No. 123525

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- RALPH EUBANKS Defendant-Appellee	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-2837. There on appeal from the Circuit Court of Cook County, Illinois , No. 10 CR 1904. Honorable Timothy Joseph Joyce, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

DEEPA PUNJABI
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

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Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES Page

ISSUES PRESENTED FOR REVIEW

I. Whether the appellate court correctly found 625 ILCS 5/11-501.2(c)(2) to be facially unconstitutional;

II. Whether the appellate court correctly reversed defendant-appellee's conviction for first degree murder where the trial court abused its discretion in refusing to instruct the jury on reckless homicide; and

III. Whether the appellate court correctly found that defendant-appellee's Class 1 conviction for failure to report a motor vehicle accident involving death within a half hour should have been reduced to the lesser Class 4 version of the offense.

STATUTES AND RULES INVOLVED

625 ILCS 5/11-501.2 Chemical and other tests.

> (c) (2). Notwithstanding any ability to refuse under this Code to submit to these tests, or any ability to revoke the implied consent to these tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death of or personal injury to another, the law enforcement officer shall request, and that person shall submit, upon the request of a law enforcement officer to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol content thereof or the presence of any drug or combination of both . . .

STATEMENT OF FACTS

Ralph Eubanks was convicted at a jury trial of first degree murder, failure to report an accident involving death or injury within a half hour, and aggravated driving under the influence ("aggravated DUI"). (C. 347-350) The appellate court reversed Eubanks' conviction for aggravated driving under the influence, finding that Section 11-501.2(c)(2), which instructs law enforcement to effect compelled chemical testing on a suspect's body without requiring a warrant or warrant exception, was facially invalid, requiring suppression of the test results in this case. The appellate court also reversed Eubanks' conviction for first degree murder and remanded the cause for a new trial, finding that the trial court abused its discretion in refusing to instruct the jury of the lesser included offense of reckless homicide. Lastly, the appellate court reduced Eubanks' Class 1 conviction for failure to report to a Class 4 conviction for leaving the scene of an accident.

Circuit Court Proceedings

On April 24, 2014, the trial court heard the defense's motion to suppress the results of Eubanks' blood and urine tests, which were drawn at the hospital with no warrant and without Eubanks' consent, using physical coercion. (C. 425-430) The defense also asked the court to find the statute mandating warrantless, nonconsensual testing in DUI cases of death or injury – 625 ILCS 5/11-501.2(c)(2) – to be unconstitutional because it requires a warrantless search whether or not exigent circumstances or other warrant exceptions apply. (C. 431-434)

At the hearing on the motion, the parties did not present evidence and stipulated that: On December 21, 2009, at 9:05 p.m. Eubanks was arrested after

a hit and run accident that resulted in the death of Maria Worthon and injury to her six year-old son Jeremiah Worthon. The police had probable cause to arrest Eubanks for driving under the influence. Eubanks was taken to the police station and placed in an interview room at 10:30 p.m. An officer told Eubanks he would be charged with driving under the influence and read him his motorist warnings. Eubanks refused to take a breathalyzer test. At 12:05 a.m., the officer asked Eubanks to submit to a blood and urine test, and Eubanks again refused. At 1:37 a.m. Investigator Deneen told Eubanks he was taking him to the hospital because Eubanks was required under state law to give the police a blood and urine sample. At 2:53 a.m. Eubanks was taken to Weiss Hospital. Eubanks refused to submit and had to be physically restrained by hospital security. Blood was forcibly taken from him at 4:00 a.m, as he was restrained and cuffed to the hospital bed. The nurse then asked for urine, but Eubanks refused to urinate. The nurse threatened to catheterize him, and she ordered a catheter at 4:56 a.m. As the nurse approached Eubanks with the catheter and was about to insert it, he urinated, and a sample was collected at 5:20 a.m. The blood and urine samples were submitted to the crime lab for analysis. Eubanks's blood test results were negative for alcohol or any illegal substance, but his urine tested positive for cannabis, ecstasy and cocaine metabolite. (R. YY5-YY7)

After argument, the trial court denied the motion to find the statute unconstitutional and the motion to suppress the test results. (R. YY27, YY33)

Prior to trial, the court admonished Eubanks and then accepted his waiver of counsel, permitting him to represent himself. (R. ZZ11-ZZ27)

Felix Worthon

The State called Felix Worthon, Maria Worthon's husband and Jeremiah Worthon's father. (R. AAA22-AAA23) Felix testified that on the evening of December 21, 2009, while they were all walking home, Maria and Jeremiah stopped to talk to Maurice, a man from their church. (R. AAA23-AAA27) Felix walked ahead, and as he crossed the street, a car almost hit him. (R. AAA28-AAA29) The car then struck Maria and Jeremiah and did not stop. (R. AAA29) Maria passed away immediately and Jeremiah suffered permanent injuries. (R. AAA31, AAA35-AAA36)

Maurice Glover

Glover testified that he knows the Worthons from his church. (R. CCC11) On December 21, 2009, he was sitting in his car outside his church, when he saw the Worthons walking down Greenview. (R. CCC12) As Maria and Jeremiah crossed the street, he saw a dark car approaching very fast, at about 80 or 90 miles per hour. He heard Maria scream and heard a boom. (R. CCC13) Then he saw Maria's body come down out of the air and land on the other side of Greenleaf. The car never stopped. (R. CCC14) Glover got out of his car and ran towards Maria. Felix was there and told Glover to go be with Jeremiah. (R. CCC14) Glover ran to Jeremiah, who was lying under a parked car. Glover called 911 at 8:58 p.m. (R. CCC15-CCC16; *People's Exhibit 20*)

Madeline Moratto and Alex Montejo

Moratto and Montejo testified that they were walking down the sidewalk together when they witnessed the collision. (R. BBB69-BBB73, BBB93) Moratto estimated the car's speed to be 80 miles per hour, and Montejo estimated a speed

of 60 miles per hour. (R. BBB75, BBB94) Moratto testified that the collision occurred on a quiet, residential street. (R. BBB70)

Calvin Tanner

Calvin Tanner was the passenger inside the car with Eubanks when the collision occurred. (R. AAA55-AAA56) Tanner testified that he and Eubanks, as well as Tanner's cousin, Dennis Jeter, are all old friends. (R. AAA48-AAA50) In 2009, Jeter owned a 1998 green Pontiac Grand Prix. (R. AAA50) Tanner testified that sometimes Jeter would let Eubanks drive his car. On December 21, 2009, Eubanks was driving Tanner to Tanner's and Jeter's grandmother's house. Jeter was there when they arrived. (R. AAA51) While there, Tanner had some drinks, but he could not recall if Jeter or Eubanks were drinking. (R. AAA52-AAA53).

Later that night Eubanks drove Tanner, in Jeter's car, to pick up a futon on the north side, near Tanner's new apartment. (R. AAA51) When they approached Jonquil and Greenview, Eubanks pulled over because they heard an ambulance. (R. AAA54) He continued driving, and as he approached Greenview and Greenleaf, there was a U-Haul in front of a church, and Eubanks hit something. (R. AAA55-AAA56) Tanner testified that he hoped it was parked car, but he feared it was a person, and he told Eubanks, "I hope you didn't do what I thought you did." The collision caused the front windshield to shatter, and there was glass and blood in Tanner's mouth. (R. AAA57) Eubanks stopped the car down the street, and they both got out. Tanner called Jeter and told him "Your car has been wrecked." (R. AAA58) Tanner told Eubanks to go back to the scene of the collision, but he refused. (R. AAA78) Tanner walked back himself and saw that Eubanks had hit

someone. (R. AAA56) Tanner told the police that he had been a passenger in the car involved in the collision. (R. AAA60) Tanner could not recall if he gave the police a description of Eubanks. (R. AAA66)

Tanner denied that he told the police the car was going 60-70 miles per hour. (R. AAA61) He testified that he told Eubanks to slow down and stop speeding, but explained that the speeding occurred on the expressway, not on the residential streets. (R. AAA62) He denied that he told the police that there was no obstruction, and insisted that he mentioned the parked U-Haul. (R. AAA62) Tanner denied telling the police that after the accident he was upset and swearing at Eubanks and wanted to fight him. (R. AAA67) Tanner testified that Eubanks is still his friend. (R. AAA68)

Tanner further testified that he agreed to memorialize his statement to an Assistant State's Attorney ("ASA") that night at the police station. (R. AAA70) However, Tanner testified that even though he was allowed to review and make changes to the statement, he did not know how to read and write, and the police would not let him go and pressured him to cooperate. (R. AAA71) The statement was admitted and published to the jury as *People's Exhibit 7* through the testimony of ASA Mary Jo Murtaugh. (R. EEE66-EEE70) In it, he told ASA Murtaugh that "Bobo suddenly started driving at a high rate of speed," and that he was afraid they would get hurt. (R. AAA82) Tanner explained in the statement that when he told Eubanks, "Man, I hope you didn't hit what I thought you hit," Eubanks replied, "It's too late," and Tanner then wanted to exit the car. (R. AAA83-AAA84) Tanner explained that while he did read aloud the handwritten statement to the

ASA, she helped him with it, as he could not really read and write. (R. BBB4) He admitted that his statement said that the police treated him well, but that the ASA told him he needed to say that in order to go home. (R. BBB6) At trial, ASA Murtaugh denied threatening Tanner or telling him that he could not go home without providing a statement. (R. EEE64)

Tanner also testified that in February of 2014, he and Jeter met ASA Murtaugh and another ASA named Ashley at the crime scene, and one of the investigators drove them around the area. (R. AAA74) Tanner and the others got out of the car at the church at Greenview and Greenleaf so that he could show them where the collision occurred. (R. AAA76) However, he testified that it was the ASA that "was showing me while we were walking through it." (R. AAA76) He admitted showing them the alley where he and Eubanks got out and "had words" after the collision about whether they should return to the scene. (R. AAA77)

Lastly, Tanner testified that he spoke with ASA DeBoni before giving his grand jury testimony. (R. BBB8) He admitted that in his grand jury testimony he said Eubanks started driving fast in a residential area, not an expressway, and that he estimated a speed of about 50-60 miles per hour, a speed that scared him. (R. BBB13-BBB14) He told the grand jury that when he called Jeter from the alley, immediately after the collision, he told him, "I think Bobo did something bad." (R. BBB16) Tanner told ASA DeBoni that ASA Murtaugh treated him fairly and no one told him he had to testify a certain way at the grand jury or he could not go home. (R. BBB18)

Dennis Jeter

Similar to Tanner, Jeter testified that he, his cousin Tanner, and Eubanks were friends, that he occasionally allowed Eubanks to drive his 1998 Grand Prix, and that they were at his grandma's house on December 21, 2009. (R. BBB99-BBB103) Jeter testified that while there, they talked, went to the liquor store, came back and started drinking some vodka. (R. BBB104)

Jeter further testified that he left his grandma's house to go to a restaurant, and when he returned 15 minutes later, Eubanks and Tanner had left in his car. (R. BBB105-BBB106) Jeter was aware that Eubanks and Tanner had planned on driving to the north side of the city to pick up a futon for Tanner. (R. BBB107) In the late evening, Tanner called Jeter and told him to meet him at the 711 on Sheridan street because Eubanks had an accident in Jeter's car and hit something, but Tanner didn't know what it was. (R. BBB108) Tanner sounded hyper, scared and startled on the phone, and when Jeter went to meet him, Tanner had glass and blood on his face. (R. BBB109) Tanner took him to the scene of the car accident, and they saw a body on the ground with a sheet over it. (R. BBB110) They approached the police and identified themselves as a witness of the accident and the owner of the car involved in the accident. Jeter told the police he had loaned his car to Eubanks. (R. BBB111)

Officers Murphy and Wertepeny

Officers Brian Murphy and Chris Wertepeny testified that they were working together as partners on the evening of December 21, 2009. (R. CCC19-CCC20, EEE32) Just before 9:00 p.m. they observed a green Pontiac head west at a high

rate of speed and then turn north on Bosworth, with no headlights. (R. CCC21-CCC22, EEE33) They curbed the vehicle, but when they got out and approached the car, it drove away quickly. (R. CCC23, EEE33) As Murphy and Wertepeny drove around the area, they saw two pedestrians that had been struck by a car at Greenleaf and Greenview. (R. CCC25-CCC26, EEE34) Murphy made a radio call, after witnesses to the collision spoke to them and identified a car that matched the description of the car that had fled from the officers on Bosworth. (R. CCC26, EEE34) Calvin Tanner approached the officers, and Wertepeny took a witness statement from him. (R. CCC27)

Wertepeny further testified that just before 11:00 p.m. he spoke with Tanner at the police station. (R. EEE35) Tanner related that he was the passenger in the vehicle, and that Eubanks had been driving at least 60-70 miles per hour. (R. EEE36) He said there were no obstructions at the time of the collision and did not mention any U-Haul to Officer Wertepeny. He also told Wertepeny that immediately after the collision he told Eubanks he wanted to get out of the car, but Eubanks said, "It's too late now," and continued speeding and driving. (R. EEE37) Tanner told Wertepeny that when he got out of the car he was swearing at Eubanks, angrily asking him what he did. (R. EEE38)

Officers Escher, Pierson and McHugh

Officers Escher, Pierson and McHugh all testified that on December 21, 2009, at around 9:00 p.m., they received a radio call about a hit and run at Greenview and Greenleaf by a green Pontiac Grand Prix, license plate H37583. (R. CCC42-CCC43, CCC65-CCC67, CCC80) Officer Escher saw the car and

approached it at a rate of 50 miles per hour, but the car was going so fast that she lost sight of it. (R .CCC44-CCC46) Officers Escher, Pierson and McHugh all testified that they saw the Pontiac at the 6400 block of Newgard, where it crashed into several parked cars and stopped. (R. CCC48, CCC69, CCC86) The driver, who they each identified in court as Eubanks, got out of the car and ran down Newgard. (R. CCC49, CCC70, CCC89) Officers Pierson and Ventrella detained Eubanks and placed him in custody. (R. CCC49, CCC70)

The State played a recording of the radio traffic between the officers during the incident. In it, Officer Escher relates that at 9:04 p.m., the offender is fleeing on foot, and at 9:05 p.m., he had been placed in custody. (*People's Exhibit 25*)

Officer John Ventrella

Officer Ventrella testified that on December 21, 2009, he received radio traffic that a dark green Pontiac had been involved in a fatal hit and run and was fleeing. (R. DDD8-DDD9) He then heard that the fleeing car had crashed and the offender, of whom he received a radio description, was fleeing on foot. (R. DDD9) As he was driving north on Newgard, he saw a man, who he later identified as Eubanks, matching the description of the offender run past his car, so he exited and placed him in custody. (R. DDD10-DDD11)

At 10:30 p.m. Ventrella interviewed Eubanks at the police station. (R. DDD12) Ventrella described Eubanks' demeanor as "carefree," and joking with the officers. (R. DDD17) Ventrella smelled alcohol on Eubanks' breath. (R. DDD18) Ventrella further testified that at midnight, he entered the interview room, woke the sleeping Eubanks, and after reading him his motorist warnings, asked him to take a

breathalyzer test, but Eubanks refused. (R. DDD15-DDD16) Eubanks also refused to submit blood and urine for testing. (R. DDD16) Ventrella later took Eubanks to Weiss hospital to obtain blood and urine, arriving at 2:57 a.m. (R. DDD16) When a nurse approached Eubanks to draw blood, Eubanks became combative and pulled his arm away, refusing to comply. (R. DDD17) Security officers came and held him down, handcuffed him, and drew his blood at 4:10 a.m. (R. DDD18) They also asked for his urine, but Eubanks refused or claimed he could not pee. (R. DDD19) However, at 5:00 a.m., after the nurse threatened to catheterize him, Eubanks provided urine. (R DDD19) Eubanks' blood and urine were put in a DUI test kit that was later submitted to forensics. (R. DDD20)

Eubanks was taken back to the police station, and Ventrella again spoke with him at 5:54 a.m. (R. DDD22) A video of this conversation was played for the jury, in which Eubanks asked to go to the bathroom. When the officer expressed surprise, Eubanks laugingly stated that he drank a quart of Hennessy earlier that now needed to come out. (*People's Exhibit 29*)

Colleen Lord and Jennifer Bash

Lord and Bash testified they were scientists with the ISP laboratory, and that in connection with this case, they tested Eubanks' blood and urine for certain substances. (R. DDD60-DDD63, DDD80-DDD82) They both testified that Eubanks' blood results were negative for any alcohol or drugs. (R. DDD66, DDD84) However, his urine contained cannabis, and its metabolite, ecstasy, and its metabolite, and cocaine metabolite. (R. DDD68) For both the cocaine and ecstasy, the result was plus / minus, but the cannabis reading was a clear positive. (R. DDD74)

Bash testified that cannabis can cause a relaxed state of mind and affect one's sense of time, while ecstasy and cocaine are stimulants that can decrease inhibitions. (R. DDD87-DDD88) She was called again as a rebuttal witness and testified that cannabis will typically clear one's system in about 48 to 72 hours, but if one is a heavy user it can stay in the body longer. (R. DDD186) Furthermore, the presence of the drug itself, rather than just the metabolite, indicates more recent usage. (R. DDD186)

Ralph Eubanks

Eubanks testified that Dennis Jeter was the driver in this incident, and that Eubanks was not present for the crash. (R. EEE138-EEE139) According to Eubanks, on December 21, 2009, Jeter called Eubanks and asked him to return his car so that Jeter could take his cousin, Calvin Tanner, to go pick up a futon. (R. EEE134-EEE135) Eubanks met Jeter at his grandma's house, where they had some drinks together. (R. EEE135) Eubanks, Tanner and Jeter subsequenly proceeded to Tanner's apartment. (R. EEE136) Jeter and Tanner then left Eubanks at Tanner's place because they had a good parking spot that they wanted Eubanks to save. They told Eubanks that they would not be gone long because Jeter's brother, who had the futon, lived close by. (R. EEE136) After they left, Eubanks got a call from Tanner, who said, "Bo, I was just in an accident." (R. EEE136) Eubanks asked what happened and Tanner said, "It's all fucked up." Eubanks then asked where Tanner was and started walking in that direction. (R. EEE137) When Eubanks arrived, the police were everywhere. Eubanks ran because he was carrying cannabis on him, and the police chased and arrested him. (R. EEE138)

On cross examination, Eubanks reiterated that he was not in the car at the time of the collision. (R. EEE139) According to Eubanks, the officers' testimony about observing Eubanks exit from the Pontiac was false. (R. EEE148) Eubanks admitted that he drank a quart of Hennessey earlier in the day, but said he had not smoked marijuana for almost a week prior to that night. (R. EEE143, EEE149) He admitted that he took an ecstasy pill two days prior, but he did not take any cocaine, although it might have been cut with the ecstasy. (R. EEE152)

Instructions, Argument and Verdict

At the instructions conference, the judge denied Eubanks' request for an instruction on reckless homicide, ruling that there was no evidence of recklessness. (R. EEE220) After arguments and deliberation the jury found Eubanks guilty of first degree murder, guilty of aggravated DUI resulting in the death of Maria Worthon, guilty of aggravated DUI resulting in great bodily harm to Jeremiah Worthon, and guilty of aggravated failure to report an accident involving death or injury. (R. FFF92)

After a sentencing hearing, the court sentenced Eubanks to 30 years for first degree murder, 6 years for aggravated DUI relating to Jeremiah Worthon, and 4 years for failure to report an accident, consecutively served, for a total of 40 years in prison. (C. 465, R. LLL64)

Appellate Proceedings

On appeal, Eubanks argued that: 1) the statute that subjected Eubanks to compulsory blood and urine tests without requiring a warrant or warrant exception is unconstitutional on its face and as applied, requiring suppression

of the test results, reversal of Eubanks' conviction for aggravated driving under the influence and a new trial for first degree murder; 2) where the trial court abused its discretion in refusing to instruct the jury on reckless homicide, a new trial was warranted; 3) Eubanks' Class 1 conviction for failure to report should be reduced to a Class 4 conviction for leaving the scene of an accident; and 4) Eubanks was denied a fair trial by several instances of prosecutorial misconduct during the trial and closing arguments. The appellate court granted relief on the first three arguments, finding it unnecessary to reach the issue of prosecutorial misconduct.

Specifically, the appellate court found that: 1) the trial court abused its discretion in refusing to instruct the jury on reckless homicide, warranting a new trial for first degree murder; 2) the State could not establish the Class 1 offense of failure to report a vehicle accident involving death within a half hour without relying on impermissible evidence or inferences, and therefore the conviction should be reduced to Class 4 leaving the scene; and 3) Sectional 11-501.2(c)(2) of the Vehicle Code is unconstitutional on its face, where it sets forth a categorical warrant exception of the kind rejected by the Supreme Court in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). The State now appeals the appellate court's conclusions on all three issues upon which it ruled.

ARGUMENT

I. The appellate court correctly found Section 11-501.2(c)(2) to be facially unconstitutional.

In his direct appeal, Ralph Eubanks, defendant-appellee, argued to the appellate court that the trial court erred in admitting the results of his warrantless blood and urine tests, and that the statute that mandated such testing, 625 ILCS 5/11-501(c)(2), is unconstitutional, facially and as applied to Eubanks, pursuant to the U.S. Supreme Court's decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). The appellate court agreed, finding the statute unconstitutional on its face where its compels chemical testing without a warrant in all cases where an officer has probable cause to believe that a driver under the influence has caused the death or personal injury of another. *People v. Eubanks*, 2017 IL App (1st) 142837, ¶ 66. The appellate court noted that the statute essentially codifies a *per se* exigency in contravention of the constitutional principles espoused in *McNeely*, which eschewed categorical, *per se* definitions of exigent circumstances, and found that the Fourth Amendment requires a case-by-case, "totality of the circumstances" approach to defining exigencies. *Eubanks*, ¶¶ 61, 66.

On appeal to this Court, the State argues that the appellate court should have applied the principle of constitutional avoidance adhered to by this Court in *In re E.H.*, 224 Ill.2d 172, 179 (2006), and *People v. Lee*, 214 Ill.2d 476, 482 (2005), and should not have reached the question of facial invalidity at all. The State, however, relies on an erroneously broad reading of the principle of constitutional avoidance, where there were no nonconstitutional grounds upon which the challenge to the aggravated DUI charge could have been resolved. The

State also argues that Section 11-501.2(c)(2) is not facially unconstitutional because there are certain circumstances where the statute may be validly applied. The circumstances referred to by the State do not, however, cure the inherent constitutional defect in the statute, as explained below. This Court should accordingly affirm the appellate court's facial invalidation of Section 11-501.2(c)(2).

A. The principle of constitutional avoidance is inapplicable to the instant case where the question of the constitutionality of the compelled testing and the statute that mandated it was required to resolve the case, and there were no nonconstitutional grounds upon which the case could have been resolved.

This Court has repeatedly reaffirmed a long-standing principle of constitutional avoidance, holding that a court should "avoid determining a constitutional question if the case can be resolved on other, nonconstitutional grounds." *People v. Lee*, 214 Ill.2d 476, 482 (2005) (citing decisions by this Court holding the same). Invoking the principle of constitutional avoidance, the State argues that the appellate court should not have considered Eubanks' challenge to the constitutionality of Section 11-501.2(c)(2) of the Vehicle Code. Here, however, there were no nonconstitutional grounds upon which the challenge to the compulsory testing and to Eubanks' conviction for aggravated DUI could have been otherwise decided. The principle of constitutional avoidance is therefore inapplicable.

The State argues that the appellate court should have found that the warrantless testing in this case violated Eubanks' constitutional rights, but should have halted its analysis there without addressing the facial challenge to the statute. But there is no question that the testing at issue was taken in reliance on and because of the mandates of Section 11-501.2(c)(2). The parties stipulated that

the officers were acting pursuant to Section 11-501.2(c)(2) in subjecting Eubanks to compulsory testing. (R. YY5-YY6) The defense stated in the stipulated proffer that "Investigator Deneen came into the room and told Mr. Eubanks he was going to take him to the hospital because Mr. Eubanks was required to give the police a blood and urine sample. . . At that time Mr. Eubanks told the officer that he did not need to go to the hospital. The officer then explained that state law required that Mr. Eubanks submit to blood and urine testing." (R. YY5-YY6) Thus, it is clear that the warrantless, compulsory chemical testing challenged here resulted from the officers following the direct mandates of the statute. The issue of the statute's validity is therefore tied together with and inseparable from the question of whether the tests were taken in violation of Eubanks' constitutional rights.

Moreover, unlike in *In re E.H.* 224 Ill.2d at 179, and *Lee*, 214 Ill.2d at 482, there are no other nonconstitutional grounds upon which the appellate court could have resolved Eubanks' challenge to his conviction for aggravated DUI. The appellate court had no choice but to address Eubanks' challenge to the warrantless compulsory testing and the statute that mandated it, and the appellate court did so properly. This Court has cautioned that courts "should not compromise the stability of the legal system by declaring legislation unconstitutional when a particular case does not require it." *Lee*, 214 Ill.2d at 482. Here, however, the question of the validity of the warrantless compulsory testing, and the statute that mandated it, was unavoidable, and in fact, allowing the statute to stand is what would likely "compromise the stability of the legal system." Section 11-501.2(c)(2) codifies an unconstitutional practice, instructing officers to rely on a *per se* exigency rather

than requiring them to obtain a warrant or determine based on the specific circumstances of each case whether exigent circumstances preclude obtaining a warrant. Allowing the statute to stand will result in officers committing future illegal searches, leading to further litigation and repeated disputes over the suppression of chemical test results that follow from the application of the statute.

Thus, where the principle of constitutional avoidance is inapplicable to this case, as the appellate court had no other nonconstitutional grounds upon which it could have resolved the challenge to Eubanks' aggravated DUI conviction, the appellate court properly addressed Eubanks' constitutional challenge, and properly found Section 11-501.2(c)(2) facially unconstitutional.

B. Section 11-501.2(c)(2) is constitutionally invalid on its face.

In *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), the U.S. Supreme Court held that the possibility of dissipation of alcohol or other substances in a suspect's body does not support a *per se* exigency authorizing warrantless blood draws, and it eschewed altogether a categorical, *per se* approach to defining exigencies in this context, holding, "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances . . ." *Id*. at 1563 *McNeely*, 133 S.Ct. at 1563, 1568. The Court was explicitly clear regarding the Fourth Amendment's requirements in the context of compelled chemical testing of a suspect's body: "In those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 1561. Thus, per *McNeely*,

the police are constitutionally required to secure a warrant whenever feasible based on the totality of the circumstances prior to a compulsory chemical test of a suspect's body.

On appeal, Eubanks argued, and the appellate court agreed, that the statute that compelled testing in this case does precisely what *McNeely's* explication of the Fourth Amendment prohibits – it instructs law enforcement to rely on a categorical, presumed, *per se* exigency that excuses the warrant requirement in all DUI cases involving death or severe injury, rather than requiring the police to determine if securing a warrant is feasible based on the totality of the circumstances. *See* 625 ILCS 5/11-501.2(c)(2) (West 2009). The State argues to this Court that "Section 11-501.2(c)(2) is facially valid because even if it permits chemical testing in violation of the Fourth Amendment (as in this case), the provision also permits blood and urine testing that complies with the Fourth Amendment, that is, pursuant to a warrant, with the arrestee's consent, or under exigent circumstances." (St. Br. p. 17) None of these circumstances, however, cure the facial defect in the statute, which is that it essentially codifies a bypass for the warrant requirement and instructs law enforcement to rely on a statutory *per se* exigency rather than evaluate the circumstances on a case-by-case basis as required to see if a warrant can be procured prior to compelled chemical testing.

First, with respect to the State's claim that 501.2(c)(2) could be validly applied where the driver consents, it must be noted that there is no right to refuse testing under section 501.2(c)(2). *People v. Jones*, 214 Ill.2d 187, 200 (2005). Unlike other sections of the Code such as 501(c)(3) or 501.1(c), under section 501.2(c)(2) a driver

lacks the right to refuse testing – it is compelled.[1] *Id.* Thus, the testing under this provision takes place irrespective of consent. The issue of consent or lack of consent is meaningless to the analysis of this statutory provision and fails to cure the inherent defect in the statute. In this way, Eubanks' facial challenge to Section 501.2(c)(2) of the Vehicle Code is distinguishable from the unsuccessful facial challenge in *People v. Hasselbring*, 2014 IL App (4th) 131128, to Section 11-501.6(a) which, unlike Section 501.2(c)(2), does contain a meaningful right to withdraw consent to chemical testing. *See Byars v. State*, 336 P.3d 939, 946 (Nev. 2014) (Nevada's implied consent statute, unlike Illinois' statute, did not allow a driver to withdraw consent and was therefore unconstitutional under *McNeely*).

Secondly, to argue that the statute could be validly applied if officers obtained a warrant, or if the officers determined that there are exigent circumstances, results in the strange claim that the statute can only be validly applied if the officers disregard what the statute actually instructs them to do, which is to rely on a categorical, presumed, *per se* exigency that excuses the warrant requirement in all cases involving death or severe injury, rather than requiring the police to undertake the determination of whether a warrant can be obtained and to obtain it, if feasible based on the totality of the circumstances. *McNeely* makes clear that

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[1]Although the language of section 501.2(c)(2) provides that the officer "shall request" and the driver "shall submit" to testing, this is "notwithstanding," or in spite of any right to refuse testing that exists in other sections of the Code. Our Supreme Court in *Jones*, examining the statutory language, explained that unlike other sections of the Code such as 501(c)(3) or 501.1(c), under section 501.2(c)(2) a driver lacks the right to refuse testing – it is compelled (with the caveat that law enforcement may not use physical force to complete testing). *People v. Jones*, 214 Ill.2d 187, 200-201 (2005).

the police are constitutionally required to secure a warrant unless under the totality of the circumstances they are unable to do so without significantly affecting their ability to obtain reliable evidence. *McNeely*, 133 S.Ct. 1561. Any statute that rejects this "totality of the circumstances approach" to whether exigent circumstances exist to prevent obtaining a warrant contains an inherent constitutional defect.

The plain language of Section 11-501.2(c)(2) clearly bypasses the warrant requirement and is meant to act as a shortcut around the "totality of the circumstances" approach to determining if there are exigent circumstances. To demonstrate, a comparison of the language in a similar out-of-state statute is instructive. North Dakota had a statute similar to Section 501.2(c)(2), which authorized nonconsensual blood draws of DUI arrestees where there has been a fatality or serious injury. *See* N.D. Cent. Code Ann. § 39-20-01.1.

Prior to *McNeely*, the language of North Dakota's statute provided:

§ 39-20-01.1. Chemical test of driver in serious bodily injury or fatal crashes. (2012)

1. Notwithstanding section 39-20-01 (implied consent) or 39-20-04 (summary revocation of driving privilege), when the driver of a vehicle is involved in an accident resulting in the death of another person, and there is probable cause to believe that the driver is in violation of section 39-08-01 (driving under the influence) or has committed a moving violation as defined in section 39-06.1-09, the driver must be compelled by a police officer to submit to a test or tests of the driver's blood, breath or urine to determine the alcohol concentration or the presence of other drugs or substances.

2. Notwithstanding section 39-20-01 (implied consent) or 39-20-04 (summary revocation of driving privilege), when the driver of a vehicle is involved in an accident resulting in the serious bodily injury, as defined in section 12.1-01-04, of another person, and there is probable cause to believe that the driver is in violation of section 39-08-01 (driving under the influence), a law enforcement officer may compel the driver to submit to a test or tests of the driver's blood, breath or urine to determine the alcohol concentration or the presence of other drugs or substances. The methods and techniques established by the director of the state crime laboratory

must be followed in collecting and preserving a specimen or conducting a test.

N.D. Cent. Code Ann. § 39-20-01.1. (2012) (parenthetical references added).

After the issuance of *McNeely*, North Dakota amended this statutory provision so that it now appears as follows:

§ 39-20-01.1. Chemical test of driver in serious bodily injury or fatal crashes. (2014)

1. If the driver of a vehicle is involved in a crash resulting in the death of another individual, and there is probable cause to believe that the driver is in violation of section 39-08-01 (driving under the influence), a law enforcement officer shall request the driver to submit to a chemical test or tests of the driver's blood, breath or urine to determine the alcohol concentration or the presence of other drugs or substances, or both.

2. If the driver of a vehicle is involved in a crash resulting in the serious bodily injury, as defined in section 12.1-01-04, of another individual, and there is probable cause to believe that the driver is in violation of section 39-08-01 (driving under the influence), a law enforcement officer shall request the driver to submit to a test or tests of the driver's blood, breath or urine to determine the alcohol concentration or the presence of other drugs or substances, or both.

3. If the driver refuses to submit to a chemical test or tests of the driver's blood, breath or urine and exigent circumstances are not present, the law enforcement officers shall request a search warrant to compel the driver to submit to a chemical test or tests of the driver's blood, breath or urine to determine the alcohol concentration or the presence of other drugs or substances, or both.

4. The approved methods of the director of the state crime laboratory or the director's designee must be followed in collecting and preserving a sample of the driver's blood, breath or urine and conducting a chemical test or tests to determine the alcohol concentration or the presence of other drugs or substances, or both.

N.D. Cent. Code Ann. § 39-20-01.1. (2014) (emphasis added).

Thus, the initial version of North Dakota's statute provided that, where there has been a fatality, an officer was to compel chemical testing of a DUI arrestee's body, bypassing the warrant requirement by codifying a categorical, *per se* exigency of a fatality or serious injury, thereby containing a constitutional

infirmity. The new version of the statute, in essence a *McNeeely* "fix," amended the procedure an officer is to follow by requiring the officer to request a warrant (if there are no exigent circumstances preventing this) instead of going straight to compelling the driver to submit to testing.

Clearly, the statute at issue in this case, 625 ILCS 5/11-501.2(c)(2), resembles North Dakota's pre-*McNeely* version of this statute. Section 501.2(c)(2) provides:

> Notwithstanding any ability to refuse under this Code to submit to these tests, or any ability to revoke the implied consent to these tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death of or personal injury to another, the law enforcement officer shall request, and that person shall submit, upon the request of a law enforcement officer, to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol content thereof or the presence of any drug or combination of both . .

625 ILCS 5/11-501.2(c)(2) (West 2009). Thus, the procedure the officer is to follow under the statute is as follows: when an officer has probable cause to believe a driver is under the influence, and the driver has caused a death or personal injury, the officer is to compel the chemical testing of the driver's body. The statute does not state that the officer is to request a search warrant from a magistrate or judge before doing so. It does not state that the officer is to determine whether exigent circumstances preclude requesting a warrant. It simply mandates that the officer is to compel testing, relying on the fact that a death or personal injury has occurred. The statute bypasses the warrant requirement and codifies a categorical, *per se* exigency based on the death or injury of the victim, in violation of the Fourth Amendment and *McNeely*. *McNeely*, 133 S.Ct. at 1561. This Court should accordingly uphold the appellate court's facial invalidation of Section 11-501.2(c)(2).

II. The appellate court correctly reversed defendant-appellee's conviction for first degree murder and remanded for a new trial where the trial court abused its discretion in refusing to instruct the jury on the offense of reckless homicide.

The State urges that this Court should reverse the appellate court's holding that the trial court abused its discretion in refusing to instruct the jury on the offense of reckless homicide. In doing so, the State argues that the appellate court did not apply the deferential standard of review that this Court set forth in *People v. McDonald*, 2016 IL 118882. However, the State fails to acknowledge that while the *McDonald* decision adopted a deferential abuse of discretion standard, it also clarified that the trial court's scope of discretion when determining lesser included offense instructions is narrow, removing from the trial court's authority any ability to weigh open factual questions raised by the evidence or assess credibility when determining if an instruction on a lesser offense should issue. *McDonald*, 2016 IL 118882 ¶25. Thus, where the trial court in this case intruded upon the jury's province to resolve the open factual question of intent raised by the evidence, ignoring or rejecting the evidence of recklessness that was presented at trial, this by itself constituted an abuse of discretion. Furthermore, the trial court abused its discretion when, while refusing the recklessness instruction, it erroneously focused on factors that did not bear on Eubanks' state of mind and did not indicate a lack of recklessness. Lastly, the trial court abused its discretion when it relied on facts not in evidence, instead finding no evidence of recklessness based on it own personal assumptions and subjective experiences. For these reasons, this Court should uphold the appellate court's ruling that Eubanks is entitled to a new trial for first degree murder.

A. The trial court abused its discretion when it ignored or rejected the evidence of recklessness that was elicited at Eubanks' trial, intruding upon the province of the jury to evaluate that evidence and consider whether it constituted proof beyond a reasonable doubt of reckless homicide.

In *McDonald,* this Court clarified that the standard of review in determining whether a jury instruction on a lesser included offense was erroneously denied is an abuse of discretion standard. *McDonald*, 2016 IL 118882, ¶ 42. However, *McDonald* also adopted a less stringent test for trial courts to apply in making the initial determination on whether to issue an instruction on a lesser included offense. This Court noted that its own case-law on this topic had been confusing. *McDonald*, ¶23 ("We have sometimes stated that an instruction is justified if *some credible* evidence exists in the record that would reduce the charged offense to a lesser offense ... In other cases, we have stated that an instruction on a lesser offense should be given where the record contains *some evidence* to support the giving of the instruction.") (*italics in original*). This Court then opted for the latter approach. In doing so, it removed from the trial court's authority any ability to weigh the evidence or assess credibility in making this determination:

> We hold that the appropriate standard for determining whether a defendant is entitled to a jury instruction on a lesser-included offense is whether there is *some evidence* in the record that, if believed by the jury, will reduce the crime charged to a lesser offense, not whether there is *some credible* evidence. It is not the province of the trial court to weigh the evidence when deciding whether a jury instruction is justified. ... Requiring that credible evidence exist in the record risks the trial court invading the function of the jury and substituting its own credibility determination for that of the jury.

McDonald, 2016 IL 118882 ¶25 (citations omitted).

Here, there was "some evidence" that Eubanks' state of mind when committing the offense was merely reckless rather than knowing. To the extent that there was other, contrary evidence that contradicted the evidence of recklessness, this should not have defeated Eubanks' request for a recklessness instruction, as it was the jury's duty, and not that of the trial court, to resolve these factual disputes to determine whether Eubanks acted knowingly or merely recklessly. Thus, the trial court abused its discretion in refusing to issue the recklessness instruction.

The trial court erred in its ruling when it ignored certain evidentiary factors that have long been held to be indicative of recklessness that were present in Eubanks' case. For example, intoxication is a well-recognized factor that would have supported an instruction of reckless homicide in Eubanks' case. *People v. Tainter*, 304 Ill.App.3d 847, 851 (1st Dist. 1999); *People v. Smith*, 149 Ill.2d 558, 565 (1992) (Evidence of intoxication is probative on the question of recklessness); *People v. Gosse*, 119 Ill.App.3d 733, 737 (2d Dist. 1983) ("Clearly evidence of intoxication is probative of the issue or recklessness").

Here, testing revealed that Eubanks' urine contained tetrahydrocannabinol ("THC"), commonly known as cannabis, as well as its metabolite. (R. DDD68) His urine also contained methylenedioxymethamphetamine ("MDMA"), commonly known as ecstasy, as well as methylenedioxyamphetamine ("MDA"), which is sometimes a metabolite of MDMA. (R. DDD68) Lastly, his urine contained benzolyecgonine, a cocaine metabolite. (R. DDD68) For both the cocaine metabolite and ecstasy, the result was a plus / minus reading, an amount that was between positive and negative, but the cannabis reading was a clear positive. (R. DDD74)

Even if this Court suppresses the chemical test results pursuant to Argument I, there still remains "some evidence" of intoxication, as Eubanks admitted to the police, upon returning from the hospital, that he had drank a quart of Hennessy, causing him to need to urinate. (*People's Exhibit 29*) While the State speculates that "he could have metabolized the alcohol by the time he hit Maria," the fact that he imbibed the beverages recently enough that it still caused him to need to use the bathroom indicates otherwise. (St. Br. p. 29) Eubanks' admission that he had been drinking a large amount of Hennessey recently enough to cause him to need the bathroom meets the low bar of "some evidence" of intoxication, even if this Court suppresses the evidence that Eubanks was under the influence of other substances. The trial court ignored the issue of intoxication, a factor classically associated with recklessness, when it found no evidence of recklessness.

The trial court also wrongly resolved the fact of Eubanks' high speed as indicative of an intentional or knowing mental state when in fact it could also indicate a reckless state of mind. (R. EEE215) Speeding is a factor traditionally associated with recklessness, not murder. *People v. Jakupcak*, 275 Ill.App.3d 830, 838 (2d Dist. 1995) (Excessive speed by itself does not prove recklessness but in conjunction with other circumstances can indicate a reckless state of mind). Even in the relatively rare cases where defendant's excessive speed and manner of driving resulted in a first degree murder guilty verdict, the juries in those cases were at least instructed on recklessness. *People v. Alsup*, 373 Ill.App.3d 745, 748 (5th Dist. 2007); *People v. Thomas*, 266 Ill.App.3d 914, 926 (1st Dist. 1994). Moreover, the combination of excessive speed and intoxication has repeatedly been found to be

proof of recklessness. *Gosse*, 119 Ill.App.3d at739; *People v. Bolar*, 109 Ill.App.3d 384, 392 (2d Dist. 1982); *People v. Davis*, 105.Ill.App.3d 129, 133 (5th Dist 1982). Here, Eubanks's high rate of speed combined with his intoxicated state certainly constituted, at a minimum, "some" evidence of recklessness, entitling the jury to make the determination on whether Eubanks' mental state was reckless.

In support of its argument, the State cites cases where the combination of high speed and intoxication were present and the defendant's conviction for knowing first degree murder was nevertheless upheld. (St. Br., p. 23 citing *People v. Thomas*, 266 Ill.App.3d 914, 926-927 (1st Dist. 1994), and *People v. Alsup*, 373 Ill.App.3d 745, 747 (5th Dist. 2007)). However, the State's citation to these cases only strengthens Eubanks' argument where in these cases, the trial court determined that there was enough evidence of recklessness to at least issue a recklessness instruction to the jury. In Eubanks' case, however, the trial court ignored these factors classically associated with recklessness in declining to issue a reckless homicide instruction.

Furthermore, there were other evidentiary factors in the record from which a jury could have found that Eubanks' mental state was less culpable than that required for first degree murder. For example, Madeline Moratto testified that the accident occurred on a quiet, residential street. (R. BBB70) If the difference between murder and reckless homicide depends on how risky the defendant's conduct is – whether death is merely likely rather than strongly probable – then evidence that the street where the accident occurred was relatively quiet rather than bustling with activity would weigh in favor of a finding that death was a substantial risk

rather than practically certain, or merely reckless rather knowing. *See People v. Cates*, 111 Ill.App.3d 681, 689 (1st Dist. 1982) (An individual commits reckless homicide where a defendant consciously disregards a substantial and unjustifiable risk that his acts are likely to cause death or great bodily harm); 720 ILCS 5/9-1(a) (West 2009) (Murder requires a specific intent to kill or knowledge of a strong probability that death or great bodily harm will result from the defendant's conduct).

Even if there was evidence in the record that contradicted Moratto's testimony, per *McDonald*, that would not be a factual dispute for the trial court to resolve, but rather one for the jury. Regardless of what the other evidence in the case was, Moratto's testimony that the accident occurred on a quiet street rather than one full of activity constituted "some evidence" that lowered the risk of Eubanks' conduct such that his mental state could be found to be merely reckless rather than knowing. Although Eubanks was driving in a dangerous manner, a jury could have found that he acted recklessly, as the odds of hitting somebody on a relatively quiet street would have been lower than on a busy street. The court, however, ignored Moratto's testimony in finding that there was no evidence of recklessness.

Secondly, Calvin Tanner testified that there was an obstruction, a U-Haul truck parked on the street, at the time of the accident. (R. AAA55) Although Officer Wertepeny testified that Tanner told him there were no obstructions on the night of the offense (R. EEE37), this constitutes a factual dispute for the jury to resolve, but it does not negate that Tanner's testimony was "some evidence" of a reckless rather than knowing state of mind, as it would have been difficult for Eubanks, given the obstruction, to see the pedestrians, particularly in his intoxicated state,

lowering his culpability for the offense. The court ignored these facts when it found no evidence of recklessness, and refused to allow the jury to do its job and determine the factual question of Eubanks' mental state.

A jury could have concluded that Eubanks did not commit first degree murder and instead committed reckless homicide. The jury was not given this option. Instead, the judge took it upon himself to weigh the evidentiary factors, some that are classically probative of recklessness, and to make a finding as to Eubank's mental state, encroaching upon the jury's rightful province. *People v. Jones*, 175 Ill.2d 126, 132 (1997) (In "deciding whether to instruct on a certain theory, the court's role is to determine whether there is some evidence supporting that theory; it is not the court's role to weigh the evidence"); *DiVincenzo*, 183 Ill.2d at 252 (determination of a defendant's mental state is a "task particularly suited to the jury").

B. The trial court abused its discretion when it erroneously focused on factors that did not bear on Eubanks' state of mind or did not indicate a lack of recklessness.

The State argues that the trial court properly focused on several factors in a legitimate exercise of its discretion when it refused to issue an instruction on reckless homicide. Specifically, the State points to the severity of the impact and injuries, Eubanks' flight from the police, and the fact that Eubanks' testimony did not support a theory of reckless homicide. However, the severity of impact and Eubanks' flight had no bearing on what level of criminal intent Eubanks exhibited at the time of the offense. Furthermore, in Illinois it is well-established that where there is some evidence of a lesser offense, an instruction should be

given on the lesser offense, even when the defense's theory at trial is inconsistent with the defendant having committed the lesser offense. *People v. Walker*, 259 Ill.App.3d 98, 102 (1st Dist. 1994); *People v. Bembroy*, 4 Ill.App.3d 522, 525 (1st Dist. 1972); *People v. Scalisi*, 324 Ill. 131 (1924). The trial court therefore abused its discretion in relying on these improper factors to support its ruling denying the reckless homicide instruction.

In support of its argument that the trial court properly considered the severity of injury and impact to Maria Worthon as a basis to deny the recklessness instruction, the State cites cases that have no relation to these facts. Specifically, the State cites *People v. Ward*, 101 Ill.2d 443, 449, 451-453 (1984), *People v. Fenderson*, 157 Ill.App.3d 538, 548 (5th Dist. 1987), and *People v. McDonald*, 2016 IL 118882, ¶¶ 44-57. (St. Br. pp. 24, 27) However, all of the cases cited by the State involved physical fights, stabbings or beatings between two people, which is a far different set of circumstances than a car accident. That the impact was so severe as to cause grave injuries and kill one of the victims in this case does not bear on the question of whether Eubanks' state of mind was merely reckless rather than intentional or knowing. Even in reckless homicide cases the impact of the collision necessarily will always be very severe, at least severe enough to cause death. Even where the conduct is completely noncriminal and purely accidental, extremely severe impacts can and do occur. While it is logical to infer a level of intent from someone beating or stabbing another person based on the force or location of their blows, which is something the assailant can control to some degree, the same does not hold true for injuries resulting from a car accident.

The driver of a car cannot control the impact of a car collision in the same way, regardless of whether the collision is the result of knowing conduct, recklessness or a purely noncriminal accident. As such, the severity of impact and injury does not bear on the level of intent in the same way under Eubanks' circumstances as it did in the cases cited by the State, and the trial court abused its discretion in citing that factor as a basis to deny the recklessness instruction.

Neither does Eubanks' flight from the police bear on the question of whether Eubanks' state of mind was merely reckless rather than intentional or knowing. It is true that evidence of flight can tend to demonstrate a defendant's consciousness of guilt. *People v. Harris*, 52 Ill.2d 558, 561 (1972). However, the inference of guilt which may be drawn from flight depends upon the suspect's knowledge that a certain offense has been committed and that he is suspected of committing that offense. *People v. Lewis*, 156 Ill.2d 305, 349 (1995). Here, although Eubanks' flight may have demonstrated that he knew he caused a car accident, it was not indicative of his level of intent, or any knowledge on his part that he committed murder rather than reckless homicide. Thus, the issue of flight did not bear on the question of mental state in this case, as Eubanks could have been fleeing because he was guilty of reckless homicide rather than first degree murder. The trial court should not have relied on this factor to preclude the jury from determining whether Eubanks committed reckless homicide.

The State also suggests that the trial court properly denied the reckless homicide instruction on the basis that Eubanks' testimony did not support the theory that he was driving recklessly, as he testified that he was not driving the

car at all when the collision occurred. (St. Br. p. 27) The trial court noted, "Mr. Eubanks' testimony . . . clearly seeks to establish his belief that he never drove the car at the time that Ms. Worthon and her son Jeremiah were struck. Certainly Mr. Eubanks' testimony does not give the Court any basis upon which to conclude that there is some or slight evidence that Mr. Eubanks was driving the car in a manner which was only reckless." (R. EEE218) The majority below, however, correctly observed that a defendant is entitled to a lesser offense instruction as long as there is only *some* evidence in the record that would reduce the crime to the lesser offense, regardless of whether that evidence was proffered by the defendant or the State. *People v. Eubanks*, 2017 IL App (1st) 142837, ¶ 40, citing *People v. White*, 311 Ill. 356, 363-364 (1924), *People v. Garcia*, 188 Ill.2d 265, 270-271, and *People v. Rogers*, 286 Ill.App.3d 825, 829-31 (1st Dist. 1997).

Defendant-appellee acknowledges that the dissent below urges a different approach, but in Illinois it is well-established that where there is some evidence of a lesser offense, an instruction should be given on the lesser offense, even when the defense's theory at trial is inconsistent with the defendant having committed the lesser offense. *People v. Walker*, 259 Ill.App.3d 98, 102 (1st Dist. 1994); *People v. Bembroy*, 4 Ill.App.3d 522, 525 (1st Dist. 1972); *People v. Scalisi*, 324 Ill. 131 (1924). Therefore, in denying the reckless homicide instruction, to the extent that the trial court relied on the fact that Eubanks testified that he was not the driver, this was in misapprehension of the applicable case law, and constituted an abuse of discretion.

C. The trial court abused its discretion by relying on facts not in evidence, based on it own personal assumptions and subjective experiences, in finding that there was no evidence of recklessness.

Lastly, the trial judge also improperly relied on his own speculative assumption that because it was a few days before Christmas the street would have been"very highly populated," even though there was no evidence introduced at trial to support this assumption. (R. EEE219) The court reasoned, "[T]he fact that it's before Christmas . . . you would expect a certain number of people to be out at 9:00 at night on any weekday or weekend in the evening . . . [W]hoever was driving could only conclude that in that very highly populated area, that very tightly constructed street filled with cars, driving in that manner could only create a strong probability of death or great bodily harm to some individual." (R. EEE219) Thus, in inferring that Eubanks' intent was more than reckless, the court relied quite significantly on its assumption that the street would have been heavily populated at that time. If anything, the evidence at trial indicated the opposite. Moratto testified that, although there were some people out walking their dogs (R. BBB72), the car accident occurred on a "quiet" street in a "quiet neighborhood," not on a street that was bustling with activity, holiday-related or otherwise. (R. BBB70) Moratto's testimony negated the court's assumption that the street would have been "very highly populated." However, the judge relied on his own assumptions about the holiday season, with no basis in the evidentiary record, to inform his finding that the street was very highly populated at the time of the crash, and then he proceeded to rely on that finding to deny the reckless homicide instruction. It is well established that such a practice results in error.

Due process is violated where the court relies on private knowledge that is untested by cross examination or the rules of evidence. *People v. Nelson*, 58 Ill.2d 61, 66 (1974).; *People v. Kennedy*, 191 Ill.App.3d 86, 90-91 (1st Dist. 1989) (due process violated and conviction reversed where the court relied on its own preconceived notions and assumptions, outside of the evidentiary record, to inform its finding that the defense witnesses were probably all "thieves, drug addicts, fornicators and welfare recipients," and thus not believable). In this case, not only did the judge assume a fact not in evidence, the unsupported assumption that he made affected a central matter rather than a tangential or collateral one. If the difference between murder and reckless homicide depends on how risky the defendant's conduct is – whether death is merely likely rather than strongly probable – then a finding that the street was highly populated likely affected the court's assessment of the riskiness of Eubanks' conduct such that it weighed against a reckless mental state and towards a knowing or intentional one. Therefore, the judge's assumption of a fact not in evidence was not just any error, but an extremely damaging one. The judge should not have relied on his own private assumptions about the holiday season to find that the street was "very highly populated," and he should not have relied on that finding to refuse a reckless homicide instruction. (R. EEE219)

Thus, the trial court abused its discretion in refusing to instruct the jury on reckless homicide. Not only did this error deprive Eubanks of the opportunity to argue a theory of the case that may have been his best chance at success, it also deprived the jury of making a factual determination that it alone was entitled

to make. This Court should accordingly uphold the appellate court's ruling that Eubanks' conviction for first degree murder should be reversed, and the case should be remanded for a new trial on that charge.

III. The appellate court correctly found that defendant-appellee's conviction for failure to report a motor vehicle accident involving death within a half hour should have been reduced to the lesser Class 4 version of the offense.

Defendant-appellee, Ralph Eubanks, argued to the appellate court below, pursuant to *People v. Patrick*, 406 Ill.App.3d 548, 558 (2nd Dist. 2010), that his Class 1 conviction for failure to report a motor vehicle accident should be reduced to the lesser Class 4 version of the offense, where the State did not sufficiently prove an element of the Class 1 version – that Eubanks did not report the accident at a police station within half an hour. 625 ILCS 5/11-401(a),(b); 625 ILCS 5/11-403 (West 2009). The appellate court agreed, finding that since Eubanks was already in custody only seven minutes afer the offense occurred, and after that any evidence (or inferences drawn therefrom) that would burden Eubanks' right against self-incrimination would not be admissible, "the State cannot establish that Eubanks failed to report the accident within half an hour." *People v. Eubanks*,, 2017 IL App (1st) 142837, ¶¶ 46, 49. The State now appeals that ruling.

Eubanks maintains that where there was insufficient evidence of what he did or did not say during the first half hour after the collision, the State did not sustain its burden. Furthermore, Eubanks urges that this Court should not draw any adverse inferences from his subsequent denials of involvement to the police after the first half hour, as was drawn in *Moreno*, when doing so runs the risk of burdening Eubanks' right against self-incrimination, and when such an

inference is inherently speculative and does not necessarily follow from the evidence. For these reasons, this Court should uphold the appellate court's reduction of the Class 1 conviction for failure to report to the Class 4 version of the offense.

A. Defendant-appellee did not forfeit his challenge.

On appeal to this Court, the State argues that Eubanks' self-incrimination challenge to the "hit and run" statute under which he was convicted is forfeited because it was raised for the first time in his reply brief. (St. Br. pp. 33-34) To be clear, defendant-appellee is *not* rasing an as-applied challenge to the constitutionality of the statutory provision setting forth the offense at issue in this case. Eubanks' argument remains that the State did not sustain its evidentiary burden where there was little, if any, evidence about what Eubanks did or did not say during the first half hour after the offense occurred. It is only in response to the State's suggestion that the appellate court follow *People v. Moreno,* 2015 IL App (2d) 130581, that defendant-appellee was obligated to highlight the constitutional infirmities of the approach adopted by the appellate court in *Moreno*.

In its brief to the appellate court, the State urged that the appellate court follow the Second District Appellate Court's decision in *Moreno*. In *Moreno*, the appellate court held that although there was no evidence of what, if any, statements were made by defendant in the first half hour after the collision, the court could nevertheless infer the defendant's failure to report in that first half hour from his subsequent denials to the police of any involvement in the auto collision. *Moreno*, 2015 IL App (2d) 130581, ¶¶ 24-25. Eubanks replied that such an inference was inherently speculative, did not sustain the State's burden, and burdened his right

against self-incrimination. U.S. Const., amend. V, XIV; Ill. Const. 1970, art. I. §10. As such, Eubanks urged that the appellate court decline to follow *Moreno*, and pursuant to *Patrick*, reduce his Class 1 conviction.

Thus, this Court should reject the State's claim that defendant-appellee forfeited the argument that it would be improper to fulfill the elements of the failure to report charge by making an adverse inference that defendant did not report from the defendant's subsequent denials to the police. Although defendant-appellee first made this argument in his reply brief, it was in response to the State's suggestion that the appellate court should follow the Second District's approach in *Moreno*, which made that same inference. Eubanks was certainly entitled to respond with arguments as to why the appellate court should reject the approach urged by the State, and should decline to make the evidentiary inference that the appellate court made in *Moreno* from the defendant's subsequent denials. Where defendant-appellee was in custody and being actively investigated for homicide charges related to the car crash on which he was to report during the reporting period, to make any adverse inferences based on his refusal to incriminate himself would implicate Eubanks' Fifth Amendment rights, and in any event, the evidence does not demand this speculative inference. As such the appellate court was wise to avoid the *Moreno* approach and correctly held that the State could not sustain its burden in this case.

Defendant-appellee acknowledges that the sufficiency argument he makes here may implicate constitutional concerns and reveal constitutional defects in the statute that sets forth the offense of failure to report. It may very well be that,

given these arguments, a State will not ever be able to prove this offense with any suspect in custody facing criminal charges during the half hour period following a car accident. It may well be that bringing charges under such a provision only reasonably make sense when the person required to report is not already in custody and being actively investigated for homicide charges related to the vehicular accident on which he is required to report. In another case, under the right facts, an as-applied constitutional challenge to the statute may be appropriate. Here, where a challenge to the statute was not raised in the trial court, Eubanks' challenge in this case to his failure to report conviction remains a challenge to the sufficiency of the evidence, albeit one in which the arguments touch on constitutional concerns. *See People v. Harris*, 2018 IL 121132, ¶¶ 39-41 (Where an as-applied constitutional challenge to a statute was not raised in the trial court, there was an insufficient evidentiary record to resolve the claim on appeal; as such it was forfeited). To the extent that this Court may find that the appellate court based its ruling on self-incrimination grounds, it was certainly entitled to do so. *People v. Davis*, 213 Ill.2d 459, 470 (2004) (Forfeiture presents a limitation on the parties, not the reviewing court). However, Eubanks maintains that his arguments regarding why the court should not make the same evidentiary inference made in *Moreno* was a proper response to the State's arguments and therefore not forfeited.

B. The State did not sustain its burden of proof beyond a reasonable doubt.

Defendant-appellee was charged with and convicted of Class 1 failure to report a motor vehicle accident involving death at a police station within a half hour ("failure to report"). (C. 150; R. FFF92) The statute defining this offense

provides that it is a Class 1 offense where a driver both flees the scene of a motor accident and then fails to report it within a half hour. 625 ILCS 5/11-401(b) (West 2009); *People v. Patrick*, 406 Ill.App.3d 548, 558 (2nd Dist. 2010) ("evidence that defendant failed to report the accident within one half hour of the accident [is] a required element to support a section 11–401(b) conviction"). Because the State failed to present sufficient evidence that Eubanks failed to report the accident within half an hour, this Court should reduce his Class 1 conviction to the Class 4 version of the offense, which requires that a driver in an accident involving death or injury stop at the scene and give the "reasonable assistance" required by Section 11-403. 625 ILCS 5/11-401(a),(b); 625 ILCS 5/11-403 (West 2009).

Due process requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. U.S. Const., amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 364 (1970). In a sufficiency of the evidence claim, the appellate court has a duty to carefully consider the evidence and to reverse the judgment where the evidence was not sufficient to remove all reasonable doubt of the defendant's guilt. *People v. Cunningham*, 212 Ill.2d 274, 279-80 (2004); *People v. Smith*, 185 Ill.2d 532, 541 (1999). The relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Viewing evidence "in the light most favorable to the State" means that the reviewing court must allow reasonable inferences from the record that favor the State; however, unreasonable inferences must not be allowed. *Cunningham*, 212 Ill.2d at 280. A reasonable

inference must have a factual evidentiary basis, or else it is mere speculation. *People v. Davis*, 278 Ill.App.3d 532, 540 (1st Dist. 1996) Here, the State failed to prove every fact necessary to sustain a conviction under Section 11-401(b).

Under 625 ILCS 5/11-401(a), a motorist involved in an accident has the following duties:

> (a) The driver of any vehicle involved in a motor vehicle accident resulting in personal injury to or death of any person shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible and shall then forthwith return to, and in every event shall remain at the scene of the accident until the requirements of Section 11-403 have been fulfilled. Every such stop shall be made without obstructing traffic more than is necessary.

Failure to stop at the scene as required under 11-401(a) is a Class 4 felony. 625 ILCS 5/11-401(d) (West 2009). Under the statute, if the motorist does not comply with section 11-401(a) and immediately stop at the scene of the accident, the motorist is given a "second chance" under Section 11-401(b), whereby they must report the accident at a police station within half an hour:

> (b) Any person who has failed to stop or to comply with the requirements of paragraph (a) shall, as soon as possible but in no case later than one half hour after such motor vehicle accident, or, if hospitalized and incapacitated from reporting at any time during such period, as soon as possible but in no case later than one half hour after being discharged from the hospital, report the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle, at a police station or sheriff's office near the place where such accident occurred. No report made as required under this paragraph shall be used, directly or indirectly, as a basis for the prosecution of any violation of paragraph (a).

625 ILCS 5/11-401(b). Failure to report an accident within the half hour period

as required by 11-401(b) is a Class 1 felony. 625 ILCS 5/11-401(d).

Eubanks was convicted of failure to report under 625 ILCS 5/11-401(b), a Class 1 felony. The State was thus required to prove beyond a reasonable doubt both that Eubanks left the scene of the accident and in addition, that he failed to report the accident at a police station or sheriff's office within half an hour. (C. 150) Yet, the State did not present any evidence concerning Eubanks' statements or reports during the half an hour following the accident, from approximately 8:58 p.m. to 9:28 p.m., while in police custody.

The evidence showed that at 8:58 p.m., Maurice Glover informed a 911 operator that an ambulance was needed for two pedestrians that had just been struck by a car. (R. CCC15-CCC16; *People's Exhibit 20*) The radio traffic introduced by the State established that Eubanks was taken into custody at 9:05 p.m. (*People's Exhibit 25*) The primary officer involved in Eubanks' arrest, Officer John Ventrella, did not interview Eubanks until 10:30 p.m. at the station. (R. DDD11-DDD12) The State introduced no firsthand testimony and no recordings regarding the substantative contents of Eubanks' statements to the police within the half hour grace period. The State can only point to a single line or two of testimony from Investigator Postelnick that after speaking with other officers he learned that Eubanks had not said anything about the accident. (R. EEE78) However, this vague, hearsay testimony hardly rises to the level of proof beyond a reasonable doubt, as there is no indication of who Officer Postelnick spoke to, or if he even spoke to the officer or officers who were actually present with Eubanks during the statutory half hour. The State simply neglected to present sufficient evidence

that Eubanks failed to inform the police of what happened or provide the requisite identifying information under Section 11-401(b). There was no reliable evidence pertaining to Eubanks' reports or lack thereof during the half hour after the collision.

There was good reason for this failure of evidence. Once Eubanks was taken to the station, the officers were not concerned with any independent 'report' from him, as they had already spoken to Calvin Tanner, Dennis Jeter and other eyewitnesses at the scene, and they already had all the information required by Section 401(b). Indeed, given the fact that Eubanks was being arrested and booked during the half-hour period, it is likely that the police told Eubanks, who was intoxicated, to remain quiet at that time, or at least advised him on his right to silence. Because the State failed to present sufficient evidence that Eubanks failed to make the requisite report during the half hour following the car crash, pursuant to *Patrick*, 406 Ill.App.3d 548, Eubanks' conviction was correctly reduced to the Class 4 offense of leaving the scene under 625 ILCS 5/11-401(a).

Following *Moreno,* 2015 IL App (2d) 130581, ¶¶ 24-25*,* the State urges that this Court infer from Eubanks' subsequent denials of involvement that he must not have furnished the required information during the half hour reporting period. However, this amounts to nothing more than bare speculation. Eubanks could have implicated himself and later recanted, as defendants sometimes do. Given his intoxicated condition and the fact that he had just been involved in a car crash, he could have furnished the required information and then forgot he did so in a confused state. There is no way to know, as the State did not present evidence from any police officers who were actually present with Eubanks during the half-hour

reporting period about what Eubanks said. The fact remains that in the hour and a half between Eubanks' arrest and when he was placed in an interview room with ERI equipment activated, the State presented no reliable evidence of what, if anything, Eubanks said or did not say. Any inference regarding what Eubanks did or did not tell the police during that first half hour after the collision would be mere conjecture. As such, this Court should affirm the appellate court's holding reducing Eubanks' conviction to the Class 4 offense of leaving the scene of the accident under 625 ILCS 5/11-401(a), and remanding the cause for re-sentencing.

C. The appellate court correctly decided that because defendant-appellee was in custody on homicide charges minutes after the offense, the court would not consider evidence or draw inferences on the failure to report charge that burdened the defendant's right against self-incrimination.

The State urges that this Court should reverse the appellate court's holding on the failure to report offense and follow *People v. Moreno*, 2015 IL App (2d) 130581. (St. Br. 31-33) In *Moreno*, the reviewing court held that although there was no evidence of what, if any, statements were made by defendant in the first half hour after the collision, the court could nevertheless infer the defendant's failure to report in that first half hour from his subsequent denials to the police of any involvement in the auto collision. *Moreno*, 2015 IL App (2d) 130581, ¶¶ 24-25. This Court should decline to follow *Moreno* because that decision impermissibly allows the court to draw an adverse inference from a defendant's failure to incriminate himself on charges for which he is in custody, implicating a defendant's constitutional right against self-incrimination. See U.S. Const., amend. V, XIV; Ill. Const. 1970, art. I. §10; *U.S. v. Hubbell*, 530 U.S. 27, 34-38 (2000); *Hiibel v.*

Sixth Judicial District of Nevada, 542 U.S. 177, 191 (2004) (the constitutional protection against self-incrimination is violated "where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense").

The State responds that constitutional self-incrimination concerns are not implicated by "hit and run" self-reporting statutes such as Section 11-401(b), citing *People v. Lucas*, 41 Ill.2d 370, 371-372 (1968), and *California v. Byers*, 402 U.S. 424, 425-426 (1971). In *Byers*, the U.S. Supreme Court rejected a Fifth Amendment challenge to a statute that required any driver involved in a vehicle accident to furnish his name and address to the owner of any vehicle that was damaged in the collision or accident. *Byers*, 402 U.S. at 426. Although there was no majority opinion in that case, in two, separate plurality opinions, a majority of justices relied on balancing the public necessity of enforcing what they found to be essentially a noncriminal, regulatory traffic scheme against the risk of self-incrimination inherent in a compulsory self-reporting scheme. *Id.* at 433-434, 437-439, 458. There, the balance was struck in favor of the need to control traffic and manage civil liabilities arising from accidents, against the incidental possibility of self-incrimination that the primarily noncriminal, regulatory reporting scheme in that case created.

Under different facts and different self-reporting schemes, however, courts have struck a different balance. For example, in *Commonwealth v. Sasu*, the Massachusetts Supreme Court vacated, on Fifth Amendment grounds, a failure to report conviction that would have required the driver to file an accident report

identifying himself as the driver, even though the State had already begun prosecuting him for vehicular homicide related to the same incident on which he was being asked to file a report. *Commonwealth v. Sasu*, 536 N.E.2d 603 (Mass. 1989). The Massachusetts Court acknowledged *Byers* and undertook the same balancing analysis in *Byer*s, but came to a different result, finding that while the self-reporting statute requiring the accident report was

> . . . nonincriminating, and in most cases aimed at noncriminal, regulatory governmental objectives . . . where the authorities seeking to compel the defendant to submit a report were the very authorities who had already instituted a criminal prosecution against him, the defendant was clearly faced with a 'real [and] substantial danger that the evidence suppplied' would incriminate him. Under the circumstances, *any* information provided by the defendant on the report would tend to incriminate him; the threat of incrimination was not merely a remote possibility or unlikely contingency, but an actual and present danger, against which the defendant was constitutionally protected.

Sasu, 536 N.E.2d at 606 (citations omitted).

Eubanks' circumstances are far more like those in *Sasu* than in *Byers*; as such, *Sasu* should guide this Court's analysis on whether Eubanks' Fifth Amendment rights were implicated. As in *Sasu*, and unlike in *Byers*, Eubanks was convicted of purportedly failing to report that he was the driver to the very same police officers who were in the midst of conducting an active homicide investigation while holding Eubanks in custody as the primary suspect, relating to the very same traffic incident out of which the homicide investigation arose. As in *Sasu*, "the threat of incrimination was not merely a remote possibility or unlikely contingency, but an actual and present danger." *Id*. When a defendant sits in custody as a primary suspect in a homicide investigation and is expected to report on the incident giving

rise to the homicide investigation to the very same police officers that are conducting the investigation, the risk of self-incrimination is no longer incidental or a mere possibility.

On the other side of the scale, the regulatory purpose for the self-reporting scheme collapses when the police already have the suspect in custody and presumably are already aware of the suspect's identity and information that the self-reporting scheme is intended to elicit in the first place. Therefore, when undertaking the *Byers* balancing analysis in this case, such analysis yields a different conclusion under the facts in this case than the one reached in *Byers*. Thus, the appellate court correctly decided that because defendant-appellee was in custody on homicide charges minutes after the offense, the court would not, in order to sustain Eubanks' conviction, consider evidence or draw inferences on the failure to report charge that burdened his right against self-incrimination. The appellate court's ruling reducing Eubanks' Class 1 conviction for failure to report to Class 4 leaving the scene was accordingly appropriate and should not be disturbed.

CONCLUSION

For the foregoing reasons, Ralph Eubanks, defendant-appellee, respectfully requests that this Court affirm the First District Appellate Court's judgment on all issues upon which it ruled. Alternatively, should this Court reverse the appellate court's judgment on any of defendant-appellee's convictions, defendant-appellee requests that this Court remand the matter to the appellate court for consideration of the prosecutorial misconduct argument, which the appellate court never reached in its opinion.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

DEEPA PUNJABI
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us
COUNSEL FOR DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE

I, Deepa Punjabi, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and any matters to be appended to the brief under Rule 342(a) is 48 pages.

/s/Deepa Punjabi
DEEPA PUNJABI
Assistant Appellate Defender

No. 123525

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- RALPH EUBANKS Defendant-Appellee	)	Appeal from the Appellate Court of Illinois, No. 1-14-2837. There on appeal from the Circuit Court of Cook County, Illinois , No. 10 CR 1904. Honorable Timothy Joseph Joyce, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Kimberly M. Foxx, Cook County State's Attorney, 2650 So. California, Chicago, IL 60608;

Mr. Ralph Eubanks, Register No. K59751, Western Illinois Correctional Center, 2500 Rt. 99, Mt. Sterling, IL 62353

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 19, 2019, the Brief and Argument 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-appellee 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 Brief and Argument to the Clerk of the above Court.

/s/Carol Chatman
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us