No. 121413

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, Fifth District,
Plaintiff-Appellant,	)	No. 5-15-0095
	)	
	)	There on Appeal from the Circuit
	)	Court of the Fourth Judicial Circuit,
v.	)	Effingham County, Illinois,
	)	No. 14-DT-136
	)	
MICHAEL BROOKS,	)	The Honorable
	)	Stanley Brandmeyer,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
LEAH M. BENDIK
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5029
LBendik@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

ARGUMENT

I. The Circuit Court Should Have Denied Defendant's Suppression Motion Because He Did Not Prove that Any Hospital Blood Test Was an Illegal Search Under the Fourth Amendment.

A. Defendant Failed to Make a Prima Facie Showing of an Illegal Search Because He Failed to Establish that Any Blood Test Was a Product of State Action.

1. Defendant offered no evidence regarding who conducted the alleged blood test or whether a blood test occurred at all.

Defendant failed to make a prima facie showing of an illegal search because he offered no evidence about (1) who conducted the alleged blood test, or (2) whether a blood test even occurred. St. Br. 9-12.[1] Defendant neither mentions nor disputes his failure to offer evidence about *who* conducted the blood test. Def. Br. 9-12. And his proffered "evidence" that a blood test occurred, *see id.*, is insufficient. For example, the fact that St. Anthony Hospital sent an envelope, *id.* at 10 — apparently in response to the State's subpoena requesting blood work for defendant, Supp. — proves nothing because it remains unopened; for all we know it may contain a statement that the hospital has no documents responsive to the subpoena. And because the envelope remains unopened (and in the custody of the clerk) due to defendant's objection, R72-74, 113, 124-25 (A12-13), its contents should not be assumed to support defendant, *cf. Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (any doubts arising from incompleteness of record construed against appellant, who bears burden

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[1] Consistent with the opening brief, "C_" refers to the common law record and "R_" refers to the report of proceedings; "Supp." refers to the unbound sheets of paper entitled "Subpoena – Duces Tecum"; "A_" refers to the appendix to the opening brief; "St. Br." refers to the State's opening brief, and "Def. Br." refers to defendant-appellee's brief.

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of producing adequate record). Given that defendant failed to show that a blood test occurred and, if so, who drew the blood, this Court should reverse.

2. Defendant offered no evidence that a blood test by a hospital staff member was a product of State action.

Even assuming that hospital personnel tested defendant's blood, suppression is unwarranted because defendant failed to make a prima facie case that this search was a product of State action. Defendant acknowledges that the blood test could not have violated the Fourth Amendment absent State action, Def. Br. 9, but he fails to satisfy his burden of proving that the hospital staff member was acting as a State agent when testing his blood. *See also* St. Br. 8-9.

In evaluating State action in this context, this Court has considered the totality of the circumstances, including the nature of police involvement and the reason why the private actor decided to conduct the search. *People v. Heflin*, 71 Ill. 2d 525, 539-41 (1978). Here, defendant offered no evidence demonstrating any connection between the blood tester and the sole State actor, Officer Webb. Defendant alleges neither that Officer Webb conducted the blood test nor that Webb instructed hospital personnel to do so. Defendant also does not assert that Webb in any way encouraged hospital personnel to perform the test. In fact, as explained above, defendant made no effort to establish the identity of the blood tester, much less present his or her testimony about why the blood test occurred. Because defendant does not argue — much less prove — that the hospital staff member was motivated by a law enforcement purpose in testing his blood, Def. Br. 12-18, defendant's suppression motion should have been denied.

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B. The Concerns Cited by the Lower Courts — Police Participation in Compelling Defendant to Receive Medical Treatment and Defendant's Lack of Consent Either Generally to Medical Treatment or Specifically to a Blood Test — Do Not Justify Suppression.

Like the lower courts, defendant stresses two facts in arguing suppression is appropriate: (1) that Officer Webb compelled defendant to go to the hospital, and (2) that defendant objected to receiving medical treatment or to having his blood drawn. Def. Br. 12-25. But neither is relevant to the Fourth Amendment analysis here.

1. Officer Webb's seizure of defendant during transport to the hospital does not warrant suppression.

Webb unquestionably seized defendant when compelling his transport to the hospital. R81-83; *see People v. Luedemann*, 222 Ill. 2d 530, 550 (2006). But defendant is not challenging the propriety of that seizure; he is challenging only the subsequent search, the hospital blood test. And absent an evidentiary connection between the seizure and the subsequent search, the seizure is irrelevant to the Fourth Amendment question presented here.

Defendant repeatedly mischaracterizes the State's argument as contending that State action exists here only if Webb "specifically order[ed] the needle to be placed in [defendant]'s arm." Def. Br. 2; *see also id.* at 13, 13, 15. Not so. Instead, the State acknowledges that under binding precedent, a court weighs all relevant circumstances when evaluating whether a private actor should be considered a State agent. *See* St. Br. 12-16 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971); *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (asking whether private actor conducted search with "participation or knowledge of any government official"); *Heflin*, 71 Ill. 2d at 539-41 (analyzing factors such as nature of police participation during search, whether police

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coerced private actor into conducting search, and whether private actor made independent decision to conduct search)). Here, defendant failed to satisfy his burden of proving State action not only because he offered no evidence that Webb directly ordered the blood testing, but also because he offered neither evidence of more subtle pressure or encouragement by Webb nor evidence of any law enforcement motivation by hospital personnel in deciding to conduct the blood test.

Having failed to establish State action under the established test, defendant proposes a new one. Defendant suggests that this Court ask whether a search would not have happened "but for" State action, and then contends that the answer here is yes because the blood test would not have happened but for Webb forcing him to go to the hospital. Def. Br. 9, 18. But defendant provides no support for his proposed test, which must be rejected as unacceptably broad.

Defendant's cited cases do not support his view. First, defendant relies on a statement in *People v. Yant* that "there is no indication in the record that either the emergency restraints or the physician's blood test order here was a subterfuge procured by the police or any form of State action." 210 Ill. App. 3d 961, 965 (2d Dist. 1991). Defendant claims that this language indicates that the appellate court considered "whether the restraints used to transport the defendant to the hospital had been a result of State Action." Def. Br. 14. This is incorrect. Yant was handcuffed during transport to the hospital, and he remained in restraints while he received medical treatment at the hospital. *Yant*, 210 Ill. App. 3d at 963, 965. Thus, the court's reference might have concerned only events at the hospital, which would be consistent with the court's focus on whether the "medical circumstances" of the blood test shocked the conscience in violation of *Schmerber v. California*, 384 U.S. 757

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(1966). *Yant*, 210 Ill. App. 3d at 965. In any event, even if conduct commencing during transport and continuing during hospital treatment were relevant to analyzing State action, no such continuing conduct was present here.

Second, defendant relies on *People v. Poncar*, claiming that court found no Fourth Amendment violation because, unlike here, there only unintentional conduct by the police led to hospital medical treatment that included a blood test. Def. Br. 14 (citing *People v. Poncar*, 323 Ill. App. 3d 702 (2d Dist. 2001)). Defendant turns *Poncar* on its head. While it is true that police unintentionally injured Poncar while booking him for DUI, police officers also took steps to compel Poncar to receive emergency medical treatment: officers wrestled an uncooperative Poncar to the floor while awaiting an ambulance, and an officer handcuffed him to a gurney and waited with him while he received medical treatment. *Poncar*, 323 Ill. App. 3d at 703-04. Ultimately, the appellate court found no Fourth Amendment violation requiring suppression of the blood test results because there was no evidence that the blood test was a result of police subterfuge. *Id.* at 707. Thus, *Poncar* is on all fours with this case in that police forcibly compelled an injured DUI suspect to be transported to the hospital despite his objection to receiving medical treatment. But for the police officers' conduct, Poncar's blood would not have been tested, yet the court found no Fourth Amendment violation. Accordingly, defendant's proposed but-for test is incompatible with *Poncar*.

Third, defendant claims his case is similar to *People v. Farris*, which he describes as holding that Farris's Fourth Amendment rights had been violated and that blood test results were properly suppressed because police officers used force to obtain a blood sample. Def. Br. 16-17. Defendant is incorrect. After finding Fourth Amendment cases "irrelevant" to

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the question presented, *Farris* held that law enforcement officers have no *statutory* right under the Vehicle Code to use physical force to extract a chemical sample from a DUI arrestee. 2012 IL App (3d) 100199, ¶¶ 21, 22, 24. Thus, *Farris* is inapposite because it raised no Fourth Amendment issue.

The lack of support for defendant's proposed new "but for" test is confirmed by his attempt to distinguish *Wall*, Def. Br. 20-21, a case relied upon in the People's opening brief, St. Br. 17-18. Defendant notes that *Wall* does not describe the extent of Wall's injuries or whether she consented to be transported to the hospital for treatment. Def. Br. 21. But that is precisely the point. *Wall* confirms that the circumstances of transport (and whether the defendant consented to medical treatment) are irrelevant to determining whether private medical personnel acted as State agents for Fourth Amendment purposes when there is no evidence of interaction between police and the blood tester. The New Hampshire Supreme Court explained that the hospital blood tester should be considered a State agent only if an affirmative act by the police induced the private actor to conduct the search. *State v. Wall*, 910 A.2d 1253, 1258 (N.H. 2006).

2. Defendant's lack of consent to the blood test or to medical treatment is irrelevant.

Similarly, defendant unquestionably objected to being transported to the hospital for medical treatment, and his testimony that he objected to having his blood tested at the hospital is unrebutted. R80, 97-98.[2] But the State is not relying on consent to excuse the fact that the blood test, a search, was conducted without a warrant as is generally required under

[2] However, the fact that defendant remained at the hospital for twelve hours for treatment, long after Officer Webb had left, rebuts any assertion that defendant objected to all medical treatment at the hospital. *See* R84-87, 98-99.

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the Fourth Amendment. Instead, the State asserts that the search was done by a private actor who was not acting as a State agent so that the Fourth Amendment was never triggered. The law is well-established that lack of consent, without more, does not transform a blood test into a Fourth Amendment violation. St. Br. 20-21.

Defendant's invocation of the Health Care Surrogate Act (Act), 755 ILCS 40/1, *et seq.*, Def. Br. 21-25, does not call into question this well-settled law. Defendant moved to suppress the blood testing results in his criminal case solely on the ground that this test was a warrantless search that violated the Fourth Amendment, *see* C24 (asserting police "insisted upon a blood test" without a warrant); *see also People v. Brooks*, 2016 IL App (5th) 150095-U, ¶¶ 18-25 (A3-5) (finding Fourth Amendment violation warranting suppression), and there is no indication that defendant pursued any civil cause of action related to the events of this case. Defendant now cites the Act and medical battery cases, Def. Br. 21-25, but the existence of these civil causes of action has nothing to do with whether a Fourth Amendment violation warranting suppression of nonconsensual chemical testing results in defendant's criminal prosecution. *See, e.g., Yant*, 210 Ill. App. 3d at 963, 965 (though Yant refused all medical treatment and appeared able to do so, no Fourth Amendment violation resulted from blood test because it was not procured through State action or "police subterfuge"); *see also Poncar*, 323 Ill. App. 3d at 704, 707 (finding no Fourth Amendment violation despite Poncar's resistance to transport to hospital and treatment by nurse). So the Act, like defendant's nonconsent, is irrelevant.

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C. No Fourth Amendment Violation Should Be Found Here Because the Circuit Court's Ruling Does Not Establish an Administrable Rule for Police Officers.

Further, this Court should not find a Fourth Amendment violation because suppression here would not establish an administrable rule for police officers. St. Br. 22-23. Defendant asserts that this argument is forfeited because it was not presented in the appellate court, Def. Br. 25, but the State properly presented the issue of whether the trial court correctly found a Fourth Amendment violation, *Brooks*, 2016 IL App (5th) 150095-U, ¶¶ 15-28 (A3-5), and the argument is inextricably intertwined with the preserved Fourth Amendment issue. *See People v. Leach*, 2012 IL 111534, ¶ 61 (Court may exercise discretion to review otherwise forfeited issue if "inextricably intertwined" with other properly presented issues).

Substantively, defendant responds by citing the trial court's countervailing concern that denying suppression here would encourage police officers to circumvent the warrant requirement by compelling medical treatment for all injured DUI suspects with the hope that the hospital will conduct chemical testing during medical treatment that could later be obtained by police or prosecutors. Def. Br. 25-26 (citing R122). But here, no basis exists for concern because ambulance personnel — not Officer Webb — determined that defendant needed emergency medical treatment. R95-96. Moreover, the availability of civil causes of action such as medical battery, actions under the Health Care Surrogate Act, and § 1983 claims is sufficient to discourage overreaching. And the Court should decline to adopt a rule that discourages law enforcement from complying with requests from first responders to assist with people who appear injured and intoxicated. St. Br. 22-23.

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II. Alternatively, If Defendant Demonstrated a Prima Facie Case, then this Court Should Remand for Further Proceedings on the Suppression Motion.

In the alternative, if this Court concludes that defendant made a prima facie showing that the blood test violated the Fourth Amendment, it should remand for further proceedings on defendant's suppression motion.

A. The Circuit Court Erred by Failing to Shift the Burden to the State to Rebut Defendant's Prima Facie Case.

The circuit court erred by simply granting defendant's motion to suppress rather than first finding that defendant had made a prima facie case and shifting the burden to the State. *See* C36-37 (A6-7); R120-25 (A8-13); St. Br. 23. Defendant contends that this argument is forfeited because the State did not raise it in the appellate court, Def. Br. 26, but this Court should not enforce any forfeiture because this question is inextricably intertwined with the preserved issue of whether the circuit court properly suppressed the blood test results, *see Leach*, 2012 IL 111534, ¶ 61.

The parties agree that, at a suppression hearing, the defendant is required to make a prima facie showing that the challenged evidence was obtained through an illegal search or seizure and, if that showing is made, the burden shifts to the State to counter the prima facie case, although the ultimate burden of proof remains with the defendant. St. Br. 1 (citing *People v. Gipson*, 203 Ill. 2d 298, 306-07 (2003)); Def. Br. 8 (same). And the parties agree that the circuit court can *deny* a suppression motion (without the State presenting evidence) upon concluding that a defendant failed to make a prima facie showing of an illegal search or seizure. *See* Def. Br. 27 (citing *People v. Janis*, 139 Ill. 2d 300, 306 (1990)). But this Court should hold that a circuit court may not *grant* a suppression motion before ensuring that the State has an opportunity to present evidence knowing that the defendant made a

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prima facie case. Such a holding would be consistent with *Batson* cases that involve an analogous burden-shifting procedure. *See, e.g., People v. Davis*, 345 Ill. App. 3d 901, 905-06, 911 (1st Dist. 2004) (upon reversing circuit court's finding that defendant did not make prima facie showing of *Batson* violation, remanding for further proceedings with State bearing burden to show race-neutral reasons sufficient to rebut defendant's prima facie case).

Here, the circuit court did not do so. The court heard defendant's two witnesses, R78-100, asked the State if it wished to present any witnesses without giving any indication that the burden had shifted to the State to counter defendant's prima facie case, R100, and granted the motion to suppress without hearing any evidence from the State, C36-37 (A6-7). This was error.

Defendant's cited case of *Litwhiler*, Def. Br. 27, does not excuse the circuit court's error. Defendant is correct that in the usual case, like *Litwhiler*, the burden shifts with the "slightest bit of testimony." *Id.* at 28. But in the usual case, State action is apparent and uncontested because a police officer conducted the challenged warrantless search or seizure. In such a case, the defendant makes a prima facie case simply by testifying that he or she was not doing anything to justify the challenged warrantless police attention or intrusion. *People v. Litwhiler*, 2014 IL App (3d) 120431, ¶¶ 3-4, 33 (Litwhiler made prima facie case by testifying that he was not speeding when police initiated traffic stop); *see also People v. Cregan*, 2014 IL 113600, ¶¶ 25, 26 (Cregan made prima facie case by showing that police officers searched his luggage without warrant); *Gipson*, 203 Ill. 2d at 307 (Gipson made prima facie case by showing that officer searched his car's trunk without warrant). Thus, it is unsurprising that, in *Litwhiler*, after defendant's testimony, the State promptly offered the testimony of police witnesses about the details of the traffic stop and the subsequent search

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of the vehicle, specifically about the alert by a drug-sniffing canine and the canine's training. 2014 IL App (3d) 120431, ¶¶ 5-14. In contrast, here, because the alleged search was conducted by a private actor, defendant did *not* make a prima facie case simply by testifying that he did not consent to the warrantless blood draw; defendant also had to make a prima facie showing of State action.

Since State action was a contested issue, it was incumbent upon the circuit court to inform the State that it believed that defendant had made a prima facie case so that the State knew it should present witnesses to counter that case, for example by calling the blood tester to testify that he or she conducted the blood test for a purely medical reason without any knowledge or participation by Officer Webb. That is not to say, as defendant suggests, that the circuit court must interrupt testimony and force the State to recall a witness at the moment the prima facie case has been made and the burden shifts. Def. Br. 27, 28. Instead, this Court should hold that — whatever the order of events of the hearing — the circuit court may not grant a suppression motion until the State has been given the opportunity to present evidence knowing that defendant has made a prima facie case of an illegal search or seizure. Thus, if this Court finds that State action was present, it should remand to the circuit court for further proceedings on the suppression motion to provide the State with that opportunity.

B. This Court Should Reverse the Circuit Court's Findings that, in Effect, Quashed the State's Subpoena or, Alternatively, Remand to the Appellate Court to Address the Subpoena Issue.

In the event of a remand, this Court should hold that the circuit court erred by refusing to open an envelope sent from the treating hospital on the basis that the State lacked authority to subpoena defendant's blood testing results. R74, R124-25 (A12-13); St. Br. 24-29. Defendant has abandoned his prior objections to the State's subpoena of the blood

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testing results, *i.e.*, medical-record confidentiality and application of HIPAA. *Compare* Def. Br. 28-31 *with* R72-74. Instead, defendant now asserts that the State had no right to subpoena the blood testing results under 625 ILCS 5/11-501.4 (2014) for two reasons: (1) Officer Webb compelled defendant's transport to the hospital, and (2) defendant did not consent to medical treatment. Def. Br. 28-31. Defendant is incorrect.

Section 11-501.4 concerns the admissibility of chemical testing results at DUI trials, not the scope of the prosecution's subpoena power. Even if his two reasons were relevant to admissibility under the statute, defendant provides no authority holding that a defendant's nonconsent to transport to the hospital or to medical treatment renders resulting blood test results immune from a prosecution subpoena. Thus, after the circuit court conducts in camera review to confirm that the hospital envelope contains documents pertaining to defendant's blood-alcohol test from the night in question, such documents should be turned over to the State. St. Br. 28-29.

III. Alternatively, Even If a Fourth Amendment Violation Occurred Here, Suppression Is an Inappropriate Remedy.

Finally, even if this Court concludes that a Fourth Amendment violation occurred, suppression is not an appropriate remedy because the deterrence benefits do not outweigh its substantial costs. St. Br. 29-31 (citing *Hudson v. Michigan*, 547 U.S. 586, 591, 594-96 (2006)). Defendant contends that this argument is forfeited because the State did not raise it in the appellate court, Def. Br. 31-32, but this Court should not enforce any forfeiture because this question is inextricably intertwined with the preserved issue of whether the circuit court properly suppressed the blood testing results, *see Leach*, 2012 IL 111534, ¶ 61.

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Defendant claims that suppression of blood test results obtained in violation of the Fourth Amendment is routine, citing cases like *Missouri v. McNeely*, 133 S. Ct. 1552, 1560-64 (2013), that emphasize that blood tests invade bodily integrity so that search warrants are required. Def. Br. 31-33. There, upon McNeely's refusal to consent to roadside blood-alcohol-concentration testing, the police officer took McNeely to a hospital and directed hospital personnel to draw a blood sample without first securing a search warrant. 133 S. Ct. at 1556-57. The State disputes neither that a blood test is a search generally subject to the Fourth Amendment's warrant requirement nor that suppression is an appropriate remedy for a case, like *McNeely*, in which a police officer directs medical personnel to conduct a blood test without a warrant or a case-specific exigency. But the present case includes facts that distinguish it from *McNeely*.

Suppression for a Fourth Amendment violation is a "last resort" that is appropriate only upon weighing societal costs and deterrent effect. St. Br. 29-30. Here, Officer Webb compelled defendant's transport to the hospital only after ambulance personnel requested his assistance, and he left the hospital without speaking to medical personnel. Unlike in *McNeely*, any blood test here occurred, apparently, for medical reasons. To suppress the blood testing results under such circumstances would have great societal cost with little deterrent effect. Such a holding, in addition to suppressing relevant inculpatory evidence, could potentially cause police officers to hesitate or even refuse to act when emergency responders request their assistance in providing necessary medical treatment for injured DUI suspects. In other words, suppression here would not deter improper police action; if anything, it would deter helpful police action. Accordingly, suppression is an inappropriate remedy for any Fourth Amendment violation in this case.

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CONCLUSION

For these reasons and those set forth in their opening brief, the People of the State of Illinois respectfully request this Court to reverse the Fifth District's judgment affirming the circuit court's order granting defendant's motion to suppress and, if necessary, remand for further proceedings.

June 27, 2017

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
LEAH M. BENDIK
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5029
LBendik@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 14 pages.

/s/ Leah M. Bendik
LEAH M. BENDIK
Assistant Attorney General

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PROOF OF FILING AND SERVICE

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 June 27, 2017, the **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the email addresses of the persons named below:

H. Kent Heller
Bryant Hitchings
Heller, Holmes & Assoc., P.C.
1101 Broadway Avenue
P.O. Box 889
Mattoon, Illinois 61938
bryant@hhlawoff.com

Patrick Delfino, Director
David J. Robinson, Deputy Director
Jennifer Camden, Staff Attorney
State's Attorneys Appellate Prosecutor
730 East Illinois Highway 15, Suite 2
P.O. Box 2249
Mt. Vernon, Illinois 62864
jcamden@ilsaap.org

Bryan M. Kibler
Effingham County State's Attorney
Effingham County Government Center
120 West Jefferson Avenue, Suite 201
Effingham, Illinois 62401
statesattorney@co.effingham.il.us

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Leah M. Bendik
LEAH M. BENDIK
Assistant Attorney General

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Carolyn Taft Grosboll
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