No. 122598

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellee, -vs- NELSON A. YOUNG Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-15-0575. There on appeal from the Circuit Court of the Seventh Judicial Circuit, Morgan County, Illinois, No. 05-CF-136. Honorable David R. Cherry, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

JACQUELINE L. BULLARD
Deputy Defender

JASON B. JORDAN
ARDC No. 6319268
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

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Carolyn Taft Grosboll
SUPREME COURT CLERK

ARGUMENT

Nelson Young is entitled to an additional 183 days of credit for time served, and this Court should amend the mittimus to reflect the accurate total of days that he spent in presentence custody.

At the end of its brief, the State concedes that the amount of creditable days recorded on the mittimus is clearly incorrect. (State's Brief at 18). The State admits "[t]he record is *clear* that [Nelson Young] spent more than 215 days in presentence custody." (Emphasis added) (State's Brief at 18); 730 ILCS 5/5-8-7(b) (2005); 730 ILCS 5/5-4.5-100(b) (2017) (herein after referred to as "liberty" sentence credit). Despite this concession, the State insists there was nothing an appellate court could have done to fix the liberty sentence credit, unless this Court resurrects a version of the abolished void-sentence rule. (State's Brief at 20-21); See *People v. Castleberry*, 2015 IL 116916, ¶ 1 (abolishing the void-sentence rule). In order to correct a simple and ministerial error in arithmetic concerning Young's credit against his sentence, the State invites this Court to establish an entirely new cause of action enabling circuit courts to review all types of illegal sentences– *in perpetuity*. (State's Brief at 20-21).

There are many problems with the State's proposal. First, resurrecting a version of the void-sentence rule in the circuit courts goes against the policy of preserving the finality of judgments. See *Castleberry*, 2015 IL 116916, ¶ 15, quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶¶ 30-38; *Belleville Toyota, Inc. v. Toyota Motor Sales*, U.S.A., Inc., 199 Ill.2d 325, 335-37 (2002). Second, it would clog our lower courts with yet another avenue for judicial review encompassing a myriad of contexts for litigation due to the ever-increasing substantive changes to the sentencing code. Over the years, the legislature's

numerous modifications to the sentencing code have resulted in a wide range of possible ways that a sentence will not conform to a statute. The following are just some of the possible contexts for an illegal sentence: the failure to impose a mandatory consecutive sentence; the failure to impose the minimum sentence; the failure to impose a firearm enhancement or an enhancement based on the age of the victim; the failure to impose mandatory fines and assessments; and the failure to make a finding of great bodily harm. See *e.g.*, 730 ILCS 5/5-8-2 (2018)730 ILCS 5/5-8-4 (2018); 730 ILCS 5/5-4.5 *et seq*. (2018); 730 ILCS 5/5-5-3.2(b) (2018); 720 ILCS 5/19-6(a)(5) (2018); 730 ILCS 5/5-9-1.1 (2018); 730 ILCS 5/4.5-110 (2018). Moreover, providing an avenue in the circuit courts for either party to attack an illegal sentence would double the amount of possible attacks on an illegal sentence by reestablishing the State as a party that could cross-appeal or attack a trial court's final judgment and sentence. See *Castleberry*, 2015 IL 116916, ¶ 6 (State cross-appealed in appellate court for relief arguing trial court erred when it failed to add a statutorily mandated 15-year firearm enhancement to defendant's sentence). Thus, reviving the void-sentence rule in the context of the circuit courts greatly increases the possibilities for new types of litigation and judicial review.

The State's proposal to breathe life into this otherwise dead doctrine is inconsistent with the concerns it raises elsewhere in its brief about the use of judicial resources. (State's Brief at 11-12). The State argues "judicial economy is better served" by not addressing claims for liberty credit when raised for the first time on collateral appeal. (State's Brief at 12).Thus, on the one hand, the State complains that allowing appellate courts to correct mathematical errors on a mittimus– concerning one narrow issue, *i.e.*, liberty sentence credit– wastes judicial resources.

(State's Brief at 12). On the other hand, the State seeks to piggy-back the behemoth void-sentence rule onto ministerial claims for credit. (State's Brief at 20-21).

The main problem with the State's proposal to create a new cause of action in the circuit courts is that it assumes miscalculated credit totals on a mittimus are tantamount to an illegal sentence. (State's Brief at 20-21). The State's assumption strikes at the heart of the issue in this case. The question is whether a miscalculation of credit recorded on a mittimus renders a sentence illegal? The State's arguments, throughout its brief, are premised upon the assumption that it does. (State's Brief at 6-21).

Young contends, however, that credit recorded incorrectly on a mittimus does not render the entire sentence illegal because the credit against a sentence is *not* part of the sentence. See *People v. Buffkin*, 2016 IL App (2d) 140792, n. 2 (noting an application for sentence credit for time served is not a request to reduce the sentence but a motion to amend the mittimus which may be made at any time). The credit to be used against a sentence and the underlying sentence itself are distinct from each other. This means a criminal sentence remains legal even if the credit is recorded inaccurately. Fixing the credit is a ministerial action involving simple addition in contrast to the substantive action of lowering the underlying sentence which disturbs the finality of a trial court's judgment. See *People v. Caballero*, 228 Ill.2d 79, 88 (2008) (addressing a claim for $5-per-day credit when raised for the first time in a collateral appeal); 725 ILCS 5/110-14 (2017) (herein after referred to as *per diem* credit or section 110-14 credit).

In other words, Young is asking this Court to apply credit against a legal sentence which conforms to the statute. (Defendant's Brief at 12-14). Young is

not asking this Court to correct or reduce an illegally high sentence. A simple analogy illuminates why credit is not part of the sentence. A woman buys a $10 blue hat from a store, returns the hat because it doesn't fit, and in exchange receives a $10 store-credit to be used against a future purchase. The next day, she buys a more expensive red hat which costs $25, and she pays for it, in part, by using her store credit. Did the application of her store credit reduce the actual price of the red hat from $25 to $15? No. The actual price of the red hat stayed the same. The price was not modified or reduced.

The prison term of a criminal sentence is like the price of a hat. The application of credit against a sentence does not modify the actual sentence itself just as the application of store credit does not alter the underlying price of a hat. Applying credit merely changes the way something will be paid for. Thus, an incorrect credit calculation recorded on a mittimus does not render a lawful sentence illegal, and correcting the credit does not modify the trial court's judgment and sentence. See *Buffkin*, 2016 IL App (2d) 140792, n. 2.

The conclusion that credit against a sentence is not part of the sentence itself is supported by authority from other jurisdictions. See 77 A.L.R.3d 182 (collecting cases). For example, in Indiana, "credit toward one's criminal sentence for time in confinement prior to sentencing is *not* part of the actual sentence." (Emphasis added) *Buchanan v. State*, 956 N.E.2d 124, 127-28 (Ind. Ct. App. 2011), citing *Robinson v. State*, 805 N.E.2d 783, 789 (Ind. 2004); Indiana Code § 35-38-3-2 (2018). Similarly, Ohio construes the calculation of presentence custody credit as merely a computation of how much time has been served and how much remains on a legally rendered sentence. See *In re D.S.*, 71 N.E.3d 223, 229 (Oh. 2016),

citing *State v. Gregory*, 670 N.E.2d 547, 549 (Oh. Ct. App. 2011). That's because the calculation of days already served in jail is not part of the sentence itself. See *In re D.S.*, 670 N.E.2d at 549; but see *Yearout v. State*, 311 P.3d 180 (Wyo. 2013) (a sentence that does not include proper credit for time previously served is an illegal sentence), and *Gonzalez v. Sherman*, 873 F.3d 763 (9th Cir. 2017) (miscalculated credit in Californian results in an illegal sentence); see also 77 A.L.R.3d 182 (collecting cases).

The State's faulty premise, that incorrect credit results in an illegal sentence, touches upon nearly all of the arguments in its brief. Under headings III. and IV. of its brief, the State lists various procedural defaults, cites to this Court's recent abolishment of the void-sentence rule announced in *Castleberry*, and then concludes, *e.g.*, "[these] procedural rules apply with equal force when a defendant alleges that his sentence does not conform to a statute." (State's Brief at 7, 9-10); See *Castleberry*, 2015 IL 116916, ¶ 15. Thus, the State lumps miscalculated credit on a mittimus in with the void-sentence rule to reach its conclusion that credit miscalculations, like illegal sentences, are not free from procedural defaults post-*Castleberry*. (State's Brief at 8); See *Castleberry*, 2015 IL 116916, ¶ 15. As argued above, the abolished void-sentence rule is not applicable to this situation because miscalculated credit does not render a sentence illegal.

In Young's opening brief, he argued the rationale of *Caballero* extends to claims for liberty credit because both types of credit naturally share similar features such as their mandatory nature, lack of a statutory deadline for the seeking the credit, the simple and ministerial nature of computing the credit, and the promotion of judicial economy and the orderly administration of justice where eligibility for

the credit is clear from the record. (Defendant's Brief at 17-20); *Caballero*, 228 Ill.2d at 83-88. The State responds that the two types of credit are dissimilar. (State's Brief at 8-21). The State ignores the most obvious relationship between the two types of credit which is the fact that the amount of *per diem* credit is dependant upon the amount of liberty credit. 730 ILCS 5/5-8-7(b); 725 ILCS 5/110-14. A prisoner can not accrue *per diem* credit without also accruing liberty credit. To apply monetary credit, one counts the days of time served, multiplies by $5, and then deducts that credit total from applicable fines. 725 ILCS 5/110-14. In short, you can't have one without the other.

Ignoring the obvious, the State urges this Court to treat the two types of credit differently because of the phrase "upon application" located in section 110-14, but absent from section 5-8-7(b). (State's Brief at 8); 730 ILCS 5/5-8-7(b); 725 ILCS 5/110-14. The State makes the same mistake as the Fourth District by placing too much emphasis on this one phrase. (Defendant's Brief 17-21); See *People v. Young*, 2017 IL App (4th) 150575-U, ¶¶ 42-44.; *People v. Nelson*, 2016 IL App (4th) 140168, ¶¶32-39; *People v. Morrison*, 2016 IL App (4th) 140712, ¶¶13-21. The State interprets *Caballero* as if this Court relied solely on the above phrase contained in section 110-14. *Caballero*, 228 Ill.2d at 87-88; 725 ILCS 5/110-14.

The reason, ultimately, that *per diem* credit can be addressed at any time is because of its simple ministerial nature which it naturally shares with liberty credit. See *Caballero*, 228 Ill.2d at 88; 730 ILCS 5/5-8-7(b); 725 ILCS 5/110-14. A claim of credit against a sentence, whether it effects time served or fines paid, does not disturb the underlying sentence itself, but merely adjusts the way in which one serves, or pays for, his fixed prison term or financial penalty. See *Buffkin*, 2016 IL App (2d) 140792, n. 2.

The State's over-reliance on the distinction related to the phrase "upon application" causes it to make illogical conclusions. For example, the State claims "there is no such thing" as an application for liberty credit, and defendants are not "authoriz[ed] to apply" for the liberty credit. (State's Brief at 8-10). But defendants can, and often do, ask for liberty credit. As the State admits elsewhere in its brief, defendants can raise claims for liberty credit in the sentencing court or on direct appeal. (State's Brief at 11). The substance of the action stays the same whether one calls it an application, request, claim, or motion. However, according the State's logic concerning the word "application," when a defendant raises a claim for both types of credit on direct appeal, one is an *application* while the other is not. This is a distinction without a difference. Both claims are applications and there is nothing substantively different about them. The State's reliance on the word "application" to differentiate the two types of credit is strained, and actually demonstrates why treating them differently is illogical.

The State also argues the lack of a statutory time limit for seeking either type of credit is a factor that relates *only* to an "application" for *per diem* credit (State's Brief 10-11). This rationale only works if one presumes, as the State does, that there is no such thing as an "application" for liberty credit simply because that language is not in section 5-8-7. See 730 ILCS 5/5-8-7(b); 725 ILCS 5/110-14. Here again, the State wrongly treats miscalculated liberty credit like an illegal sentence, and not like miscalculated *per diem* credit.

The State also claims considerations of judicial economy, and the credit's ministerial nature, were merely secondary factors in *Caballero's* reasoning. (State's Brief at 11). By downplaying the credit's ministerial nature, the State's theory

for why a claim for *per diem* credit can be made at any time, in any court, boils down to this: the "application" clause imparts jurisdiction to any court. But that was not why the legislature added that phrase. As discussed by this Court in *People v. Woodard*, 175 Ill.2d 435, 445-46 (1997), the "application" phrase in section 110-14 was included to benefit prisoners by making clear to prisoners and clerks the simple ministerial (and clerical) process for receiving the benefit. 725 ILCS 5/110-14. Thus, claims for *per diem* credit are immune from forfeiture rules because modifying the credit is a ministerial and clerical function, not because the "application" clause imparts never-ending jurisdiction in every court. See 730 ILCS 5/5-8-7(b); 725 ILCS 5/110-14; see also 730 ILCS 5/5-4-1(e)(4) (2006) ("The clerk of the court shall transmit to the department, * * * the number of days, if any, which the defendant has been in custody ***, which information shall be provided to the clerk by the sheriff[.]"); *Cowper v. Nyberg*, 2015 IL 117811, ¶ 20 (the duties prescribed in 730 ILCS 5/5-4-1(e)(4) (2016), are "ministerial" and do not require the "exercise of discretion").

The State goes on to argue that judicial efficiency is harmed by granting ministerial claims for liberty credit. (State's Brief at 12). The State's view runs counter to the rationale of *Caballero* which reasoned that "'[g]ranting the [*per diem*] credit is a simple ministerial act that will promote judicial economy by ending any further proceedings over the matter.'" *Caballero*, 228 Ill.2d at 88, quoting *Woodard*, 175 Ill.2d at 456-457, quoting *People v. Scott*, 277 Ill.App.3d 565, 566 (3rd Dist. 1996). Without the State explaining why granting liberty credit is not a simple ministerial act, compared to granting *per diem* credit, the State's position on judicial economy is directly contradicted by this Court's reasoning in *Caballero*. See *Caballero*, 228 Ill.2d at 88.

In his opening brief, Young argued that reviewing courts have traditionally treated the two types of credit similarly. (Defendant's Brief at 20); See *Caballero*, 228 Ill.2d at 83-88; *Woodard*, 175 Ill.2d at 457. The State counters by pointing out that the two statutes are located in different ILCS chapters, and concludes "[a] legislative directive to treat the credits differently overrides any judicial preference to the treat them the same." (State's Brief at 13). Perhaps, but the minor differences between the two types of credit can hardly be deemed a legislative directive. Here again, the State argues as if the two types of credit have nothing in common. (State's Brief at 13).

The State also argues the weightier concern of liberty credit compared to monetary credit is not a factor this court should consider because "procedural rules do not turn on the importance of the right." (State's Brief at 14). Again, the State assumes miscalculated liberty credit is tantamount to an illegal sentence and applies forfeiture. (State's Brief at 14). This approach is wrong. See *Buffkin*, 2016 IL App (2d) 140792, n. 2.

The State goes on to claim that, nonetheless, liberty credit is actually favored over *per diem* credit because "[c]ourts award *per diem* credit *only* on application but must award presentence custody credit without request." (Emphasis added) (State's Brief at 14). Like earlier in its brief, the State reads too much into the "application" clause by arguing an application for *per diem* credit is a precondition to receiving it. The State is wrong. Though applying for *per diem* is a sufficient condition, it is not a necessary precondition for receiving it. For example, while making her oral pronouncement, a trial judge may indicate the specific amount of liberty and *per diem* credit on her own initiative. Other times the trial judge will mention only the specific amount of liberty credit and order the clerk to calculate

the *per diem* credit accordingly. In neither situation, has the prisoner made an affirmative application himself. Thus, a prisoner's affirmative application is not a necessary precondition for receiving *per diem* credit. See 730 ILCS 5/5-8-7(b); 725 ILCS 5/110-14.

Using the State's preferred outcome to this case, a petitioner in a collateral appeal who was under credited *per diem* credit could raise his issue, but a petitioner under credited liberty credit could not. That would be the case even though the appellate court would have to first compute the liberty credit in order to grant the *per diem* credit. See 725 ILCS 5/110-14. The more complicated ministerial task should not be favored over the more simple one, and it would be inequitable to allow the one petitioner to seek his monetary credit but bar the other petitioner seeking his liberty credit for time served. Favoring monetary credit over liberty credit also presents the incongruous situation where a petitioner in a collateral appeal could seek his $500 in *per diem* credit but not his 100 days of credit for time served that his *per diem* was predicated upon.

Further, the State argues a claim for liberty credit can not be construed like a motion to amend mittimus because the thing being amended is the underlying sentencing judgment. (State's Brief at 15-17). The State again relies on the faulty presumption that credit against a sentence is part of the sentence itself. As explained earlier in this brief, adjusting the credit against a sentence does not effect the actual sentence. Like a motion to amend a mittimus, correcting miscalculated credit on a mittimus does not disturb the finality of the court's judgment. See *Buffkin*, 2016 IL App (2d) 140792, n. 2. It is the simple ministerial nature of either action which relieves them both from rules of procedural default. See *Baker v. Department of Corrections*, 106 Ill.2d 100 (1985).

In his opening brief, Young argued, in the alternative, that this Court should amend its own rules to allow liberty credit to be corrected at any time. (Defendant's Brief at 21-23). Notably missing from the State's brief is any comment on Young's proposal or its merits. Instead, the State proposed a new rule of its own which would revive the old void-sentence doctrine by allowing an illegal sentence, *i.e.*, one that failed to conform to a statute, to be corrected in the circuit court at any time– *in perpetuity*. (State's Brief at 20-21).

Setting the State's proposed rule side-by-side against Young's proposed rule presents a clarifying juxtaposition. The State's rule is broad and casts a wide net that will capture a whole host of legal claims unrelated to the issue of credit, and allow the State an avenue to cross-appeal or attack a trial court's final judgment and sentence. See *Castleberry*, 2015 IL 116916, ¶ 6 (State cross-appeal). It would revive a doctrine that this Court determined was unconstitutional, and one that would keep the finality of a trial court's judgment in perpetual limbo. See *Id.* ¶ 18. Whereas Young's rule is narrow, limited to the issue at hand, and would keep a trial court's underlying judgment intact. (Defendants' Brief at 21-23). In sum, the State's rule would open up a pandora's box, while Young's rule would streamline the issue of credit by tying liberty credit to its natural offspring, monetary credit.

Deciding which rule is favored by public policy poses a question raised earlier in this brief. Is a claim to correct liberty credit more akin to a claim to correct *per diem* credit, or a claim to correct an illegal sentence? The State's rationale places miscalculated liberty credit into the illegal sentence category, and drives a wedge between liberty and monetary credit. (State's Brief at 2-23). However, the large category of illegal sentences includes things like, mandatorily consecutive sentences and extended term sentencing, as well as a bevy of enhancements based

on things like prior convictions, custodial status at the time of the offense, the age of the victim, the possession of a firearm, and even the proximity of the offense to a school, park, or church, just to name a few. See *e.g.*, 720 ILCS 570/407(b) (2018); 730 ILCS 5/5-8-2; 730 ILCS 5/5-8-4; 730 ILCS 5/5-4.5 *et seq*; 730 ILCS 5-5-3.2(b)(1)-(3) (2018); 720 ILCS 5/19-6(a)(3) (2018).

Liberty credit is more similar to *per diem* credit than any of the possible illegal sentences above. For one, some of the above, like firearm and locality enhancements, are elements of the offense and thus, subject to our highest standard of proof– beyond a reasonable doubt. See *e.g.*, *People v. Sims*, 2014 IL App (4th) 130568, ¶ 106 (analyzing the State's burden in proving a drug-delivery offense occurred within 1,000 feet of a church); 720 ILCS 570/407(b). As far as standards in the law go, nothing could be farther from proving something beyond a reasonable doubt than simply adding up the days a person sits in jail. Moreover, claims for liberty credit do not have an analog in civil jurisprudence, where the doctrine of inherent power was first abolished. See *People v. Castleberry*, 2015 IL 116916, ¶ 15 (discussing the abolishment of the void-sentence rule in civil cases). Thus, Young's proposed rule, treating liberty credit and *per diem* credit the same, makes more sense than tethering miscalculations in credit to a revived version of the void-sentence doctrine.

Lastly, the State argues that if this Court uses its supervisory authority to address Young's claim, this case should be remanded because the record is not clear as to how many days Young spent in presentence custody. (State's Brief at 18-20). The State is wrong. (Defendant's Brief at 12-14). Although it is unclear exactly when Young was transferred to and from the Department of Human Services, it is clear that he was in custody the entire time. 725 ILCS 5/104-24 (2005) ("Time

spent in custody *** pursuant to a commitment to the Department of Human Services *** shall be credited against any sentence imposed ***."); *People v. Williams*, 23 Ill.App.3d 127, 130 (5th Dist. 1974).

Young was never released from custodial status after he was arrested for murder. All that is needed from the record is two dates: when Young was arrested and when he was sentenced. (R. X, 15; C. I, 13, 171) (C. I, 170, brown envelope, presentence investigation report (PSI) pages 3, 9). Thus, remand is unnecessary and this Court should correct the mittimus to reflect the total amount of days Young spent in presentence custody which is 398 days. (Defendants Brief at 12-14).

In conclusion, to sum up the division in this case, the State asks this Court to treat Young's mittmus, which inaccurately reflects the total amount of liberty credit, like an illegal sentence. Young asks this Court to treat that his mittmus like it would if the *per diem* credit were incorrect, or like a motion to amend the mittimus. See *Buffkin*, 2016 IL App (2d) 140792, n. 2. This Court should side with Young because adjusting the credit against a sentence does not disturb the underlying sentence itself. It is clear from the record that Young had served 398 days in jail prior to sentencing, but was only granted credit for 215 days. (C. I, 171). This Court should grant him the credit to which he is entitled pursuant to *Caballero*. See *People v. Truesdell*, 2017 IL App (3d) 150383, ¶ 19, citing *Caballero*, 228 Ill.2d at 88.

In the alternative, this Court should amend its rules to make clear that a claim for liberty sentence credit can be made at any time and at any stage of court proceedings, even on appeal in a collateral proceeding. See *Castleberry*, 2015 IL 116916, ¶ 28; Ill. S.Ct. R. 3: see also *In re B.L.S.*, 202 Ill.2d 510, 519 (2002) (holding the credit-against-sentence statute (730 ILCS 5/5-8-7(b)) applied to

juveniles); *In re A.G.*, 195 Ill.2d 313, 319 (2001) (holding compliance with Ill. S.Ct. R. 604(d) is required in juvenile proceedings).

Lastly, if this Court declines to address Young's claim for liberty credit pursuant to *Caballero*, or by amending its own rules, then this Court should use its supervisory authority to grant Young the 183 additional days of liberty sentence credit to which he is clearly entitled. Ill. S.Ct. R. 383 (eff. July 1, 2017); Ill. Const. 1970, art. VI, § 16.

CONCLUSION

For the foregoing reasons, Nelson A. Young, defendant-appellant, respectfully requests that this Court correct the mittimus to reflect that he is entitled to 398 days of presentence custody credit.

Respectfully submitted,

JACQUELINE L. BULLARD
Deputy Defender

JASON B. JORDAN
ARDC No. 6319268
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Jason B. Jordan, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is fifteen pages.

/s/Jason B. Jordan
JASON B. JORDAN
ARDC No. 6319268
Assistant Appellate Defender

No. 122598

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NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Nelson A. Young, Register No. K99533, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764

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 April 10, 2018, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Linsey Carter
LEGAL SECRETARY
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240
Service via email will be accepted at
4thdistrict.eserve@osad.state.il.us
(217) 782-3654