No. 124940

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DEMARIO D. REED Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-17-0090. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 14-CF-1205. Honorable Jeffrey S. Geisler, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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REPLY BRIEF FOR DEFENDANT-APPELLANT

Petitioners who pleaded guilty must, under *Washington*, be given an opportunity to demonstrate their actual innocence with evidence that is new, material, noncumulative, and of such a conclusive character that it would probably change the result at a trial.

The State never answers this yes-or-no question: In Illinois, do we tolerate the continued punishment of a person who can convincingly demonstrate their innocence? The State instead offers "four reasons" this Court "should affirm the appellate court's judgment." (St. Br. at 8)

But the State's position is clear: Yes, Illinois courts should tolerate the continued punishment of a person like Mr. Reed even if he has evidence of his innocence that is new, material, noncumulative, and of such a conclusive character that it would probably change the result at a trial. In effect, the State asks this Court to abandon *Washington* and thus do silently what this Court in *Coleman* declined to do expressly. Because doing so would lead to results that are fundamentally unfair and conscience-shocking, this Court should decline the State's invitation and firmly reject its contentions.

1. Washington opened the courthouse doors to those seeking to demonstrate their innocence with newly discovered evidence. (Reply to St. Br. at 9-17)

The State asks this Court to close the courthouse doors to petitioners who pleaded guilty and now seek under *Washington* to demonstrate their innocence. (St. Br. at 8) The State's core premise—that an error-free prosecution precludes petitioners from later alleging their actual innocence (St. Br. at 9-17)—is one that this Court has considered, and rejected, twice.

In *Washington*, this Court considered whether "additional process [should] be afforded in Illinois when newly discovered evidence indicates that a convicted person is actually innocent," and "the 'adjudicatory process' by which [they were] convicted did not otherwise lack due process." *People v. Washington*, 171 Ill. 2d 475, 487 (1996). This Court concluded that petitioners may bring actual innocence claims under the Post-Conviction Hearing Act because, in Illinois, "no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence." *Washington*, 171 Ill.2d at 489. Later, in *Coleman*, this Court considered whether, "as a matter of state constitutional law," *Washington* was "fundamentally flawed" for declining to distinguish between petitioners who could identify an error in the proceedings that led to their conviction and those who could not. *People v. Coleman*, 2013 IL 113307, ¶¶ 86-92. This Court rejected that contention because, "[i]n Illinois, a post-conviction actual-innocence claim is just that—a postconviction actual-innocence claim." *Coleman*, 2013 IL 113307, ¶ 91.

But put *Washington* and *Coleman* aside, the State suggests, because "[t]he pivotal question here is not whether a constitutional right is at stake, but whether [Mr. Reed] waived that right by pleading guilty." (St. Br. at 12) This focus on waiver echoes a point made by the appellate court below. Yet, before this Court, the State rejects the appellate court's principal case, *Cannon*, and declines to explain how its argument coheres with *Washington* and *Coleman*. Compare *People v. Reed*, 2019 IL App (4th) 170090, ¶¶ 16-27 with (St. Br. at 9 n.3, 10-17).

The State instead relies on *Boykin v. Alabama*, *People v. Townsell*, and *People v. Knight*. (St. Br. at 10-11, 17) The State contends that, by pleading guilty, Mr. Reed "relinquished" and "waived the right to collaterally attack his conviction

based on new evidence pertaining to innocence." (St. Br. at 10-11) These cases do not support the State's contentions.

In *Boykin*, the United States Supreme Court held that, for a guilty plea to be valid under the federal due process clause, the record must show that the defendant accepted the plea intelligently and with full knowledge of its consequences. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). The Supreme Court's decision in *Boykin* sets a floor, not a ceiling, for due process protections under the Illinois Constitution. See *Washington*, 171 Ill.2d at 485 (noting that this Court "labor[s] under no self-imposed constraint to follow federal precedent in lockstep"). Compliance with the federal due process clause does not always ensure compliance with Illinois' due process clause. *Id.*; see *People v. Caballes*, 221 Ill. 2d 282, 313 (2006).

In *Townsell*, this Court held that, after entering a valid guilty plea, a defendant could not raise "an *Apprendi*-based sentencing objection" on appeal. *People v. Townsell*, 209 Ill. 2d 543, 545-48 (2004). *Townsell*—like the other cases from this Court that the State cites—"did not deal with novel constitutional rights." *Townsell*, 209 Ill. 2d at 547.[1] "Those kinds of claims are fundamentally different from ones [like Mr. Reed] raised." *Washington*, 171 Ill. 2d at 487.

Unlike *Townsell*, this Court in *Washington* did identify a novel constitutional right under the Illinois Constitution: the due process right of petitioners to

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[1]See also (St. Br. at 10-14) (citing *People v. Brown*, 41 Ill. 2d 503, 504-05 (1969) (discussing alleged violations of *Miranda*, *Boykin*); *People v. Barker*, 83 Ill. 2d 319, 332-33 (1980) (discussing an alleged violation of Illinois Supreme Court Rule 402); *People v. Horton*, 143 Ill. 2d 11, 21-22 (1991) (same); *People v. Whitfield*, 217 Ill. 2d 177, 195 (2005) (same); *Hill v. Cowan*, 202 Ill. 2d 151, 153-55 (2002) (discussing an alleged violation of *Apprendi*); *People v. Jackson*, 199 Ill. 2d 286, 302 (2002) (same)).

demonstrate their innocence with newly discovered evidence. *Id.* at 489. This Court refused to erect procedural barriers by requiring petitioners to allege, in addition, that some error occurred during their prosecution. *Id.* at 488; *Coleman*, 2013 113307, ¶ 90. So the State's citation to *Knight*—an appellate court case in which the petitioner happened to also allege that his guilty plea was involuntary—does not control this issue, which this Court decided decades ago. (St. Br. at 17) (citing *People v. Knight*, 405 Ill. App. 3d 461 (3d Dist. 2010)).

Citations to cases other than *Washington* only forestall this Court's consideration of the key issue. The key issue is not, as the State contends, whether waiver occurred. (St. Br. at 12) Under *Washington*, this Court instead considers whether any waiver should continue to operate now that a petitioner has newly discovered evidence of their innocence. *Washington*, 171 Ill.2d at 487-88. That is, given a petitioner's prior guilty plea, should the courthouse doors remain closed? Or, should "additional process be afforded * * * [because] newly discovered evidence indicates that a convicted person is actually innocent?" *Id.*

Under *Washington*, the path is clear. Because ignoring such a claim is fundamentally unfair (*Id.*), and because continuing to punish an innocent person is conscience-shocking (*Id.*), this Court should hold that petitioners like Mr. Reed may litigate claims of actual innocence without also challenging the validity of their prior guilty pleas.

Acknowledging actual innocence claims under *Washington* strengthens, rather than undermines, the plea-bargaining system, which is but one facet of our criminal-justice system. Contrary to the State's assertion, this Court need

not reconsider the use of *Alford* pleas specifically. (St. Br. at 12 n.4)[2] And this Court need not reconsider the "waiver doctrine" generally. (St. Br. at 12-14 (discussing plea bargains), 14-17 (discussing the difference between forfeiture and waiver—though, under *Townsell*, Rule 615 does not apply to guilty pleas)). Even after *Washington*, defendants and the State alike retain an interest in the finality, certainty and efficiency of the plea-bargaining process as is.

What *Washington* clarifies, however, is that the due process clause of the Illinois Constitution tempers the State's asserted interest in the *continued* punishment of each person in the penitentiary. *Washington*, 171 Ill. 2d at 488-89; see 725 ILCS 5/122-1(a). No matter how it happens, the conviction of an innocent person is the equivalent of a stress test for our criminal-justice system. And this Court in *Washington* properly described as "conscience shocking" the continued punishment of a person who could now demonstrate their innocence convincingly. *Washington*, 171 Ill. 2d at 488-89.

This Court also resolved how best to respond when a petitioner alleges that this occurred. *Id.* at 485-90; see *Coleman*, 2013 IL 113307, ¶ 93. Under *Washington*, petitioners with "newly discovered evidence" may assert their actual innocence. *Id.* After *Washington*, finality, certainty and efficiency still matter—but so does innocence. See also 725 ILCS 5/122-1(c) (dictating that the time limitation under the Act "does not apply to a petition advancing a claim of actual innocence").

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[2] The term "*Alford* plea" stems from a federal case, *Alford v. North Carolina*, 400 U.S. 25 (1970). But, in Illinois, so-called *Alford* pleas are just guilty pleas by another name. *People v. Barker*, 83 Ill. 2d 319, 332 (1980); *People v. Church*, 334 Ill. App. 3d 607, 614-15 (3d Dist. 2002). And the issue before this Court is not whether a guilty plea occurred, but whether a guilty plea should continue to operate now that a petitioner has newly discovered evidence of their innocence.

Contrary to the State's suggestion, acknowledging these claims does not mean the sky will fall. Compare (St. Br. at 12 n.4, 18) with *Coleman*, 2013 IL 113307, ¶¶ 94-97 (re-affirming the *Washington* standard and noting that it is "extraordinarily difficult to meet"). It means only that the courthouse doors are open to those petitioners who may convincingly demonstrate their innocence. *Washington*, 171 Ill. 2d at 493 (McMorrow, J., specially concurring).

2. The General Assembly has likewise recognized the right of all petitioners—even those who previously pleaded guilty—to litigate their innocence with newly discovered evidence. (Reply to St. Br. at 17-20)

Nothing in the State's response rebuts the observation that, consistent with *Washington*, Illinois post-conviction statutes are highly inclusive. 725 ILCS 5/122-1(c) (exempting claims of actual innocence from the Act's time bar); 725 ILCS 5/116-3(c); (Open. Br. at 16-18). The State points to no place in the text of these statutes that bars petitioners who previously pleaded guilty from pursuing claims of actual innocence. (St. Br. at 17-20)

On the contrary, the State describes as "proper" *People v. Knight* (St. Br. at 17), which held in part that, under *Washington*, a petitioner who previously pleaded guilty could "raise his free standing claim of actual innocence in postconviction proceedings," under section 122-1 of the Act. *People v. Knight*, 405 Ill. App. 3d 461, 472 (3d Dist. 2010); see (Open. Br. at 15, 27-29) (discussing *Knight*). In *Knight*, the petitioner supported his actual innocence claim with an affidavit from a witness, who asserted he was present when the murder occurred and that the petitioner was not involved. *Knight*, 405 Ill. App. 3d at 464, 470. Sworn affidavits

are but one type of evidence that petitioners may use to support actual innocence claims.

Section 116-3 is yet another tool that petitioners may use when seeking to demonstrate their innocence following a guilty plea. (Open. Br. at 17-18) The State errs by suggesting that section 116-3 exists only for petitioners who can no longer file petitions under section 122-1 of the Act. See (St. Br. at 18). Section 122-1 of the Act and section 116-3 are independent of one another, although one may properly describe either as a "postconviction action." *People v. Gawlak*, 2019 IL 123182, ¶ 32. This independence ensures that petitioners who obtain evidence of their innocence under section 116-3 are free to include that evidence in a petition filed under section 122-1 of the Act. After all, any evidence obtained under section 116-3— that is, results of tests run on physical evidence—is simply a subset of evidence that may satisfy the *Washington* standard. See generally *People v. Robinson*, 2020 IL 123849, ¶¶ 78-80 (noting that courts are not limited by the Illinois Rules of Evidence during post-conviction hearings).

Thus, the State's criticism of Mr. Reed—that he "does not qualify" for 116-3 testing (St. Br. at 19)—misses the mark. Mr. Reed never made that contention (Open. Br. at 16-18), and this Court should confirm that Mr. Reed properly brought his post-conviction actual innocence claim under section 122-1 of the Act. *People v. Sanders*, 2016 IL 118123, ¶ 40 (citing *Knight* approvingly); *Knight*, 405 Ill. App. 3d at 471; see generally *Washington*, 171 Ill. 2d at 485-90.

3. The State's reluctance to litigate claims of actual innocence should not compel this Court to abandon Washington and its guarantees of due process under the Illinois Constitution. (Reply to St. Br. at 20-24)

Nothing in the State's response supports its assertion that, "as a matter of law," Mr. Reed cannot litigate a post-conviction claim of actual innocence. (St. Br. at 20-22) At most, the State's response raises policy reasons why it would prefer not to litigate against petitioners like Mr. Reed, who allege their actual innocence without also challenging the validity of their pleas. Because this Court resolves legal questions, not policy disputes, it should reject the State's contentions.

In the opening brief, Mr. Reed marshaled many decisions from this Court and the appellate court to demonstrate that, consistent with *Washington*, Illinois courts can resolve post-conviction actual innocence claims following guilty-plea proceedings. (Open. Br. at 24-29) Mr. Reed even provided examples of Illinois courts doing exactly that: analyzing innocence claims by comparing the petitioners' newly discovered evidence against the plea proceedings and other record facts. (Open. Br. at 27-29 (discussing *People v. Knight*, 405 Ill. App. 3d 461 (3rd Dist. 2010), and *People v. Whirl*, 2015 IL App (1st) 111483)) Yet, the State does not acknowledge that these cases do in fact what the State says is impossible. (St. Br. at 20-22)

The State instead complains that, when litigating these claims, it would have only "a limited record." (St. Br. at 22) This concern does not establish that litigation could not occur. On the contrary, it assumes that parties could litigate these claims.

In any event, the State fails to appreciate that, even before post-conviction proceedings begin, it will have established factual allegations tending to defeat a petitioner's claim of innocence. Ill. S. Ct. R. 402(c); *cf. People v. Gaultney*, 174 Ill. 2d 410, 420 (1996); *People v. Bailey*, 2017 IL 121450, ¶ 24. Moreover, because a petitioner will have pleaded guilty, their present assertion of innocence—alone—will not satisfy *Washington*'s requirements. See *Robinson*, 2020 IL 123849, ¶ 53 (finding that the petitioner's affidavit was not "newly discovered" because, among other things, he knew before trial the information in it). Petitioners will need something more, ensuring that *Washington* remains an "extraordinarily difficult" hurdle for any petitioner to meet. See *Coleman*, 2013 IL 113307, ¶¶ 94-97.

The State also complains that, because a trial never occurred, it might have "allow[ed] [its] evidence to potentially become stale." (St. Br. at 21-22) This concern does not establish that litigating actual innocence claims is impossible. It only describes a difficulty that may arise for the State and petitioners, alike—and one that arises precisely because actual innocence claims are not time-barred in Illinois. See *People v. Edwards*, 2012 IL 111711, ¶ 24. Thus, at most, the State has raised a policy disagreement with the General Assembly, which—like this Court—has decided that the time limitation under the Act "does not apply to a petition advancing a claim of actual innocence." 725 ILCS 5/122-1(c).

This Court should understand the State's complaints in the light that the State raises them: speculating about the effect of having "to try guilty-plea petitioners' guilt at third-stage hearings." (St. Br. at 22) But circuit courts do not decide petitioners' guilt or innocence when deciding whether to grant relief or

whether to advance a petition to the next stage of proceedings. *Coleman*, 2013 IL 113307, ¶ 97. If "the sufficiency of the State's evidence to convict beyond a reasonable doubt" was at issue, "the remedy would be an acquittal, not a new trial." *Id.* (citing *Washington*, 171 Ill.2d at 497 (McMorrow, J., specially concurring)). Circuit courts instead analyze whether the record—that is, a guilty-plea proceeding (*Knight*), a hearing on a motion to suppress (*Whirl*), or even a police report now attached to a petition (*Reed*)—rebuts the allegations, and whether the allegations are of such conclusive character that they would probably change the result at a trial. See, *e.g.*, *People v. Sanders*, 2016 IL 118123,¶¶ 42, 48. As a matter of law, courts conduct a far narrower inquiry than the State suggests, and as a matter of practice, courts have proven able to do what this Court in *Washington* directed.

Yet the State "alternatively" asks this Court to "articulate an appropriately stringent standard that applies to a limited class of guilty-plea petitioners." (St. Br. at 22) The State points toward *dicta* in the appellate court decisions *Shaw* and *Reed*, and suggests that this Court has yet to create a "workable" standard. (St. Br. at 22-23) Without a workable standard, the State contends, this Court should adopt the test that is "similar to the federal standard" under *Schlup v. Delo*, 513 U.S. 298 (1995), and aimed "specifically" at "forensic evidence as contemplated by 725 ILCS 5/116-3." (St. Br. at 23)

Despite its request, the State does not acknowledge that this Court has twice rejected requests to adopt the federal standards on actual innocence. Compare (St. Br. at 23-24) with *People v. Coleman*, 2013 IL 113307, ¶ 89 (analyzing *Washington* and stating, "The State simply assumes that this court, like the United States Supreme Court, has recognized two types of actual-innocence claims. We

have not.") The State also does not resolve the tension between the relative ease with which Illinois courts analyze these claims and its suggestions that *Washington* is "unworkable" and witness affidavits are now unreliable. Compare *Knight*, 405 Ill. App. 3d at 470 (noting the State may present evidence at the third stage, "as would be the purpose behind conducting such a hearing") with (St. Br. at 23). And the State does not explain why, when analyzing claims like Mr. Reed's, courts should only analyze physical evidence, and not the broad array of evidence that the rules permit every other petitioner to use. *Cf.* Ill. R. Evid. 1101(b)(3) (providing that the rules of evidence do not apply to post-conviction hearings). In short, the State does not identify either good cause or compelling reasons to justify such an erratic change in Illinois law. See *People v. Castleberry*, 2015 IL 116916, ¶ 19 (discussing the principle of stare decisis).

Thus, this Court should decline the State's invitation to abandon *Washington* and to do silently what this Court in *Coleman* declined to do expressly. Under *Washington*, all petitioners have a chance to demonstrate their actual innocence with evidence that is new, material, noncumulative, and of such a conclusive character that it would probably change the result at a trial. *Washington*, 171 Ill. 2d at 485-90. In Illinois, a post-conviction actual-innocence claim remains just that—a post-conviction actual-innocence claim. *Coleman*, 2013 IL 113307, ¶ 91. Today, nearly a quarter century since this Court decided *Washington*, "nothing has changed." See *id.*, ¶ 93. So this Court should affirm that its commitment to *Washington* is "unwavering." *Id.*

4. The State has identified issues of fact that may justify a remand for new third-stage proceedings. (St. Br. at 24-26)

In the opening brief, Mr. Reed asked this Court to remand the matter to the appellate court so would finally hear his argument that the circuit court committed manifest error. (Open. Br. at 32) In response, the State asks this Court to sidestep the appellate court's decision and affirm the circuit court's order because it "properly rejected Callaway's testimony." (St. Br. at 25) If this Court chooses to reach this issue, it should vacate both lower-court decisions.

The circuit court's confusion undermined Mr. Reed's opportunity to have the one court that could decide, after an in-person hearing, whether his witness was credible. The State does not defend the circuit court's analysis. See (St. Br. at 24-26). The State instead makes the most of the cold record before this Court, noting for example that Mr. Reed ran from an officer; Mr. Reed possessed a gun found in a different room but near the drugs at issue; and Mr. Reed, who was pretending to sleep, had a scale in his pocket. (St. Br. at 24-26) To be sure, this Court could draw reasonable inferences against Mr. Reed. See *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000) ("knowledge of the location of contraband is not the equivalent of possession but merely a necessary element"). But see (St. Br. 21) (asserting that proof of possession is "uniquely within [Mr. Reed's] knowledge"). The point, however, is this: Based on a mistake of law, the circuit court failed to assess Callaway's credibility.

The circuit court never teased out inconsistencies, lies or obfuscations. Rather, the circuit court criticized Callaway's testimony as not being "actual new evidence"

and Callaway for writing the affidavit "after he pled [when] he and [Mr. Reed] were in prison together." (R.C176) Both criticisms were improper.

The first criticism—that Callaway's testimony was not "actual new evidence"—stemmed from the circuit court's contention that, at trial, it would have been "logical [for Mr. Reed] to argue the drugs were [his] co-defendant's." (R.C176) Thus, the argument goes, Callaway's testimony would have supported a possible defense at a trial, but Mr. Reed necessarily forfeited this defense by pleading guilty. This analysis improperly rejected the premise that petitioners may raise claims of actual innocence after a valid guilty plea. *Washington*, 171 Ill. 2d 485-90.

The circuit court also criticized Callaway for writing the affidavit "after he pled [when] he and [Mr. Reed] were in prison together."(R.C176) This second criticism rejected Callaway's unimpeached admissions of guilt as too little, too late. It was not specific to Callaway's own behavior. Callaway had no control over the State's decision to offer separate plea bargains to him and Mr. Reed, or over where the Illinois Department of Corrections would house them afterward. The circuit court had found no inconsistency, obfuscation, or lie in Callaway's account. The circuit court instead seized upon relative accidents of history to infer that Callaway was not credible.

The circuit court appeared to reason that, in order to be credible, Callaway had to come forward before he personally pleaded guilty. (R.C176) But this requirement arbitrarily limited the type of evidence that could support Mr. Reed's actual innocence by excluding the testimony of his co-defendant unless he testified during his own case. Few petitioners, if any, could bring actual innocence claims

under such circumstances, given well-recognized fifth amendment concerns (*People v. Molstad*, 101 Ill. 2d 128, 135 (1984)), and given the overwhelming number of prosecutions that result in guilty pleas (*Missouri v. Frye*, 566 U.S. 134, 143-44 (2012)). In this context, timing alone cannot undermine the credibility of consistent and unimpeached testimony. And it was logically inconsistent for the circuit court to first find that Callaway's account was newly discovered under *Edwards*, 2012 IL 111711, and then find that the same factor stated differently—delay—meant that Callaway's account was not of such character that it would probably change the result at a new trial. (R.C176)

In its response, the State does not dispute these points, and at the evidentiary hearing, the State declined to call any witnesses after its cross examination of Callaway. (Vol. XIX, p.8) Yet, before this Court, the State raises issues of fact. In particular, the State now wonders whether Callaway could provide more details about the searches and arrests that day. (St. Br. at 25) (noting that Callaway "did not discuss where the cocaine was found, or provide other information that could support a plausible claim that petitioner was unaware of it"). Of course, the State will be free to cross-examine Callaway on these issues if this Court chooses to reach this issue and remand the matter for a third-stage hearing under the Act. See *People v. Queen*, 56 Ill. 2d 560, 565 (1974) (remanding where the circuit court failed to exercise its discretion based on a mistake of law).

CONCLUSION

Today, Demario D. Reed asks this Court to make clear that nothing has changed since it decided *Washington*. A footing remains in the Illinois Constitution for recognizing claims of actual innocence based on newly discovered evidence. A petitioner who previously pleaded guilty may litigate this claim under the Post-Conviction Hearing Act without also attacking the validity of their prior plea.

Mr. Reed pleaded guilty and later pursued his claim of actual innocence in exactly that way, even reaching the third stage of proceedings under the Act. But, on appeal, the Fourth District declined to address his contentions and instead held that his actual innocence claim was not cognizable. This Court should overrule the appellate court's decision and remand the matter with directions for the appellate court to finally address Mr. Reed's arguments. Alternatively, if this Court chooses to reach the fourth issue the State raised in its response, this Court should remand the matter for a new third-stage hearing under the Act.

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 15 pages.

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No. 124940

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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 5, 2020, 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 Chicago, 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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