No. 130988

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- SIDNEY BUTLER, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-1175. There on appeal from the Circuit Court of Cook County, Illinois , No. 15 CR 09154. Honorable Alfredo Maldonado, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

K.P.'s Victim Sensitive Interview (VSI) Should Not Have Been Admitted at Sidney's Trial Where K.P. Did not Testify to Any Incidents of Sexual Assault and Did Not Remember Discussing Sidney Butler or any Sexual Assault During the VSI.

In his opening brief, Sidney Butler argued that K.P.'s VSI should not have been played for the jury because she was unavailable for cross-examination under the confrontation clause and under 725 ILCS 5/115-10 where, although present on the stand, she did not make any accusations against Sidney and could not "defend or explain" her prior statement where she had no recollection of making it. (Def. Br., p. 15, quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004)) The State disagrees, asserting that K.P. was available under the confrontation clause and the statute because she took the stand and answered some questions, albeit none concerning the offense or her unsworn prior accusations. The State's argument amounts to this - that the prosecution can simply call a witness and tender her for cross, without eliciting a single answer beyond her name, and other preliminary matters, thereby reducing her "testimony" entirely to what was said in an *ex parte* examination conducted outside of court and not under oath. This is not and never has been permissible under the Confrontation Clause as it was what the clause was designed to prohibit. For these reasons, the State's arguments should be rejected.

The State has no quarrel with Sidney's argument that the Confrontation Clause does not bar admission of a statement so long as the declarant is present to defend or explain it. (St. Br. 9) Rather, the State argues that K.P.'s testimony met these requirements. In support, the State cites a number of cases decided before *Crawford v. Washington*, 541 U.S. at 36. *Delaware v. Fensterer*, 474 U.S. 15 (1985); *United States v. Owens*, 484 U.S. 554, 556,(1988); *People v. Flores*, 128 Ill.2d 66, 87 (1989). (St. Br. 11-12) However, the law that applied to those cases

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was the *Roberts* rule, which held that well-established hearsay exceptions also satisfied the sixth amendment. *Crawford*, 541 U.S. at 42, 60 (discussing and citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). That rule was overruled in *Crawford*, thereby rendering those earlier cases less persuasive on the question facing this Court. *See People v. Burnett*, 2015 IL App (1st) 133610, ¶ 99.

After *Crawford*, the existence of an applicable hearsay exception is irrelevant. *Crawford*, 541 U.S. at 61. The issues are instead whether the out-of-court statement is testimonial and whether the declarant is present at trial to defend or explain it. It is undisputed that K.P.'s unsworn accusations were testimonial. Indeed, the prosecutor told jurors that K.P.'s out-of-court interview *was her testimony*: "when you watch that forensic interview of K[.P.], when she was 9 years old. It's just as if that 9-year-old girl was up on that witness stand, and Allison Alstott was the lawyer asking her questions." (R. 712), This is the exact type of *ex parte* examination that motivated the founders to adopt the confrontation clause: "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50.

Despite this, the State's brief contains no analysis of the original meaning of the clause and no attempt to argue that the founders would have permitted the admission of the *ex parte* examination here. The State also does not address the trial of Sir Walter Raleigh, discussed extensively throughout the *Crawford* opinion and in Sidney's opening brief, nor does it address Blackstone's statement that confrontation ensures that a witness "is at liberty to *correct and explain* his meaning, if misunderstood, which he can never do after a written deposition is once taken." 3 William Blackstone, Commentaries on the Laws of England *373-74 (1768) (emphasis added).

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Instead, the State asks this Court to apply pre-*Crawford* cases. But no Supreme Court case, not even one pre-*Crawford*, permits the introduction of an *ex parte* examination where the declarant is unable to defend or explain her prior accusations. For example, in *Fensterer*, the United States Supreme Court rejected the defense argument that he was deprived of the opportunity of cross-examining an expert who could not recall the basis of his expert opinion. The case did not even involve the admission of a prior out-of-court accusation. Since there was no out-of-court statement admitted, the adequacy of a later opportunity to cross-examine as a substitute for cross-examination at the time of the declaration was not in question. 474 U.S. at 21.

And, while *United States v. Owens* extended the *Fensterer* holding to cases where out-of-court statements were introduced, 484 U.S. 554, 558 (1988), it too did not involve a witness who could not remember making the prior accusation. In *Owens*, although the witness was unable to recall the incident due to injuries incurred during the assault, the witness was able to recall and answer questions about his identification of his assailant two weeks after the assault. 484 U. S. at 559.("[The] opportunity [to cross-examine] is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief."). This is in contrast to the instant case where K.P. not only was unable to remember the interview, but did not testify to any sexual assault or abuse. (R. 572, 577-78, 586-87)

Finally, this Court's decision in *Flores*, which relied on *Owens*, is no help to the State. While the witness there initially denied recalling what he said to the grand jury, after being shown "a transcript of the grand jury proceedings to

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refresh recollection," the witness "acknowledged that it contained an accurate description of his grand jury testimony" and "acknowledged he testified before the grand jury that" defendant made inculpatory statements to him. *Flores*, 128 Ill. 2d at 78–79. Here, K.P.'s memory was never refreshed and she never acknowledged the accusations she made during her *ex parte* examination.

For the State to prevail here, this Court must expand *Owens* to cover the situation where a witness does not remember either the incident or the out-of-court statement. The State's request for extending *Owens* is misplaced where its reasoning is rooted in *Ohio v. Roberts,* 448 U.S. 56 (1980), which was overruled by *Crawford* and is no longer good law. This Court instead should apply the reasoning in *Crawford*.

Next, the State acknowledges that availability means more than being allowed to confront the witness physically, as discussed in *Davis v. Alaska*, 415 U.S. 308, 315 (1974), but asserts that this requirement is fulfilled when a witness takes the stand and answers some questions, as was the case here. (St. Br. 15) In a radical argument that would reduce the confrontation clause to an easily-avoided formality, the State asserts that "the only relevant question is whether the declarant herself appeared for cross examination," and that, "the People complied with this requirement by calling K.P. to the stand and placing her under oath, making her available for cross examination." (St. Br. 22, 26) In other words, the witness need not testify to anything related to the charged crime at all: the State can put the witness on the stand, have her take the oath and state her name, and then admit the witness's *ex parte* examination as her testimony.

Not only is this argument directly contrary to the animating principles behind the confrontation clause that were identified in *Crawford*, the State's

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argument is undermined by this Court's holding in *In re Brandon P.*, 2014 IL 116653. The State asserts that *Brandon P.* is not controlling where, in that case, the witness answered some questions, but was then reluctant to testify, rendering her unavailable. (St. Br. 18-91) On the contrary, *Brandon P.* is directly on point. There, M.J., the child-witness, was at first reluctant to testify. She ultimately answered questions, albeit none about the incident or her prior statements: she provided her name and the names of the those in her family, her age, her grade in school, and said that she would tell the truth. *Brandon P.* 2014 IL 116653, ¶ 14. However, she provided non-verbal responses throughout questioning, she could not answer questions about the incident because she did not remember, and she expressed reluctance to testify. *Id.* at ¶¶ 15. She was found unavailable.

Likewise in this case, when first called to the stand, K.P. refused to answer any questions. (R. 516) After several other witnesses testified, K.P. was recalled and only answered questions by nodding. (R. 550-58) When admonished to use words, she still often provided non-verbal responses, though she answered questions about her age and who she lived with. (R. 570-78, 587-88, 591-92) When asked if Sidney did anything to her, she twice responded "No. I don't remember." (R. 572) In other words, what happened here is functionally identical to what happened in *Brandon P.*, *i.e.*, in both cases the witnesses were initially reluctant to testify, answered only basic preliminary questions, and did not make any accusations against the respective defendants.

The State asserts that *Brandon P.* does not control because, there, the witness "could not answer questions." (St. Br. 18) But that is not true, as shown above. The witness in *Brandon P.* answered many questions, just not any relevant to the incident or her prior accusations.

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The State also attempts to distinguish *Brandon P.* by arguing that, here, K.P.'s failure to recall anything she said in her out-of-court statement did not impede cross-examination. The State asserts that despite K.P.'s failure to make any accusations or even acknowledge her prior statement, let alone defend or explain it, defense counsel could have questioned her about these matters, but voluntarily did not do so, likely because "K.P. had already answered those questions on direct examination." (St. Br. 19-20) The State further argues that the confrontation clause was satisfied because K.P. was present to defend or explain her statement, despite the fact that she was unable to do either of these things. The State's argument defies logic. There was no basis on which to question K.P. as she did not answer any questions about the interview on direct beyond claiming not to recall making the statements. In other words, she could not defend or explain a statement she did not recall making. Defense counsel would have had to elicit inculpatory evidence in order to question her about it. This is not a viable defense strategy.

Moreover, this argument contradicts *Brandon P.*, where counsel made a voluntary choice not to cross-examine M.J. 2024 IL 116653, ¶16. The obvious reason was because the witness had not accused his client of anything in her testimony. Similarly here, although defense counsel asked K.P. some questions, he could not have asked her about the statements, not because she answered those questions on direct, as asserted by the State, but because she never acknowledged making them. Thus, *Brandon P.* is on point, consistent with *Crawford* and the original meaning of the confrontation clause, and should be followed by this Court.

Finally, the State attempts to distinguish this case from *Brandon P.* by claiming, without support in the record, that K.P.'s failure to recall was not "genuine," but fabricated. (St. Br. 14) The State asserts that "[K.P.'s] mother - who is also Sidney's mother - appeared to be coaching or influencing her testimony

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from the gallery." (St. Br. 15) What the State is referring to is a point during K.P.'s testimony where K.P.'s mother was disrupting the proceedings. (R. 560-62) She was admonished and the trial continued without incident. (R. 564) Indeed, the prosecutor who witnessed the disruption did not request to bar the mother from the courtroom. (R. 563) Nor did the record indicate that K.P. was being coached to lie and say she did not recall making these statements.

If the State's accusation is true, however, it is all the more reason to insist on a robust application of the confrontation clause's demand that a witness defend or explain a prior accusation. Under the State's interpretation of the confrontation clause, the State could introduce any testimonial out-of-court statement of a witness as long as the declarant physically takes the stand and says – truthfully or not – that she does not recall making the statement. What is more, the State can admit these prior, unsworn statements even where it suggests, as it does here, that the witness is not truthful and is susceptible to improper influence. Such an interpretation reduces the confrontation clause to nothing.

The State next disputes defendant's reading of *Smith v. Arizona*, 602 U.S. 799 (2024). The State attempts to distinguish *Smith* from the instant case on the grounds that in *Smith* the declarant of an out-of-court statement introduced for its truth was not in court to defend or explain that statement, whereas in this case, K.P. did take the stand. (St. Br. 21-22) While acknowledging that *Smith* confirmed the importance of cross-examination, the State argues that it meant the presence of the witness in the courtroom, not for any "truth-testing" function. St. Br. 22) On the contrary, the *Smith* Court, relying on *Melendez-Diaz* and *Bullcoming*, recognized not just the need for the presence of the witness for confrontation purposes, but the use of cross-examination to test the reliability of the out-of-court

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statement, especially where the out-of-court statement "propped up [the State's] whole case." *Smith*, 602 U.S. 797-800. This was impossible here, even with K.P.'s presence, as she made no accusations against Sidney and was unable to defend or explain her out-of-court statement. And, not only did the out-of-court statement "prop up" the State's case, it was the State's case.

Smith is particularly important because the Court announced it would reject a "practice" that would "allow for easy evasion of the Confrontation Clause." *Smith*, 602 U.S. at 798. That is what the State seeks here. Prior to *Crawford*, a state could evade the confrontation clause by using a hearsay exception to admit the out-of-court accusations of a non-testifying witness. 541 U.S. at 40. *Crawford* put an end to such evasive practices, and, if there were any question whether the Court intends to stand by that holding, *Smith* answers it affirmatively.

The State then discusses the admissibility of the VSI under Illinois statutory law. (St. Br. 23) If this Court agrees that the statements here were not admissible under Illinois statutory law, it need not address the confrontation clause question. *People v. Martinez,* 348 Ill. App.3d 521, 535 (1st Dist. 2004).

The State disagrees that the analysis of the Constitutional question and statutory violation overlap because, under the confrontation clause, the concern is whether the witness answered questions on cross-examination and, under 115-10, the responsibility is on the prosecution to elicit testimony. (St. Br. 23-24) The overlap lies in the fact that cross-examination is directly related to the witness's testimony on direct and the State's argument to the contrary is an effort to use state evidentiary law to resurrect the pre-*Crawford*, non-originalist understanding of the Confrontation Clause.

The State fails to recognize this relationship as it defines the prosecution's responsibility under the statute as nothing more than calling the witness to the

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stand, with no requirements as to the substance of the testimony. (St. Br. 26) This is what happened in *Brandon P.* The witness took the stand and "testified" in that she answered the prosecutor's questions, but could not answer questions about the offense or her prior statement. This Court held that this witness was unavailable under the statute. The State asks for a contrary result here, in effect nullifying the distinction between available and unavailable under 115-10.

Citing *People v. Bowen*, 183 Ill. 2d 103, 115 (1998), the State asserts that to impose further substantive requirements would undermine the purpose of the statute, which was created to deal with the "difficulty of convicting persons accused of sexually assaulting children." (St. Br. 26) First of all, *Bowen* is not controlling where it is yet another case cited by the State that was decided before *Crawford v. Washington*, and therefore relied on the reasoning of the *Roberts* rule. 183 Ill. 2d at 117. Also, in *Bowen*, the question before the Court was wether a prior video recording was admissible under a different statute, which is not at issue here. *Id.* at 113-14. However, the most important distinction between these cases is that in *Bowen*, the witness made accusations against the defendant in her testimony. The video was admitted as substantive evidence to corroborate the details of her complaint. *Id*. at 106. In this case, the video-recorded out-of-court statement was not corroborative, but was the *only* evidence of any offense.

The State mischaracterizes Sidney's argument as requiring a witness to *duplicate* her testimony from the stand, which the State asserts would undermine the purpose of 115-10. However, Sidney never asserts that the testimony must duplicate the prior statement, but, as in other cases cited here, it at least must reference it or the offense itself. Here, K.P. did neither. Under the statute, this is equivalent to being unavailable. And the statute provides for the admission

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of an out-of-court statement in these circumstances - the statements are allowed if the State produces corroborative evidence of the subject of the statement. 115-10 (b) (2)(B). The State failed to do that here. However, this is not a legitimate reason allow the statute to swallow the confrontation clause. As this Court explained in *In re Rolandis G.*, 232 Ill. 2d 13, 36 (2008), confrontation clause protections cannot be watered down for certain cases: while the court expressed sympathy for "the State's concern that child abuse victims are often unavailable to testify because of their tender years and, for that reason, '*Crawford* is incompatible with the realities of child abuse prosecutions[,]'" the Court explained that "we may not abridge constitutional guarantees simply because they are a hindrance to the prosecution of child sexual abuse crimes."

The State next discusses the appellate court's decision in *People v. Learn* 396 Ill. App. 3d 891 (2nd Dist. 2009) and how it impacts on K.P.'s testimony. (St. Br. 28-32) The State asserts that the *Learn* court misconstrued both the statute and the confrontation clause. (St. Br. 31) First, the State argues that the witness should have been deemed incompetent rather than unavailable. But this is contrary to *Brandon P.* In *Brandon P.,* the witness who answered some questions, but made no accusations and did not acknowledge her out-of-court statement, was found to be "unavailable." 2014 IL 116653, ¶ 14. K.O., the witness in *Learn*, also answered some questions, including identifying Learn as a man she did not like who was married to her aunt. The court held that she was "unavailable" where none of the testimony was accusatory, material, or relevant. 396 Ill. App. 3d at 901-02. The same is true in this case. K.P. answered some questions, but none of her testimony was accusatory and all she said about Sidney was that he was her brother and he lived with her family until she was grown. (R. 555-58, 572-73) She should likewise be considered unavailable.

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The State also rejects Sidney's reliance on *People v. Kitch* 239 Ill. 2d 452, 463 (2011), arguing that the quoted language in *Kitch* refers to defendant's argument in that case, not this Court's holding. (St. Br. 32) On the contrary, in *Kitch*, this Court distinguished *Learn,* finding that in *Learn*, "[the victim's] spoken testimony was not incriminating; thus, defendant was not confronted by his accuser nor given the right to rigorously test the accusation against him through cross-examination." *Kitch* 239 Ill. 2d at 465, *quoting Learn*, 396 Ill. App. 3d at 901-902 (alteration in *Kitch*). This Court then explained why *Kitch* was different: "Here, by contrast, K.J.K. and M.J.B. 'accused' defendant of multiple acts of sexual abuse, through their direct testimony. *Learn* is distinguishable from the case at bar." *Kitch* 239 Ill. 2d at 465. In other words, the *Kitch* court found those witnesses available in part because their testimony was accusatory.

The State then asserts that "[a] child-victim is a witness against the defendant, regardless of whether her in-court testimony is accusatory, if her prior out-of-court statement accusing him his admitted" and therefore, defendant's right to confront her did not hinge on the substance of her testimony. (St. Br. 31) But, the out-of-court statement is not admissible unless the witness is available for cross-examination. Here, defense counsel could not cross-examine K.P. where she made no accusations against Sidney, responded "no" to whether he assaulted her, and did not remember accusing him during the VSI.

The State again argues that a witness is available for cross-examination if she takes the stand and answers counsel's questions. (St. Br. 31-32) As set forth in his original brief, Sidney acknowledges that lower-court cases have held that a witness's appearance on the stand and willingness to answer some questions satisfies the availability requirement of the statute. (Def. Orig. Br., pp. 20-21) However, for the reasons explained in the original brief, those cases are largely

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distinguishable from this case where in the majority of those cases, the witnesses either made accusations from the stand, remembered their out-of-court statements, and/or other evidence supported the State's case. (Def. Orig. Br., pp. 20-21) In this case, K.P.'s out-of-court statement was the only evidence of that any offense occurred. Here, the State's evidence simply did not comply with the statutory requirements for purposes of the admission of the VSI, and Sidney was unduly prejudiced by its admission. Moreover, as explained earlier, interpreting the statute the way the State does creates, rather than avoids, a constitutional problem.

The State further asserts that even if K.P. failed to accuse Sidney from the stand, the fact that she was asked about the offense and the out-of-court statement and claimed she could not remember, renders her statement admissible. (St. Br. 33-34) The State cites to *People v. Sundling*, 2012 IL App (2d) 070455-B in support of its argument. (St. Br. 33) *Sundling* is distinguishable. In *Sundling*, the 4-year-old witness in a criminal sexual abuse case could not remember details of what happened to him, but remembered being touched by defendant. The *Sundling* court considered him available. Here, because K.P. did not remember anything, and could not answer questions about the offense, she should be considered unavailable.

In addressing Sidney's reliance on *State v. Rorich*, 939 P.2d 697 (Wash. 1997), the State cites to *State v. Price*, 146 P.3d 1183 (Wash. 2006). (St. Br. 34) The State asserts that the *Price* court distinguished *Rorich* on the grounds that in *Rorich*, the prosecutor did not ask the witness about the offense, whereas in *Price*, the prosecutor asked the witness about the offense, but the witness claimed lack-of-memory. (St. Br. 34-35) This distinction is without a difference in light of *Brandon P.* Again, there the prosecutor asked questions about the offense and received responses (both verbal and non-verbal) that she did not remember anything about the offense or going to the hospital afterwards.

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Finally, the State argues that because (it says) the VSI would have been admissible under 5/115-10.1 as a prior inconsistent statement, this Court should affirm the appellate court's decision. (St. Br. 35) Once again, the State seeks a return to the pre-*Crawford* era where a hearsay exception can be used to evade the confrontation clause. This is no longer the law, so, even if the State were correct that K.P.'s prior accusations were admissible under section 115-10.1, the confrontation clause would still require a new trial. But the State is not correct, as section 115-10.1 requires that the witness be "subject to cross-examination concerning the statement," which K.P. was not for the reasons explained above. Moreover, as the State never sought to have the statement admitted on these grounds, this issue is not before this Court. Indeed, the focus of the pre-trial hearing in the trial court was whether the VSI was admissible under 5/115-10. (R. 72-85, 184, 188-94; C. 151-53) The parties never discussed, nor did the trial judge rule on, the foundational requirements of section 115-10.1. Moreover, in opening statement the prosecutor told the jurors that "[K.P] is going to get up on that witness stand today and testify with regards to this incident and the defendant Sidney Butler." (R. 508)Therefore, the State has forfeited this argument. *See People v. Wells*, 182 Ill.2d 471, 490 (1998) (party, including the State, must promptly articulate arguments, and the failure to raise an argument that could and should have been timely made in a lower court results in forfeiture on review).

Finally, even under 115-10.1, the admissibility of K.P.'s out-of-court statement is subject to the requirements of the Confrontation Clause. As previously argued, her statement was testimonial and she was not subject to cross-examination at the time the statement was made. Therefore, she had to be able to explain or defend that statement. *Crawford*, 541 U.S. at 59.

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In conclusion, then, K.P.'s out-of-court statement should not have been admitted at Sidney Butler's jury trial where K.P. was not available for cross-examination as required by the confrontation clause, rendering her functionally unavailable to testify under 115-10. Aside from K.P.'s out-of-court statements, there was no other evidence to convict Sidney. Thus, as the State concedes in its brief, the admission of the statements cannot be harmless. Therefore, this Court should reverse Sidney Butler's convictions and/or remand this case for a new trial.

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CONCLUSION

For the foregoing reasons, Sidney Butler, Respondent-Appellant , respectfully requests that this Court reverse his conviction and/or remand this cause for a new 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 fifteen pages.

/s/Maria A. Harrigan
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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 August 14, 2025, 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 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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