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## Erring on the Side of Justice: A Call for an End to Prosecutorial Arrogance in Opposing DNA Testing for Evidence Untested at Trial - Lessons of Innocence and Humility from the Case of Dean Cage

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**ERRING ON THE SIDE OF JUSTICE:  
A CALL FOR AN END TO PROSECUTORIAL  
ARROGANCE IN OPPOSING DNA TESTING  
FOR EVIDENCE UNTESTED AT TRIAL –  
LESSONS OF INNOCENCE AND HUMILITY  
FROM THE CASE OF DEAN CAGE**

STEVEN W. BECKER\*

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**INTRODUCTION**

In November 1994, Dean Cage was arrested for the aggravated criminal sexual assault of L.Z. There was no physical evidence linking Cage to the crime despite the fact that L.Z. testified at trial that the rapist repeatedly sexually assaulted her in a variety of ways. The only evidence introduced against Cage was the victim's eyewitness identification. Yet, although Cage presented an alibi witness and testified on his own behalf that he was at home with his girlfriend at the time of the crime, he was convicted at a bench trial and sentenced to 40 years in prison.

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The author represented Dean Cage on appeal seeking a reversal of the trial court's denial of Cage's motion for DNA testing. *See People v. Cage*, No. 1-02-2898 (1st Dist. Mar. 26, 2004) (Rule 23 Order) (affirming denial of DNA motion on the ground that there was no basis to conclude that the victim's clothing contained genetic material for testing). The views expressed in this article are the author's own and do not necessarily reflect the views of the organizations with which he is affiliated.

After Cage's direct and post-conviction appeals were exhausted, he filed a motion for DNA testing pursuant to section 116-3 of the Illinois Code of Criminal Procedure ("the Code"). A judge other than the trial judge denied Cage's motion on the ground that there was a stipulation at trial that the swabs taken from L.Z. tested negative for spermatozoa, thus concluding that there was nothing to test. On appeal from the denial of the DNA motion, appellate counsel discovered that several items of L.Z.'s clothing had never been tested and could contain genetic material suitable for testing. Given the potential that testing these items could have toward demonstrating Cage's innocence, appellate counsel requested that the State not oppose Cage's request for DNA testing. The State, however, vigorously fought the case on appeal, and, in March 2004, the appellate court affirmed the trial court's denial of the motion.

Thereafter, Cage contacted the Innocence Project in New York. Subsequent DNA testing of L.Z.'s clothing and the swabs positively excluded Cage as the rapist. Cage was exonerated and released from prison on May 27, 2008, after being incarcerated for almost 14 years for a crime he did not commit. What is equally troubling, however, is that had the State not opposed Cage's request for DNA testing on appeal, Cage could have been released years earlier. It is this latter travesty of justice that the present article seeks to confront.

Part I of this article addresses Illinois's DNA statute at the time of Cage's motion and provides an overview of Illinois Supreme Court jurisprudence interpreting the statute. Part II gives a detailed factual description of Cage's odyssey through the Illinois court system, concluding with his recent exoneration. Part III focuses on the many lessons to be learned from Cage's case, including the unreliability of eyewitness testimony, the importance of allowing the post-trial testing of items previously untested at trial, the significance of recent revisions to Illinois' DNA statute, the ethical duty of prosecutors to see that justice is done, the compensatory hurdles faced by those victimized by

wrongful convictions and the exceptional virtue of humility exhibited by Cage in the face of this personal tragedy.

### I. ILLINOIS'S DNA STATUTE

On July 23, 1997, Illinois became only the second state in the nation to “allow a person convicted of a crime to obtain DNA or fingerprint testing on evidence gathered at the time of trial, if such testing had not then been available and the results might prove the person’s innocence.”<sup>1</sup> Four months later, a dozen individuals had been exonerated.<sup>2</sup> As of May 2008, a total of 29 people in Illinois, Cage being the most recent, had been cleared of criminal wrongdoing through DNA evidence.<sup>3</sup>

At the time of Cage’s motion in 2002, Illinois’ DNA statute, which is contained in section 116-3 of the Code, provided, as it had since its inception, as follows:

Motion for fingerprint or forensic testing not available at trial regarding actual innocence.

(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial. Reasonable notice of the motion shall be served upon the State.

<sup>1</sup> Gregory W. O’Reilly, *A Second Chance for Justice: Illinois’ Post-trial Forensic Testing Law*, 81 JUDICATURE 114, 114 (1997).

<sup>2</sup> Kathryn E. Carso, Comment, *Amending the Illinois Postconviction Statute to Include Ballistics Testing*, 56 DEPAUL L. REV. 695, 721 (2006).

<sup>3</sup> Maurice Possley, *DNA Exonerates Inmate on Rape Conviction After 14 Years*, CHI. TRIB., May 27, 2008, available at <http://www.chicagotribune.com/news/local/chi-dna-exonerates-prisoner-webmay28,0,5734277.story>.

(b) The defendant must present a prima facie case that:

(1) identity was the issue in the trial which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence;

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.<sup>4</sup>

The Illinois Supreme Court has addressed the scope of the DNA statute on multiple occasions. For example, in *People v. Savory*,<sup>5</sup> the Court construed the meaning of the phrase "materially relevant" in subsection (c)(1)'s requirements that "the result of the testing has the scientific potential to produce new, noncumulative evidence *materially relevant* to the defendant's assertion of actual innocence."<sup>6</sup> The question faced by the Court was whether testing is permitted only where a favorable result will completely vindicate a defendant or whether it is permitted where the result will merely significantly advance an assertion of innocence.<sup>7</sup> The Court concluded that "evidence

<sup>4</sup> 725 ILL. COMP. STAT. 5/116-3 (2002).

<sup>5</sup> 1756 N.E.2d 804 (Ill. App. Ct. 2001).

<sup>6</sup> 725 ILL. COMP. STAT. 5/116-3(c)(1) (2002) (emphasis added).

<sup>7</sup> *Savory*, 756 N.E.2d at 810-11.

which is ‘materially relevant’ to a defendant’s claim of actual innocence is simply evidence which tends to significantly advance that claim.”<sup>8</sup> Said another way, it is not necessary that the testing lead to a complete exoneration.<sup>9</sup> The Court ruled, however, that such an assessment “cannot be determined in the abstract” and necessitates a review of the trial evidence, as well as consideration of the evidence the defendant seeks to test.<sup>10</sup> In *Savory*, after reviewing the evidence at trial, the Court concluded that a favorable outcome would not materially advance the defendant’s assertion of innocence.<sup>11</sup>

In *People v. Johnson*,<sup>12</sup> the Illinois Supreme Court decided the question of whether the petitioner presented a prima facie case where he sought testing of a previously untested item.<sup>13</sup> More specifically, in *Johnson*, the petitioner filed an amended post-conviction petition seeking, inter alia, DNA testing of a Vitullo rape kit pertaining to the victim, contending that the results would raise doubts as to whether he committed the rape and, ultimately, whether he was responsible for the murder of a second individual.<sup>14</sup> The petitioner asserted that the swab in the kit had never been tested.<sup>15</sup> Additionally, he contended that identity was the principal matter of dispute at trial because the sole proof introduced against him was the rape victim’s identification testimony.<sup>16</sup>

Initially, the Court clarified that a request for DNA testing may be made in a post-conviction petition, which is an appropriate vehicle by which to assert claims of actual innocence.<sup>17</sup> The

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 811.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 811-12.

<sup>12</sup> 793 N.E.2d 591 (Ill. App. Ct. 2002).

<sup>13</sup> *Id.* at 599.

<sup>14</sup> *Id.* at 596, 598.

<sup>15</sup> *Id.* at 598.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Court also clarified that to present a prima facie case for DNA testing, a “defendant must show that identity was the central issue at trial and that the evidence to be tested was subject to a sufficiently secure chain of custody.”<sup>18</sup> With respect to the latter requirement, the Court noted that, “[o]n the record before us . . . we cannot discern the condition of the Vitullo kit . . . .”<sup>19</sup> The Court further rejected the State’s claim that the petitioner failed to meet this element because he did not present evidence of the kit’s current location, reasoning that “such evidence would not be available to the defendant” and remarking that the kit “would have remained in the custody of the circuit court clerk after the defendant’s conviction.”<sup>20</sup>

As to Johnson’s particular case, the Court pointed out that, at the trial court level, the State did not oppose DNA testing but claimed that there was no evidence to test.<sup>21</sup> The State’s forfeiture aside, the Illinois Supreme Court highlighted that, in Johnson’s case, “evidence about the source of genetic material in the Vitullo kit was never presented at trial.”<sup>22</sup> That is, the defendant’s request was not merely for the purpose of impeaching the prosecution’s evidence; “[i]nstead, he [sought] to present, for the first time, evidence about the genetic identity of Payne’s assailant.”<sup>23</sup> Significantly, the Court explained that it was unaware of whether any testable material was present.<sup>24</sup> The Court then declared that “[i]f the available DNA evidence is capable of supporting such a determination by significantly advancing a claim of actual innocence, *there is no valid justification to withhold such relief* if requested on post-conviction review.”<sup>25</sup> Accord-

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<sup>18</sup> *Id.* at 599.

<sup>19</sup> *Id.* at 598.

<sup>20</sup> *Id.* at 600.

<sup>21</sup> *Id.* at 599.

<sup>22</sup> *Id.* at 601.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 598.

<sup>25</sup> *Id.* at 601 (quoting *People v. Dunn*, 713 N.E.2d 568, 572 (Ill. App. Ct. 1999)) (emphasis added).

ingly, the Court held that the trial court erred in refusing to allow DNA testing of the Vitullo rape kit.<sup>26</sup>

In *People v. Shum*,<sup>27</sup> just as in *Johnson*, the petitioner raised a request for DNA testing of a Vitullo rape kit in an amended post-conviction petition;<sup>28</sup> the only direct evidence at trial against the petitioner was the eyewitness identification testimony of one of the victims, and the State indicated that it did not oppose testing.<sup>29</sup> Moreover, DNA testing was unavailable in 1984 when petitioner's trial was held.<sup>30</sup> The trial court had granted the State's motion to dismiss the petition on the ground that it was speculative as to whether DNA testing would produce evidence of actual innocence, especially in light of the fact that, in the trial court's view, identity was not at issue in the case because the eyewitness who positively identified the petitioner had been previously acquainted with him.<sup>31</sup> The Illinois Supreme Court, however, rejected this narrow construction of the issue of identity, holding that because the only evidence presented was the identification testimony of a single witness in a case involving a single assailant and the petitioner had consistently denied any involvement in the crimes, the petitioner had established a prima facie case in demonstrating that identity was a central issue in the case.<sup>32</sup> Accordingly, following *Johnson*, the Court ruled that the trial court erred in denying the petitioner's request for DNA testing.<sup>33</sup>

Next, in *People v. Brooks*,<sup>34</sup> the Illinois Supreme Court construed subsection (a)'s requirement that the evidence "was not subject to the testing which is now requested because the tech-

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<sup>26</sup> *Id.*

<sup>27</sup> 797 N.E.2d 609 (Ill. App. Ct. 2003).

<sup>28</sup> *Id.* at 612, 614.

<sup>29</sup> *Id.* at 620, 621.

<sup>30</sup> *Id.* at 619.

<sup>31</sup> *Id.* at 619-20.

<sup>32</sup> *Id.* at 620-21.

<sup>33</sup> *Id.* at 621.

<sup>34</sup> 851 N.E.2d 59 (Ill. App. Ct. 2006).



nology for the testing was not available at the time of trial.”<sup>35</sup> Therein, the defendant filed a section 116-3 motion requesting polymerase chain reaction DNA testing (“PCR DNA testing”).<sup>36</sup> In affirming the trial court’s denial of the motion, the Illinois Supreme Court noted that, at the time of the defendant’s trial in 2000, PCR DNA testing was an available testing method and was recognized nationwide.<sup>37</sup> Accordingly, the Court held that the defendant was unable to demonstrate that the requested testing method was unavailable at the time of trial.<sup>38</sup>

Most recently, in *People v. O’Connell*, the Illinois Supreme Court held that, based upon an interpretation of the plain language of the statute, “a defendant who pleads guilty may not use section 116-3 as a means to request DNA testing.”<sup>39</sup>

In 2003, Illinois’s DNA statute was amended to allow for comparison analysis with evidence collected by criminal justice agencies<sup>40</sup> and to clarify, in harmony with the Illinois Supreme Court’s holding in *Savory*, that testing must be allowed “even though the results may not completely exonerate the defendant.”<sup>41</sup> The recent 2007 amendments to the statute, which will hopefully aid in remedying the vital defects contained in the original DNA provision, are detailed below.<sup>42</sup>

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<sup>35</sup> *Id.*; 725 ILL. COMP. STAT. 5/116-3(a) (2002).

<sup>36</sup> *Brooks*, 851 N.E.2d at 62. For an explanatory description of this technique, see Charles M. Strom, *Genetic Justice: A Lawyer’s Guide to the Science of DNA Testing*, 87 ILL. B.J. 18, 23-24 (1999).

<sup>37</sup> *Brooks*, 851 N.E.2d at 65.

<sup>38</sup> *Id.*

<sup>39</sup> *People v. O’Connell*, 879 N.E.2d 315, 319 (Ill. 2007).

<sup>40</sup> 725 ILL. COMP. STAT. 5/116-3(a) (2004).

<sup>41</sup> 725 ILL. COMP. STAT. 5/116-3(c)(1) (2004).

<sup>42</sup> See *infra* notes 93-98 and accompanying text.

## II. THE CASE OF DEAN CAGE

### A. Trial

Dean Cage was charged by indictment with, *inter alia*, the aggravated criminal sexual assault of L.Z.<sup>43</sup> At the bench trial before Judge Bolan, L.Z. testified that on November 14, 1994, while walking down the street, she was hit in the eye, dragged to a porch behind an apartment building, taken down some stairs, and then sexually assaulted. L.Z. stated that she was wearing a school shirt, sweater and jacket on the upper portion of her body. On the lower portion of her body she was wearing a uniform skirt, which she described as a culotte, a pair of boxers and a pair of underwear. L.Z. testified that, during the attack, the assailant pulled down her uniform but nothing else and inserted his penis into her anus. Then, the assailant instructed her to get on her hands and knees, and he again inserted his penis into her anus. Next, the assailant told L.Z. to get on her back, after which he performed cunnilingus. Following this act, the assailant repeatedly inserted his penis into and removed it from L.Z.'s vagina. After that, the assailant kicked dirt around L.Z. and told her to rub it all over her body. The assailant then fled.

L.Z. testified that, after the assailant ran away, she gathered her uniform, book and book bag. She said that her uniform was on the stairs. When asked how her uniform came to be on the stairs, L.Z. said that she did not know. L.Z. then ran out on the street, and an individual at a newspaper stand called for assistance. L.Z. had not yet put her clothes back on at the time the police arrived. After the police took L.Z. back to the scene of the assault, they took her to the hospital. At the hospital, the police collected L.Z.'s uniform, sweater, shorts, bra and school shirt. All these clothing items were included in the trial court's impounding order.

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<sup>43</sup> Unless otherwise noted, the facts are taken from the appellate pleadings.

Based on L.Z.'s description of the assailant, a computer-generated composite sketch was produced and circulated throughout the neighborhood in which the assault occurred.<sup>44</sup> Approximately one week later, the police received an anonymous tip that the perpetrator may have worked at a local meat-packing house.<sup>45</sup> On November 19, 1994, the police took L.Z. to Cage's place of employment where she identified him as her assailant. At the police station, L.Z. identified Cage in a lineup,<sup>46</sup> and she also identified Cage by voice.<sup>47</sup> Similarly, at trial, L.Z. identified Cage as her attacker. Both Cage and his girlfriend, Jewel Mitchell, testified that, at the time of the assault, Cage was at home with Ms. Mitchell.

At trial, a stipulation was entered into between the parties that the vaginal, anal and oral swabs taken from L.Z. on November 14, 1994, did not reveal any spermatozoa. There was no indication in the stipulation that L.Z.'s clothing was tested for the presence of spermatozoa. There was no scientific evidence linking Cage to the assault. During closing arguments, the State noted that it was unknown whether the assailant ejaculated because L.Z. did not observe that portion of the assailant's body.

The trial court found Cage guilty of, *inter alia*, three counts of aggravated criminal sexual assault. Cage was sentenced to a total of 40 years in prison. Cage's conviction and sentence were affirmed on direct appeal. Subsequently, Cage filed a post-con-

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<sup>44</sup> Possley, *supra* note 3.

<sup>45</sup> Bluhm Legal Clinic, Northwestern Univ. Sch. of Law, *Erroneous ID Sent Dean Cage to Prison for 14 Years* [hereinafter *Erroneous ID*], <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilCageSummary.html>. (last visited June 7, 2009).

<sup>46</sup> *Id.*

<sup>47</sup> Angela Rozas, *Ex-inmate Reflects on Prison: Man Cleared by DNA in 1994 Rape Spent 14 Years Incarcerated*, CHI. TRIB., May 29, 2008, § 2, at 2; Innocence Project, Press Release, *Dean Cage, Wrongfully Convicted Based on Eyewitness ID Practices that Are Still in Place Today, Is Exonerated in Chicago with DNA*, May 28, 2008 [hereinafter *Wrongfully Convicted*], available at <http://www.innocenceproject.org/Content/1377.php>.

viction petition, which was denied. The trial court's dismissal was affirmed on appeal.

### ***B. DNA Motion***

In June 2002, Cage filed a *pro se* "Motion for DNA Testing Not Available at Trial" pursuant to section 116-3. In his motion, he alleged that the "[i]dentity of the perpetrator was a key issue in the trial" and that the materials collected from which DNA samples could be obtained are "in the possession of the proper authorities and ha[ve] not been tampered with, replaced, or altered in any material aspect." Cage further alleged that the DNA testing he sought was unavailable at the time of his trial. Cage also stated that "[n]one of the material collected was subjected to the test requested." In addition, Cage asserted that such test results were relevant to an assertion of actual innocence.

On August 16, 2002, Judge Crane denied Cage's motion because "[a] review of the file indicates that there was a stipulation in the case that the oral, vaginal and rectal swabs were negative for spermatozoa, therefore, there's no substance to test." Cage filed a timely appeal. On appeal, Cage contended that the trial court erred in denying his motion for DNA testing where: (1) identity was the central issue in his case; (2) a sufficient chain of custody was established; and (3) articles of the complainant's clothing, which had the potential to produce new, noncumulative evidence material to his claim of actual innocence, were never tested at trial.<sup>48</sup> With respect to the subject of identity, Cage noted that because the only evidence against him was the 15-year-old complainant's testimony, and because he had raised an alibi defense and had consistently denied involvement in the crime, identity of the assailant was the central issue in the case.<sup>49</sup>

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<sup>48</sup> People v. Cage, No. 1-02-2898, Opening Brief, at 8-18 (filed June 17, 2003) [hereinafter Opening Brief].

<sup>49</sup> *Id.* at 10.

Cage also asserted that the chain of custody requirement was met because the items of clothing which he sought on appeal to have tested, L.Z.'s school uniform, sweater, shorts, bra and school shirt, were the subject of an impounding order in the trial court.<sup>50</sup>

Next, Cage argued that DNA testing would potentially produce new, noncumulative evidence that was materially relevant to his claim of actual innocence. First, he pointed out that there was no scientific evidence linking him to the crime and that, according to the trial stipulation, the vaginal, anal and oral swabs taken from L.Z. did not reveal any spermatozoa.<sup>51</sup> In addition, based upon L.Z.'s testimony that the assailant engaged in rapid thrusting activity near the end of the sexual assault, Cage asserted that it was very likely that the assailant ejaculated.<sup>52</sup> Because there was no evidence that the assailant did not ejaculate, Cage contended that it was possible that seminal fluid might have been deposited on L.Z.'s clothing, considering her physical positioning during the assault and the location of her uniform and/or shorts, which were presumably lying on the ground.<sup>53</sup> Moreover, because it appeared from the trial testimony that the assailant may have moved some of L.Z.'s clothing to a nearby stairwell during the assault, Cage argued that he may have transferred semen from his hands onto the clothing.<sup>54</sup>

Furthermore, citing to the then-newly decided case of *People v. Johnson*<sup>55</sup> in the Illinois Supreme Court,<sup>56</sup> Cage vigorously contended that testing on the clothing items should be allowed as a matter of course because, just as with the Vitullo rape kit at issue in *Johnson*, they were never tested prior to trial.<sup>57</sup> In so

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<sup>50</sup> *Id.* at 10-12.

<sup>51</sup> *Id.* at 13.

<sup>52</sup> *Id.* at 13-14.

<sup>53</sup> *Id.* at 14.

<sup>54</sup> *Id.*

<sup>55</sup> 793 N.E.2d 591 (2002).

<sup>56</sup> *See supra* notes 11-23 and accompanying text.

<sup>57</sup> Opening Brief, *supra* note 48, at 15-16.

doing, Cage relied specifically on *Johnson's* exclamation that, where DNA evidence may exist, "there is no valid justification to withhold such relief. . . ." <sup>58</sup> Cage subsequently noted that the Court in *Johnson* granted relief despite the fact that there was no evidence that the Vitullo kit at issue contained any testable genetic material, a situation directly analogous to Cage's case *vis-à-vis* the complainant's clothing. <sup>59</sup>

Finally, Cage claimed that, with regard to the statutory mandate that a defendant must allege that the DNA testing method sought was unavailable at the time of trial, he satisfied such requirement despite the fact that he did not enumerate to which particular DNA technology he was referring, which he contended he was not required to identify until the hearing stage on the motion. <sup>60</sup>

In response, the State argued that "[a] rape kit and victim's clothing do not have the same potential to produce genetic evidence, and since the victim was tested for the presence of spermatozoa and it was negative, there is no potential for new evidence to be found from the [clothing]." <sup>61</sup> The State further asserted that "the record is devoid of any evidence that defendant ejaculated." <sup>62</sup> Thus, the State concluded that Cage's request for testing L.Z.'s clothing did not have the scientific potential to produce new evidence materially relevant to Cage's claim of actual innocence. <sup>63</sup> In addition, the State contended that "defendant's unsupported general claim in his motion for DNA testing that the technology was unavailable when he was

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<sup>58</sup> *Johnson*, 793 N.E.2d at 601 (quoting *People v. Dunn*, 713 N.E.2d 568, 572 (Ill. App. Ct. 1999)).

<sup>59</sup> *People v. Cage*, No. 1-02-2898, Reply Brief, at 4-5 (filed June 17, 2003).

<sup>60</sup> Opening Brief, *supra* note 48, at 16-17.

<sup>61</sup> *People v. Cage*, No. 1-02-2898, State's Response Brief, at 15 (filed Aug. 5, 2003).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

tried is tantamount to failing to properly plead the prior unavailability of the testing.”<sup>64</sup>

In a terse, nine-page unpublished decision, the Illinois Appellate Court affirmed the trial court’s denial of Cage’s DNA motion.<sup>65</sup> From the very outset, the court seemed to reject the validity of Cage’s appeal because, with respect to the statutory requirement that the testing method requested must have been unavailable at the time of trial, “[Cage] did not indicate any specific type of DNA testing sought or provide any evidence as to when such testing first became available.”<sup>66</sup> Nevertheless, assuming for the sake of argument that the testing was unavailable at the time of trial, the appellate court turned to the merits of Cage’s appeal.<sup>67</sup>

The court did find that Cage presented a *prima facie* case for DNA testing under the statute, as identity was the key issue at trial and the clothing items that Cage sought to test were listed in an impounding order.<sup>68</sup> Yet, the appellate court opined that the record “disclose[d] no basis for concluding that the clothing defendant seeks to test is ‘materially relevant’ to his claim of actual innocence.”<sup>69</sup> The basis for the court’s ruling was encapsulated in the following passage:

The parties stipulated that the oral, vaginal and rectal swabs taken from the victim tested negative for spermatozoa. Thus, there is no indication that her assailant ejaculated or reason to believe that the victim’s clothing contains any samples which have the potential to produce genetic evidence for DNA testing, much less to produce new noncumu-

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<sup>64</sup> *Id.* at 16.

<sup>65</sup> *People v. Cage*, No. 1-02-2898, Order at 9 (Ill. App. Ct. Mar. 26, 2004) (Rule 23 Order) (Campbell, P.J., with O’Brien & Reid, JJ., concurring).

<sup>66</sup> *Id.* at 5.

<sup>67</sup> *Id.* at 6.

<sup>68</sup> *Id.* at 6-7.

<sup>69</sup> *Id.* at 7.

lative evidence to advance defendant's claim of actual innocence.<sup>70</sup>

Accordingly, the reviewing panel affirmed the trial court's judgment.<sup>71</sup>

### C. *Exoneration*

In 2004, Cage wrote to the New York-based Innocence Project, which began to investigate his case.<sup>72</sup> In late 2006, the Innocence Project secured the agreement of the Cook County State's Attorney's Office to conduct DNA testing.<sup>73</sup> Although initial DNA tests were not conclusive, subsequent testing completely eliminated Cage as the assailant.<sup>74</sup> More specifically, DNA testing on L.Z.'s clothing and the rape kit produced the samples that excluded Cage as the perpetrator.<sup>75</sup>

On May 27, 2008, Chief Criminal Court Judge Paul Biebel vacated Cage's conviction and dismissed all charges against him.<sup>76</sup>

## III. LESSONS TO BE LEARNED

### A. *Unreliability of Eyewitness Identification*

Cage's case provides just one further example of the inherent unreliability of eyewitness identification, especially in a case in

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<sup>70</sup> *Id.* at 8.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> Possley, *supra* note 3.

<sup>73</sup> *Wrongfully Convicted*, *supra* note 47.

<sup>74</sup> Possley, *supra* note 3.

<sup>75</sup> *Erroneous ID*, *supra* note 45 (noting that the Innocence Project sought DNA testing "of saliva recovered from the victim's body and clothing"). According to Alba Morales, an attorney with the Innocence Project who worked extensively on Cage's case, the testable genetic material on L.Z.'s clothing was located on her shirt.

<sup>76</sup> Possley, *supra* note 3; Innocence Project, Press Release, DNA Testing Proves Chicago Man's Innocence in 1994 Rape (May 27, 2008), available at <http://www.innocenceproject.org/Content/1377PRINT.php>.



which such identification constitutes the sole evidence against a defendant. According to the Innocence Project, “[e]yewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing.”<sup>77</sup> The United States Supreme Court itself emphasized that “[t]he vagaries of eyewitness identification are well-known” and confirmed that “the annals of criminal law are rife with instances of mistaken identification.”<sup>78</sup>

Moreover, the reliability of identifications in criminal cases “is highly contested in both legal and psychological circles.”<sup>79</sup> Because of the numerous variables, both natural and procedural, that may affect or otherwise adversely influence the accuracy of an identification, there is a growing trend for courts to permit defendants to present expert testimony to juries on the subject of the reliability, or lack thereof, of eyewitness identification testimony.<sup>80</sup> As Cage’s case demonstrates, not only should this trend continue, but it might be advisable to extend it to bench trials as well.

### ***B. Testing Previously Untested Evidence***

Of all the lessons to be learned from Dean Cage’s case, probably the most important is that, in the future, there should be no opposition by the State to post-trial requests by defendants for

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<sup>77</sup> Innocence Project, *Eyewitness Misidentification*, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Oct. 1, 2008).

<sup>78</sup> *United States v. Wade*, 388 U.S. 218, 228 (1967).

<sup>79</sup> Rudolph Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1098 (2003).

<sup>80</sup> See, e.g., *United States v. Brownlee*, 454 F.3d 131, 140-44 (3d Cir. 2006) (reversing convictions due to district court’s refusal to allow expert testimony concerning the reliability of eyewitness identification evidence and remanding case for new trial). In Illinois, see Justice Wolfson’s thoughtful opinion in *People v. Allen*, 875 N.E.2d 1221, 1229-33 (Ill. App. Ct. 2007), *appeal denied*, 882 N.E.2d 78 (2008).

DNA testing of items previously untested at trial where actual innocence is asserted. This is especially so in a case like Cage's, where there was no physical evidence whatsoever linking Cage to the sexual assault of L.Z. and where the only evidence against him was the victim's eyewitness identification. Cage's case clearly demonstrates that just because a certain piece of evidence initially tested by the State – in this case the Vitullo rape kit – fails to disclose testable genetic material, it in no way precludes the possibility that the testing of other items, such as L.Z.'s clothing, may contain testable material and may be outcome determinative on the question of actual innocence.

For example, in a case surprisingly similar in many details to Cage's, a stain later discovered on the complainant's clothing proved to be dispositive in freeing a suspect falsely accused of rape in DuPage County, Illinois.<sup>81</sup> The case involved a man who was identified as the attacker two months after an alleged rape took place when the complainant saw him in a restaurant.<sup>82</sup> He, like Cage, had an alibi; in fact, the man was not even in Illinois at the time of the incident but was conducting business in Michigan.<sup>83</sup> The complainant and witnesses described the assailant as a young man in his 20s, weighing approximately 180 pounds, with curly blond hair and blue eyes.<sup>84</sup> The man charged in the rape, however, was in his 40s, weighed 250 pounds, had green eyes, and was balding with sparse dark hair.<sup>85</sup> An initial test of the complainant's underwear tested negative for semen; however, testing from semen stains on her shorts "indicated that it could have come from 45 percent of the male Caucasian population," which included the defendant.<sup>86</sup>

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<sup>81</sup> See Andrew Martin, *Lab Clears DuPage Rape Suspect: Charges Dropped 2 Years After Arrest In Girl's Assault*, CHI. TRIB., June 18, 1994, § 1, at 1.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

Close to two years after the defendant's arrest, during preparation for trial, another forensic scientist scrutinized the State's evidence and concluded that additional tests on the underwear could be conducted.<sup>87</sup> In fact, it was discovered that the state crime lab failed to notice a semen stain on the victim's underwear.<sup>88</sup> When the stain was tested, the results completely excluded the defendant from being the assailant.<sup>89</sup> The next day, the charges against the defendant were dropped.<sup>90</sup> Serious questions remain as to whether any further inquiry would have even been conducted into the physical evidence in the case had the media not begun to publicly question the obvious discrepancy between the initial description of the assailant and that of the charged suspect.<sup>91</sup> In any event, the state crime lab's failure to identify the semen stain on the girl's underwear kept the suspect "under a wrongful accusation of rape for nearly two years,"<sup>92</sup> left him penniless and destroyed his international consulting business.<sup>93</sup>

In the aforementioned case, the defendant was at least spared the trauma of being incarcerated after being wrongfully convicted of rape. Yet, where an imprisoned defendant claiming actual innocence seeks to have previously untested evidence tested, there is no legitimate justification for the State to challenge such a request. As a matter of fact, in both of the Illinois Supreme Court's decisions in *Johnson* and *Shum*, the items sought to be tested had not previously been subjected to DNA

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<sup>87</sup> *Id.*

<sup>88</sup> Andrew Martin & Thomas Hardy, *Rape Suspect's Nightmare Lab Kept Wrong Man Jailed*, CHI. TRIB., June 22, 1994, § 1.

<sup>89</sup> Martin, *supra* note 81, at 5.

<sup>90</sup> *Id.* For further information on the case and the resulting civil suit, see *Tangwall v. Stuckey*, 135 F.3d 510 (7th Cir. 1998).

<sup>91</sup> See, e.g., Eric Zorn, *Battling for Justice is Dicey in DuPage*, CHI. TRIB., June 7, 1994, §1.

<sup>92</sup> Martin & Hardy, *supra* note 88.

<sup>93</sup> Zorn, *supra* note 91.

testing, and the Court granted relief.<sup>94</sup> For the State to oppose testing of untested items in such circumstances deprecates the quest for justice in favor of the subservient goals of efficiency and finality.

### *C. Recent Revision to Illinois's DNA Statute*

Effective October 23, 2007, Illinois's DNA statute was amended by Public Act 95-688 to allow for the filing of a motion requesting the testing of evidence that "was not subject to the testing which is now requested at the time of trial," rather than solely because the technology for such testing was not available at the time of trial.<sup>95</sup> This is a significant revision that will undoubtedly have a salutary effect on preventing the type of injustice evident in the appellate court's decision in *Cage's* case, where a defendant is effectively precluded from obtaining relief in the form of DNA testing for evidence previously untested at trial simply because the technology for testing may have been previously available.

Public Act 95-688 resulted from Senate Bill 1023, which, in turn, incorporated changes made to House Bill 1290, the latter of which was originally introduced to permit the filing of a motion for the performance of Integrated Ballistic Identification System testing.<sup>96</sup> One can best see the evolution of the change resulting in the new DNA statute by viewing House Amendment Number 1 to House Bill 1290, which altered in the following manner the latter portion of subsection (a) of the DNA statute that would allow the filing of a motion for DNA testing where the evidence:

<sup>94</sup> See *People v. Johnson*, 793 N.E.2d 591, 598, 601 (Ill. 2002); *People v. Shum*, 797 N.E.2d 609, 619, 621 (Ill. 2003).

<sup>95</sup> 725 ILL. COMP. STAT. 5/116-3(a)(1), (2) (2008).

<sup>96</sup> 95th Ill. Gen. Assem., House Proceedings, July 12, 2007, at 3-4 (statement of Rep. Turner) ("Amendment #1 encompass[es] what was . . . House Bill 1290. And in House Bill 1290 we dealt with ballistic testings and DNA and the ability to use that evidence in future cases.").

~~(1) but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial; or - Reasonable notice of the motion shall be served upon the State.~~

*(2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. Reasonable notice of the motion shall be served on the State.*<sup>97</sup>

The legislature describes these revisions as providing that the defendant may make a motion for performance of Integrated Ballistic Identification System or forensic DNA testing on evidence: (1) that was not the subject of testing which is now requested at the time of trial (rather than because the technology for the testing was not available at the time of trial) or (2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results.<sup>98</sup>

As such, subsection (a) of the new DNA Statute now reads, *in toto*:

(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or

<sup>97</sup> Amendment No. 1 to House Bill 1290, Judiciary II – Criminal Law Committee, 95th Gen. Assem., Mar. 22, 2007, <http://www.ilga.gov/legislation/fulltext.asp?DocName=09500HB1290.ham001&GA=95&SessionId=51&DocTypeId=HB&LegID=30055&DocNum=1290&GAID=9&Session=>

<sup>98</sup> Senate Bill 1023, Bill Status, 95th Gen. Assem., *available at* [http://www.ilga.gov/legislation/BillStatus\\_pf.asp?DocNum=1023&GAID=9&DocTypeID=SB&LegID=29086&SessionID=51&GA=95](http://www.ilga.gov/legislation/BillStatus_pf.asp?DocNum=1023&GAID=9&DocTypeID=SB&LegID=29086&SessionID=51&GA=95) (describing Senate Floor Amendment No. 1).

forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections, on evidence that was secured in relation to the trial which resulted in his or her conviction, and

- (1) was not subject to the testing which is now requested at the time of trial; or
- (2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. Reasonable notice of the motion shall be served on the State.<sup>99</sup>

In sum, although the new amendment correctly retains the option of obtaining additional testing of evidence where an advanced methodology was unavailable at the time of initial testing, it eliminates the draconian requirement that post-trial testing can only be granted where the technology was not available at the time of trial. Thus, the inclusion of new subsection (a)(1) solves two deficiencies in the former version of the statute. First, it eliminates the requirement for defendants, most likely *pro se* inmates with no legal or scientific background, to have to identify a previously unavailable DNA testing method – a task that most lawyers would find daunting, to say the least.<sup>100</sup> Secondly, it provides for the testing of items previously untested at trial. Although there are not currently any reported decisions interpreting this new provision, the revision seems to signal an

<sup>99</sup> 725 ILL. COMP. STAT. 5/116-3(a) (2008).

<sup>100</sup> Strom, *supra* note 36, at 18 (“Lawyers must learn the historical context of DNA testing, the chronology of testing methods, and the implications of recent advances in DNA technology.”).

important advance in streamlining the procedure for defendants seeking DNA testing in pursuit of a claim of actual innocence.

#### ***D. Prosecutorial Duty to Seek Justice***

Rule 3.8(a) of the Illinois Rules of Professional Conduct provides that “[t]he duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict.”<sup>101</sup> Long ago, the Illinois Supreme Court declared that “[t]he State’s attorney in his official capacity is the representative of all the people, including the defendant, and it [is] as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen.”<sup>102</sup>

What happened, however, to this duty to seek justice in Cage’s case? The State knew that there was no physical evidence linking Cage to the crime. It knew that, in addition to his own testimony, Cage had an alibi witness and that L.Z.’s clothing had never been tested for DNA material. In addition, because of the very real probability that such testing could demonstrate that Cage was actually innocent, Cage’s appellate counsel formally requested that the State not oppose Cage’s motion under these unique circumstances.<sup>103</sup> Yet, the State’s intransigence, coupled with the appellate court’s unjustified adherence thereto, cost Cage years of freedom.

Was it just easier for the State to oppose Cage’s request for DNA testing on appeal than to face the possibility that it had convicted the wrong man? Was it more cost-effective to keep Cage locked up for the remainder of his sentence than to conduct a new investigation in an effort to find the real assailant? Was it more important for the Criminal Appeals Division of the Cook County State’s Attorney’s Office to maintain its numerical tally of affirmances than to risk letting a potentially innocent

<sup>101</sup> ILL. RULES OF PROF’L CONDUCT R. 3.8(a) (2007).

<sup>102</sup> *People v. Cochran*, 145 N.E. 207, 214 (1924).

<sup>103</sup> Opening Brief, *supra* note 48, at 17.

man go free? Was the Chief of the Criminal Appeals Division, who was appointed as an associate judge in Cook County the year following the appellate court's decision in Cage's case,<sup>104</sup> more concerned with her personal political ambitions than with the rudiments of justice? Or was it just a case of institutional arrogance, by which the prosecutor's office persistently refuses to admit that it is ever wrong, no matter how egregious the error?

Such systemic arrogance is clearly evident in the recurring problem of prosecutorial misconduct in Illinois, which the Illinois Supreme Court has consistently decried.<sup>105</sup> Another egregious example of this "win at all costs" attitude was callously exhibited in a recent, high-profile case in New York involving a mother who was wrongfully convicted and incarcerated for more than a decade for allegedly killing her own 13-year-old daughter.<sup>106</sup> In that case, after DNA evidence was found that matched the real killer, the District Attorney tried to save face by suggesting that the daughter, who was brutally strangled and whose naked body was found lying on her bed, may have been having consensual sex with the murderer, and later, after the mother was released by the court, made a public announcement that the young victim had actually died of a cocaine overdose.<sup>107</sup>

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<sup>104</sup> See SULLIVAN'S JUDICIAL PROFILES: THE ILLINOIS JUDICIAL DIRECTORY 306 (2008) (containing biographical information on Renee Goldfarb, former Chief of the Criminal Appeals Division, whose name appears as the supervising attorney on the State's appellate brief in Cage's case).

<sup>105</sup> See, e.g., *People v. Johnson*, 803 N.E.2d 405, 423-25 (Ill. 2003) (reversing the convictions of three defendants where prosecutors made improper remarks during closing argument); *People v. Blue*, 724 N.E.2d 920, 940-42 (Ill. 2000) (granting a new trial due to the State's improper suggestions to the jury and the introduction of a bloodied police uniform and editorialized objections).

<sup>106</sup> Keith Morrison, *A Common Thread*, June 9, 2008 (transcript from NBC television broadcast June 8, 2008), available at <http://www.msnbc.msn.com/id/25047818/print/1/displaymode/1098/>.

<sup>107</sup> *Id.*



One can only hope that these cases will serve in the future as vivid reminders to prosecutors to err on the side of seeking justice.

### *E. Compensation for the Wrongly Imprisoned*

Illinois law provides for compensation for those wrongfully incarcerated. In fact, a newly revised statutory amendment that just came into effect in September 2008 provides for monetary compensation based upon the time period spent in prison, “for time unjustly served in prisons of this State when the person imprisoned received a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which he or she was imprisoned or he or she received a certificate of innocence from the Circuit Court . . . .”<sup>108</sup>

Upon his release, Cage had “no money or material possessions.”<sup>109</sup> Hopefully, Governor Pat Quinn will act quickly to pardon Cage and thereby demonstrate some of the same courage heroically exhibited by former Governor George H. Ryan in his historic condemnation of the deplorable state of the criminal justice system in Illinois,<sup>110</sup> which has led to substantial reforms.<sup>111</sup>

### *F. The Virtue of Humility*

On the day that Dean Cage was finally to be released from prison after spending almost 14 years behind bars for a crime he did not commit, he remarked, “But my mother said everything happens for a reason, that it happened to put me closer to the

<sup>108</sup> 705 ILL. COMP. STAT. 505/8 (2008).

<sup>109</sup> Sophia Tareen, *DNA Exonerates Chicago Man; Spent 12 Years in Prison on Rape Conviction*, CHI. DAILY L. BULL., May 29, 2008, at 24.

<sup>110</sup> See Address of Governor George Ryan at DePaul University College of Law, at 12 (Jan. 10, 2003) (transcript on file with author).

<sup>111</sup> See COMMISSION OF CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (2002).

Father, to make me a stronger person.”<sup>112</sup> It is a truism that we grow more in adversity than in times of calm and pleasure, our character must reveal its true nature under the crucible of testing and resistance. Cage also stated that he was not embittered by his experiences, having nourished his faith through reading the Bible while in prison.<sup>113</sup> Cage credited his endurance of the past decade and a half to “his faith in God and the perseverance of his family and attorneys.”<sup>114</sup> Finally, after spending those many years unjustly convicted and imprisoned, Cage simply concluded, “There’s a God up there. He blessed me. I couldn’t have done this without him.”<sup>115</sup> Such a remarkable revelation after such a personal tragedy is reminiscent of the lesson of Christ, who, in addressing a group of lawyers, proclaimed, “For whosoever exalteth himself shall be abased; and he that humbleth himself shall be exalted.”<sup>116</sup>

Prosecutors across the country could learn an invaluable lesson from Dean Cage. One could argue that the virtue of humility is an essential quality in seeking justice. As human beings, we ought to place ourselves in another’s shoes and consider how we would like to be treated if we were in the position of the other person. It is hoped that prosecutors will begin to nurture this virtue, as without it their lives will be irretrievably consumed in the intoxicating power of the State.

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<sup>112</sup> Possley, *supra* note 3.

<sup>113</sup> Tareen, *supra* note 109, at 24.

<sup>114</sup> Rozas, *supra* note 47, at 2.

<sup>115</sup> *Id.* at 3.

<sup>116</sup> *Luke* 14:11 (King James).

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