No. 126824

IN THE
SUPREME COURT OF ILLINOIS

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

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

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

The People appeal from the appellate court's judgment that the proper remedy for a violation of section 116-4 of the Code of Criminal Procedure, 725 ILCS 5/116-4 — which requires law enforcement agencies to retain forensic evidence until the defendant has discharged his sentence — is vacatur of defendant's conviction and remand for a new trial, at which defendant will receive an adverse inference instruction pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988). A1.[1] No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether a violation of section 116-4 does not require vacatur of a defendant's conviction and remand for a new trial.

2. Whether, if this Court were to affirm the vacatur of defendant's conviction, it should hold that an instruction that informs jurors of the post-trial failure to preserve evidence and permits them to draw a negative inference is not required at defendant's retrial.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On May 26, 2021, this Court granted the People's petition for leave to appeal.

[1] Citations to the common law record, the report of proceedings, and the appendix to this brief appear as "C__," "R__," and "A__," respectively.

STATUTES INVOLVED

725 ILCS 5/116-4(a)-(b)

(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, or in a prosecution for an offense defined in Article 9 of that Code, or in a prosecution for an attempt in violation of Section 8-4 of that Code 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.

720 ILCS 5/33-5

§ 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.

(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.

STATEMENT OF FACTS

In 2004, the People charged defendant with aggravated criminal sexual assault and criminal sexual assault. C11-12. At defendant's jury trial, the People presented the testimony of defendant's niece, Z.G., who had cerebral palsy and was legally blind. R40-41. Z.G. testified that defendant lived with her family and one night, he "busted in the door" of her bedroom while she was changing. R38. He pushed her to the floor and placed his penis in her vagina three times. R38-39. Defendant then twice placed his penis in her anus. R39.

During the attack, Z.G.'s younger brother Jeremy entered the room to ask what was happening. R40. Jeremy testified that he heard "bumping" in Z.G.'s room. R61. When Jeremy managed to open the locked door, defendant was in the room, pulling up his pants. R56. Defendant told him not to tell anyone, but Jeremy immediately informed his father. *Id.* A sexual assault nurse examiner testified that she performed a forensic evaluation of Z.G.'s genitals and found redness indicative of forced trauma. R71. During the examination, the examiner also found a hair that was collected but not tested. R204.

Defendant testified that he had not had any sexual contact with Z.G. and that Z.G. had told him that Jeremy had sex with her. R90. Defendant further testified that when he confronted Jeremy, Jeremy woke everyone in the home and accused defendant. R91.

The jury found defendant guilty of both charges, C46-47, 89, and the trial court merged the counts and sentenced him to 14 years in prison for aggravated criminal sexual assault, C93, 100-01.

On direct appeal, defendant raised a sentencing claim that is not relevant to the current appeal. C104-05, 112-13, 118. He subsequently pursued several collateral attacks[2] against his conviction and sentence, again raising claims that are not relevant to this appeal. C119-24, 169-96, 213-73, 353-67.

In 2013, defendant filed a motion for forensic testing of the hair[3] found during Z.G.'s forensic examination pursuant to section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3). C404-10. The trial court denied the motion, but the appellate court reversed, holding that defendant had satisfied the requirements of section 116-3 and remanding for forensic testing of the hair. *People v. Grant*, 2016 IL App (3d) 140211, ¶ 30.

On remand, the trial court held a hearing at which Peoria Police Department (PPD) employees testified that the hair had been destroyed in accordance with department policy on February 28, 2007. R198-207. Defendant filed a motion for new trial or judgment notwithstanding the

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[2] Defendant filed a postconviction petition in 2006, a second postconviction petition in 2009, and a motion for leave to file a successive postconviction petition in 2011. C119-24, 213-73, 353-67.

[3] Defendant's initial motion also sought testing of scrapings taken from Z.G.'s fingernails, but he later amended the motion to omit that request. C423-24, 454-55.

verdict on the ground that the hair evidence had been destroyed, C532-33, which the trial court denied, R218-19.

On appeal, the appellate court reversed, vacated defendant's conviction, and remanded for a new trial. A11. The appellate majority reasoned that section 116-4, which provides that law enforcement must retain forensic evidence until a defendant's sentence is completed, is mandatory (rather than directory) because the failure to retain evidence extinguishes the defendant's opportunity to have it forensically tested pursuant to section 116-3. A9-10. The majority acknowledged that the legislature provided a consequence for violations of section 116-4 in section 33-5 of the Criminal Code, 720 ILCS 5/33-5(a), which provides that the intentional violation of section 116-4 is a felony. A9. However, it decided that section 33-5 did not provide a sufficient remedy for defendant. *Id.* Instead, the majority determined that defendant was entitled to a new trial at which the jury would be instructed of "the State's obligation to preserve the evidence in question and its failure to do so; [and that] it was allowed to draw a negative inference therefrom." A10-11.

Dissenting, Justice Schmidt agreed that section 116-4 was mandatory because, he explained, the legislature, through section 33-5, provided an "extreme consequence" for violations of section 116-4. A12. However, because the legislature created a consequence for such violations, Justice Schmidt reasoned that it was improper for the court "to usurp the role of the

legislature and create a remedy for defendant from whole cloth." *Id.* Further, Justice Schmidt added, vacatur of defendant's conviction was improper because the preservation of evidence post-trial is not a procedural step that results in conviction. A13. Thus, he explained, the failure to preserve evidence as required by section 116-4 should not invalidate defendant's conviction. *Id.* Justice Schmidt also reasoned that a *Youngblood* instruction would be inappropriate at a new trial because there is no constitutional right to the post-trial preservation of evidence and the PPD did not act in bad faith. A13-14.

ARGUMENT

There is no dispute that the PPD violated section 116-4 by failing to preserve the recovered hair. The only question before this Court is whether the General Assembly intended this violation to require vacatur of defendant's conviction. It did not.

The plain language of section 116-4 does not provide that a defendant is entitled to a new trial when evidence is prematurely destroyed following his conviction. Instead, by authorizing criminal prosecution for intentional violations in section 33-5, the General Assembly specified a different consequence for post-trial failures to preserve evidence. Because the legislature expressly provided a consequence only for intentional violations of section 116-4 and provided no other consequences, it clearly did not intend that a violation should result in vacatur of a defendant's conviction.

Furthermore, the vacatur of defendant's constitutionally sound conviction is not an appropriate consequence for a section 116-4 violation. The post-trial preservation of evidence is not a procedural step that a court must take in order to render a conviction, and a violation of section 116-4 neither causes nor indicates any infirmity in the trial or conviction. Moreover, the vacatur of a conviction is not an appropriate means of remedying any harm caused by the violation, because destroyed evidence cannot be recreated. Additionally, vacating defendant's valid conviction following a fair trial would provide him with a windfall, a result that the General Assembly could not have intended.

Alternatively, should this Court hold that vacatur of defendant's conviction and a new trial are appropriate, it should not require that the jury be instructed regarding the PPD's post-trial failure to preserve evidence and that it may draw a negative inference based on this failure. The instruction in *Youngblood* was given to address concerns about due process and bad faith that are not implicated here.

I. Standard of Review and Principles of Statutory Construction

This appeal presents a question of statutory interpretation, which is reviewed de novo. *People v. Hardman*, 2017 IL 121453, ¶ 19. The primary goal of such interpretation is "to determine and effectuate the legislature's intent." *Id.* The plain and ordinary meaning of the statutory language is the best indicator of the legislature's intent. *Id.* Additionally, where multiple

statutes relate to the same subject, courts must consider each individual statute in the context of the full legislative scheme. *Knolls Condo. Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002).

Where a statute is clear and unambiguous, courts may not read into it conditions or terms not expressed by the legislature. *People v. Glisson*, 202 Ill. 2d 499, 505 (2002). Thus, a court may not, "under the guise of statutory interpretation," rewrite a statute to include new provisions not present in the statute's plain language. *People v. Pullen*, 192 Ill. 2d 36, 42 (2000); *see also People v. Smith*, 2016 IL 119659, ¶ 28 ("No rule of construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports, nor may we rewrite a statute to add provisions or limitations the legislature did not include.").

Where a statute issues a procedural command to government officials, a reviewing court interpreting the statute must determine whether the command is mandatory or directory. *See Lakewood Nursing & Rehab. Ctr., LLC v. Dep't of Pub. Health*, 2019 IL 124019, ¶ 29. "[S]tatutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision" and directory where "no particular consequence flows from noncompliance." *People v. Delvillar*, 235 Ill. 2d 507, 514-15 (2009). If the legislature does not expressly provide a consequence for the failure to comply with a statutory command, courts will presume the statute is directory. *In re M.I.*, 2013 IL 113776, ¶ 17. This presumption is overcome —

and a court will read the provision as mandatory — if (1) "there is negative language prohibiting further state action in the case of noncompliance or (2) . . . the right the provision is designed to protect would generally be injured under a directory reading." *Id.*

II. The Section 116-4 Violation Does Not Warrant Granting Defendant a New Trial.

The plain language of section 116-4 does not require that a defendant be granted a new trial when evidence is prematurely destroyed in violation of the section. Instead, the General Assembly specified the consequence for such violations by authorizing criminal prosecution under section 33-5.

A. The plain language of section 116-4 does not require vacatur of a defendant's conviction.

A convicted defendant does not have a due process right to access forensic evidence for testing, and, consequently, there is no constitutional obligation upon the People to preserve evidence following a conviction. *Dist. Att'ys Off. v. Osborne*, 557 U.S. 52, 73-74 (2009). Considering the issue, the United States Supreme Court determined that questions of access to and preservation of DNA evidence after a criminal trial were best left to the legislature. *Id.* In Illinois, the General Assembly created a limited statutory right to postconviction forensic testing through section 116-3, which allows defendants to seek new forensic testing of evidence when certain conditions are met. 725 ILCS 5/116-3.

Section 116-4 provides 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" in prosecutions for enumerated crimes, including aggravated criminal sexual assault. 725 ILCS 5/116-4(a). Following a conviction, the agency must retain any such physical evidence in its possession until the completion of the defendant's sentence, including any term of mandatory supervised release. 725 ILCS 5/116-4(b). The legislature imposed a severe consequence for violations of section 116-4 by providing that intentional failure to comply with the preservation requirements of section 116-4 is a Class 4 felony. 720 ILCS 5/33-5(a)-(b). As the appellate majority acknowledged, *see* A5, the plain language of section 116-4 specifies no other consequence for the failure to preserve evidence. *See* 725 ILCS 5/116-4. Thus, the plain language of the statute does not require vacatur of a defendant's conviction and a new trial following a violation of section 116-4.

Moreover, 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. *In re D.W.*, 214 Ill. 2d 289, 308 (2005) (applying "the familiar maxim *expressio unius est exclusio alterius*, meaning, to express or include one thing implies the exclusion of the other, or of the alternative"). Accordingly, because the General Assembly expressly provided a single, specific consequence for a violation of section 116-4 — through section 33-5 —

its omission of any other consequences shows that it did not intend to provide such consequences.

That section 116-4 is properly construed as mandatory rather than directory does not change this. A statute is "mandatory if the intent of the legislature dictates a *particular* consequence for failure to comply with the provision." *Delvillar*, 235 Ill. 2d at 514 (emphasis added). Here, the General Assembly dictated a particular consequence — felony liability for intentional violations — and thus section 116-4 is mandatory. The appellate majority deemed the General Assembly's chosen consequence insufficient because it did not "invalidate any government action," A5-6, or provide a remedy to defendant, A9. But settled rules of statutory construction do not permit courts to read new consequences or remedies into statutes that conflict with the legislature's demonstrated intent, *Glisson*, 202 Ill. 2d at 505, much less to rewrite statutes to correct perceived errors or oversights by the legislature, *Pullen*, 192 Ill. 2d at 42; *Smith*, 2016 IL 119659, ¶ 28. Just as the General Assembly had the power to provide in section 116-4 that certain evidence be preserved, it also had the power to define the consequences that flow from a violation of that section. *See* Ill. Const. art. IV, § 1; *see also Osborne*, 557 U.S. at 73-74. Here, the legislature determined that the appropriate consequence is criminal liability for intentional violations, not vacatur of a defendant's conviction.

B. Vacatur of defendant's conviction is not an appropriate remedy for a section 116-4 violation.

Even if the General Assembly had not clearly established a single consequence for a violation of section 116-4, the remedy created by the appellate majority is not an appropriate consequence.

In vacating defendant's conviction, the appellate majority reasoned that the violation of a mandatory statute requires the invalidation of some government action, citing *People v. Robinson*, 217 Ill. 2d 43 (2005), *Delvillar*, and *In re M.I.* A5-6. It then concluded that here the relevant government action was defendant's continued incarceration, and that defendant's conviction would have to be vacated to invalidate that action. *See* A6-7. This misapprehends the mandatory-directory dichotomy and misapplies *Robinson*, *Delvillar*, and *In re M.I.*.

In each of these cases, the Court considered a statute that created a procedural step that the circuit court must follow when taking a specific judicial action. Section 122-2.1(a)(2), considered in *Robinson*, requires the court to serve a defendant within 10 days when it summarily dismisses a postconviction petition. *See* 217 Ill. 2d at 50. Section 113-8, considered in *Delvillar*, requires the court to admonish a defendant of potential immigration consequences before accepting a guilty plea. *See* 235 Ill. 2d at 513-14. And section 5-810(2), considered in *In re M.I.*, requires the court to hold a hearing on whether to grant the People's motion to designate a case as an extended jurisdiction juvenile (EJJ) matter within 60 days. *See* 2013 IL

113776, ¶¶ 13-14. But none of these statutes includes an express consequence for violating the procedural requirement, and thus, in each case, this Court was called upon to decide whether it should imply a consequence. *See Robinson*, 217 Ill. 2d at 50 (considering 725 ILCS 5/122-2.1(a)(2)); *Delvillar*, 235 Ill. 2d at 513-14 (considering 725 ILCS 5/113-8); *In re M.I.*, 2013 IL 113776, ¶ 14 (considering 705 ILCS 405/5-810(2)). Because those statutes in question created procedural steps, the consequence the Court considered was whether the failure to take those steps invalidated the entire process and its end result, *i.e.*, the resultant judicial action. *See Robinson*, 217 Ill. 2d at 58-59 (holding that the failure to timely serve the petitioner did not invalidate the summary dismissal of his postconviction petition); *Delvillar*, 235 Ill. 2d at 518-19 (holding that the failure to admonish the defendant did not invalidate the court's acceptance of his guilty plea); *In re M.I.*, 2013 IL 113776, ¶¶ 13 & 28 (holding that the untimeliness of the hearing on an EJJ motion did not invalidate the court's granting of the motion).

By contrast, the post-trial preservation of evidence required by section 116-4 is not a procedural step in the process of obtaining or rendering a conviction. Once 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. And although new forensic

evidence may support an actual innocence claim, it does not suggest any legal infirmity in either the trial or the conviction. Nor does the preservation of such evidence affect the constitutional validity of the conviction. *See Osborne*, 557 U.S. at 73-74. Consequently, there is no relation between section 116-4 and the defendant's conviction such that a violation of the statute undermines the conviction and renders it invalid.

Moreover, vacatur of defendant's conviction would not provide a proportionate remedy to any harm caused by the section 116-4 violation. Under section 116-3, defendant had a limited statutory right to test the recovered hair. *See* 725 ILCS 5/116-3; *see also Grant*, 2016 IL App (3d) 140211, ¶ 30. However, the failure to preserve the hair makes exercising that right impossible. Vacating defendant's conviction will not alter that fact. As the dissent reasoned, this likely why the General Assembly took "the extraordinary step" of making the intentional failure to comply with the section a felony. *See* A12. Because there is no appropriate corrective remedy for a 116-4 violation, the legislature instead chose to deter such violations through the harsh consequence of criminal liability. *See id.*

Finally, as the dissent observed, the appellate majority's newly minted remedy provides an "absurd windfall" to defendant. A12. Defendant was convicted of aggravated criminal sexual assault after a fair trial. He unsuccessfully challenged his conviction through a direct appeal and numerous collateral attacks. C104-05, 112-13, 118-24, 213-73, 353-67.

Nevertheless, the appellate court vacated his constitutionally sound conviction and granted him a new trial, based upon the failure to preserve evidence that might not even have been helpful to defendant. Indeed, as even the appellate majority recognized, a new trial would provide defendant with nothing more than a "do-over" of his first trial, because there is no new evidence to introduce or old evidence that should be excluded. *See* A1 (stating that "a potential retrial could be wholly identical to defendant's original trial, insofar as neither trial would have the results of forensic testing on the hair"). Thus, vacatur of defendant's conviction would produce an absurd result. *See People v. Ringland*, 2017 IL 119484, ¶ 13 ([A] court presumes that the General Assembly did not intend to create absurd, inconvenient, or unjust results.").

III. Alternatively, a *Youngblood* Instruction Is Not Required at Any Retrial.

Alternatively, should this Court affirm the vacatur of defendant's conviction, it should hold that a jury instruction pursuant to *Youngblood* is not required at defendant's retrial. In *Youngblood*, the United State Supreme Court held that the pretrial destruction of potentially exculpatory evidence violates due process where the evidence was destroyed in bad faith. 488 U.S. at 58. In his concurrence, Justice Stevens approved a jury instruction informing the jury of the State's failure to preserve evidence and allowing the jury to draw a negative inference from that failure, opining that it would bolster the fairness of the trial. *Id.* at 59-60 (Stevens, J. concurring).

But the due process considerations that supported the jury instruction in *Youngblood* are not present here, because the failure to preserve evidence occurred *after* defendant's trial, *see Osborne*, 557 U.S. at 73-74 (a convicted defendant does not have a due process right to the post-trial preservation of evidence), and there is no indication that the PPD acted in bad faith. On the contrary, department policy authorized the destruction of the hair after defendant's conviction was affirmed on direct appeal. R198-207. Thus, unlike in *Youngblood*, there is nothing to support an inference that failure to preserve occurred in an attempt to hide potentially exculpatory evidence, and thus no reason to instruct the jury that they might draw an adverse inference. Accordingly, should this Court agree that a retrial is the appropriate remedy for the section 116-4 violation, it should clarify that defendant is not entitled to a *Youngblood* instruction.

CONCLUSION

This Court should reverse the appellate court's judgment.

September 7, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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(a), is 17 pages.

/s/ Nicholas Moeller
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APPENDIX

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2020 IL App (3d) 160758

Opinion filed December 24, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANDREW GRANT, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Appeal No. 3-16-0758 Circuit No. 04-CF-232 Honorable Albert L. Purham Jr., Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court, with opinion.
Justice McDade concurred in the judgment and opinion.
Justice Schmidt dissented, with opinion.

OPINION

¶ 1 Defendant, Andrew Grant, appeals following the Peoria County circuit court's denial of his motion for new trial. He contends that the State's illegal posttrial destruction of forensic evidence in his case entitles him to a new trial under statutory and constitutional law. We reverse the ruling of the circuit court, vacate defendant's conviction, and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 The State charged defendant via indictment with aggravated criminal sexual assault (720 ILCS 5/12-14(a)(6) (West 2004)) and criminal sexual assault (*id.* § 12-13(a)(1)). The indictment

alleged that defendant knowingly committed an act of sexual penetration upon Z.G. by force or threat of force, knowing Z.G. to be a physically handicapped person.

¶ 4 This court has previously set forth the facts of defendant's trial in great detail. See *People v. Grant*, 2016 IL App (3d) 140211, ¶¶ 4-9. The evidence showed that Z.G., who had cerebral palsy and was legally blind, lived in a house with her parents, a sister, her brother Jeremy, and the defendant, her uncle. Z.G. testified that, one night, defendant entered her room and sexually assaulted her. He stopped and left the room when Jeremy came in. Jeremy testified that when he entered the room defendant was pulling up his pants and Z.G. was in her bed without clothes on. Jeremy testified that defendant told him not to tell anyone what he had seen. Defendant testified that Z.G. told him that she had had sex with Jeremy. When defendant confronted Jeremy, Jeremy woke up the other household members and accused defendant of assaulting Z.G.

¶ 5 Nurse Cathy Jackson Bruce performed an examination on Z.G., collecting a number of oral, rectal, and anal swabs. The parties stipulated that no semen was identified on the swabs. Jackson Bruce also collected a single hair in the course of the examination and took scrapings from underneath Z.G.'s fingernails. Neither the hair nor the scrapings were tested for DNA.

¶ 6 The jury found defendant guilty on both counts. The court merged the counts and sentenced defendant to a term of 14 years' imprisonment for aggravated criminal sexual assault. Defendant continued to maintain his innocence through a series of appeals and postconviction filings, though he failed to obtain any substantial relief.

¶ 7 In 2013, the Illinois Innocence Project filed on defendant's behalf a motion for forensic testing on the hair and fingernail scrapings. It later amended the motion to remove the request for testing on the scrapings. The circuit court denied the motion.

¶ 8 This court reversed the circuit court's ruling, determining that defendant had fulfilled the obligations of section 116-3 of the Code of Criminal Procedure of 1963 (Code), which governs postconviction motions for forensic testing (725 ILCS 5/116-3 (West 2012)). *Grant*, 2016 IL App (3d) 140211, ¶¶ 14-28. Specifically, we found that "[t]he testing sought by defendant *** has the potential to be materially relevant to a claim of actual innocence." *Id.* ¶ 26. We reasoned that, if the hair were found not to match defendant or Z.G., that fact, absent any other physical evidence directly tying defendant to the offense, would be highly probative. We also pointed out that if the hair were found to match Jeremy, defendant's credibility would be significantly bolstered while Jeremy's credibility would be undermined. *Id.* We also rejected the State's argument that the strength of the evidence against defendant would render DNA test results on the hair immaterial: "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." *Id.* ¶ 27.

¶ 9 On remand, counsel was appointed for defendant, and the court held a hearing relating to the motion for forensic testing. At that hearing, it was revealed that all of the forensic evidence in defendant's case had been destroyed in 2007 pursuant to Peoria Police Department policy. Defense counsel moved for a new trial or a judgment notwithstanding the verdict, on the grounds that law enforcement had failed in its duty to preserve evidence. The circuit court denied the motion, finding that the order for forensic testing could not be complied with. The court further stated: "I don't find that it was willful or there was a bad intent on the Sheriff Department [*sic*]." Defendant appealed.

¶ 10 The Office of the State Appellate Defender (OSAD) was appointed to represent defendant on this appeal. OSAD initially filled a motion under *Pennsylvania v. Finley*, 481 U.S.

551 (1987), seeking to withdraw on the grounds that this appeal presented no issues of merit. We granted that motion in an opinion, with one justice dissenting. OSAD subsequently moved to vacate that opinion and to be reinstated as appellate counsel for defendant. We granted that motion.

¶ 11 II. ANALYSIS

¶ 12 Where a defendant is convicted of aggravated criminal sexual assault, section 116-4(a) of the Code mandates that a law enforcement agency securely retain any forensic evidence in the case. 725 ILCS 5/116-4(a) (West 2006). Section 116-4(b) dictates that the forensic evidence must be retained until the defendant has completed his sentence, including the period of mandatory supervised release (MSR). *Id.* § 116-4(b). The State concedes that the 2007 destruction of all forensic evidence in this case was in violation of section 116-4 of the Code. The present controversy concerns only a potential remedy for that violation.

¶ 13 A. Mootness

¶ 14 The State first argues that this appeal is moot and should be dismissed because "there is no rational remedy that defendant could possibly be afforded," because defendant has been discharged from the Illinois Department of Corrections and has completed his term of MSR.

¶ 15 However, defendant's completion of his sentence has no bearing on his ability to obtain relief. When a defendant who has completed his sentence challenges only that sentence, the claim will be moot. *E.g.*, *In re Shelby R.*, 2012 IL App (4th) 110191, ¶ 16. Here, defendant challenges his conviction, in which he has an ongoing interest, given the "obvious advantages in purging oneself of the stigma and disabilities which attend a criminal conviction." *People v. Davis*, 39 Ill. 2d 325, 329 (1968). As our supreme court has explained: "the completion of a defendant's sentence renders a challenge to the sentence moot, but not a challenge to the

conviction. [Citation.] Nullification of a conviction may hold important consequences for a defendant." *In re Christopher K.*, 217 Ill. 2d 348, 359 (2005).

¶ 16 B. Mandatory or Directory Construction

¶ 17 Section 116-4(b) says that a law enforcement agency must retain any forensic evidence in a case until defendant has completed his sentence and any term of MSR. 725 ILCS 5/116-4(b) (West 2006). It is silent as to the result of the government's failure to comply with that mandate. See *id.* However, section 33-5 of the Criminal Code of 1961 (Criminal Code), imposes a felony criminal offense for the intentional failure to comply with section 116-4. 720 ILCS 5/33-5(a), (b) (West 2006); 730 ILCS 5/5-8-1(a)(7) (West 2006).

¶ 18 1. Mandatory or Directory Language

¶ 19 As a threshold matter, we must consider whether the criminal consequences contemplated in section 33-5 render the provisions of section 116-4 mandatory, rather than directory. It is well settled that whether a statutory provision is mandatory or directory "concerns the consequences of a failure to fulfill an obligation." *People v. Robinson*, 217 Ill. 2d 43, 52 (2005). More specifically, our supreme court has frequently declared that "the mandatory/directory question ' "simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." ' " *In re M.I.*, 2013 IL 113776, ¶ 16 (quoting *Robinson*, 217 Ill. 2d at 51-52, quoting *Morris v. County of Marin*, 559 P.2d 606, 610-11 (Cal. 1977)); see also *People v. Delvillar*, 235 Ill. 2d 507, 516-17 (2009).

¶ 20 The language employed in *M.I.*, *Robinson*, *Delvillar*, and myriad other cases makes clear that the question of a mandatory-directory analysis is whether the legislature intended the specific consequence of invalidating the governmental action at issue. The question is not

whether *any* consequence exists. Here, while section 33-5 plainly prescribes a consequence for failure to comply with section 116-4, that consequence under section 33-5 does nothing to invalidate any governmental action. Indeed, the consequence is wholly ancillary; it has no direct impact on any individual defendant or upon any proceedings.

¶ 21 2. Intended Consequences for Violation

¶ 22 Although section 33-5 itself does not make section 116-4 mandatory, we must still decide whether the legislature nevertheless intended section 116-4 to be mandatory in nature. "[W]hether a particular statutory provision is mandatory or directory depends upon the intent of the legislature, which is ascertained by examining the nature and object of the statute and the consequences which would result from any given construction." *Pullen v. Mulligan*, 138 Ill. 2d 21, 46 (1990). Thus, we must consider whether the legislature intended section 116-4 of the Code to have the specific consequence of negating or vitiating the governmental action to which it relates. *In re M.I.*, 2013 IL 113776, ¶ 16. To do so, we must first identify (1) exactly what the "particular procedural step" required by section 116-4 is and then (2) the "governmental action to which the procedural requirement relates." *In re James W.*, 2014 IL 114483, ¶ 35.

¶ 23 The first answer is clear. Section 116-4 imposes upon police departments a procedural rule relating to the storage and preservation of forensic evidence. 725 ILCS 5/116-4 (West 2006).

¶ 24 The question remains: what is the governmental action to which the requirement relates? In other words, what is the governmental action that may be "invalidated" if section 116-4 is construed as mandatory?

¶ 25 3. Action Contemplated

¶ 26 The action undertaken by the government is its continued incarceration of convicted defendants. Indeed, the procedural requirement of evidence preservation is explicitly linked to

that action, as section 116-4(b) mandates that the evidence be safeguarded only until a defendant's sentence is completed. See *id.* § 116-4(b). Section 116-4 sets forth a procedural requirement of preserving evidence that relates to the government's continued imprisonment of convicted defendants. If that section is construed as mandatory, then noncompliance with the procedural requirement must result in invalidation of that governmental action, *i.e.*, vacatur of the underlying conviction. *Robinson*, 217 Ill. 2d at 51-52.

¶ 27 A procedural command to a government official is presumptively directory in nature. *People v. Ringland*, 2017 IL 119484, ¶ 57 (citing *Robinson*, 217 Ill. 2d at 58; *Delvillar*, 235 Ill. 2d at 517). However, the presumption is overcome "when the right the provision is designed to protect would generally be injured under a directory reading." *Delvillar*, 235 Ill. 2d at 517. This rule of construction goes back as far as the mandatory-directory dichotomy itself:

> "It has long been held that 'statutory requisitions' directed to government officials ' "designed to secure order, system and dispatch in proceedings" ' are usually directory rather than mandatory, but if they ' "are intended for the protection of the citizen, *** and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory." ' " *Robinson*, 217 Ill. 2d at 56 (quoting *People v. Jennings*, 3 Ill. 2d 125, 127 (1954), quoting *French v. Edwards*, 80 U.S. 506, 511 (1871)).

¶ 28 We are hard pressed to think of a statute in which the above rule is more applicable. Section 116-3 of the Code allows convicted persons to seek forensic testing on previously untested evidence in an effort to prove their own innocence. 725 ILCS 5/116-3 (West 2006).

¶ 29 First enacted in 1998, section 116-3 has the unquestionable benefit of reducing the number of wrongfully convicted persons in prison. Section 116-4, enacted two years later,

protects the efficacy of section 116-3 by ensuring that forensic evidence will actually be available for potential future testing. The importance of these two statutes together was recognized during the floor debate of House Bill 4593, which created section 116-4 as well as section 33-5 of the Criminal Code. See Pub. Act 91-871, §§ 5, 10 (eff. Jan. 1, 2001) (adding 720 ILCS 5/33-5, 116-4). There the bill's sponsor, Representative Calvin Giles, stated:

> "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, in post conviction *** 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, [*sic*] is to ensure that the evidence *** is retained and available for post conviction testing." 91st Ill. Gen. Assem., House Proceedings, Feb. 23, 2000, at 167 (statements of Representative Giles).

¶ 30 The potential for exoneration afforded by section 116-4 vanishes when the government fails to comply. 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.

> "The destruction of evidence has a uniquely damaging effect on the administration of justice, for once evidence has been destroyed it cannot be retrieved for judicial review. And the destruction is irrevocable, with a concomitant impossibility of vindication by a wronged defendant and an accompanying subversion of the public interest in correct, not merely swift, justice." *Wilkinson v. Ellis*, 484 F. Supp. 1072, 1084 (E.D. Pa. 1980).

¶ 31 The importance of the right in question and the injury caused by its noncompliance indicate a mandatory intent on the part of the legislature. Our conclusion is supported by a principle of statutory construction, namely, "a court presumes that the General Assembly did not intend to create absurd, inconvenient, or unjust results." *Ringland*, 2017 IL 119484, ¶ 13. It is unlikely that the legislature would bestow the right to postconviction DNA testing, protect that right by mandating that forensic evidence be preserved, yet not intend for a defendant to have any recourse when the rule is ignored.

¶ 32 Although, section 33-5 of the Criminal Code provides a consequence for failure to comply with section 116-4, that consequence is no remedy for an aggrieved defendant. Moreover, section 33-5 only applies where the destruction of evidence is "intentional[ ]." 720 ILCS 5/33-5(a) (West 2006). When evidence is destroyed out of negligence or recklessness, there is no remedy at all. The 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. See *Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

¶ 33 Section 116-4 protects a person's right to pursue postconviction DNA testing. When the government fails to comply with that section by prematurely destroying evidence, it is an

understatement to say that the person's right "would generally be injured under a directory reading." *Delvillar*, 235 Ill. 2d at 517. We believe that the legislature intended section 116-4 to be mandatory and find that the government's failure to comply with that statute must result in vacatur of a defendant's conviction. See *Robinson*, 217 Ill. 2d at 51-52.

¶ 34 C. Remedy

¶ 35 The only relief available to the defendant here is the vacatur of his conviction. There is no reason to withhold that relief, given the consequences of defendant's continued status as a convicted felon. See *Davis*, 39 Ill. 2d at 329; *Christopher K.*, 217 Ill. 2d at 359. The defendant was still imprisoned when he commenced proceedings under section 116-3 more than seven years ago. The sometimes slow machinery of the court system presents no reason to deny him relief.

¶ 36 We recognize that vacating defendant's conviction and remanding for a potential new trial is an imperfect remedy. The permanent nature of the State's action renders defendant unable to test the evidence in question. As a result, a potential retrial could be wholly identical to defendant's original trial, insofar as neither trial would have the results of forensic testing on the hair. A partial cure for this concern may be found in *Arizona v. Youngblood*, 488 U.S. 51 (1988). The jury in that case was given instructions concerning the State's obligation to preserve the evidence in question and its failure to do so; it was allowed to draw a negative inference therefrom. See *id.* at 54. Justice Stevens commented that such a procedure bolstered the fairness of the defendant's trial. *Id.* at 59-60 (Stevens, J., concurring). The same partial remedy has also been suggested as appropriate by the Innocence Project and others. See, *e.g.*, *Preservation of Evidence*, Innocence Project, https://www.innocenceproject.org/preservation-of-evidence/ (last visited Dec. 18, 2020) [https://perma.cc/NG6Y-DYHB]; Norman C. Bay, *Old Blood, Bad Blood,*

and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith, 86 Wash. U. L. Rev. 241, 293 (2008). The State does not respond to defendant's claim that such a strategy would be suitable on remand. Accordingly, in addition to vacating defendant's conviction, we order 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. See *Youngblood*, 488 U.S. at 54.

¶ 37 III. CONCLUSION

¶ 38 In closing, we note that the impact of this decision is limited in two important ways. First, the construction of section 116-4 as mandatory does not impose any new duties or burdens upon police departments in Illinois. Those departments were already obligated under section 116-4 to preserve certain forensic evidence for certain time periods.

¶ 39 Second, a right to postconviction forensic testing is a limited right. A convicted person is not entitled to *carte blanche* testing of every piece of forensic evidence collected in his case. Section 116-3 limits postconviction forensic testing only to those cases where identity was at issue and the testing has the potential to produce new, materially relevant evidence, among other requirements. 725 ILCS 5/116-3 (West 2006). Only when all conditions are met does the right to testing apply. In defendant's case, this court had already found that he was entitled to such testing. See *Grant*, 2016 IL App (3d) 140211, ¶¶ 14-28.

¶ 40 We reverse the judgment of the circuit court of Peoria County, vacate defendant's conviction, and remand for further proceedings.

¶ 41 Reversed and vacated.

¶ 42 Cause remanded.

¶ 43 JUSTICE SCHMIDT, dissenting:

¶ 44 I agree with the majority that section 116-4(a) is mandatory with respect to the mandatory-directory dichotomy. I respectfully dissent from the rest of the analysis.

¶ 45 Section 33-5 of the Criminal Code of 1961 holds: "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 ***." 720 ILCS 5/33-5(a) (West 2006). Failure to comply with section 116-4(a) is a Class 4 felony, punishable by up to three years in prison. *Id.* § 33-5(b); 730 ILCS 5/5-8-1(a)(7) (West 2006). Thus, the legislature has explicitly prescribed an extreme consequence for a law enforcement agency's failure to preserve forensic evidence. The legislative intent is clear; section 116-4 of the Code is plainly, *definitionally*, mandatory. The legislature, when considering consequences for a failure to comply, elected not to declare that posttrial destruction of evidence should warrant a new trial or vacatur of a conviction for a defendant.

¶ 46 The State concedes that the deliberate destruction of the evidence in this case violated section 116-4. The majority acknowledges that the statutory scheme details a consequence for a failure to follow its strictures. Unsatisfied with this consequence, the majority goes on to usurp the role of the legislature and create a remedy for defendant from whole cloth. There is no common-law duty for law enforcement to retain this evidence. This responsibility is entirely a creation of statute, and as such, I would adhere to the explicit intent of the legislature. "The people of the State of Illinois expect the courts to follow and interpret the law, but not to create it. Judicial activism is the result of legislative inaction." *People v. Lang*, 62 Ill. App. 3d 688, 712 (1978), *aff'd in part, rev'd in part*, 76 Ill. 2d 311 (1979). The majority's judicial activism and promulgation of this result-oriented jurisprudence where the legislature has clearly acted is unwarranted.

¶ 47 Further, when deciding what governmental action to invalidate, my colleagues state that "[t]he action undertaken by the government is its continued incarceration of convicted defendants." *Supra* ¶ 26. They then go on to find noncompliance with the section results in "vacatur of the underlying conviction." *Supra* ¶ 26. Wrong.

¶ 48 Here, defendant is no longer incarcerated. Furthermore, the posttrial preservation of evidence cannot properly be considered a "procedural step." (Internal quotation marks omitted.) *Supra* ¶ 19. Once the trial is complete, there is no "governmental action" to which the preservation requirement relates. (Internal quotation marks omitted.) *Supra* ¶ 19. In short, there is no pending proceeding that can be "undone" as a consequence of the State's noncompliance. It is likely because of these difficulties of remedy that the legislature took the extraordinary step of rendering it a felony for intentionally failing to comply with section 116-4.

¶ 49 In sum, the statutory section in question is mandatory, and the legislature provides a consequence for failing to comply that applies in this situation. That should be the end of the analysis. I find the vacatur of defendant's conviction due to the destruction of potentially helpful evidence an absurd windfall.

¶ 50 Turning to the new trial on remand, in *Arizona v. Youngblood*, 488 U.S. 51 (1988), the United State Supreme Court considered the consequences flowing from the State's failure to preserve or retain forensic evidence *prior to trial*. Under *Youngblood*, the pretrial destruction of evidence that is merely potentially exculpatory is a due process violation where that destruction was done in bad faith. *Id.* at 58. Yet, the Supreme Court has never held that the same standard should apply to the postconviction destruction of evidence, as occurred in this case. In fact, the Court explicitly rejected the notion of a freestanding due process right to postconviction access to DNA evidence. *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S.

52, 72 (2009). The Court pointed out that, if it did find such a constitutional right, it "would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested." *Id.* at 74. Instead, the *Osborne* Court concluded that questions of access to and preservation of DNA evidence after a criminal trial were best left to the legislatures. *Id.* at 73. Sections 116-3 and 116-4 of the Code are a part of that legislative response. Illinois statute mandates that police departments preserve forensic evidence in certain cases and punishes the failures to do so with criminal consequences. While the destruction of the evidence in this case was intentional, there has been no showing of bad faith. *Youngblood* and its progeny are inapplicable to the present matter, as there is no due process violation. The majority's instruction for a new trial on remand with the court giving the *Youngblood* instruction postconviction and postincarceration is error.

¶ 51 I would affirm.

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Cite as:	*People v. Grant*, 2020 IL App (3d) 160758
Decision Under Review:	Appeal from the Circuit Court of Peoria County, No. 04-CF-232; the Hon. Albert L. Purham Jr., Judge, presiding.
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 7, 2021 the foregoing **Plaintiff-Appellant's Brief and Appendix** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

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