No. 126824

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- ANDREW GRANT, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-16-0758. There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, No. 04-CF-232. Honorable Albert Purham, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether the state's destruction of potentially exculpatory evidence, in violation of its mandatory statutory duty to preserve that evidence and in deprivation of Andrew Grant's adjudicated statutory right to postconviction forensic testing thereof, entitles Mr. Grant to vacatur of his conviction and a new trial with an adverse-inference jury instruction.

STATUTES INVOLVED

720 ILCS 5/33-5 (2018), Preservation of evidence: See A-5.

725 ILCS 5/116-3 (2012), Motion for fingerprint, Integrated Ballistic Identification System, or forensic testing not available at trial or guilty plea regarding actual innocence: See A-1–A-2.

725 ILCS 5/116-4 (2018), Preservation of evidence for forensic testing: See A-3–A-4.

STATEMENT OF FACTS

On March 11, 2004, defendant-appellee Andrew Grant was indicted for aggravated criminal sexual assault (sexual penetration by use of force upon a physically handicapped person), a Class X felony pursuant to 720 ILCS 5/12-14(a)(6), (d)(1) (2003), and criminal sexual assault (sexual penetration by use or threat of force), a Class 1 felony pursuant to 720 ILCS 5/12-13(a)(1), (b) (2003). The indictment alleged that Mr. Grant committed those offenses against complainant Z.G. on or about February 27, 2004. (Vol. I, C. 11-12.)

The charges were tried to a jury on September 28, 2004. (R. 28-125.) In a published opinion, *People v. Grant*, 2016 IL App (3d) 140211, ¶¶ 4-6, the appellate court summarized the conflicting lay witness testimony presented at Mr. Grant's short trial. (See R. 36-66, 84-102.) Z.G., a legally blind niece of Mr. Grant, testified to vaginal and anal penetration by Mr. Grant's penis; Z.G.'s brother Jeremy testified that he saw Mr. Grant in Z.G.'s bedroom near Z.G. with his pants down; and Mr. Grant testified that he did not have any sexual contact with Z.G., who disclosed to him that she and Jeremy had had sex. (R. 38-39, 56, 60, 62, 86-91.) Expert and stipulated testimony established that an evidence collection kit was used to take various swabs and specimens from Z.G.'s body, and police transported the kit to a crime lab where a forensic scientist determined that no semen was present on swabs taken from Z.G.'s vagina, mouth, and rectum. (R. 66-82.)

The jury found Mr. Grant guilty as charged. (Vol. I, C. 46-47, 89; R. 124.) On December 7, 2004, the trial court denied Mr. Grant's timely motion for a new trial or judgment notwithstanding the verdict, entered judgment of conviction for aggravated criminal sexual assault, and sentenced Mr. Grant to 14 years' imprisonment at 85 percent. (Vol. I, C. 93, 100-01; R. 144.) And on December 14, 2004, the court denied Mr. Grant's timely motion to reconsider sentence. (Vol. I, C. 103-04; R. 150.)

For the next eight-and-a-half years, Mr. Grant challenged his conviction and sentence through a direct appeal, *pro se* petitions for postconviction relief, and appeals of the denial of his postconviction petitions. (Vol. I, C. 112-13, 119-24, 137, 163-66; Vol. II, C. 211-73, 277, 351-80, 386-88, 391; Vol. III, C. 401-03.) Though Mr. Grant continually asserted his innocence, he won only nominal sentencing relief relating to his custody and *per diem* credit. (Vol. I, C. 112-13; Vol. II, C. 386-88.)

On June 5, 2013, represented by John J. Hanlon of the Illinois Innocence Project, Mr. Grant filed a motion for postconviction forensic testing pursuant to 725 ILCS 5/116-3 (2012) (A-1–A-2), which provided in relevant part:

> "(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 *** forensic DNA testing *** on evidence that was secured in relation to the trial which resulted in his or her conviction, and *** was not subject to the testing which is now requested at the time of trial[.]
>
> ***
>
> (c) The trial court shall allow the testing *** upon a determination that *** the result of the 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[.]"

Mr. Grant initially requested DNA testing of two items of physical evidence that were collected in the kit but never tested: an apparent hair found in Z.G.'s vagina, and scrapings taken from under Z.G.'s fingernails. (Vol. III, C. 404-10.) Mr. Grant subsequently withdrew his request for DNA testing of the fingernail scrapings. (R. 160.) In support of his motion, Mr. Grant argued in part that such testing had the scientific potential to produce new, noncumulative evidence materially relevant to his assertion of actual innocence because the absence of his DNA from those items would impeach Z.G.'s testimony and weaken the state's case

against him. (Vol. III, C. 407-08.) Exhibits to the motion confirmed that the hair and scrapings were never tested for DNA despite the lack of physical evidence tying him to any crime against Z.G. (Vol. III, C. 423-24, 454-55.)

At an August 30, 2013 hearing on Mr. Grant's motion for forensic testing, the state argued that DNA testing of the hair did not have the scientific potential to produce new, noncumulative evidence materially relevant to Mr. Grant's assertion of actual innocence in light of the inculpatory lay witness testimony given at trial. (Vol. III, C. 416; R. 176-79.) On February 11, 2014, the trial court issued an order denying the motion because of the "unrecanted eyewitness testimony." (Vol. III, C. 480-81.) Mr. Grant timely appealed the order, arguing that he satisfied every statutory requirement for postconviction forensic testing, including the requirement that the requested testing had the scientific potential to produce new, noncumulative evidence materially relevant to his assertion of actual innocence. (See Vol. III, C. 484-85, 505-14.) On January 29, 2016, in a published opinion, the appellate court reversed and remanded "for the trial court to enter an order for further forensic testing," reasoning:

> "The testing sought by defendant in the present case has the potential to be materially relevant to a claim of actual innocence. No physical evidence was introduced at defendant's trial that directly linked defendant to the sexual assault of Z.G. *** Thus, if the hair found in Z.G.'s vagina did not match defendant's DNA, that result would stand alone, rather than being weighed against other forensic evidence against defendant. Moreover, defendant testified that Z.G. told him that Jeremy had sex with her. If the hair was found to match Jeremy's DNA, such a result would severely undermine Jeremy's credibility while bolstering that of defendant."

Grant, 2016 IL App (3d) 140211, ¶¶ 26, 30. The state did not petition for leave to appeal to this Court, and the mandate issued.

On remand, Mr. Grant was represented by public defender Jason Ramos. (See Vol. III, C. 525, 527, 532; R. 197.) The parties appeared before the trial court on July 8, 2016, and Mr. Ramos informed the court that the state had rendered further forensic testing impossible:

> "THE COURT: [T]he Appellate Court had reversed their [*sic*] earlier decision by the Circuit Court of Peoria County and ordered that further DNA testing or forensic testing be conducted.
>
> And where do we stand, Mr. Ramos?
>
> MR. RAMOS: Judge, but I guess by way of proffer at this point I would say that I spoke with [Peoria Police] Officer Scott Bowers and also people from the Property Department of the Peoria Police Department and they've informed me that all evidence with regards to Mr. Grant's case has been destroyed. So it would be my desire to put them on the stand today to testify to that, just so we have it on the record and then I will file whatever additional motions would be appropriate at that point."

(R. 197.) Officer Bowers and Peoria Property Room Clerk Larry Ware testified that all physical evidence from Mr. Grant's case, including the hair, was destroyed on February 28, 2007, *i.e.*, three years after the evidence was collected. (R. 198-207; see Supp. Ex. 8-17.) Mr. Ware further testified as follows:

> "Q. And was that destroyed as department policy?
> A. Yes.
> Q. There was no court order that you were aware of?
> A. No."

(R. 204.) Records produced by Mr. Ware indicated that he was the one who personally destroyed the evidence. (Supp. Ex. 9, 11, 13, 15, 17.) Mr. Ramos then stated: "I don't really have a motion at this point. I think we were just wanting to put the officers on the stand to get their testimony and I'll have to speak with Mr. Grant on how he would like me to proceed further." (R. 207.)

On October 6, 2016, through Mr. Ramos, Mr. Grant filed a motion for a new trial or judgment notwithstanding the verdict, noting that the Peoria Police Department had a statutory duty to preserve physical evidence from Mr. Grant's case until he finished serving his sentence and arguing that the Department "inherently acted in bad faith" by ignoring its duty, thereby violating his right of due process (Vol. III, C. 532-33). See 725 ILCS 5/116-4 (2018) (A-3–A-4) (requiring law enforcement agencies to preserve "any physical evidence in their possession or control that is reasonably likely to contain forensic evidence *** until the completion of the sentence, including the period of mandatory supervised release for the offense, *** for any conviction for [a homicide offense or a major sex] offense"); see also Pub. Act 91-871, H.B. 4593, § 10, eff. Jan. 1, 2001 (adding 725 ILCS 5/116-4). As relief, Mr. Grant asked for either a new trial at which the jury would be instructed that "the Peoria Police Department failed to comply with the statute and preserve the evidence," or entry of a not-guilty verdict. (Vol. III, C. 533.) Mr. Grant argued that the trial court had jurisdiction to grant the requested relief because the appellate court "revest[ed] it with jurisdiction by the order for DNA testing." (Vol. III, C. 533.)

On December 2, 2016, the state filed a motion to dismiss as untimely Mr. Grant's motion for a new trial or judgment notwithstanding the verdict, arguing in part: "Section 116-3 does not allow for the attack of the underlying conviction within its provisions. It simply permits certain types of post-conviction investigatory forensic testing. Any potential exculpatory results must be brought in another collateral proceeding to obtain post-conviction relief." (Vol. III, C. 536.)

The same day, the trial court conducted a hearing on the motions and denied them both, as follows:

> "[T]he Appellate Court did reinvest us with the power that ordered the testing, but we're unable to comply because there is no hair sample left because it was destroyed, that we all learned after the hearing. The question—what is the appropriate remedy?
>
> I think that a JNOV is not the proper remedy to be—in this situation, nor is a dismissal. We're just unable to comply. And I think we all agreed we were unable to comply, based upon the testimony of the officer. I don't find that it was willful or there was a bad intent on the Sheriff Department [*sic*]. They destroyed—they destroyed it based upon, I guess, their policy of—for whatever reason, did not understand they should keep it until his sentence was done. But I don't think that the appropriate remedy is to dismiss or grant a JNOV. Those, I agree, should have been done at a different stage.
>
> This is question [*sic*] that he argued his innocence, and there's—the question in the trial was: Identity and the hair follicle or hair sample will probably go to that. But it's no longer in existence, so what is the appropriate remedy? And when it went up on appeal, I don't know if it was every [*sic*] pointed out or ever inquired into that the hair sample no longer existed. But it doesn't exist, to the best of my knowledge and based on the testimony that was heard.
>
> So, respectfully, I deny that the State's motion to dismiss is untimely [*sic*] because I think that the—it was reinvested. But I don't—I also deny your motion for a new trial. I don't think it was willful, and I think it does have to show that it was willful or some type of tint [*sic*]."

(R. 218-19.)

The Office of the State Appellate Defender (OSAD) was appointed to represent Mr. Grant, and notice of appeal was filed on December 8, 2016. (Vol. III, C. 538-40; R. 219.) OSAD subsequently filed a motion to withdraw from the representation on the grounds that this appeal presents no issues of merit upon which Mr. Grant could expect to obtain any relief. On March 12, 2019, the appellate court granted OSAD's motion to withdraw in a published opinion, *People v. Grant*, 2019 IL App (3d) 160758, ¶ 11, from which Justice Mary W. McDade dissented. The majority concluded that the state's destruction of evidence neither entitled Mr. Grant to

statutory relief nor amounted to a violation of due process, reasoning that section 116-4 of the Code of Criminal Procedure of 1963 is directory rather than mandatory and that Mr. Grant had not shown bad faith on the part of the state. *Grant*, 2019 IL App (3d) 160758, ¶¶ 7-9. Justice McDade opined that the court should have the benefit of briefing before determining whether section 116-4 is mandatory rather than directory and whether the unlawful destruction of evidence is an act in bad faith. *Id.* at ¶¶ 16, 19 (McDade, J., dissenting). On March 22, 2019, OSAD filed a motion to vacate the appellate court's March 12, 2019 opinion and reappoint OSAD to represent Mr. Grant on this appeal. On April 9, 2019, the appellate court granted that motion.

Before the appellate court, Mr. Grant argued that he is entitled to vacatur of his conviction and a new trial with an adverse-inference jury instruction because section 116-4's command to preserve evidence is mandatory under controlling caselaw on the mandatory-directory dichotomy, in light of a related criminal statute attaching Class 4 felony consequences to the intentional failure to comply with section 116-4, and by reference to due-process principles. (Opening brf. at 10-17; see also Reply brf. at 1-7.) The state responded by arguing that the case was moot and section 116-4 is directory, insisting that "no rational remedy" is available where it violates the statutory command to preserve evidence. (State's brf. at 3-4, 9.) The state argued in the alternative that Mr. Grant had not shown bad faith on the part of the state. (State's brf. at 4-9.)

On December 24, 2020, the appellate court held in a published opinion that section 116-4 is mandatory and, as a result, the state's violation of that statute in this case entitles Mr. Grant to vacatur of his conviction and a new trial at which the jury is advised that the state failed to preserve potentially exculpatory evidence

as required and that the jury may construe that fact against the state. *People v. Grant*, 2020 IL App (3d) 160758, ¶¶ 33, 35-36. Justice Daniel L. Schmidt dissented, agreeing with Mr. Grant and the majority that section 116-4 is mandatory but opining that the state's violation of a mandatory statutory command need not be followed by any remedy for a defendant who is harmed thereby. *Grant*, 2020 IL App (3d) 160758, ¶¶ 44-48 (Schmidt, J., dissenting). Justice Schmidt decried vacatur of Mr. Grant's conviction as "an absurd windfall" and disapproved of the adverse-inference instruction on remand because "there has been no showing of bad faith." *Id.* at ¶¶ 49-50.

On March 1, 2021, the state petitioned for leave to appeal to this Court, taking no position on the mandatory-directory dichotomy but arguing generally that "the remedy fashioned by the panel majority is incompatible with both the legislature's intent, as reflected in the plain language of [section 116-4], and the interests of justice." (PLA at 7-8.) On May 26, 2021, this Court allowed the state's petition for leave to appeal. Before this Court, the state essentially mirrors Justice Schmidt's dissent below, admitting its own violation of section 116-4's mandatory statutory command to preserve physical evidence for postconviction forensic testing but denying that Mr. Grant is entitled to any relief from his conviction as a result of the violation. (Appellant's brf. at 6-15.) The state alternatively argues that even if Mr. Grant is entitled to vacatur of his conviction, he is not entitled to an adverse-inference instruction at any retrial because "there is no indication that [Mr. Ware] acted in bad faith" when he unlawfully destroyed the hair. (Appellant's brf. at 15-16.)

ARGUMENT

The state's destruction of potentially exculpatory evidence, in violation of its mandatory statutory duty to preserve that evidence and in deprivation of Andrew Grant's adjudicated statutory right to postconviction forensic testing thereof, entitles Mr. Grant to vacatur of his conviction and a new trial with an adverse-inference jury instruction.

When Andrew Grant first asked the appellate court for relief in this case, postconviction DNA testing had exonerated 365 people in the United States. Innocence Project, Exonerate the Innocent, http://www.innocenceproject.org/exonerate/ (as of May 20, 2019). The state having forever deprived Mr. Grant of the opportunity to likewise exonerate himself of aggravated criminal sexual assault through forensic testing of a hair found inside the complainant's vagina, the appellate court vacated his conviction and remanded for a new trial at which the jury is instructed that the state's unlawful destruction of the hair may be construed against it—the only remedy available to Mr. Grant through no fault of his own. *People v. Grant*, 2020 IL App (3d) 160758, ¶¶ 35-36, *appeal allowed*, 169 N.E.3d 347 (Ill. 2021). And even as the state challenges the appellate court's judgment in this Court, the ranks of the DNA-exonerated continue to grow. Exonerate the Innocent, http://www.innocenceproject.org/exonerate/ (375 exonerated as of October 5, 2021).

For almost 25 years now, that has been a goal of our legislature. In 1998, the Illinois General Assembly first acted to advance the postconviction exoneration of the innocent by providing a procedural mechanism by which a defendant may: (1) access physical evidence from his case in order to perform postconviction fingerprint, ballistic, or forensic DNA testing on that evidence; and (2) seek to vacate his conviction based on the results of that testing. 725 ILCS 5/116-3 (2012) (A-1–A-2); see Pub. Act 90-141, H.B. 2138, § 5, eff. Jan. 1, 1998 (adding 725 ILCS 5/116-3). The statutory right to postconviction forensic testing of physical evidence was intended to "make sure that if science can exonerate someone, that science

does exonerate them," because "[n]obody wants the wrong person behind bars." 90th Ill. Gen. Assem., House Proceedings on H.B. 2138, Apr. 15, 1997, at 16-17 (statements of Representative Roskam); see also *id.* at 22 (statements of Representative Tom Johnson) ("I think that the one uniform thing that we all agree on, and that is that as the new technology gives us the ability to finally determine if somebody is wrongfully convicted[,] the last thing any of us want to see is somebody who is wrongfully incarcerated.").

The legislation creating a limited right to postconviction testing was thus viewed as means to make justice. See *id.* (statements of Representative Currie) ("This is a simple issue of basic justice."); see also 90th Ill. Gen. Assem., Senate Proceedings on H.B. 2138, May 9, 1997, at 107 (Senator Petka) (stating that "this piece of legislation strengthens the integrity of the judicial system in the fact-finding process"). House Bill 2138 passed by an overwhelming margin in the House and unanimously in the Senate. See 90th Ill. Gen. Assem., House Proceedings on H.B. 2138, Apr. 15, 1997, at 23 (showing that H.B. 2138 passed in the House 107 to 11); 90th Ill. Gen. Assem., Senate Proceedings on H.B. 2138, May 9, 1997, at 107 (showing that H.B. 2138 passed in the Senate 56 to 0).

But as this case demonstrates, "[a] major impediment to the use of DNA evidence to exonerate the wrongly convicted has been—and continues to be—the destruction of evidence, such as rape kits, by the government." Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239, 1240 (2005). Our legislature has acted to remove that impediment by requiring the preservation of physical evidence in certain classes of cases. See 725 ILCS 5/116-4(a), (b) (2018) (A-3) (providing that law enforcement agencies "shall preserve, subject to a continuous chain of custody, any physical evidence in their possession or control that is reasonably likely to contain forensic evidence" and that such evidence

"shall be securely retained *** until the completion of the sentence, including the period of mandatory supervised release for the offense, *** for any conviction for [a homicide offense or a major sex] offense"); see also Pub. Act 91-871, H.B. 4593, § 10, eff. Jan. 1, 2001 (adding 725 ILCS 5/116-4). And the same legislation that imposed the requirement to preserve physical evidence, House Bill 4593, also criminalized the intentional failure to comply with that requirement:

> "(a) It is unlawful for a law enforcement agency or an agent acting on behalf of the law enforcement agency to intentionally fail to comply with the provisions of subsection (a) of Section 116-4 of the Code of Criminal Procedure of 1963.
>
> (b) Sentence. A person who violates this Section is guilty of a Class 4 felony."

720 ILCS 5/33-5 (2018) (A-5); see Pub. Act 91-871, H.B. 4593, § 5, eff. Jan. 1, 2001 (adding 720 ILCS 5/33-5).

The legislative history leaves no doubt that section 116-4 of the Code of Criminal Procedure of 1963 and section 33-5 of the Criminal Code of 2012 were intended to work together to protect the forensic-testing right previously created by section 116-3 of the Code of Criminal Procedure of 1963. The sponsor of House Bill 4593 explained as much:

> "A couple of years ago, we here in the General Assembly, we passed a Post Conviction Forensic Testing Act which allowed a convicted person, under certain circumstances, to obtain DNA testing and other forensic testing on evidence from his or her trial when the technology for the testing was not available during the trial period. Since that time, *** DNA evidence has figured in the exoneration of several wrongfully convicted defendant[s] in Illinois on death row. Also in recent years, innocent men have been released from prison when using the DNA testing that proved their innocence, and moreover, in some cases this testing also even caught the perpetrator. What this Bill is intended, is to ensure that the evidence *** is retained and available for post conviction testing."

91st Ill. Gen. Assem., House Proceedings on H.B. 4593, Feb. 23, 2000, at 77-78 (statements of Representative Giles); see also *id.* at 78 (Representative Giles) (stating that "the point" of H.B. 4593 is not "to try to punish anyone" but "to make

sure that this evidence is retained, and that individual will have the opportunity for recourse, or to prove their innocence"); *id.* at 79 (Representative Giles) ("We're just simply trying to secure and retain the evidence here. That's the thrust of this legislation. It's not to punish anyone."). And just like the legislation creating the right to postconviction forensic testing, the legislation aimed at protecting that right was passed by a very large margin in the House and unanimously in the Senate. See *id.* at 83 (showing that H.B. 4593 passed in the House 102 to 13); 91st Ill. Gen. Assem., Senate Proceedings on H.B. 4593, Mar. 31, 2000, at 22 (showing that H.B. 4593 passed in the Senate 56 to 0).

Before this Court, the state quietly concedes—for the first time—that section 116-4's command to preserve physical evidence is mandatory rather than directory. (Appellant's brf. at 11; compare PLA at 7-8; State's brf. at 3-4.) The state yet insists that its destruction of potentially exculpatory evidence, in blatant violation of the mandatory statutory command to preserve that evidence, can have no consequence save a possible prosecution of its own agent under a criminal provision that may well have been unused in the more than 20 years since its enactment, see Westlaw Citing References for 720 ILCS 5/33-5 (2021) (A-6). (Appellant's brf. at 6-15.) The state is mistaken. Because its destruction of the hair violated a mandatory statutory command to preserve that evidence, Mr. Grant is entitled to vacatur of his conviction and a new trial with an adverse-inference jury instruction. Far from an absurdity (Appellant's brf. at 14-15) or a departure from the will of the legislature (Appellant's brf. at 9-11), that relief is a rational and effective remedy that honors the legislative intent behind the three closely related statutes at issue in this case.

I. Section 116-4's command to preserve physical evidence is not directory but mandatory.

The mandatory-directory dichotomy is a "separate question" from the mandatory-permissive dichotomy, though the two are "easily confused." *People v. Robinson*, 217 Ill. 2d 43, 50-52 (2005). "[T]he mandatory-permissive dichotomy concerns whether the language of a statute has the force of a command that imposes an obligation, or is merely a grant of permission or a suggestion, which therefore imposes no obligation." *Robinson*, 217 Ill. 2d at 52. The mandatory-directory dichotomy, on the other hand, "concerns the consequence of a failure to fulfill an obligation." *Id.* Differently stated, a statute aimed at a state actor is either mandatory or permissive, meaning that it either does or does not command the state actor to comply with its terms, and a statutory command is either mandatory or directory, meaning that a failure to comply with the command either "will or will not have the effect of invalidating the governmental action" to which the command "relates." (Internal quotation marks omitted.) *Id.* at 51-52.

> "Under the principles of both dichotomies, a statute could be mandatory, in that the [state actor] has no discretion to ignore the directive, but noncompliance nevertheless does not require automatic relief absent prejudice. [Citation.] Yet, if mandatory under a mandatory-directory dichotomy, the duty is necessarily mandatory under both dichotomies, and the governmental action to which the requirement relates is invalid."

People v. Sophanavong, 2020 IL 124337, ¶ 55 n.3 (Karmeier, J., dissenting), *reh'g denied* (Nov. 16, 2020).

In this case, as in *Robinson*, "there is no genuine dispute" that the statutory language "has the force of a command," *i.e.*, that section 116-4 is mandatory under the mandatory-permissive dichotomy, such that the state "failed to do something that was obligatory" when it destroyed the hair at a time when Mr. Grant was

still serving his sentence. *Robinson*, 217 Ill. 2d at 50-52; see 725 ILCS 5/116-4(b) (2018) (A-3) (providing that "the evidence *** shall be securely retained by a law enforcement agency" and further providing that "[r]etention shall be until the completion of the sentence, including the period of mandatory supervised release for the offense"); *Robinson*, 217 Ill. 2d at 54 (stating that "when the issue is whether the force of the statutory language is mandatory or permissive, then 'shall' does usually indicate the legislature intended to impose a mandatory obligation"); see also 725 ILCS 5/116-4(c) (2018) (A-3) (referring to "the law enforcement agency required to retain evidence"). "The issue is the *consequence*" of the state's violation of the statutory command, *i.e.*, whether section 116-4 is mandatory under the mandatory-directory dichotomy. (Emphasis in original.) *Robinson*, 217 Ill. 2d at 51-52.

"Whether a statutory command is mandatory or directory is a question of statutory construction" that is subject to *de novo* review. *Id.* at 54. "The answer is a matter of legislative intent." *Id.* A provision, then, is mandatory "if the intent of the legislature dictates a particular consequence for failure to comply with the provision," with that consequence being invalidation of the state action to which the provision relates. *People v. Delvillar*, 235 Ill. 2d 507, 515-17 (2009). While the legislative intent is best evidenced by the language of the statute, the purpose of the statute also may be considered. *Robinson*, 217 Ill. 2d at 54, 56; see also *Andrews v. Foxworthy*, 71 Ill. 2d 13, 21 (1978) (stating that "when a statute prescribes the performance of an act by a public official or a public body, the question of whether it is mandatory or directory depends on its purpose"). Accordingly, this Court has long held that statutory commands "designed to secure order, system and dispatch in proceedings" are generally directory rather than mandatory, but

statutory commands that are instead "intended for the protection of the citizen, and by a disregard of which his rights might be and generally would be injuriously affected, *** are not directory but mandatory." (Internal quotation marks omitted.) *Robinson*, 217 Ill. 2d at 56.

It cannot be argued that section 116-4 was intended for administrative ease or efficiency. Section 116-4 imposes significant costs and burdens on the state as part of a larger statutory scheme designed to protect wrongfully convicted citizens by ensuring their access to potentially exculpatory evidence for so long as their liberty is actually constrained by the state. See 725 ILCS 5/116-3 (2012) (A-1–A-2) (providing a procedural mechanism by which a defendant may: (1) access physical evidence from his case in order to perform postconviction fingerprint, ballistic, or forensic DNA testing on that evidence; and (2) seek to vacate his conviction based on the results of that testing). It is equally obvious that the state's failure to comply with section 116-4 will not just generally injure the right to postconviction testing—it will always eviscerate that right, for evidence that is lost or destroyed can never be accessed and tested by a wrongfully convicted citizen who seeks to prove his innocence. As a majority of the appellate court panel put it,

> "The legislature has provided convicted persons with a limited right to postconviction DNA testing. Where the State illegally destroys evidence, that right is fully and irreparably extinguished. The harm cannot be overstated. Defendants are no longer able to have forensic tests conducted and are foreclosed from ever proving their innocence."

People v. Grant, 2020 IL App (3d) 160758, ¶ 30, *appeal allowed*, 169 N.E.3d 347 (Ill. 2021). Section 116-4's command to preserve evidence is therefore mandatory.

II. Violation of section 116-4's mandatory command to preserve physical evidence requires relief for a defendant who was thereby deprived of his statutory right to postconviction forensic testing of that evidence.

For its part, the state acknowledges that a statutory provision is mandatory under the mandatory-directory dichotomy where " 'the right the provision is designed to protect would generally be injured under a directory reading.' " (Appellant's brf. at 8-9, quoting *In re M.I.*, 2013 IL 113776, ¶ 17.) It also concedes that section 116-4 is mandatory rather than directory. (Appellant's brf. at 11.) But the concession apparently is not based on the acknowledgment; the state does not even identify as among the "STATUTES INVOLVED" in this case section 116-3, which created the right to postconviction forensic testing that section 116-4 was designed to protect, even though that right is necessarily nullified by destruction of physical evidence in violation of section 116-4. (See Appellant's brf. at 2, 8-11.) Instead, according to the state, section 116-4 is mandatory because "the General Assembly dictated a particular consequence" for intentional violations of that statute: felony liability under 720 ILCS 5/33-5 (2018) (A-5). (Appellant's brf. at 11.)

Mr. Grant agrees that our legislature's prescription of Class 4 felony penalties for the intentional failure to comply with section 116-4 supports the conclusion that it intended the statute to be mandatory rather than directory. See, *e.g.*, *O'Brien v. White*, 219 Ill. 2d 86, 96 (2006) ("A strong indication that the legislature intended a provision to be mandatory is if the statute prescribes a consequence for failing to obey the statutory provision."). But the state goes on to argue that "where, as here, the legislature has expressly specified a consequence for the failure to abide by a statutory requirement, its omission of other consequences must be viewed as expressing an intent to exclude those other consequences," citing *In re D.W.*, 214 Ill. 2d 289, 308 (2005)—a child-protection case that did not involve the

mandatory-directory dichotomy—for its application of *expressio unius est exclusio alterius*. (Appellant's brf. at 10-11.) In other words, the state argues that because the legislature authorized the criminal prosecution of a state agent who intentionally violates section 116-4, the legislature also must have made the judgment that no relief may be had by a defendant whose statutory right to postconviction forensic testing is erased by a section 116-4 violation. For three reasons, this Court should reject the state's argument.

First, while *expressio unius* is a useful cannon of statutory interpretation where it applies, any resort to it here is dubious at best. "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). That is, judicial application of this interpretive cannon requires a statutory "series of terms from which an omission bespeaks a negative implication." *Echazabal*, 536 U.S. at 81; see also *In re Det. of Lieberman*, 201 Ill. 2d 300, 319 (2002) (describing *expressio unius* as "the rule of statutory construction that items omitted from a list are intended by the legislature as exclusions from that list"). Section 116-4 contains no series of terms or list of items from which the requested relief was omitted, mindfully or otherwise. See 725 ILCS 5/116-4 (2018) (A-3–A-4).

Second, "the rule of *expressio unius est exclusio alterius* is a rule of statutory construction and not a rule of law." (Internal quotation marks omitted.) *Lieberman*, 201 Ill. 2d at 319. *Expressio unius* is therefore "subordinate to the primary rule that the legislative intent governs the interpretation of the statute." (Internal quotation marks omitted.) *Id.* To read section 33-5 as foreclosing any relief to a

defendant who was denied his statutory right to postconviction forensic testing due to the state's violation of section 116-4 "would be to deny effect to the legislature's clearly expressed intent in enacting this law," *id.* at 318-19: to ensure that wrongfully convicted citizens "will have the opportunity for recourse, or to prove their innocence." 91st Ill. Gen. Assem., House Proceedings on H.B. 4593, Feb. 23, 2000, at 77-78 (statements of Representative Giles). For the same reason, the state misses the mark with its citation of *People v. Glisson*, 202 Ill. 2d 499, 505 (2002), a savings-clause case that did not involve the mandatory-directory dichotomy, for the proposition that a court may not "read new consequences or remedies into statutes that conflict with the legislature's demonstrated intent." (Appellant's brf. at 11.) The remedy inferred by the appellate court in this case is not only consistent with our legislature's demonstrated intent to protect the wrongfully convicted, see 725 ILCS 5/116-3 (2012) (A-1–A-2), 116-4 (2018) (A-3–A-4)—it is quite literally the only available means to protect the wrongfully convicted where state actors destroy the physical evidence they were mandated to preserve.

The state similarly cites *People v. Pullen*, 192 Ill. 2d 36, 42 (2000), and *People v. Smith*, 2016 IL 119659, ¶ 28, for the proposition that courts may not "rewrite statutes to correct perceived errors or oversights by the legislature." (Appellant's brf. at 11.) Again, neither of those cases involved or even mentioned the mandatory-directory dichotomy. And as the state itself acknowledges just two pages later (Appellant's brf. at 13), where a court is faced with a violation of a mandatory statutory command, it may well be called upon to infer an invalidating consequence to carry out the legislature's implied intent. See *In re Rita P.*, 2014 IL 115798, ¶¶ 44-45 (indicating that a statute is mandatory with respect to the mandatory-directory dichotomy, notwithstanding its lack of language imposing an invalidating

consequence for its violation, where "the right or rights the statute was designed to protect would generally be injured by a directory reading"); see also *People v. Delvillar*, 235 Ill. 2d 507, 514 (2009) (stating that "statutes are mandatory if the *intent* of the legislature dictates a particular consequence for failure to comply with the provision" (emphasis added)).

Third, the possibility that state actors could face criminal prosecution under section 33-5—a statute with no presence in Illinois caselaw despite having been on the books for more than 20 years, see Westlaw Citing References for 720 ILCS 5/33-5 (2021) (A-6)—is not the kind of consequence that is required for violation of a mandatory statutory command. Again, the failure to comply with a mandatory statutory command carries the unconditional consequence of "invalidating the governmental action" to which the command "relates." (Internal quotation marks omitted.) *People v. Robinson*, 217 Ill. 2d 43, 52 (2005). And as established above, section 116-4's command to preserve physical evidence is mandatory because it was "intended for the protection of the citizen" and because a failure to comply with that command will "injuriously affect[]" the citizen's rights, namely, his statutory right to postconviction forensic testing. (Internal quotation marks omitted.) *Id.* at 56. It follows that violation of the command must be met by a consequence ameliorating to whatever extent possible the injurious effect of the violation. See *People v. Ramirez*, 214 Ill. 2d 176, 178-80, 187 (2005) (reversing the defendant's conviction and remanding for a new trial in consequence for the clerk's failure to comply with a mandatory statutory requirement to provide the defendant with notice of the date of trial *in absentia* by certified mail); see also *Robinson*, 217 Ill. 2d at 60 (explaining that "a mandatory reading [of the statute at issue in *Ramirez*] was necessary to adequately protect the important trial rights the certified mail requirement was designed to protect").

And section 33-5 does not provide such a consequence. The theoretical possibility of *Mr. Ware's* conviction under section 33-5 cannot restore *Mr. Grant's* lost opportunity to prove his innocence through forensic testing of the hair—never mind that any prosecution of Mr. Ware was time-barred more than six years before Mr. Grant learned of the hair's unlawful destruction. See 720 ILCS 5/3-5(b) (2020) (providing that "a prosecution for any offense not designated in subsection (a) or (a-5) must be commenced within 3 years after the commission of the offense if it is a felony"). Far from the "automatic relief" required, *Sophanavong*, 2020 IL 124337, ¶ 55 n.3 (Karmeier, J., dissenting), prosecutions under section 33-5 will be exceedingly rare, not only due to the time bar but also because

> "criminal penalty provisions create an inherent conflict for the government. When a prisoner files a petition for DNA testing, innocence protection statutes give the local prosecuting authority the right to oppose the petition and ask the court to deny DNA testing of biological evidence. In addition, if an evidence custodian destroys the very biological evidence that the government did not want tested, the same prosecutor's office would be responsible for deciding whether to file criminal charges against the custodian under the innocence protection statute. The decision to initiate criminal charges is a largely unreviewable, discretionary decision vested with the prosecution, not the court. A district attorney's office has the right to decide for any reason, or for no reason at all, not to prosecute an evidence custodian for intentionally destroying evidence in violation of the statute. This gives the government the power to nullify criminal penalty provisions in innocence protection statutes in any case where the government opposed DNA testing."

Evidence Destroyed, Innocence Lost, 42 Am. Crim. L. Rev. at 1259-60.

The state nevertheless argues that the bare existence of section 33-5 must suffice as the sole consequence for its violation of section 116-4 because "[o]nce the trial is complete and the conviction secured, there is no governmental action to which the post-trial preservation requirement relates and no pending proceeding or governmental action that can be undone as a consequence of the section 116-4 violation." (Appellant's brf. at 13.) But as *Ramirez* shows, a proceeding or

governmental action need not be pending to be invalidated due to the state's violation of a related mandatory statutory command. See *Ramirez*, 214 Ill. 2d at 187 (reversing the defendant's conviction after trial *in absentia* due to the state's violation of a mandatory statutory requirement regarding notice of that trial); see also *M.I.*, 2013 IL 113776, ¶ 13 (considering whether a statutory command to hold a hearing on the state's extended juvenile jurisdiction motion within 60 days of the motion's filing was mandatory, such that failure to comply with the command invalidated the adult sentence imposed after trial); *Delvillar*, 235 Ill. 2d at 513 (considering whether a statutory command to admonish the defendant of the possible immigration consequences of his guilty plea was mandatory, such that failure to comply with the command invalidated the plea and the resulting conviction).

To be sure, the statutory command in *Ramirez* directly related to the proceeding invalidated by the violation of that command: "At issue in *Ramirez* was a statute permitting a defendant to be tried *in absentia* even though he was not present in open court when the trial date was set." *Robinson*, 217 Ill. 2d at 59. The same statute also provided that " '[w]hen such trial date is set the clerk shall send to the defendant, by certified mail at his last known address indicated on his bond slip, notice of the new date which has been set for trial.' " *Ramirez*, 214 Ill. 2d at 179-80 (quoting 725 ILCS 5/115-4.1(a) (1992)). This Court concluded that the notice provision is mandatory and so trial *in absentia* and any conviction resulting therefrom are invalid absent the required notice. *Id.* at 182-83, 187.

Mr. Grant acknowledges that the relationship between section 116-4 and his trial and conviction is not as direct as the relationship between the notice provision and the defendant's trial and conviction in *Ramirez*. But the relationship is not, as the state suggests, nonexistent. (See Appellant's brf. at 12-14.) Section 116-4 includes express references both to trial, 725 ILCS 5/116-4(a) (2018) (A-3),

and to entry of a judgment of conviction, 725 ILCS 5/116-4(b), (c) (2018) (A-3). Indeed, entry of a judgment of conviction for a homicide offense or a major sex offense is the very event that triggers a law enforcement agency's duty to "securely retain[]" physical evidence connected to that offense. 725 ILCS 5/116-4(a), (b) (A-3). The conviction is thus subject to invalidation as the "governmental action" to which section 116-4's mandatory command to preserve evidence most clearly "relates." (Internal quotation marks omitted.) *Robinson*, 217 Ill. 2d at 52.

To whatever extent the state means to argue that its violation of a mandatory statutory command must precede in time the governmental action invalidated by the violation, even some of the caselaw cited by the state does not bear that out. (See Appellant's brf. at 12-13.) *Robinson* involved a statute requiring service of an order summarily dismissing a postconviction petition within 10 days of the order's entry. *Robinson*, 217 Ill. 2d at 46-47. Although this Court determined that the statute was directory, it also made clear that if the statute were instead mandatory with respect to the mandatory-directory dichotomy, then an order of dismissal would be invalidated by any subsequent violation of the statutory command regarding service of that order. See *id.* at 58-59 (holding that "the clerk's duty to effect service within 10 days is directory, and thus the clerk's tardiness did not invalidate the judgment of the circuit court"). It follows that an earlier governmental action may be invalidated by a later violation of a related statutory command.

The state next protests that invalidation of the conviction is not a "proportionate remedy to any harm caused by the section 116-4 violation" and is in fact an "absurd windfall" to the defendant aggrieved by that violation. (Appellant's brf. at 14-15.) Mr. Grant's disagreement on this point could not be more vehement. By destroying the hair, the state did not just violate section 116-4—it effected a

concomitant and total deprivation of Mr. Grant's adjudicated statutory right to test that hair in furtherance of his fight to prove his actual innocence of a violent sexual crime. See 725 ILCS 5/116-3 (A-1–A-2) (providing a procedural mechanism by which a defendant may: (1) access physical evidence from his case in order to perform postconviction fingerprint, ballistic, or forensic DNA testing on that evidence; and (2) seek to vacate his conviction based on the results of that testing); *People v. Grant*, 2016 IL App (3d) 140211, ¶¶ 16, 22, 28, 30 (concluding that Mr. Grant satisfied each element of section 116-3 and therefore was entitled to forensic testing of the hair). As the appellate court panel majority recognized, "[t]he permanent deprivation of a defendant's right to prove his own innocence is a deprivation of such a magnitude that the legislature must have intended a remedy." *Grant*, 2020 IL App (3d) 160758, ¶ 32.

And due to the state's unlawful act of destruction, vacatur of Mr. Grant's conviction and a new trial with an adverse-inference jury instruction is the only available remedy in a case that turned on the credibility of three lay witnesses, a case to which postconviction forensic testing could have made a real difference:

> "No physical evidence was introduced at defendant's trial that directly linked defendant to the sexual assault of Z.G. *** Thus, if the hair found in Z.G.'s vagina did not match defendant's DNA, that result would stand alone, rather than being weighed against other forensic evidence against defendant. Moreover, defendant testified that Z.G. told him that Jeremy had sex with her. If the hair was found to match Jeremy's DNA, such a result would severely undermine Jeremy's credibility while bolstering that of defendant."

Grant, 2016 IL App (3d) 140211, ¶ 26. To deny Mr. Grant the only available remedy because a state agent broke the law and made section 116-3 forensic testing impossible in a close case is to give a windfall to the state, whose premature destruction of potentially exculpatory evidence effectively insulated Mr. Grant's

conviction from postconviction proof of actual innocence. Allowing the state to so benefit from its own illegal conduct is itself an absurdity—and an injustice that this Court should presume our legislature did not intend. See *People v. Palmer*, 2021 IL 125621, ¶ 53 ("It is presumed that the legislature did not intend absurd, inconvenient, or unjust results.").

The state relatedly argues that the available remedy is "absurd" as duplicative or futile since "there is no new evidence to introduce or old evidence that should be excluded" at a new trial. (Appellant's brf. at 15.) This argument dismisses a crucial part of that remedy: the adverse-inference jury instruction. The jury at any new trial presumably would hear some version of the same conflicting lay witness testimony given at the original trial. (See R. 36-66, 84-102.) And the jury at any new trial presumably would hear the same expert and/or stipulated testimony that no semen was present on swabs taken from Z.G.'s vagina, mouth, and rectum. (See R. 66-82.) But the jury at any new trial also would be advised that it may construe the unlawful destruction of evidence against the state. *Grant*, 2020 IL App (3d) 160758, ¶ 36. Thus any new trial would not be identical to the original trial, at which no such instruction was given. (See Vol. I, C. 50-64; R. 103-06, 121.)

Finally, the state argues in the alternative that even if vacatur of Mr. Grant's conviction is required, an adverse-inference jury instruction is not required because "there is no indication that [the Peoria Police Department] acted in bad faith" in destroying the hair. (Appellant's brf. at 15-16.) The state goes on to distinguish *Arizona v. Youngblood*, 488 U.S. 51 (1988), on the grounds that here, "unlike in *Youngblood*, there is nothing to support an inference that failure to preserve occurred in an attempt to hide potentially exculpatory evidence." (Appellant's brf. at 16.) The state's alternative argument must fail because it is based on two faulty premises.

One, the state appears to believe that an adverse inference on missing evidence is permissible only where *Youngblood* bad faith has been shown, *i.e.*, "knowledge of the exculpatory value of the evidence at the time it was lost or destroyed," *Youngblood*, 488 U.S. at 56 n.*. (See Appellant's brf. at 15-16.) But any such belief is not borne out by the authority—including *Youngblood* itself. In that case, a five-justice majority held that the state's bad-faith failure to preserve potentially exculpatory evidence constitutes a denial of due process of law. *Youngblood*, 488 U.S. at 58. The majority went on to conclude that no due-process violation had occurred in the case before it—where, weeks before the defendant was arrested for crimes including sexual assault, police collected but did not refrigerate semen-stained clothing belonging to the child victim—reasoning that "there was no suggestion of bad faith on the part of the police" because "[t]he failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent." *Id.* at 53-54, 58. Yet the jurors were instructed that "if they found the State had destroyed or lost evidence, they might 'infer that the true fact is against the State's interest.'" *Id.* at 54. The majority did not disapprove the instruction, see *id.* at 52-59, and in a concurring opinion, Justice John Paul Stevens indicated that the instruction had bolstered the fairness of the defendant's trial, *id.* at 59-60 (Stevens, J., concurring in the judgment).

And so, in a sexual-assault case that pre-dated sections 116-3 and 116-4, the appellate court held that the defendant was entitled to the same jury instruction given in *Youngblood* notwithstanding the court's conclusion that police did not act in bad faith by failing to retain the complainant's underwear after the initial investigation. *People v. Danielly*, 274 Ill. App. 3d 358, 362-65, 368 (1st Dist. 1995).

The court reasoned that

> "such an instruction, when combined with the defendant's opportunity to argue the 'missing evidence' issue to the jury in closing, serves as an effective protection to defendants from any uncertainty that might arise from missing evidence. The instruction also serves as an incentive for the police to exercise due care in their handling of evidence. This instruction is particularly important in those cases, as here, where the police have in their possession evidence and subsequently fail to properly preserve the evidence for trial."

Danielly, 274 Ill. App. 3d at 368.

Danielly is far from an outlier in Illinois caselaw. See *People v. Moore*, 2016 IL App (1st) 133814, ¶¶ 12, 13, 17, 38 (approving an adverse-inference instruction where the state failed to preserve multiple photo arrays for introduction into evidence at trial, though "the arrays were only potentially useful and there [wa]s no evidence that the photos were missing due to bad faith"); *In re Julio C.*, 386 Ill. App. 3d 46, 49-50, 53 (1st Dist. 2008) (suggesting an adverse-inference instruction where police failed to retain a vehicle for pre-trial inspection by the defense, though "there was no evidence of bad faith"); *People v. Camp*, 352 Ill. App. 3d 257, 259, 262 (2d Dist. 2004) (suggesting an adverse-inference instruction where the state's attorney lost a videotape of the defendant's field sobriety tests, though the defendant conceded that the loss was not in bad faith). This line of discovery-sanction cases shows that even where evidence is lost or destroyed by the state absent knowledge of its exculpatory value, *i.e.*, without *Youngblood* bad faith, an adverse-inference jury instruction may be appropriate.

The second faulty premise, essentially an echo of the first, is that the judgment below would permit the jury at any new trial to infer that the state destroyed the hair in bad faith. (See Appellant's brf. at 16.) The appellate court ordered in relevant part "that the jury at any retrial be advised that the State has failed to preserve

potentially exculpatory evidence as required and that the jury may construe that fact against the State." *Grant*, 2020 IL App (3d) 160758, ¶ 36. Of course, the jury would not be tasked with determining whether Mr. Ware had knowledge of the exculpatory value of the hair when he destroyed it; the jury would be tasked with determining whether the state proved beyond a reasonable doubt that Mr. Grant had committed the sexual offenses charged. The adverse inference that the jury would be permitted to draw, then, is no greater and no less than what Mr. Grant might have proved through forensic testing of the hair, if the state had not unlawfully prevented him from doing so: that the hair was not his and therefore tended to exculpate him of the charged offenses. See *Grant*, 2016 IL App (3d) 140211, ¶ 27 ("Although the State is correct that a nonmatch would not completely exonerate defendant of the sexual assault, it is arguable that such a result could advance defendant's claim that he is innocent of the crime.").

In sum, the state would have this Court reverse the judgment below and hold that its agent's violation of a mandatory statutory command—a command that was indisputably intended to protect a defendant's right—a command whose violation eradicates the defendant's right—entitles the defendant to precisely nothing. (See Appellant's brf. at 9-16.) This Court should instead honor our legislature's intent for a network of statutes designed to provide the wrongfully convicted with some "opportunity for recourse." 91st Ill. Gen. Assem., House Proceedings on H.B. 4593, Feb. 23, 2000, at 77-78 (statements of Representative Giles); see 720 ILCS 5/33-5 (A-5); 725 ILCS 5/116-3 (A-1–A-2); 725 ILCS 5/116-4 (A-3–A-4). The remedy inferred by the appellate court, "imperfect" though it may be, *Grant*, 2020 IL App (3d) 160758, ¶ 36, is the only way to do so here.

CONCLUSION

For the foregoing reasons, Andrew Grant, defendant-appellee, respectfully requests that this Court affirm the appellate court's judgment.

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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 pages.

/s/Amy J. Kemp
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APPENDIX TO THE BRIEF

Illinois Statutes Annotated - 2012

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 725. Criminal Procedure
Act 5. Code of Criminal Procedure of 1963 (Refs & Annos)
Title VI. Proceedings at Trial
Article 116. Post-Trial Motions

725 ILCS 5/116-3

5/116-3. Motion for fingerprint, Integrated Ballistic Identification System, or forensic testing not available at trial regarding actual innocence

Effective: October 23, 2007
Currentness

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

(d) If evidence previously tested pursuant to this Section reveals an unknown fingerprint from the crime scene that does not match the defendant or the victim, the order of the Court shall direct the prosecuting authority to request the Illinois State Police Bureau of Forensic Science to submit the unknown fingerprint evidence into the FBI's Integrated Automated Fingerprint Identification System (AIFIS) for identification.

Credits

Laws 1963, p. 2836, § 116-3, added by P.A. 90-141, § 5, eff. Jan. 1, 1998. Amended by P.A. 93-605, § 15, eff. Nov. 19, 2003; P.A. 95-688, § 5, eff. Oct. 23, 2007.

Illinois Statutes Annotated - 2018

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 725. Criminal Procedure
Act 5. Code of Criminal Procedure of 1963 (Refs & Annos)
Title VI. Proceedings at Trial
Article 116. Post-Trial Motions

725 ILCS 5/116-4

5/116-4. Preservation of evidence for forensic testing

Effective: January 25, 2013
Currentness

§ 116-4. Preservation of evidence for forensic testing.

(a) Before or after the trial in a prosecution for a violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012 [1] or in a prosecution for an offense defined in Article 9 of that Code, [2] or in a prosecution for an attempt in violation of Section 8-4 of that Code [3] of any of the above-enumerated offenses, unless otherwise provided herein under subsection (b) or (c), a law enforcement agency or an agent acting on behalf of the law enforcement agency shall preserve, subject to a continuous chain of custody, any physical evidence in their possession or control that is reasonably likely to contain forensic evidence, including, but not limited to, fingerprints or biological material secured in relation to a trial and with sufficient documentation to locate that evidence.

(b) After a judgment of conviction is entered, the evidence shall either be impounded with the Clerk of the Circuit Court or shall be securely retained by a law enforcement agency. Retention shall be permanent in cases where a sentence of death is imposed. Retention shall be until the completion of the sentence, including the period of mandatory supervised release for the offense, or January 1, 2006, whichever is later, for any conviction for an offense or an attempt of an offense defined in Article 9 of the Criminal Code of 1961 or the Criminal Code of 2012 or in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012 or for 7 years following any conviction for any other felony for which the defendant's genetic profile may be taken by a law enforcement agency and submitted for comparison in a forensic DNA database for unsolved offenses.

(c) After a judgment of conviction is entered, the law enforcement agency required to retain evidence described in subsection (a) may petition the court with notice to the defendant or, in cases where the defendant has died, his estate, his attorney of record, or an attorney appointed for that purpose by the court for entry of an order allowing it to dispose of evidence if, after a hearing, the court determines by a preponderance of the evidence that:

(1) it has no significant value for forensic science analysis and should be returned to its rightful owner, destroyed, used for training purposes, or as otherwise provided by law; or

(2) it has no significant value for forensic science analysis and is of a size, bulk, or physical character not usually retained by the law enforcement agency and cannot practicably be retained by the law enforcement agency; or

(3) there no longer exists a reasonable basis to require the preservation of the evidence because of the death of the defendant; however, this paragraph (3) does not apply if a sentence of death was imposed.

(d) The court may order the disposition of the evidence if the defendant is allowed the opportunity to take reasonable measures to remove or preserve portions of the evidence in question for future testing.

(d-5) Any order allowing the disposition of evidence pursuant to subsection (c) or (d) shall be a final and appealable order. No evidence shall be disposed of until 30 days after the order is entered, and if a notice of appeal is filed, no evidence shall be disposed of until the mandate has been received by the circuit court from the appellate court.

(d-10) All records documenting the possession, control, storage, and destruction of evidence and all police reports, evidence control or inventory records, and other reports cited in this Section, including computer records, must be retained for as long as the evidence exists and may not be disposed of without the approval of the Local Records Commission.

(e) In this Section, "law enforcement agency" includes any of the following or an agent acting on behalf of any of the following: a municipal police department, county sheriff's office, any prosecuting authority, the Department of State Police, or any other State, university, county, federal, or municipal police unit or police force.

"Biological material" includes, but is not limited to, any blood, hair, saliva, or semen from which genetic marker groupings may be obtained.

Credits

Laws 1963, p. 2836, § 116-4, added by P.A. 91-871, § 10, eff. Jan. 1, 2001. Amended by P.A. 92-459, § 10, eff. Aug. 22, 2001; P.A. 96-1551, Art. 2, § 1040, eff. July 1, 2011; P.A. 97-1150, § 635, eff. Jan. 25, 2013.

Illinois Statutes Annotated - 2018

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 720. Criminal Offenses
Criminal Code
Act 5. Criminal Code of 2012 (Refs & Annos)
Title III. Specific Offenses
Part E. Offenses Affecting Governmental Functions
Article 33. Official Misconduct (Refs & Annos)

720 ILCS 5/33-5

5/33-5. Preservation of evidence

Effective: August 22, 2001
Currentness

§ 33-5. Preservation of evidence.

(a) It is unlawful for a law enforcement agency or an agent acting on behalf of the law enforcement agency to intentionally fail to comply with the provisions of subsection (a) of Section 116-4 of the Code of Criminal Procedure of 1963. [1]

(b) Sentence. A person who violates this Section is guilty of a Class 4 felony.

(c) For purposes of this Section, "law enforcement agency" has the meaning ascribed to it in subsection (e) of Section 116-4 of the Code of Criminal Procedure of 1963.

Credits

Laws 1961, p. 1983, § 33-5, added by P.A. 91-871, § 5, eff. Jan. 1, 2001. Amended by P.A. 92-459, § 5, eff. Aug. 22, 2001.

Citing References (3)

Title	Date	NOD Topics	Type
1. People v. Grant 172 N.E.3d 590, 594+ , Ill.App. 3 Dist. CRIMINAL JUSTICE — Postconviction Relief. Defendant challenging sexual assault convictions was entitled to relief for government's failure to retain forensic evidence pursuant to...	Dec. 24, 2020	—	Case
2. Notice of Motion and Motion to Dismiss the Indictment, in the Alternative Motion for Sanctions in View of Destruction/Loss of Critical Evidence UNITED STATES OF AMERICA, Plaintiff, v. Ray Mon HILL, et al., Defendants. 2006 WL 5443627, *5443627+ , N.D.Cal. (Trial Motion, Memorandum and Affidavit)	Dec. 14, 2006	—	Motion
3. EVIDENCE DESTROYED, INNOCENCE LOST: THE PRESERVATION OF BIOLOGICAL EVIDENCE UNDER INNOCENCE PROTECTION STATUTES 42 Am. Crim. L. Rev. 1239 , 1270 In 1997, Texas governor George W. Bush issued a pardon to Kevin Byrd, a man convicted of sexually assaulting a pregnant woman while her two-year old daughter lay asleep beside her....	2005	—	Law Review

No. 126824

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- ANDREW GRANT, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-16-0758. There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, No. 04-CF-232. Honorable Albert Purham, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 5, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Rachel A. Davis
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