Br.44-49). To be clear, foundation, in the court below, was the State's **sole** argument. The State now argues that foundation is irrelevant, abandoning its original argument entirely (St.Br.43). If nothing else, this represents an additional reason to remand. If this Court does not reverse the lead opinion of the appellate court and remand for a new trial pursuant to Argument I, it should remand. First, remand is appropriate because the lead opinion incorrectly analyzed waiver. Under Rule 341(j), when a party responds to an argument brought for the first time on reply, it is not waived. This is what happened here, so if this Court remands, it should instruct the lower court that Smith did not waive the foundation issue, and direct the

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lead opinion to consider it. Alternatively, remand is appropriate because the concurrence and dissent in the appellate court rendered opinions based upon foundation, an issue that the State now abandons.

As argued in opening, although foundation was never Smith's main point, he discussed it on reply when the State raised it, so, pursuant to Rule 341(j), he did not waive it (Open.Br.45-48). The State's counter argument now is that, on reply in the appellate court, Smith asserted that the foundation for the clips was beside the point (St.Br.42). Even though the *Taylor* foundation factors are, indeed, beside the original point advanced by Smith in the appellate court–that the clips violated best evidence principles–Smith still distinguished *Taylor*. Though the State's argument in the appellate court did not directly address Smith's point, Smith still addressed the new point made by the State.

The State also faults Smith for only distinguishing *Taylor* "on the facts" (St.Br.21). But the distinguishing facts here are precisely why *Taylor* supports Smith's argument that the clips are inadmissible. As explained in *Taylor*, "each case must be evaluated on its own and depending on the facts of the case..the dispositive issue in every case is the accuracy and reliability of the process that produced the recording" *People v. Taylor,* 2011 IL 110067, ¶ 35. As explained in opening (Open.Br.47), were the *Taylor* court confronted with the facts of Smith's case, it would not have found this evidence admissible.

The State now agrees with Smith's original argument that foundation is not the central issue in this case, and takes it even further, arguing that *Taylor* and foundation have "no bearing" on the best evidence challenge to the admission of the clips (St.Br.43). Again, this is an exceedingly curious position, because, until now, in its appellate court brief and at oral argument, the State contended that foundation was the **only** issue in this case. To be clear, Smith does not agree with the State that *Taylor* has no bearing here. The foundational issues with the clips, and their unfairness compared to the footage in *Taylor*, while not dispositive, are contributing

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factors to their unfairness and inadmissibility under the rules. Smith argued this below. Thus, the lead opinion of the appellate court was incorrect, and this Court needs to confirm the principle espoused by Rule 341(j) that an argument responded to on reply when brought for the first time in response is ripe for consideration–not waived. *See People v. Whitfield*, 228 Ill.2d 502, 514 (2007).

While clarification on the terms of 341(j) is certainly important, to the extent this Court wishes to ignore foundation entirely, as the State asks it to do, this still does not mean this Court should affirm. Even if the foundation of these clips was perfectly laid, they still would not be admissible. *See* Wright & Miller, supra, §8004 General Rule (even assuming the proper foundation has been established, a duplicate is not admissible under Rule 1003 if its exceptions apply). That the foundation was poor only lends more credence to Smith's argument that the clips were unfair. Remand for consideration under 341(j) is necessary for clarification purposes, and to avoid letting stand an incorrect holding by the lower court.

Summary

This Court may choose to remand for the full panel to consider the impact the foundation issue had on the larger problem of these clips' unfairness. It may alternatively choose to remand because the concurring and dissenting opinions below were determined, in large part, on an issue the State now contends is "irrelevant." This Court may–and should– accept Smith's Argument I and overrule the lower court's opinion entirely, rendering its own holding that the evidence is unfair under the Rules. Any of these choices are more equitable to Smith than the choice to leave the Fifth District's opinion as is. To affirm the opinion of the appellate court would be to let stand an opinion based upon whether or not foundation was waived and whether or not foundation was adequate even though the State now advances the position that foundation is irrelevant. The appellate court opinion does not provide clear guiding principles

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on the admissibility of substitute video evidence, on the relevance of foundation to admissibility of such evidence, or on waiver principles when the State's brief brings up a new issue on reply. This Court should correct the opinion itself, and find the clips inadmissible, or, at least, remand so that the lower court may do so.

CONCLUSION

For the foregoing reasons, Carl Smith, Jr., defendant-appellant, respectfully requests that this Court reverse Carl Smith's conviction and remand for a new trial barring the admission of the surveillance clips, or remand with directions that the appellate court reconsider the *Taylor* foundation issue, either because it was not waived, or in light of the State's current argument that it is irrelevant.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

ADRIENNE E. SLOAN
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Adrienne E. Sloan
ADRIENNE E. SLOAN
Assistant Appellate Defender

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No. 127946

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CARL SMITH JR., Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 5-19-0066. There on appeal from the Circuit Court of the First Judicial Circuit, Jackson County, Illinois, No. 18-CF-303. Honorable Ralph R. Bloodworth, III, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Mr. Patrick D. Daly, Deputy Director, State's Attorneys Appellate Prosecutor, 4114 North Water Tower Place, Suite C, Mt. Vernon, IL 62864, 05dispos@ilsaap.org;

Mr. Joe Cervantez, Jackson County State's Attorney, 1001 Walnut St., 3rd Floor, Murphysboro, IL 62966-0730, statesattorney@jacksoncounty-il.gov;

Mr. Carl Smith, Jr., 2006 W. Woodriver Dr., Carbondale, IL 62901

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 13, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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CYNTHIA A. GRANT
SUPREME COURT CLERK

/s/Rebecca S. Kolar
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us

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