No. 128170

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OLIVER J. HUTT, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0142 and 4-19-0271 (Consolidated). There on appeal from the Circuit Court of the Eighth Judicial Circuit, Adams County, Illinois, No. 17-CF-405, 17-DT-51. Honorable Robert K. Adrian, Judge Presiding.

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ARGUMENT

I.

The trial court improperly denied Oliver Hutt a jury trial in 17-DT-51 when he never waived that right, and counsel was ineffective for misrepresenting the existence of a jury waiver to the court.

No waiver of his right to a jury trial in 17-DT-51 was ever made by Oliver Hutt or by his attorney. Instead, defense counsel later, repeatedly and incorrectly, claimed that Oliver had waived his jury trial right in all of his pending cases. (R. 52, 66, 77). Oliver continued to dispute this until the trial court accepted defense counsel's repeated misrepresentations and explicitly ruled that Oliver's jury trial right had been waived and that the only options were a bench trial or a guilty plea. (R. 54-55). At that point, after Oliver's objections and protestations against his attorney's misstatements had not availed him of his constitutional right to a jury trial and the court made a definite ruling that jury trial was no longer available to him. (R. 54-55). No silence on Oliver's part that occurred after that final overruling of his request for a jury trial can be used to construct a retroactive waiver of jury trial or acquiescence to bench trial. See *People v. Scott*, 186 Ill. 2d 283, 284-85 (1999).

The trial court failed to honor its duty to protect Oliver's trial right, and that mistake became clear and obvious error when Oliver repeatedly insisted on that right and when the court failed to review transcripts to determine if the right had been waived, as it promised to do. (R. 66-67). As that clear and obvious error was a structural one that denied Oliver his right to a jury trial, it is reviewable and reversible as plain error. *People v. Herron*, 215 Ill.2d 167, 186 (2005).

Finally, Oliver's attorney repeatedly misrepresented the existence of a jury waiver in all of his cases. (R. 52-54, 66). This deficient conduct denied Oliver his fundamental jury trial right, and thus constituted the ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); see *People v. McCarter*, 385 Ill.App.3d 919, 943-44 (1st Dist. 2008). As a result of these denials of Oliver's constitutional rights, this Court should vacate the conviction and finding of guilt in 17-DT-51, and remand that case for further proceedings. *People v. Ruiz*, 367 Ill.App.3d 236, 239-40 (1st Dist. 2006).

A. The trial court committed plain error in denying Oliver Hutt a jury trial in 17-DT-51.

The State initially argues that the trial court's error in denying Oliver a jury trial was forfeited for not being included in the post-trial motion. (State's Br. 9). Should this Court find the trial court's erroneous denial of Oliver's jury trial right to be procedurally forfeited, the issue is reviewable under the plain error doctrine. *People v. Sebby*, 2017 IL 119445, ¶ 48. Under the second prong of the plain error doctrine, forfeiture is excused when a clear or obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Sebby*, 2017 IL 119445, ¶ 50. Errors that fall within the purview of the second prong of the plain error rule are "presumptively prejudicial errors – errors that may not have affected the outcome, but must still be remedied" because the error "deprive[d] the defendant of a fair trial." *Herron*, 215 Ill.2d at 186.

Structural errors qualify as the type of errors that fall under the second prong of plain error review. *People v. Moon*, 2022 IL 125959, ¶¶ 27-28; *People v. Glasper*, 234 Ill.2d 173, 197-98 (2009). The erroneous denial of the right to a jury trial is a structural error, reversible without a showing of prejudice. *Rose v. Clark*, 478 U.S. 570, 578 (1986).

Oliver Neither Waived His Right To Jury Trial in 17-DT-51, Nor Did He Acquiesce To Any Such Waiver

The State argues that the totality of the circumstances suggests that Oliver made a knowing and voluntary waiver of his right to a jury trial, both through his own statements and through his acquiescence to his attorney's representations. (State's Br. 11). But the State cannot point to any particular statement on Oliver's behalf that shows any such waiver of his right to a jury trial in 17-DT-51. Nor did Oliver acquiesce to any such representation by his attorney, who rendered ineffective assistance of counsel by misrepresenting the existence of a jury waiver in that case. See I.B., below.

Because Oliver never waived his right to jury trial in 17-DT-51, either orally or in writing, the trial court's refusal to give him a jury trial on that charge can only be valid if such an acquiescence on Oliver's part took place. *People v. Frey*, 103 Ill.2d 327, 333 (1984). In *Frey*, this Court found a knowing and voluntary waiver of jury trial on the defendant's part when he failed to speak up or dispute his attorney's and the court's setting his case for a bench trial. *Id*. As the defendant in *Frey* was a sophisticated "real estate syndicator and developer, and a man of intelligence, experience and considerable education," his silent acquiescence led this Court to conclude that the jury waiver was made with the defendant's knowledge and consent. *Id*., at 333.

In *Frey*, the charges were contained in one case, and there was no question as to whether defense counsel intended to enter a waiver of jury trial as to all of the pending counts in that case. *Id*., at 329-31. In the case at bar, however, nobody ever indicated a contemporaneous intent to waive Oliver's right to jury trial in 17-DT-51. As part of a contemplated plea negotiation, Oliver waived his right to a jury trial in cases 17-CF-405 and 16-CF-752 on October 10, 2017. (4-19-0142 R. 91; 4-19-0142 C. 37). Oliver never waived his jury trial right in 17-DT-51 on that or any other date. (See 4-19-0142 C. 37). Then, at all court dates after October 10, 2017, defense counsel continued to re-state his mistaken belief that Oliver had waived his jury right on that date. (See R. 52, 66, 77). Every discussion of a jury waiver in 17-DT-51 was a reference to something that never occurred, (see R. 52, 66, 77), and there was no point at which defense counsel said "Oliver Hutt is waiving his right to jury in the DUI case," let alone any point at which Oliver was silent in the face of such a statement.

Frey relied on two key factors: that defense counsel entered a jury waiver and that a sophisticated defendant silently acquiesced to all subsequent references to that waiver. *Frey*, 103 Ill.2d at 331-32. Those factors were necessary to this Court's finding that the defendant in *Frey* made a of a knowing and voluntary waiver of the right to jury trial. *Id*. Those factors are all absent in this case, and so *Frey*'s result would be inappropriate here.

Illinois Courts have continued to hold, in refusing to extend *Frey*, that a waiver requires some affirmative statement by defendant's attorney, in the defendant's presence, that the defendant wishes not to exercise his right to a jury trial and, instead chooses a bench trial. *People v. Roberts*, 263 Ill. App. 3d 348, 351 (4th Dist. 1994); *People v. Smith*, 106 Ill. 2d 327, 337 (1985). In *Smith,* this Court held that a docket entry indicating a waiver of jury was insufficient to show that a knowing waiver occurred when verbatim transcripts of the pre-trial hearing showed that no such waiver was offered or entered. *Smith*, 106 Ill.2d at 337. Similarly to the defendant in *Smith*, neither Oliver nor his attorney ever made any affirmative statement that Oliver wished not to exercise his right to a jury trial in 17-DT-51, and, instead, chose a bench trial. (See 4-19-0142 R. 75-92). Defense counsel did, later, assert that a waiver had been entered, (see R. 52, 66, 77), but at no time did counsel ever tell the court that his client wishes to waive his jury trial in 17-DT-51. Defense counsel's subsequent statements that such a waiver had occurred are functionally identical to the erroneous docket entry in *Smith*, and do not retroactively establish such a waiver, particularly when Oliver continued to "insist" on his right to jury trial on all of his cases in response to those statements. (R. 66).

The State also discusses *People v. Scott*, (State's Br. 10, 14-15), a case in which the defendant had signed a jury waiver in his attorney's office, but was not present in court when that jury waiver was tendered and discussed. *Scott*, 186 Ill. 2d at 284-85. The waiver in that case included a provision stating that the defendant had "until the last Thursday of December, 1994 to revoke this waiver of jury trial." *Id*., at 285. This Court held that the language in that waiver, which appeared to establish an irrevocability of the waiver after a certain date, distinguished the case from *Frey*. *Id*. The defendant's silence in the face of a discussion of bench trial may have been due to his belief that it was too late to revoke his jury waiver, this Court reasoned. *Id*. Therefore, this Court held, it cannot be presumed that a defendant's silence, in light of a belief that he no longer had the right to a jury trial, should constitute a waiver in open court. *Id*.

Here, the record shows that Oliver operated under a similar belief, when the trial court overruled his renewed request for a jury trial. (R. 53-54). In fact, there is even less foundation for any belief that Oliver waived his right to jury trial in open court than there was in *Scott* or *Smith*. Of course, as repeatedly noted, there was no written jury waiver for 17-DT-51. But the State, relying on *Frey*, wants this Court to find some sort of acquiescence to a bench trial, in order to retroactively manufacture a jury waiver. (State's Br. 11-19). To do so, the State points to the court appearances that took place after October 10, 2017, when the waiver of jury trial for Hutt's other two cases was entered. (State's Br. 11-12).

At the very next court appearance, though, on October 25, 2017, defense counsel and the court erroneously informed Oliver that he had waived his right to jury trial. (R. 53-54). The trial court made no distinction between the DUI case and the cases for which Oliver had submitted a written jury waiver in its pronouncement (based on defense counsel's erroneous representation) that Oliver had waived his right to a jury trial. (See R. 53-54). Despite this, Oliver persisted in his request for a jury trial, arguing that there was a mistake regarding his eligibility for an extended-term sentence. (R. 53). In response to Oliver's request, the court reaffirmed its misinformed ruling that Oliver had waived his right to a jury trial. (R. 54). The court then advised Oliver that the case would be set for a bench trial. (R. 55). This continued insistence on Oliver's part is the opposite of acquiescence, and to construct a jury waiver out of this exchange would be to retroactively force an involuntary jury waiver on him.

At the following court date, December 21, 2017, defense counsel objected to a motion to continue from the State. (R. 60). A witness for the State was unavailable, and defense counsel objected to a continuance, saying that he had spoken with Oliver about the issue and that he "is prepared to move forward with trial today." (R. 60). No acquiescence to a bench trial can be found here for four reasons. First, counsel did not specify as to whether Oliver was prepared to move forward with a bench trial or a jury trial that day, so this Court cannot read any acquiescence to a bench trial on Oliver's part from that statement. It is not clear that Oliver

knew that a bench trial was the only type of trial contemplated or whether he agreed to proceed in that manner. (See R. 60). Secondly, this is a unique situation where defense counsel rendered ineffective assistance by misrepresenting the existence of a jury waiver in all cases, and thus any statements he made in furtherance of these misrepresentations can only reflect the lack of a knowing waiver on Oliver's part. See I.B., below. Thirdly, it is a common defense strategy to object to any continuance requested on the basis of an unavailable State's witness in hopes of a dismissal, to preserve the defendant's right to a speedy trial, and to mitigate against future continuances on the same bases. This strategy, particularly as it is employed in a situation in which a continuance is almost certain, therefore conveys no information about Oliver's state of mind. Finally, the court had already (incorrectly) ruled on the issue of whether a jury waiver had been effected in all of Oliver's cases. (R. 54). Thus, Oliver's silence may have reflected his misunderstanding as to the unavailability of a jury waiver in 17-DT-51, just as the silence from the defendant in *Scott* may have reflected a belief that his opportunity to demand a jury trial had expired. *Scott*, 186 Ill. 2d at 285.

Nor did any acquiescence occur at the court appearance on March 21, 2018, which remains unaddressed by the State's brief. (See State's Br. 11-12). The only reference to a bench trial for 17-DT-51 on that date was a statement from the prosecutor, indicating that the next step for that case and 17-CF-405 was a bench trial. (R. 65). In response to that statement, defense counsel informed the court that Oliver was "quite insistent" that he was "entitled to a trial by jury" on that charge. (R. 66). The trial court, which was being presided over by the Honorable Robert K. Adrian on that date, promised to order a transcript of the October 10, 2017 hearing, which had occurred before the Honorable Michael Atterberry, in order to determine what jury trial rights at had been waived, if any. (R. 66-67). Neither defense counsel, nor Oliver, nor the court, ever discussed proceeding with either a bench or jury trial in 17-DT-51 on that date, and thus, no waiver of jury trial or acquiescence to bench trial can be found in record of proceedings from March 21, 2018. (See R. 65-67).

The only evidence of Oliver's state of mind on that date was his insistence on a jury trial in 17-CF-405. (R. 66). Oliver *had* tendered a jury waiver in 17-CF-405, so his insistence on a jury trial in that case suggests that he likely desired a jury trial in cases in which he had *not* waived jury, as well. A reasonable inference may be made that Oliver wanted a jury trial on all of the related charges, but no reasonable inference can be made that Oliver did not want a jury trial on the DUI charge.

As discussed in the opening brief, no transcript was ever produced or discussed at the next court date, on April 25, 2018, which occurred before still another judge, the Honorable Debra L. Wellborn. (Appellant's Br. 7; R. 77-80). Instead, defense counsel correctly advised the court that Oliver still wanted a trial, but misadvised the court on the issue of whether jury trial had been waived in all cases. (R. 77). Neither Oliver, nor defense counsel, made any representation that Oliver had requested or agreed to a bench trial. (R. 77-80). At the end of that status hearing, the trial court advised Oliver that 17-CF-405 was set for trial on June 26th, and that he could be tried *in absentia*, which Oliver acknowledged understanding. (R. 80). No mention was made of trial for the DUI case in these admonishments, and the court did not explicitly inform Oliver that the June 26 date was set for a bench trial on the DUI case. (See R. 80). Thus, no waiver of jury trial or acquiescence to bench trial can be found by Oliver on April 25, 2018, for the same reasons discussed above.

Finally, on June 26, 2018, the trial court advised the parties that all of the pending cases were set for a bench trial, and defense counsel indicated that he was ready for trial. (R. 84). Unlike in *Frey*, though, Oliver had already been told, repeatedly, by his attorney and the court, that he had waived his right to jury trial in all of his cases. (R. 53-54, 66-67, 77). This fact puts Oliver's case squarely in line with *Scott*, as no assumption of acquiescence can be made where the defendant may have been under the belief that a jury trial was unavailable. *Scott*, 186 Ill.2d at 285.

Thus, no jury waiver was ever entered by Oliver as to the DUI charge, and at not time did he acquiesce to either the entry of such a waiver or the setting of the case for bench trial.

Even after he waived his jury trial right in the other two cases, in exchange for contemplated negotiated plea that never came to fruition, Oliver continued to request a jury trial in his cases. (R. 52-54, 66). The trial court's error in denying a jury trial became even more clear and obvious when Oliver insisted on that right strongly enough that the court promised to review the transcripts of prior hearings to determine if such a waiver was entered. (R. 65-67). The result of this clear and obvious error was the denial of Oliver's constitutional right to a jury trial – the fundamental right that must be protected from structural errors. See *Clark*, 478 U.S. at 578; *Moon*, 2022 IL 125959, ¶¶ 27-28; *Glasper*, 234 Ill.2d at 197-98. No acquiescence to a bench trial can be found where a defendant's silence may be dependent on a belief that he was no longer entitled to a jury trial. *Scott*, 186 Ill.2d at 285. As the incidents that the State describes as acquiescence, (State's Br. 11-15), occurred after Oliver repeatedly requested his jury trial right on companion cases and was overruled, (R. 52-54, 66), no such acquiescence to the trial court's plain error can be found here. This Court should therefore find that plain error occurred and vacate Oliver Hutt's conviction and finding of guilt in 17-DT-51 and remand the case for further proceedings. *Ruiz*, 367 Ill. App. 3d at 239-40.

B. Oliver Was Denied The Effective Assistance of Counsel When His Attorney Misrepresented Whether Oliver Had Waived His Right To Jury Trial

Oliver's right to the effective assistance of counsel was denied when defense counsel incorrectly and repeatedly advised the trial court that Hutt had waived his right to jury trial on October 25, 2017, (R. 52-54), March 21, 2018, (R. 66), and April 25, 2018. (R. 77). These misrepresentations were dispositive and relied upon by the court in setting the case for bench trial and ignoring Oliver's demands for a jury trial. (R. 53-54, 66, 77). As such, the misrepresentations were objectively deficient conduct. See *People v. Correa*, 108 Ill.2d 541, 549 (1985). They prejudiced Oliver by denying him his fundamental right to a jury trial. However, where a defendant claims that trial counsel was ineffective for usurping the defendant's right to a jury trial, the defendant need not show that a jury trial would have reached a different outcome in order to satisfy the *Strickland* analysis. See *McCarter*, 385 Ill.App.3d at 943-44.

Rather, prejudice is presumed if there is a reasonable probability that the defendant would have demanded or waived a jury trial in the absence of the error. See *id*., at 943. This is because "such fundamental structural defects cast doubt on the legitimacy of the entire proceeding and demand an automatic reversal." *Id*. at 944. This Court should therefore vacate Oliver's conviction and finding of guilt in 17-DT-51 and remand the case for further proceedings. *Ruiz*, 367 Ill. App. 3d at 239-40.

The State, though, suggests that the erroneous denial of Oliver's right to a jury trial in 17-DT-51 was invited by his counsel's request that all four cases be set on the bench calendar. (State's Br. 18, citing R. 52, 60). However, the doctrine of invited error does not bar claims of ineffective assistance. *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 210; see *People v. Villarreal*, 198 Ill. 2d 209, 228 (2001). The denial of Oliver's right to a jury trial obtained, in part, by the ineffective assistance of defense counsel, who misled the court as to the existence of a jury waiver in all cases. (See R. 52, 66, 77). This holding is also logically mandatory, as most claims of ineffective assistance of counsel that are based on actions that counsel took could usually be described as invited errors if attributed to the defendant.

Thus, the State's observation that "defense counsel repeatedly requested that all four cases be set on the bench calendar, noting that defendant had waived his right to a jury," (State's Br. 18), is non-responsive to Oliver's claim that these statements constituted the ineffective assistance of counsel. (Appellant's Br. 21-23). Counsel's statement that Oliver had waived his right to a jury in 17-DT-51 was false, as no such waiver ever occurred. (See 4-19-0142 R. 89-90). This mistake fell below the objective standard of reasonableness, as any reasonably effective defense attorney would keep track of whether his client had waived such a fundamental right in each case. The State's position, that the error was caused by defense counsel's statements, (State's Br. 18), is precisely why these statements constituted the ineffective assistance of counsel.

The State's reliance on *People v. Sailor*, 43 Ill. 2d 256, 260 (1969), is misplaced for the same reasons that this case differs from *Frey.* (State's Br. 18-19). In *Sailor*, defense counsel advised the court, in the defendant's presence, that the plea was "not guilty," and that jury

had been waived. *Sailor*, 43 Ill 2d at 260. But in that case there had been no partial jury waivers entered only as to some charges and not others. See *id*. More importantly, the defendant in *Sailor* had not previously received a ruling from the trial court, stating that jury had been waived. See *id*. The mere possibility that the defendant believed that a jury trial was no longer available to them was sufficient to distinguish *Scott* from *Frey* and *Sailor* and to prevent this Court from finding a knowing and voluntary waiver in the defendant's silence. *Scott*, 186 Ill. 2d at 285. *Sailor* points out that a finding of acquiescence is derived from a lack of objection. *Sailor*, 43 Ill. 2d at 260. As discussed above, that doctrine is inapplicable where the defendant had already objected and that objection was overruled by the trial court. (R. 52-54, 66).

The State's response to Oliver's claim of ineffective assistance is circular. According to the State, Oliver cannot show the ineffectiveness of his counsel for misstating the existence of a waiver because "the record demonstrates that he waived his right to a jury trial through his own representations to the court and through his acquiescence to his attorney's representations." (State's Br. 19). As noted repeatedly, Oliver made no representation to the court that he wanted to waive his jury trial right in 17-DT-51. (See 4-19-0142 R. 89-90). The State provides no citation to any such representation by Oliver because no such representation was made.

Further, for the reasons articulated above, no acquiescence can be found in Hutt's failure to continue to object after the trial court issued its ruling that only a bench trial was available to him. (R. 55). This ruling was a direct result of counsel's misrepresentation. (R. 54). A claim that counsel improperly represented that jury trial had been waived cannot be logically refuted by saying that Oliver, through his attorney's actions, waived his right to a jury trial. Nor can it be refuted by a claim of acquiescence, after previous objections to these representations were overruled. (See R. 52-54, 66).

Conclusion

Most claims of ineffective assistance of counsel are analyzed to determine whether counsel's mistakes jeopardized their client's right to a fair jury trial. This is the rare case where counsel's mistake eliminated his client's right to a jury trial entirely, fair or otherwise.

Oliver was also denied the same right by the trial court, which erred in finding that a jury waiver had occurred. For these reasons, and further relying on all arguments raised in the opening brief, this Court should vacate Oliver Hutt's conviction and finding of guilt in 17-DT-51 and remand the case for further proceedings. *Ruiz*, 367 Ill.App.3d at 239-40.

II.

The evidence was insufficient to find Oliver Hutt guilty of obstruction of justice when he took no action to conceal or destroy evidence and the search warrant did not command him to do anything.

The statutory language in the obstruction of justice statute does not encompass the conduct in this case, and so Oliver Hutt's conviction for obstruction of justice under that statute must be vacated as a matter of law. 720 ILCS 5/31-4(a) (2019). The definition of "concealment" of physical evidence, as used in that statute, applies only to the moving of a physical object from a state of visibility to one that is hidden, which the State concedes did not occur in this case. (State's Br. 22). Further, the evidence that Oliver took any action to obstruct justice was insufficient in this case, where there was no clear refusal and where he was under no obligation to comply with the officer's request. (C. 39; R. 120-43). This Court should therefore vacate Oliver's conviction and reverse the trial court's finding of guilt outright, as retrial would improperly submit him to double jeopardy. *People v. McKown*, 236 Ill. 2d 278, 311 (2010).

As noted in the opening brief, (Appellant's Br. 25), this Court has previously recognized that the word "conceal" may convey one of two different meanings. *People v. Comage*, 241 Ill. 2d 139, 144 (2011). The State concedes that the second definition, "to place out of sight: withdraw from being observed: shield from vision or notice," (Webster's Third New International Dictionary 469 (1961)), is inapplicable in this case. (State's Br. 22). The parties therefore agree that only the first definition of concealment (to prevent the disclosure or recognition of, refrain from revealing, or withhold knowledge of something) is at issue. *Comage*, 241 Ill.2d at 144 (quoting Webster's Third New International Dictionary 469 (1961). The State thus had to prove that Oliver concealed evidence in that way "by refusing to submit to blood and urine testing after being ordered to comply with such through a search warrant." (4-19-0142 C. 9). But, as explained by Justice Cavanagh in his dissent, only information, thoughts, and emotions can be "concealed" by the prevention of their disclosure, or by refraining from revealing them. *People v. Hutt*, 2022 IL App (4th) 190142 ¶¶ 79-85. Physical evidence can only be concealed by moving them from a state of discoverability to a hidden state. See *id*. Since Oliver was not charged with that kind of conduct, the conviction for obstruction of justice cannot stand.

Obstruction of Justice Was Not The Correct Statute To Apply To Oliver's Purported Non-Compliance

The State purports that Oliver "avoided revelation of, and refrained from revealing his blood and urine." (State's Br. 22). This simple statement, though, is non-responsive to appellant's argument and Justice Cavanagh's dissent. (Appellant's Br. 25-28); *Hutt*, 2022 IL App (4th) 190142 ¶¶ 79-85. As pointed out by Justice Cavanagh and two other different dictionaries in the opening brief, the definition of concealment relied upon by the State refers only to the non-disclosure of information, thoughts, intentions, or feelings. (Appellant's Br. 25-28); *Hutt*, 2022 IL App (4th) 190142 ¶¶ 79-85. Concealment of physical evidence, like blood and urine, would have to fall under the second definition provided by all of these dictionaries, which the State concedes does not apply. (State's Br. 22).

But the State selectively rejects the language of The Oxford English Dictionary Online (to keep information, intention, feelings from the knowledge of others), The Merriam-Webster Online Dictionary (to prevent disclosure or recognition of [things like truth and anger]), and the clear implications of the Webster's Third New International Dictionary, as relied on in *Comage*, which similarly distinguishes between the withholding of knowledge and the placing out of sight of objects. (State's Br. 25); see *Hutt*, 2022 IL App (4th) 190142 ¶¶ 79-85. The State asks this Court to adopt what it calls "the plain meaning of the word conceal." (State's Br. 25). But the State provides no argument as to why its suggested (and expansive) definition is more of a "plain" reading than the one consistently adopted by multiple teams of lexicographers. (See State's Br. 25).

Alternatively, the State argues that blood and urine are different than other physical evidence routinely sought by police, such as a gun, drugs or clothing. (State's Br. 26). In case this Court holds that Justice Cavanagh and the cited dictionaries are correct, the State argues that blood and urine should be treated as information because, the State argues, those bodily fluids are important for the information that they contain. (State's Br. 26). This distinction between urine, blood, guns, drugs, and clothing is imaginary. Police want to take a murder

weapon into evidence precisely for the information that it contains. Police investigating a shooting do not need another gun; they want the gun found on the defendant's person because it can be tested to determine if it is the gun used to shoot a victim. They want to analyze the ammunition, rifling, the strike point of the firing pin, as well as fingerprints and DNA information that might be found on the weapon. They want the information that can be conveyed by the gun, not the gun itself. This is even more true of drugs and clothing. Police want to be able to test a substance to determine if it is an illegal drug. They are not simply trying to put more cocaine into their evidence locker. Police want clothing to determine if it contains blood or DNA information, or to determine if it is the same clothing that a known perpetrator was wearing. In every example cited by the State, police seek the item in question for the information that it contains, which is sometimes derived from blood found on the objects in the same way that blood is in Oliver Hutt's body. That information ultimately boils down to whether or not a particular suspect committed a crime. And yet nobody would dispute that guns, clothing, and drugs are "physical evidence."

The blood in Oliver's body was thus physical evidence in the exact same way that blood on a weapon or clothing are physical evidence. In order to "conceal" it, then, Oliver would have needed to actively place it out of sight or withdraw it from a state of being observable, under the second set of definitions. *Comage*, 241 Ill.2d at 144. The State agrees that this definition does not apply, and so Oliver could not have obstructed justice by "concealing" the blood that began and remained inside of his own body.

The State also makes a series of policy arguments, suggesting that the only two options before this Court are either 1) to expand the definition of felonious obstruction of justice to encompass the facts of this case or 2) to require police and medical technicians to draw blood by force. (State's Br. 23-25). The falseness of this choice is highlighted by *People v. Elsperman*, 219 Ill. App. 3d 83, 85 (4th Dist. 1991). In that case, the Fourth District held that a defendant who hides their entire person may be guilty of the misdemeanor offense of resisting a police officer, under Section 31-1 (720 ILCS 5/31-1 (2019)). But they would not be guilty of the

felony charge of obstruction of justice, under Section 31-4(a), the charge in the present case. *Elsperman*, 219 Ill. App. 3d at 85. It is absurd to then argue that the same defendant who chose *not* to endanger lives by running from the police, but instead submitted to arrest and then later declined to submit to a blood draw should be instead subjected to the harsher penalty of a felony conviction than the person who ran and hid and led police on a dangerous chase and search. In short, the choice is not between an obstruction charge and violent blood draws, but between the charge of obstruction of justice and the charge of resisting an officer, which has already been held to encompass more culpable and dangerous behavior. *Id*.

Nor does the existence of a search warrant in this case change the analysis. While the charging document accuses Oliver of concealing evidence "after being ordered to comply with such through a search warrant," the search warrant in this case orders no such thing. (See C. 39; 4-19-0142 C. 9). The warrant orders all law enforcement officers to search Oliver's body and to seize blood and urine, but it does not order Oliver "to comply with such through a search warrant," or, indeed, to do anything at all. (C. 39; R. 126).

The State argues that the coercive force of a potential felony conviction is almost certainly preferable to the coercive force of physical restraints. (State's Br. 25). But there is no coercive force that might encourage a defendant to comply where the warrant does not order compliance and where the police do not inform a suspect that refusal to comply with the warrant that directs *them* to search his body may result in a felony charge for obstruction of justice. The police asked Oliver if he would comply, and, when they failed to receive explicit and enthusiastic participation, they retroactively charged him with obstruction of justice. (R. 121, 125). Thus, there is no coercive benefit to proceeding as the police and the State chose to proceed in this case. The obstruction charge was purely retributive, and unnecessarily so, where the conduct more closely fits the misdemeanor charge of resisting a peace officer.

The State attempts to brush *Elsperman* aside, by stating that there is no debate that a person's blood and urine constitute physical evidence. (State's Br. 27). This argument misunderstands the language of the obstruction statute and the Fourth District's reasoning in

Elsperman. On the State's terms, there should not be any real argument that a defendant's entire body can constitute physical evidence, as shown by the State's request for the finding of an in-court identification of the defendant at trial. (R. 138). But in the context of the obstruction statute, the legislature implicitly exempts the personage of a defendant from the types of physical evidence whose concealment can lead to an obstruction charge. 720 ILCS 5/31-4 (2019). The *Elsperman* court, in examining that statutory language, concluded that, for the purposes of the obstruction of justice statute, the defendant's person does not constitute the type of physical evidence whose concealment can lead to a felony obstruction charge. *Elsperman*, 219 Ill. App. 3d at 85.

Notably, the State cites *People v. Watson*, 214 Ill.2d 271, 283-88 (2005), as an example of blood being treated as physical evidence. (State's Br. 27). That case did not invoke the obstruction of justice statute, but instead turned on whether DNA results should have been suppressed for being collected pursuant to a grand jury subpoena for the defendant's blood. *Watson*, 214 Ill.2d at 273. The case is therefore largely non-responsive to the question of whether Oliver's failure to comply with the officer's demands constituted obstruction of justice, but it does highlight important aberrations in the case at bar. In *Watson*, the subpoena in question "commanded defendant to submit to the taking of body samples, including head hair, pubic hair, blood and semen." *Id*., at 275. This language, commonly included in similar warrants, was missing from the warrant in this case, and there was therefore no judicial command for Oliver to do anything. (C. 39). Further, the warrant in *Watson* was enforced via contempt proceedings, which is the tool most commonly employed to coerce compliance with a judicial directive. *Watson* shows, then, how much of a deviation from the best common practices occurred in Oliver's case: the wrong tool was used to coerce compliance with an absent judicial directive, and that coercive tool was employed *ex post facto* in a way that does not encourage or allow the defendant to actually do anything to comply. Further, the only relevant charge was ignored in favor of levying a more serious charge that cannot be sustained on these facts.

The State cannot be permitted to misuse its own enforcement mechanisms and then complain that its only other alternative would be to use more dangerous physical force. (State's Br. 23-25). The question of whether Oliver's purported non-compliance constituted resisting a peace officer remains untried, but as a matter of law, the question of whether he committed obstruction of justice can only be answered in the negative.

The Evidence Is Insufficient To Show That Any Action Was Taken To Conceal Evidence

Oliver contends that *de novo* review is appropriate here, where the challenge is not to either the facts adduced at trial nor to the inferences that can be drawn from those facts, but to the legal question of whether those uncontested facts and reasonable inferences were sufficient to show a failure to submit to testing and thus any obstruction of justice. (Appellant's Br. 24, citing *In re Ryan B.*, 212 Ill.2d 226, 231 (2004)). However, even when viewing the evidence in the light most favorable to the prosecution, the evidence of a refusal or failure to submit to chemical testing is insufficient. The testimony shows that Officer Bemis showed Oliver the search warrant (which, again, did not order Oliver to do anything) and Oliver responded that he needed time to think about it. (R. 120, 141). When Officer Bemis refused to give Oliver that time, Oliver asked the hospital staff what his bond was. (R. 120). Officer Bemis testified that "he really wasn't answering anything so we took that as a refusal since he would not submit to the tests that he was being ordered to submit to." (R. 120-21).

Officer McGee's testimony was far less clear and more internally contradictory. Officer McGee first said, summarily, that Officer Bemis asked Oliver if he was going to give the samples and that Oliver responded by saying no. (R. 141). This is contrary to Officer Bemis's testimony above. (R. 120-21). But then, when asked directly if Oliver ever said no, I am going to refuse to give you blood or give you urine, Officer McGee testified that "He didn't use those exact words, but he was asked if he would provide a blood sample and that the phlebotomist draw his blood or provide a urine sample and he stated no." (R. 141). Nobody clarified whether that statement of no, which does not appear in Officer Bemis's account, was in response to an officer's question or the phlebotomist's. (See R. 141).

Contrary to the State's characterization of appellant's argument, (State's Br. 30), appellant does not argue that only a verbal refusal would constitute obstruction of justice. Appellant maintains, as argued above, that obstruction of justice was not the proper charge under these facts, but in a case where the warrant had properly ordered a suspect to comply, and where he was warned that he could be charged with a felony for failing to comply, obstruction of justice could be demonstrated in many ways without an immediate verbal refusal. Prolonged recalcitrance, or any suggestion of physical resistance could be construed as a refusal to cooperate, without endangering anyone's safety. The State, though, once again presents unrealistically dramatic choices to this Court: either every failure to immediately and enthusiastically comply must be able to be construed as a refusal, or the police and courts will never be able to determine what constitutes a refusal. (See State's Br. 30).

This Court need not reinvent the wheel for this analysis. A refusal of chemical testing occurs only where, after a clear warning of the ramifications resulting from a refusal, an officer explicitly asks a defendant whether he, or she, will take the test, and the defendant, by word, act or omission, clearly refuses to take the test. *People v. Brennan*, 122 Ill. App. 3d 602, 603 (3rd Dist. 1984). This familiar test is what must be demonstrated before a defendant can face a penalty as light as losing their driving privileges. *Brennan*, 122 Ill. App. 3d at 603. Issues relating to due process and proportionate penalties suggest that a test at least this rigorous should be employed before someone can be convicted of a felony and imprisoned for more than a year for similarly refusing a request to submit to chemical testing. Also, it should be noted that the implied consent law in Illinois conveys an obligation on drivers to comply with chemical testing in order to protect their driving privileges, while the deficient warrant in this case resulted in no law or court order imposing such an obligation on Oliver to do so in order to avoid a felony charge.

In this case, the officers gave Oliver no warning of the ramifications that would result from a refusal – clear or otherwise. (R. 121, 125). This alone would be sufficient to grant a petition to rescind a statutory summary suspension that had been issued for failing to submit

to a chemical test, and should be sufficient to deny a conviction for obstruction of justice for the same conduct. See *Brennan*, 122 Ill. App. 3d at 603. And there is no evidence of any word, act, or omission on the part of Oliver that clearly demonstrate a refusal to take the test. (See R. 120-43). Instead, Oliver was briefly asked if he would comply, and his request for time to think about it and a non-sequitur question regarding his bond were unreasonably interpreted as a refusal. (R. 120-21). This testimony is insufficient to sustain a conviction.

Conclusion

Oliver Hutt was shown a warrant that imposed no obligation on him, and was never told that failure to immediately and explicitly verbally consent to the government drawing his blood against his will would result in a felony charge. (R. 120-43). The evidence that Oliver refused to comply with the officers' request to draw his blood is insufficient to sustain a conviction for obstruction of justice. In addition, the conduct described by the State's witnesses cannot legally constitute the obstruction of justice where Oliver took no action to conceal physical evidence. The State agrees that he did not move evidence from a state of discoverability to a hidden state, and multiple dictionaries agree that this is the only definition of concealment that applies to physical objects. *Hutt*, 2022 IL App (4th) 190142 ¶¶ 79-85. Finally, existing case law exempts the personage of a defendant from the definition of physical evidence whose "concealment" could constitute this felony charge. *Elsperman*, 219 Ill. App. 3d at 83-85. As a matter of statutory construction under *de novo* review, the obstruction of justice statute does not encompass Oliver's behavior, and under either that standard or when viewing the evidence in the light most favorable to the prosecution, the evidence was insufficient to convict. Oliver's actions did not constitute the obstruction of justice. For these reasons, and further relying on all arguments made in the opening brief, this Court should therefore reverse the trial court's finding of guilt on the charge of obstruction of justice outright. *McKown*, 236 Ill.2d at 311.

CONCLUSION

For the foregoing reasons, Oliver J. Hutt, defendant-appellant, respectfully requests that this Court reverse the trial court's finding of guilt in 17-CF-405 outright, and vacate the finding of guilt in 17-DT-51, remanding the latter for further proceedings, including the right to a jury trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/James Henry Waller
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No. 128170

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OLIVER J. HUTT, Defendant-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 4-19-0142 and 4-19-0271 (Consolidated). There on appeal from the Circuit Court of the Eighth Judicial Circuit, Adams County, Illinois, No. 17-CF-405, 17-DT-51. Honorable Robert K. Adrian, 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 December 29, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in 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 Reply Brief to the Clerk of the above Court.

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