No. 1-14-3150

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JEROME BINGHAM, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County, Illinois No. 14 CR 11336 Honorable Bridget Jane Hughes, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

MICHAEL J. PELLETIER
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

DEBORAH NALL
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-APPELLANT

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Jerome Bingham was convicted of theft after a bench trial; the court sentenced him to three years' imprisonment. This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Whether the Sex Offender Registration Act (SORA) is unconstitutional as applied to Jerome Bingham because there is no reasonable relationship between Bingham's theft conviction for stealing 6 wooden pallets from an unfenced K-Mart lot and SORA's purpose of protecting the public from sex offenders, where Bingham is eligible for SORA based only on a single sex offense conviction that took place more than 30 years before the minor theft that led to this case.

II. Whether applying the Sex Offender Registration Act (SORA) here violates the prohibition against *ex post facto* laws, because the registration requirements therein have become punitive and the attempted sex offense took place before SORA was enacted.

III. Whether Jerome Bingham's conviction for theft was improperly elevated from a Class A misdemeanor to a Class 4 felony where the State did not properly provide notice in the charging instrument that it intended to use a prior conviction for retail theft to elevate the classification of the offense.

IV. Whether the trial court erroneously imposed a DNA ID System Fee upon Jerome Bingham and failed to apply the $5 per day credit for pre-sentence incarceration to several charges that qualify as fines.

JURISDICTION

Jerome Bingham appeals from a final judgment of conviction in a criminal case. Mr. Bingham was sentenced on October 9, 2014. (C. 114) Notice of appeal was timely filed the same day. (C. 117) Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 603 and 606.

STATUTES AND RULES INVOLVED

720 ILCS 5/16(a)(1) (West 2014) Theft

(a) A person commits theft when he or she knowingly:

(1) Obtains or exerts unauthorized control over property of the owner;

***

(b) Sentence.

(1) Theft of property not from the person and not exceeding $500 in value is a Class A misdemeanor.

***

(2) A person who has been convicted of theft of property not from the person and not exceeding $500 in value who has been previously convicted of any type of theft . . . is guilty of a Class 4 felony.

725 ILCS 5/111-3(c) (West 2014) Form of Charge

(c) When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial. For the purposes of this Section, "enhanced sentence" means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections (730 ILCS 5/5-4.5-10); it does not include an increase in the sentence applied within the same level of classification of offense.

STATEMENT OF FACTS

Jerome Bingham was charged with theft after a surveillance camera recorded him taking several pallets from the unfenced yard of a K-Mart in Norridge, Illinois at approximately 6:30 p.m. on May 3, 2014. (C. 19; R. D3-9) The indictment alleged that Bingham committed theft:

> in that he[] knowingly obtained or exerted unauthorized control over property, to wit: pallets, of a value less than five hundred dollars, the property of K-Mart, intending to deprive K-Mart, permanently of the use or benefit of said property, and the defendant has been previously convicted of the offense [of] retail theft under case number 00125524901, in violation of chapter 720 Act 5 section 16-1(a)(1) of the Illinois Compiled Statutes 1992 as amended[.]

(C. 19)

Bingham waived his right to a jury trial, and his case proceeded to a bench trial at which a K-Mart security guard named Ali Sahtout testified that Bingham drove into K-Mart's back lot, loaded 6 pallets onto his truck, and drove away. (C. 29; R. D3-9) Norridge Police Officer Peter Giannakopoulos responded to Sahtout's call and arrested Bingham a few minutes after the offense. (R. D12-16) Sahtout testified that Bingham did not have permission to take the pallets, which were valued at $12 each. (R. D7, 9) Sahtout, who further testified that an Indian woman and a Caucasian man worked in K-Mart's receiving area during that time period, witnessed the incident on video while it was being recorded by K-Mart's surveillance cameras; the State entered the video into evidence. (R. D9, 10; St. Ex. 1)

The defense theory was that although Bingham took the pallets, it was not a theft because Bingham believed that he had permission. (R. D4) Bingham, who was working as a metal scrapper at the time of the theft,

testified that approximately 6 months earlier, a bald, African-American forklift driver at the K-Mart had told him that it would be okay to take the broken pallets that were leaned up against the wall. (R. D23-26) The parties stipulated to Bingham's prior retail theft conviction in Case No. 00125524901. (R. D20) The court found Bingham guilty of theft. (R. D32)

The case proceeded to sentencing after the court denied Bingham's motion for a new trial. (C. 106; R. E2) The presentence investigation report ("PSI") reflects the following criminal history:

Case Number	**Offense**	**Date of Sentencing**	**Sentence**
07 CR 1936001	Possession controlled substance	1/17/2008	1 year IDOC
05 CR 2623701	Possession controlled substance	1/18/2006	1 year IDOC
05120521	Possess title/registration	3/14/2005	2 days' jail
04 C 33018001	Theft (reduced)	6/2/2004	70 days' jail
00 C 44053201	Retail theft	11/4/2002	30 months' probation
00 CR 55901	Possession stolen vehicle	3/8/2000	18 months' probation
01225524901	Retail theft	11/28/2000	20 days' jail
99129034301	Retail theft < $150	7/23/1999	15 days' jail
99144265801	Violate order of protection	7/21/1999	1 year conditional discharge, 60 days' jail
96 CR 210002	Possession controlled substance (VOP)	5/10/1993	1 year IDOC

83 CR 148	Attempted criminal sexual assault	6/10/1983	4 years' IDOC

(C. 33-34)

Based on Bingham's criminal history as well as video evidence showing that he took additional pallets from the same K-Mart one day earlier, on May 2, 2014, the court sentenced the 56-year-old Bingham to the maximum of 3 years' imprisonment plus $699 in various fines and fees. (C. 30, 111-113; R. E5-14) Bingham filed a timely notice of appeal after the court denied his motion to reconsider sentence. (C. 115, 117; R. E13) The Illinois Department of Corrections website reflects that sex offender registry is required. (Appendix A-6)

ARGUMENT

I. The Sex Offender Registration Act (SORA) is unconstitutional as applied to Jerome Bingham because there is no reasonable relationship between Bingham's theft conviction for stealing 6 wooden pallets from an unfenced K-Mart lot and SORA's purpose of protecting the public from sex offenders where Bingham is eligible for SORA based only on a single sex offense conviction that took place more than 30 years before the minor theft that led to this case.

Jerome Bingham was convicted of theft based on evidence that he drove into the unfenced yard of a K-Mart in Norridge, Illinois, loaded 6 wooden pallets into his truck, and drove away. (C. 19; R. D3-16) As a result of this conviction, he will now be required to register as a sex offender pursuant to the 2012 version of Illinois's Sex Offender Registration Act ("SORA"). Subjecting Bingham to SORA violates due process because in this case there is no rational relationship between the minor theft of which Bingham was convicted and SORA's purpose of protecting the public from sex offenders,

where Bingham's history and the circumstances of the theft in this case do not indicate that he is at risk of committing another sex offense. This Court should therefore hold that SORA is unconstitutional as applied to Bingham, and that he therefore is not subject to SORA's registration requirements.

Sentencing provisions, like all statutory enactments, must be reasonable. Due process mandates that statues have a basic rationality. *See People v. Steppan*, 105 Ill. 2d 310, 318-19 (1985); U.S. CONST., amend. XIV; ILL. CONST. 1970, art. 1, § 2. Rational basis review has several levels. A statute must have a reasonable purpose, must reasonably relate to that purpose, and must reasonably further the purpose. *Boeckmann*, 238 Ill. 2d at 7. Further, a sentencing statute must be "reasonably designed to remedy the evils" the Legislature seeks to address. *People v. Bradley*, 79 Ill. 2d 410, 417 (1980). As Bingham's claim turns on the legal question of whether SORA is unconstitutional as applied to him, this Court's review is *de novo*. *See People v. Boeckmann*, 238 Ill. 2d 1, 7 (2010). An as-applied constitutional challenge supported by a sufficiently developed record may be raised for the first time on appeal. *People v. Gray*, 2016 IL App (1st) 134012, ¶ 35.

While reviewing courts are reluctant to overrule the actions of the Legislature (*Steppan*, 105 Ill. 2d at 319), rational basis review is not toothless. *Boeckmann*, 238 Ill. 2d at 7. Thus, a statute will be found to violate due process if there is an insufficient fit between it and its legitimate aim. *Compare Boeckmann*, 238 Ill. 2d at 11 (reasonable relationship between underage drinking and suspension of driving privileges), *with People v. Lindner*, 127 Ill. 2d 174, 183 (1989) (no reasonable relationship between

commission of sex offense and revocation of driver's license). Arbitrary statutes also violate due process. *See Lindner*, 127 Ill. 2d at 183.

This Court has held that SORA's "obvious purpose ... is to assist law enforcement agencies in tracking the whereabouts of sex offenders and to provide the public information about where they are residing." *People v. Wlecke*, 2014 IL App (1st) 112467, ¶ 5. Bingham concedes that this purpose is legitimate. However, this Court should nonetheless hold that SORA violates due process as applied in this case because using a minor theft offense that involved no threat of sexual violence to bring Bingham within SORA's ambit is an arbitrary classification that does not sufficiently fit the statute's purpose where neither Bingham's history nor the circumstances of the minor theft that triggered SORA suggest that he is any more likely to commit a sex offense than anyone else.

SORA was not enacted until 1996 (Pub. Act 87-1064, eff. January 1, 1996), more than ten years after Bingham's conviction for attempted criminal sexual assault. (C. 34) Bingham was not required to register because SORA applied only to those who had been convicted of a sex offense on or after January 1, 1996. 730 ILCS 150/3 (West 1996). But, in 2011, Public Act 97-578 amended the statute by adding subsection (c)(2.1), which states:

> A sex offender or sexual predator, who has never previously been required to register under this Act, has a duty to register if the person has been convicted of any felony offense after July 1, 2011. A person who previously was required to register under this Act for a period of 10 years and successfully completed that registration period has a duty to register if: (i) the person has been convicted of any felony offense after July 1, 2011, and (ii) the offense for which the 10 year registration was served currently requires a registration period of more than 10 years.

730 ILCS 150/3 (West 2012) (effective January 1, 2012). Bingham is therefore being required to register as a sex offender not because his behavior suggests he is at high risk for committing sex offenses in the future, but because he was convicted of stealing 6 wooden pallets from a K-Mart parking lot (C. 34), which triggered application of the 2011 amendment.

In *Lindner*, the defendant's driver's license became subject to mandatory revocation under several provisions of the Illinois Vehicle Code after Lindner pled guilty to three sex offenses, none of which involved a vehicle. 127 Ill. 2d at 176-177. The trial court granted Linder's motion to declare applicable provisions of the Illinois Vehicle Code unconstitutional in violation of his due process rights. *Id*. at 177.

On appeal, the Illinois Supreme Court first identified the purpose of the challenged statute: to protect against drivers who threatened the safety of others, and drivers who had abused the privilege of driving either by doing so illegally or by using a vehicle to commit a criminal act. *Id*. at 182. The Court then determined that revocation of the defendant's driver's license bore no reasonable relationship to that purpose because "a vehicle was not involved in any way in the commission of the offenses for which defendant was convicted[.]" *Id*. Continuing, the Court held that the method used to further the public interest was not reasonable because taking licenses away from drivers who had committed offenses not involving vehicles was "not a reasonable means of ensuring that the roads are free of drivers who operate vehicles unsafely or illegally." *Id*. at 183.

> To the contrary, the means chosen are arbitrary, not only because the offenses specified in section 6-205(b)(2) have no connection to motor vehicles, but also because the inclusion of

> those offenses and no others is arbitrary. That is, no reason suggests itself as to why the legislature chose the particular offenses enumerated in section 6-205(b)(3), as opposed to other offenses not involving a vehicle.

Lindner, 127 Ill. 2d at 183. For all of these reasons, the Court held that "the challenged provision [wa]s an unreasonable and arbitrary exercise of the State's police power in violation of the constitutional guarantee of due process and is therefore invalid." *Id*. The Court also noted that "[i]f the legislature may punish these offenses with revocation, nothing prohibits it from imposing that penalty for violating *any* provision of the Criminal Code, a result that would be plainly irrational." *Id*. at 185.

Here, as in *Lindner*, there is absolutely no connection between the minor theft of which Bingham was convicted and the threat that Bingham is likely to commit a sex offense. Instead, as the legislative history reflects, Public Act 97-578 added subsection (c)(2.1) to SORA in an effort to ensure that everyone who had previously been convicted of a sex offense would be required to register under SORA if they subsequently committed *any* felony or misdemeanor offense, regardless of how long ago the original offense took place and whether they had since committed any new sex offenses. *See* 97th Ill. Gen. Assem., House Proceedings, March 31, 2011, at 151, 155. (Appendix, A-9) Such overreaching is precisely what the Supreme Court condemned in *Lindner*. *See Lindner*, 127 Ill. 2d at 185 (imposing revocation of a driver's license for every violation of the Criminal Code "would be plainly irrational").

The problem is well illustrated by *People v. Johnson*, where the Supreme Court considered the constitutionality of an earlier version of SORA under which defendants convicted of aggravated kidnapping of a minor were

classified as sex offenders even if the offense was not sexually motivated. 225 Ill. 2d 573, 575-585 (2007). The appellate court held that the statute violated due process as applied to Johnson because the record showed that his particular offense was not sexually motivated. *Johnson*, 225 Ill. 2d at 577-578. In reversing, the Supreme Court first found that SORA's purpose "is to aid law enforcement by facilitating ready access to information about sex offenders and, therefore, to protect the public." *Id*. at 685. The Court then noted that Illinois's General Assembly expanded SORA's definition of sex offense to include aggravated kidnapping of a minor by a nonparent because it "recognized that aggravated kidnapping can be a precursor to sex offenses against children." *Johnson*, 225 Ill. 2d at 591. Thus, the Court held, the challenged provision satisfied the rational basis test. *Id*.

Unlike the situation in *Johnson*, here the legislative history shows no such rationale. Instead, it demonstrates an irrational zeal that cannot be condoned, particularly in this case. Bingham was convicted of attempted sexual assault when he was 25 years old. (C. 30, 34) He has never been convicted of any other sex offense. (C. 33-34) But, more than 30 years later, Bingham was convicted of theft after he drove into the unfenced yard of a K-Mart, loaded 6 pallets that were worth $12 each onto his truck, and took the pallets without permission. (C. 19, 29; R. D3-16) The defense theory was that although Bingham took the pallets, it was not a theft because Bingham believed that he had permission to take the broken pallets that were leaned up against the wall. (R. D4, 23-26) There is absolutely nothing about these facts to suggest that Bingham poses any more risk of committing another sex offense than a person who was not convicted of theft. Yet, as a result of the

theft conviction, he is now required to register as a sex offender under SORA. The requirement violates due process because there is no rational connection between the theft offense of which Bingham was convicted and SORA's purpose of protecting the public from sex offenders. This Court should therefore hold that SORA violates due process as applied to Bingham and order that he be relieved of the obligation to register as a sex offender.

II. Applying the Sex Offender Registration Act (SORA) here violates the prohibition against *ex post facto* laws, because the registration requirements therein have become punitive and the attempted sex offense took place long before SORA was enacted.

At the time of his 1983 conviction for attempt aggravated criminal sexual assault, Jerome Bingham was not subject to any reporting requirements. In the 33 years since that conviction, Bingham has not been convicted of anything except minor drug and theft charges indicative of a substance abuse problem. (C. 33-34) Yet, after he was convicted of theft and sentenced to three years' imprisonment for taking pallets from K-Mart (C. 19, 114), Bingham learned that he would be required to register as a sex offender pursuant to the 2012 version of Illinois's Sex Offender Registration Act ("SORA"). *See People v. Henderson,* 2011 IL App (1st) 090923, ¶8 (reviewing court can take judicial notice of information published on the Illinois Department of Corrections website). (Appendix A-6) This is an *ex post facto* violation because the 2012 SORA is not merely a regulatory scheme, but rather a new and ongoing punishment for an attempted sex offense that Bingham was convicted of more than three decades before his conviction in this case. *See Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009); *Doe v. State*, 189 P.3d 999, 1014 (Alaska 2009). This Court should thus find that

application of SORA to Bingham violates the prohibition against *ex post facto* laws.

The *ex post facto* clauses of the U.S. and Illinois Constitutions are equally succinct: "No...ex post facto Law shall be passed." U.S. Const. art. I, §9, cl. 3; and "No ex post facto law...shall be passed." Ill. Const. art. I, §16. The Illinois Supreme Court interprets Article I, Section 16 in lockstep with the U.S. Constitution's *ex post facto* clause. *See People ex rel. Birkett v. Konetski*, 233 Ill.2d 185, 209 (2009). The constitutionality of a statute is reviewed *de novo*. *People v. Leonard*, 391 Ill. App. 3d 926, 931 (5th Dist. 2009).

A law will be found to violate the prohibition against *ex post facto* laws if it is retroactive and disadvantageous to a defendant. *Konetski*, 233 Ill. 2d 185, 208-09. A law is disadvantageous to a defendant if it criminalizes an act innocent when performed, increases the punishment for an offense previously committed, or alters the rules of evidence making a conviction easier. *Id*. To determine whether a law criminalizes an act which was innocent when done, a reviewing court must first decide whether the statute in question creates a civil proceeding or a criminal penalty. *Smith v. Doe*, 538 U.S. 84, 92 (2003). If the legislature intended to impose punishment, the court's inquiry ends; the statute is a prohibited *ex post facto* law. But, if the legislature intended to create a civil, non-punitive regulation, the court will continue its inquiry into the nature of the statute's effects. *Smith*, 538 U.S. at 92.

SORA enacted in 1996, but Bingham was not required to register until his theft conviction in this case, which triggered application of the 2011 amendment. (See Argument I, *infra*) There is no question that SORA is

retroactive. *See* 97th Ill. Gen. Assem., House Proceedings, March 31, 2011, at 154 (noting that legislation was intended to apply retroactively) (Appendix A-13); *People v. Malchow*, 193 Ill. 2d 413, 418-419 (2000) (holding SORA to be retroactive where the defendant was required to register under SORA based on a conviction that took place prior to SORA's enactment and which had not previously required sex offender registration). Thus, the only dispute here is whether registration under SORA equals punishment for purposes of this *ex post facto* challenge. *See People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 51, note 1 (expressly not considering whether SORA and its related statutory scheme constituted "punishment" for purposes of an *ex post facto* challenge).

Bingham acknowledges that the United States and Illinois Supreme Courts have answered this question in the negative, holding that earlier versions of sex offender registration and community notification statutes did not violate the *ex post facto* clauses of the U.S. and Illinois constitutions because the notification requirements do not constitute punishment. *See Malchow*, 193 Ill.2d at 420-424; *Smith v. Doe*, 538 U.S. 84, 93 (2003); *Konetski*, 233 Ill. 2d at 210. However, as this Court has recognized, the burdens that Illinois places on sex offenders have not remained static in the years since these decisions, but have instead become increasingly onerous and punitive. *See Avila-Briones*, 2015 IL App (1st) 132221, ¶ 51 (recognizing that SORA and related statutory schemes have 'become more onerous with regard to the amount of information a sex offender must disclose, the number of agencies to which the offender must disclose that information, and how often a sex offender must register."). The same is true around the United States. It is therefore time to revisit the question.

Indeed, in reaction to increasingly onerous and punitive provisions of sex offender registration and community notification schemes, a number of state courts have stricken down statutes similar to Illinois's Sex Offender Registration Act ("SORA"), using the test employed by the U.S. Supreme Court in *Smith v. Doe*. *See, e.g., Doe v. State*, 189 P.3d 999 (Alaska 2008); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013); *State v. Letalien*, 985 A.2d 4 (Maine 2009); *Gonzalez v. State*, 980 N.E.2d 312 (Ind. 2013). Other courts have invalidated retroactive sex offender registration and reporting statutes without using that test. *See Doe v. Dept. of Public Safety and Correctional Svcs.*, 62 A.3d 123 (Md. App. Ct. 2103) (invalidating Maryland SORA under Maryland's *ex post facto* prohibition using a different constitutional test); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011) (considering the changes to the Ohio SORA "in aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment...is punitive.").

In fact, *Malchow, Smith v. Doe*, and *Konetski* address registration and community notification schemes that no longer exist, and their analyses do not accurately reflect the current state of the law. This Court should therefore revisit these decisions, analyze the current version of Illinois's SORA, and hold that Public Act 97-0578 violate the *ex post facto* prohibitions of the U.S. and Illinois Constitutions by retroactively punishing Jerome Bingham.

Courts typically use seven factors determine whether a statute is regulatory, and therefore may be applied retroactively, or punitive, and therefore may not be applied retroactively without violating the

constitutional prohibition against *ex post facto* laws: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it applies only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment—*i.e.*, retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6), whether an alternative purpose to which it may rationally be connected is assignable for it; (7) and whether it appears excessive in relation to the alternative purpose assigned. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); *Malchow*, 193 Ill. 2d at 421-424 (applying *Mendoza-Martinez* factors). If these factors show by the "clearest proof" that the punitive effect of the statute under consideration overrides the legislature's non-punitive intent in enacting it, the statute violates the *ex post facto* clause. *Smith v. Doe*, 538 U.S. at 92.

Moreover, "[e]ven if the legislature's intent is not to create a punitive scheme, in certain circumstances the legislature's intent will be disregarded where the party challenging the statute demonstrates by 'the clearest proof' that the statute's effect is so punitive that it negates the legislature's intent." *Malchow,* 193 Ill. 2d at 421, quoting *Kansas v. Hendricks*, 521 U.S. 346 (1997). Therefore, although Bingham acknowledges Illinois law holding that the legislature's intent in enacting the SORA was not punitive (*People v. Adams*, 144 Ill. 2d at 388), it is not determinative. This is so because *Adams*—the case on which *Malchow* relied to dispose of that defendant's *ex post facto* challenge to the 1998 SORA—did not employ the *Mendoza-Martinez* test to affirm the SORA. 144 Ill. 2d at 388. Instead, the Supreme Court in *Adams* terminated an Eighth Amendment analysis by finding

conclusive evidence of the Illinois legislature's intent that the SORA was non-punitive. *Id. Adams* therefore does not control the outcome of this case because *ex post facto* challenges implicate different considerations than the Eighth Amendment challenge the Supreme Court addressed in *Adams,* and legislative intent is not the sole factor in resolving an *ex post facto* challenge. This Court should therefore apply the *Mendoza-Martinez* factors, which amply demonstrate the punitive nature of the 2012 SORA, retroactive application of which violates the *ex post facto* prohibitions of the U.S. and Illinois Constitutions both facially and as applied to Jerome Bingham.

With respect to the first *Mendoza-Martinez* factor, the U.S. Supreme Court opined in *Smith v. Doe* that, if a "disability or restraint [imposed by a SORA] is minor and indirect, its effects are unlikely to be punitive." 538 U.S. at 100. There, the Supreme Court found that Alaska's SORA imposed only minor and indirect restraints rather than actual physical restraints, and did not require in person registration, meaning that registrants were not subject to "supervision." 538 U.S. at 100-101. As such, the restraints did not constitute affirmative disabilities, and hence did not constitute punitive restraints.

Unlike Alaska's SORA, however, Illinois's 2012 SORA requires *all* registrants to appear in person to register, and to do so generally within three days of a triggering event. 730 ILCS 150/3(a), (b), (c)(3), (c)(4) (West 2012). Moreover, Illinois's 2012 SORA requires a registrant to appear in person before as many as three or more agencies: those with jurisdiction over the registrant's residence or temporary domicile, workplace, institution of higher learning; those with jurisdiction over any place to which the registrant

will be traveling for three or more days; and the public safety or security director of the registrant's institution of higher learning. 730 ILCS 150/3(a)(West 2012). As noted by the Supreme Court, the SORA in question in *Smith v. Doe* did not require in-person registration. 538 U.S. at 101.

Moreover, *Smith v. Doe* fails to directly address the effect of the quantity of information registrants must provide. Illinois's 2012 SORA requires each registrant to provide all of the following information:

- current photograph;
- current address;
- current place of employment;
- telephone number, including cellular telephone number;
- the employer's telephone number;
- school attended;
- all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the registrant uses or plans to use;
- all Uniform Resource Locators (URLs) registered or used by the registrant;
- all blogs and other Internet sites maintained by the registrant or to which he or she has uploaded any content or posted any messages or information;
- extensions of the time period for registering as provided in this Article and, if an extension was granted, the reason why the extension was granted and the date the registrant was notified of the extension;
- a copy of the terms and conditions of parole or release signed by the registrant and given to the registrant by his or her supervising officer;
- the county of conviction;
- license plate numbers for every vehicle registered in the name of the registrant;
- the age of the registrant at the time of the commission of the offense;
- the age of the victim at the time of the commission of the offense; and
- any distinguishing marks located on the body of the registrant.

730 ILCS 150/3(a) (West 2012).

Many of these requirements are obscure and technically daunting, particularly in a case, like this one, where the offense took place more than

three decades ago. This is particularly true in this case, where Bingham has only a tenth grade education and a long history of drug and alcohol abuse. (C. 35) Moreover, Bingham lived in several different places before moving to Chicago at the age of 21. (C. 35) These circumstances will make it very difficult if not impossible for him to provide accurate information about all of the above-referenced details, especially when he is currently imprisoned yet is expected to register within three days of his release. *See People v. Wlecke*, 2014 IL App (1st) 112467, ¶ 29 ("Given that offenders must register within three days of their release, in many cases a registrant will not be in possession of the information necessary to obtain a state-issued ID within that period of time."). Yet, if Bingham fails to fully comply with all of the requirements, SORA mandates that he will be guilty of a Class 3 felony, required to serve a minimum period of 7 days confinement in the local county jail, and subject to a mandatory minimum fine of $500. 730 ILCS 150/10(a). To characterize such a scheme as anything other than punitive defies reason.

Smith v. Doe also fails to address the frequency of required registrations, which under Illinois's SORA range from once every seven days, for registrants lacking a permanent residence, to once per year, with the possibility of at least three more appearances at the whim of the law enforcement agency with jurisdiction over the registrant. 730 ILCS 150/6 (West 2012). These factors are far more than mere "minor and indirect" disabilities—they are a comprehensive and punitive scheme of supervision.

In fact, in *Doe v. State*, 189 P.3d 999 (Alaska 2009), the Supreme Court of Alaska used the *Mendoza-Martinez* test to strike down, under Alaska's *ex post facto* clause, the very statute upheld in *Smith v. Doe* under the U.S.

Constitution. The Court found the registration obligations of Alaska's SORA (ASORA) to be "significant and intrusive, because they compel offenders to contact law enforcement agencies and disclose information, some of which is otherwise private, most of it for public dissemination." 189 P.3d at 1009. The court further noted that "the time periods associated with ASORA are intrusive," both in the sense that offenders are required to register for fifteen years or their entire lives, and in the sense that offenders had to register within one day of changing residences. *Doe v. State*, 189 P.3d at 1009. Thus, ASORA "treats offenders not much differently than the state treats probationers and parolees subject to continued state supervision." *Doe v. State*, 189 P.3d at 1009.

Similarly, the Supreme Judicial Court of Maine found that a quarterly in-person registration requirement constituted a "form of significant supervision by the state," and rejected *Smith v. Doe*'s conclusion with respect to the first *Mendoza-Martinez* factor. *Letalien*, 985 A.2d at 18. The Supreme Court of Oklahoma engaged in a lengthy and thoughtful analysis of that state's SORA under the first *Mendoza-Martinez* factor, and likewise found that the requirement of in-person registration within three days of a triggering event (similar to Illinois), along with the felony penalties for failing to register, were among several factors that rendered Oklahoma's SORA punitive. *See Starkey*, 305 P.3d at 1021-25 (Okla. 2013). The court noted that the requirements of Oklahoma's SORA "are similar to the treatment received by probationers subject to continued supervision." 305 P.3d at 1023.

Illinois' SORA also imposes a regime similar to the state supervision of offenders released on probation or mandatory supervised release. *See generally,* 730 ILCS 5/3-3-7 (conditions of parole or mandatory supervised release); 730 ILCS 5/5-6-3 (conditions of probation and conditional discharge). Of course, the major difference between the 2012 SORA and probation and mandatory supervised release is length, and in this respect, the SORA is more punitive. A defendant sentenced to probation can only be sentenced to a maximum of four years. 730 ILCS 5/5-4.5-30(d) (four years probation for Class 1 felony, the highest level felony for which probation is available). The maximum term of mandatory supervised release is generally four years. 730 ILCS 5/5-8-1(d)(6)(four years for felony domestic battery, aggravated domestic battery, stalking, aggravated stalking, or felony violation of a protective order).[1] Conversely, the 2012 SORA imposes a *minimum* 10-year registration period, with a substantial number of registrants subject to a *lifetime* registration period.

Moreover, the 2012 SORA requires a registrant to report *in person* every seven days (registrants lacking a fixed residence), every 90 days (sexually dangerous and sexually violent registrants), or between once a year and four times a year at the demand of the law enforcement agency with jurisdiction over the defendant (all other registrants). 730 ILCS 150/6 (West 2012). Thus, even a registrant not found sexually dangerous or violent, living in one county, working in one or more other counties, and attending school in

[1]730 ILCS 5/5-8-1(d)(4) permits a period of mandatory supervised release from three years to lifetime for a number of sex offenses. However, SORA's minimum registration period is ten years, and the terms of mandatory supervised release are less onerous than those imposed by the SORA.

yet another county, could be subject to four or more in-person registrations with multiple law enforcement and public safety agencies per year. Neither the statute establishing conditions for probation, nor the statute doing the same for mandatory supervised release impose such onerous *minimum* conditions. *See* 730 ILCS 5/3-3-7; 730 ILCS 5/5-6-3.

The 2012 SORA also requires a registrant to report *in person* when changing residence address, employment, telephone number, cellular telephone number, school, email address, instant messaging identity, any other internet communication identity, URL registered to the registrant, blogs or internet sites maintained by the registrant or to which the registrant has uploaded any content or posted any message. 730 ICLS 150/6 (West 2012). This requirement could multiply the number of times a registrant must report in person, particularly if the registrant lives in one county and works or attends school in other counties.

Doe v. State, *Letalien*, and *Starkey* all found that the "supervision" of registrants by the state pursuant to their states' respective SORAs mirrored the treatment of probationers, and therefore constituted affirmative disabilities and restraints that weighed in favor of determining that the SORAs were punitive under the first *Mendoza-Martinez* factor. The Maryland Court of Appeals similarly found that Maryland's registration requirements "had the same effect as placing [a registrant] on probation" because "he or she must report to the State and must abide by conditions and restrictions not imposed upon the ordinary citizen, or face incarceration." *Doe v. Dept. of Public Safety & Correctional Svcs.*, 62 A.3d 123, 139 (Md. App. Ct. 2013).

Whether one determines that Illinois' 2012 SORA imposes conditions similar to those imposed on probationers or offenders subjected to mandatory supervised release, or is *sui generis*, the burdens imposed on registrants show that the U.S. Supreme Court's analysis in *Smith v. Doe* is inapposite. The affirmative disabilities and restraints imposed by the 2012 SORA clearly demonstrate its punitive nature.

The second *Mendoza-Martinez* factor considers whether the regime in question has historically been regarded as a punishment. *Mendoza-Martinez*, 372 U.S. at 168. The requirements imposed on registrants pursuant to the 2012 SORA are unprecedented; the 2012 SORA and similar statutes in other states are recent phenomena, making a historical analysis difficult. *Smith v. Doe* reached back to colonial history, and premised its analysis of the Alaska SORA under this factor on the "shaming" aspect of its community notification provisions. 538 U.S. at 97-99. Some of the cases cited in this brief tend to follow *Smith v. Doe*'s lead, analyzing their states' respective statutes in the context of shaming. *See Starkey*, 305 P.3d at 1025. Unlike the U.S. Supreme Court, each of these courts determined that the shaming aspect of registration and community notification weighs in favor of finding a punitive effect under the second *Mendoza-Martinez* factor. *Letalien*, 985 A.2d at 19; *Starkey*, 305 P.3d at 1026.

However, Justice Ginsburg's dissent in *Smith v. Doe* identifies the primary reason the 2012 SORA imposes requirements that have historically been regarded as punishment: "Its registration and reporting provisions are comparable to conditions of supervised release or parole...." 538 U.S. at 116 (Ginsburg, J., dissenting). *Doe v. State*, 189 P.3d at 1012, cited Justice

Ginsburg's dissent approvingly to find that SORA reporting provisions resemble the requirements of parole or supervised release, and therefore resemble punishment. Justice Stevens's dissent in *Smith v. Doe* dovetails with Justice Ginsburg's observation, and further explains why SORA reporting requirements constitute punishment:

> It is...clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals.

538 U.S. at 112 (Stevens, J., dissenting). As Justice Stevens notes, there is no civil regime which requires the extensive, long-term reporting that the 2012 SORA requires, and the 2012 SORA's requirements are only imposed on those convicted of sex offenses. Justices Ginsburg and Stevens, and the Alaska Supreme Court, identify the essence of why the 2012 SORA's requirements constitute punishment under the second *Mendoza-Martinez* factor: they resemble probation or mandatory supervised release, and they are manifestly only imposed on individuals convicted of criminal offenses. Thus, the second *Mendoza-Martinez* factor weighs in favor of finding that the 2012 SORA is punitive.

While generally the offenses that trigger Illinios' SORA require a finding of *scienter* (a guilty state of mind), Bingham acknowledges that SORA can be applied even in some instances where *scienter* has not been shown. See 730 ILCS 150/2 (West 2012) ("sex offender" includes even those charged with sex offenses but found not guilty by reason of insanity). However, as the *Mendoza-Martinez* test has been employed over the years, it is evident that

this factor should be afforded little weight. *See Smith v. Doe*, 538 U.S. at 105 (affording that factor little weight); *Doe v. State*, 189 P.3d at 1012-1016 (same); *Starkey*, 305 P.3d at 1026-1028; *Letalien*, 985 A.2d at 21-22, 26 (finding *ex post facto* violation despite the fact that SORA did not require a finding of *scienter*). Whether the 2012 SORA requires *scienter* or not, this factor seems to be of negligible impact where other factors, such as the imposition of affirmative disabilities and restraints, demand greater weight in the calculus.

The fourth *Mendoza-Martinez* factor examines whether the operation of the 2012 SORA will promote the traditional aims of punishment – retribution and deterrence. *Mendoza-Martinez*, 372 U.S. at 168. Justice Souter's concurrence in *Smith v. Doe* aptly describes how Illinois's SORA has tipped into retribution:

> [T]he Act's legislative history shows it was designed to prevent repeat sex offenses and to aid the investigation of reported offenses. [citations]. Ensuring public safety is, of course, a fundamental regulatory goal...and this objective should be given serious weight in the analyses. But, at the same time, it would be naive to look no further, given pervasive attitudes toward sex offenders.... The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

538 U.S. at 108-09 (Souter, J., concurring). The Oklahoma Supreme Court cited approvingly the Kentucky Supreme Court's use of this quotation to analyze Kentucky's restrictions on sex offenders under the fourth *Mendoza-Martinez* factor in *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky 2009).

Starkey, 305 P.3d at 1028. A key element of the Kentucky court's analysis was the fact that the Kentucky restrictions applied without any individualized determination of risk to the community: "'When a restriction is imposed equally on all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.'" *Starkey,* 305 P.3d at 1028 (quoting *Baker*, 295 S.W.3d at 444).

The *Starkey* court noted that there was no mechanism in Oklahoma's SORA by which a registrant could appeal registration requirements by showing he was no longer a danger to the community, and relied on the *Baker* analysis to determine that "retroactive extensions of SORA registration clearly appear in the nature of retribution imposed against sex offenders for their past crimes." *Starkey,* 305 P.3d at 1028. The Alaska Supreme Court also found that the fourth *Mendoza-Martinez* factor weighed in favor of finding punitive effect because the statute permitted no individualized determination of risk. *Doe v. State*, 189 P.3d at 1014.

Here, Bingham is subject to SORA because of an attempted criminal sexual assault conviction from 1983. (C. 33-34) His criminal history from the following three decades demonstrates that he does not present any danger to society where all of his convictions are, like the one in this case, for drugs or minor thefts. (C. 33-34) Yet, SORA includes no mechanism whereby people subject to registration may petition for relief. As Justice Souter noted in *Smith v. Doe*, such a scheme demonstrates that there is something more than regulation of safety going on. *Smith v. Doe*, 538 U.S. at 108-109. As *Starkey*

and *Doe v. State* found, that something is retribution and deterrence, the classical goals of punishment. As such, the fourth *Mendoza-Martinez* factor demonstrates the punitive effect of the 2012 SORA.

Under the fifth *Mendoza-Martinez* factor, the exclusive application of a statute to criminal behavior weighs in favor of concluding that the statute has a punitive effect. *Doe v. State*, 189 P.3d at 1014. The Supreme Judicial Court of Maine engaged in an analysis similar to that set out in the preceding subsection of this argument to find that Maine's SORA was punitive, noting that:

> registration under [SORA]of 1999 only applies to offenders who were convicted of specific crimes, does not arise based on individualized assessment of an offender's risk of recidivism, and cannot be waived on proof that an offender poses little or no risk, [SORA] of 1999 applies exclusively to behavior that is already a crime. It is punitive in effect in this respect.

Letalien, 985 A.2d at 22. The Oklahoma Supreme Court relied on a similar analysis to find a punitive effect pursuant to the fifth *Mendoza-Martinez* factor. *Starkey*, 305 P.3d at 1028. The 2012 SORA has all the characteristics relied on by *Letalien* and *Starkey*, and therefore has a punitive effect under the fifth *Mendoza-Martinez* factor.

Bingham concedes that the 2012 SORA has a rational connection to an alternative, non-punitive purpose, and thus that the sixth *Mendoza-Martinez* factor is not punitive. *See Adams*, 144 Ill. 2d at 388 (Illinois legislature's purpose was to protect the public); *Starkey*, 305 P.3d at 1028; *Letalien*, 985 A.2d at 22; *Doe v. State*, 189 P.3d at 1015-16; *Williams*, 952 N.E.2d at 1112. However, each of these courts also ultimately determined that this factor was outweighed by the other *Mendoza-Martinez* factors and concluded that the

registration schemes in question violated the *ex post facto* prohibitions of their state—or the federal—constitutions. This Court, too, should weigh this factor lightly.

The final *Mendoza-Martinez* factor examines Illinois's 2012 SORA's excessiveness in light of its stated purpose. This factor is the most compelling evidence that this statute violates the *ex post facto* clauses of both the U.S. and Illinois Constitutions. Justice Ginsburg's *Smith v. Doe* dissent distills to its essence the 2012 SORA's constitutional infirmity pursuant to this factor:

> What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose....[T]he Act has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community.... But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed....And meriting heaviest weight in my judgment, *the Act makes no provision whatever for the possibility of rehabilitation*: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

Smith v. Doe, 538 U.S. at 116-117 (Ginsburg, J., dissenting) (emphasis added). If the 2012 SORA's purpose is to protect the public from sex offenders, "[t]he degree to which a prior offender has been rehabilitated and does not present a risk to the public" is central to a determination of whether the statute is excessive. Alaska and Oklahoma's Supreme Courts found the seventh *Mendoz-Martinez* factor punitive because their respective statutes

lacked the means by which registrants' risk of re-offending could be examined, and the registrant offered relief from registering. *Doe v. State*, 189 P.3d at 1017; *Starkey*, 305 P.3d at 1029-30. Similarly, while not engaging in a *Mendoza-Martinez* analysis, the Ohio Supreme Court found the lack of a mechanism to determine a registrant's future risk an important element in its determination that Ohio's SORA violated Ohio's *ex post facto* clause. *State v. Williams*, 952 N.E.2d at 1113.

Illinois' 2012 SORA bears the same infirmity; it lacks any mechanism by which a registrant can petition for relief from registering based on evidence that he or she no longer presents a risk to society. Moreover, as detailed above, the burdens on registrants are onerous and intrusive, requiring registrants to report *in person* even minimal changes in many aspects of their personal lives, and to report even when there are no changes. As such, this factor amply demonstrates the punitive nature of Illinois' 2012 SORA

In conclusion, application of the *Mendoza-Martinez* factors demonstrate that the 2012 SORA violates the *ex post facto* clauses of the U.S. and Illinois Constitutions as applied to Jerome Bingham. *Smith v. Doe* requires the "clearest proof" of punitive effect to override the non-punitive intent of a legislature in order to find a violation of the U.S. Constitution's *ex post facto* clause. 538 U.S. at 93. Although some courts disagree on whether certain of the *Mendoza-Martinez* factors are punitive or regulatory, the Supreme Courts of Alaska, Oklahoma, and Maine all ultimately determined that, under the *Mendoza-Martinez* factors, each State's SORA statute violated either its *ex post facto* clause or that of the federal Constitution. *See*

Doe v. State, 189 P.3d at 1019 (Alaska Constitution); *Starkey* , 305 P.3d at 1030 (Oklahoma Constitution); *Letalien*, 985 A.2d at 26 (U.S. and Maine Constitutions).

The same result is warranted here, where five of the seven *Mendoza-Martinez* factors definitively weigh in favor of finding that the 2012 SORA is punitive, one factor does not clearly fall in either category, and only one factor weighs in favor of finding that the 2012 SORA is non-punitive. As set out above, there is clear proof that the 2012 SORA's provisions: (1) involve affirmative disabilities and restraints that equate to the treatment of offenders on probation or mandatory supervised release; (2) have historically been regarded as punishment; (3) promote the traditional aims of punishment, specifically retribution against sex offenders; (4) apply only to behavior that is already considered a crime; and (5) is grossly excessive in relation to the purpose of protecting the public from sex offenders. These five punitive factors are not outweighed by the 2012 SORA's legitimate goal of protecting the public, but rather provide the "clearest proof" that Public Act 097-0578, which retroactively imposed punitive registration requirements on Bingham for a crime committed more than three decades earlier, violates both the U.S. and Illinois Constitutions' *ex post facto* clauses.

III. Jerome Bingham's conviction for theft was improperly elevated from a Class A misdemeanor to a Class 4 felony because the State did not provide notice in the charging instrument that it intended to use a prior conviction for retail theft to elevate the classification of the offense.

Jerome Bingham was found guilty of theft of property worth less than $500, and he was given a Class 4 felony sentence of three years' imprisonment and one year of mandatory supervised release. (C. 19, 114) The

classification of the offense was increased from a Class A misdemeanor based on a prior retail theft conviction. (C. 19; R. D3, 20); 720 ILCS 5/16-1(b)(2) (West 2014). But Bingham was not eligible for a Class 4 conviction and sentence because the State failed to give notice, as required by section 111-3(c) of the Code of Criminal Procedure of 1963, that it intended to use the prior conviction to elevate the classification of the offense to a Class 4 felony. (C. 19) This Court should therefore reduce Bingham's conviction for theft to a Class A misdemeanor and remand his case for resentencing.

This issue involves a question of law that should be reviewed *de novo*. *People v. Chaney*, 379 Ill. App. 3d 524, 527 (1st Dist. 2008).

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant." 725 ILCS 5/111-3(c) (West 2014). Section 111-3(c) defines an enhanced sentence as "a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections." *Id.* *See also People v. Jameson*, 162 Ill. 2d 282, 288 (1994) (holding that section 111-3(c) applies to "those instances in which a prior conviction elevates the classification of the offense with which a defendant is charged and convicted, rather than simply the sentence imposed").

Here, the State failed to comply with section 111-3 because, while the indictment alleged that Bingham had been previously convicted of retail theft in case number 00125523901, it did not indicate the State's intent to use this prior conviction to elevate the classification from a Class A misdemeanor to a

Class 4 felony. (C. 19) Pursuant to section 111-3(c), the State was required to specifically state its intent to increase the classification of the offense from a Class A misdemeanor to a Class 4 felony. Because the State failed to do so, Bingham's theft conviction in this case should not have been elevated to a Class 4 felony.

Indeed, the plain language of 111-3(c) is unambiguous in identifying two requirements that the State must meet when it seeks an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). It requires the State to (1) "state such prior conviction," and (2) "state the intention to seek an enhanced sentence." *Id*. The best indication of the legislature's intent is the plain language of the statute, given its plain and ordinary meaning. *People v. Bradford*, 2016 IL 118674, ¶ 15. The Supreme Court has repeatedly held that where the statutory language "is plain and unambiguous, it must be applied without resort to further aids of statutory construction." *People v. Bradford*, 2016 IL 118674, ¶ 15.

Here, the State identified a prior conviction in the charging instrument, but failed to state that it intended to use that prior conviction to elevate the classification of the offense from a Class A misdemeanor to a Class 4 felony. (C. 19) The indictment alleged that Bingham committed theft:

> in that he[] knowingly obtained or exerted unauthorized control over property, to wit: pallets, of a value less than five hundred dollars, the property of K-Mart, intending to deprive K-Mart, permanently of the use or benefit of said property, and the defendant has been previously convicted of the offense [of] retail theft under case number 00125524901, in violation of chapter 720 Act 5 section 16-1(a)(1) of the Illinois Compiled Statutes 1992 as amended[.]

(C. 19) The trial judge therefore erred by raising the classification of Bingham's offense to a Class 4 felony and imposing a Class 4 sentence of three years' imprisonment and one year of mandatory supervised release because the State failed to meet the requirements of section 111-3(c). (C. 114) The remedy for this error is to vacate Bingham's enhanced Class 4 sentence, and remand his case for the trial court to impose a conviction on the lower classification of the offense, a Class A misdemeanor, and resentence him accordingly. *People v. Griham*, 399 Ill. App. 3d 1169, 1172-73 (4th Dist. 2010) (holding that the remedy for failing to comply with section 111-3(c) is to vacate the enhanced sentence and remand for resentencing on the lower class offense).

Bingham recognizes that his attorney did not object to this error, and that this issue therefore is not preserved for review. However, this Court may review this error under the plain-error doctrine, which applies when an error implicates the defendant's substantial rights and denies him a fair hearing. *See People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (plain error occurs if the error is clear or obvious, and the error was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process"). In the sentencing context, defendants must show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill.2d 539, 545 (2010). Both circumstances apply here because the evidence at Bingham's sentencing hearing was closely balanced and the error was so egregious that it denied his right to a fair sentencing hearing.

First, the evidence adduced at the sentencing hearing was closely balanced, and thus may be reviewed under the closely balanced prong. *See People v. Morris*, 2014 IL App (1st) 130512, ¶50 (reviewing courts may consider forfeited errors where the evidence was closely balanced). As counsel argued in mitigation at sentencing, Bingham's most recent conviction prior to the offense in this case was from 2007, and the vast majority of his prior convictions were for drug-related offenses. (R. E10-11) This history begs more for drug treatment than for a lengthy period of incarceration. As a counter to this mitigating evidence, the only evidence in aggravation was a video showing that Bingham took additional pallets from K-Mart the day before the offense in this case. (R. E8) This Court should therefore review this issue under the plain error doctrine because the aggravating and mitigating evidence at the sentencing hearing was closely balanced. *See, e.g., People v. Kuntu*, 196 Ill. 2d 105, 139-40 (2001) (reviewing sentencing error under the first prong of plain error because the defendant presented considerable mitigating evidence); *People v. Martin*, 119 Ill. 2d 453, 458-59 (1988) (reviewing sentencing error under the first prong of plain error where the aggravating evidence at sentencing was counterbalanced by "substantial mitigating evidence"). Bingham is, therefore, entitled to relief under the first prong of the plain error doctrine.

Second, "sentencing issues are excepted from the doctrine of waiver when they affect a defendant's substantial rights." *People v. Carmichael*, 343 Ill. App. 3d 855, 859 (1st Dist. 2003) ("the defendant's contention that the offense of which he was convicted was improperly enhanced from a Class 3 felony to a Class 2 felony implicates substantial rights justifying review of

the issue"). Thus, in *People v. Owens*, this Court held that use of the same felony to enhance both the class of the offense and its punishment amounted to an impermissible double enhancement that was reviewable under the second prong of the plain error rule as a matter that affected the defendant's substantial rights. 377 Ill. App. 3d 302, 304-305 (1st Dist. 2007). Here, Bingham contends that a violation of section 111-3(c) led to the improper elevation of the classification of his offense and that the error affected his substantial right to be sentenced based on the correct sentencing range. Thus, as in *Carmichael* and *Owens*, the error is reviewable under the second prong of the plain error rule.

In sum, the State charged Bingham with theft, but failed to provide the statutorily required notice of its intent to elevate the classification of the offense from a Class A misdemeanor to a Class 4 felony. (C. 19) The State's failure to comply with the notice requirements of section 111-3(c) violated Bingham's substantial right to a fair sentencing hearing. Therefore, Bingham respectfully requests that this Court reduce his conviction for theft to a Class A misdemeanor and remand his case for resentencing on that lesser offense.

IV. The trial court erroneously imposed a DNA ID System Fee upon Jerome Bingham and failed to apply the $5 per day credit for pre-sentence incarceration to several charges that qualify as fines.

The trial court assessed Jerome Bingham fines and fees totaling $699. (C. 111-113) He was given credit for 32 days of pre-sentence incarceration credit. (C. 114) Of the assessments levied against Bingham, a total of $420-445 (the amount rests on the outcome of Argument I, *supra*), were either improperly imposed or improperly labeled as fees when they are actually fines subject to the $5-per-day pre-sentence incarceration credit. Pursuant to

its authority under Illinois Supreme Court Rule 615(b), this Court should therefore vacate or reduce the improperly imposed fees and offset the remaining fines by Bingham's *per diem* credit, thus reducing his total assessment to $254-279. Ill. Sup. Ct. R. 615(b); *People v. Richards*, 394 Ill. App. 3d 706, 710 (3d Dist. 2009).

A. Appellate Review of Fines & Fees Errors.

Whether a fine or fee has been properly assessed is a matter of law subject to *de novo* review. *People v. Price*, 375 Ill. App. 3d 684, 697 (1st Dist. 2007). As trial counsel did not object to the errors in the fines and fees order below, Bingham asks this Court to review the errors pursuant to this Court's authority under Illinois Supreme Court Rule 615(b) or under the plain error doctrine. Rule 615(b) provides a reviewing court with broad powers to, *inter alia*, modify the judgment or order from which the appeal is taken, including ordering that the punishment imposed by the trial court be reduced. Ill. S. Ct. R. 615(b)(1)-(3). The plain error doctrine permits this Court to review obvious sentencing errors that were not preserved when either: (1) "the evidence at the sentencing hearing was closely balanced"; or (2) "the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill.2d 539, 545 (2010); *see also*, Ill. S. Ct. Rule 615(a).

The Illinois Supreme Court has specifically held that the erroneous imposition of a monetary assessment is reversible under the second prong of the plain error doctrine, "because it involves fundamental fairness and the integrity of the judicial process." *People v. Lewis*, 234 Ill.2d 32, 47-49 (2009) (holding that the trial judge committed plain error by improperly imposing a street value fine without adequate evidence). The Supreme Court noted that

the erroneous imposition of a monetary assessment undermines the "integrity of the judicial process" when the imposition "is not based on applicable standards and evidence, but appears to be arbitrary." *Lewis*, 234 Ill.2d at 48; *see also*, *People v. Anderson*, 402 Ill. App. 3d 186, 194 (3d Dist. 2010) ("Because we find that the imposition of a fine not authorized by statute challenges the integrity of the judicial process, we find plain error"). Thus, this Court should review the erroneous assessments here under the second prong of the plain error doctrine.

Alternatively, this Court may review Bingham's fines and fees order because his trial counsel was ineffective for failing to object to the errors in the order. A criminal defendant has the right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §8; *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). To succeed on a claim of ineffective assistance of counsel at sentencing, a defendant must show that "counsel's performance fell below minimal professional standards and a reasonable probability exists that the sentence was affected by the poor performance." *People v. Steidl*, 177 Ill. 2d 239, 257 (1997). Here, counsel performed deficiently by not objecting to the imposition of improper assessments against her client. Moreover, Bingham was prejudiced by counsel's error because he would not be subjected to $420 - $445 in improper charges had his trial counsel objected. *See People v. Siedlinski*, 279 Ill. App. 3d 1003, 1005-06 (2d Dist. 1996) (holding that counsel was ineffective for failing to request monetary credit the defendant was entitled by statute to receive).

B. $250 State DNA ID System Fee

The trial court ordered Bingham to pay $250 for the State DNA ID System fee under 730 ILCS 5/5-4-3(j) (West 2012). (C. 112) However, the court was without authority to order this fee because Bingham's DNA has already been taken pursuant to his earlier felony conviction. (Appendix A-__) In *People v. Marshall*, the Illinois Supreme Court held that Section 5/5-4-3 "authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." 242 Ill. 2d 285, 303 (2011). In *People v. Leach*, this Court found that, because the DNA analysis fee is statutorily mandated and courts are presumed to follow the law, such a fee should be vacated where the record shows "that defendant was convicted of at least one previous felony after section 5-4-3 became law." 2011 IL App (1st) 090339, ¶¶37-38 (noting the Jan. 1, 1998 effective date of Pub. Act 90-130 adding the DNA fee); *see also*, *People v. Lindsey*, 2013 IL App (3d) 100625, ¶61; *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶¶23-24; *People v. Williams*, 2011 IL App (1st) 091667-B, ¶¶20-22.

Here, Bingham has attached a report from the Illinois State Police providing that his DNA was taken in 2006.[2] (Appendix A-__) But even if he did not have that report, the PSI demonstrates that Bingham was convicted of possession of a controlled substance ("PCS") in 2005 and 2007, both of which were class 3 felonies. (*See* PSI, C. 33, listing two convictions for PCS:

[2] The Illinois State Police document references Jerome James, not Jerome Bingham. But the DOC number—N32301—is the same, thus demonstrating that Jerome James and Jerome Bingham are the same person. (http:www.idoc.state.il.us/subsections/search/inms_print.asp?idoc=N32301)

05 CR 2623701 and 07 CR 1936001); *see also*, 720 ILCS 570/401(e) (West 2014) (possession of any amount of controlled substance not otherwise specified in subsections (a) to (d) of Section 401 is class 3 felony). Since Bingham has two prior class 3 felony convictions entered in Illinois after 1998, those convictions would have required DNA to be taken under Section 5-4-3. 730 ILCS 5/5-4-3(j). Notably, the trial court's pre-printed order form for fines and fees explicitly limits the DNA analysis fee in accord with the Supreme Court's holding in *People v. Marshall*, by stating: "only if not convicted of a qualifying offense after July 1, 1990." (C. 112) Because Bingham's DNA has already been taken, this Court should therefore vacate the $250 DNA ID System fee. *Marshall*, 242 Ill. 2d at 285.

C. $50 Court System Fee

Bingham was also assessed the maximum $50 Court system fee pursuant to 55 ILCS 5/5-1101(c), which provides for a $50 charge for felony convictions and a $25 for Class A misdemeanor convictions. (C. 113) Here, as set forth in Argument III, *supra*, Bingham was charged with and convicted of a Class A misdemeanor, not a felony. Thus, $25 of the court system fee should vacated.

D. $5 per day credit against all charges that qualify as fines.

Individual incarcerated on bailable offenses is entitled to a $5 per day credit towards any fines assessed for each day of incarceration. 725 ILCS 5/110-14(a) (West 2012). This credit cannot be forfeited by failing to apply for it at the trial court level. *People v. Woodward*, 175 Ill. 2d 435, 457 (1997).

Here, the trial judge awarded Bingham 32 days of pre-sentence incarceration credit, which would entitle him to $170 in credit against fines

pursuant to Section 110-14(a). (C. 114) In assessing costs, the trial judge used a pre-printed form entitled "Order Assessing Fines, Fees, and Costs," which breaks the charges up into three categories: (1) fines offset by the $5 per day pre-sentence incarceration credit; (2) fines not offset by the $5 per day credit; and (3) fees and costs not offset by the $5 per day credit. (C. 111-113) The preprinted form placed all of the costs that were assessed against Bingham into the third category. (C. 112-113) The form is incorrect.

Fines and fees serve different purposes. "Broadly speaking, a 'fine' is a part of the punishment for a conviction, whereas a 'fee' or 'cost' seeks to recoup expenses incurred by the state." *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Thus, when deciding whether a particular assessment is a fine or a fee, "the most important factor is whether the charge seeks to compensate the State for any costs incurred as the result of prosecuting the defendant." *People v. Graves*, 235 Ill. 2d 244, 250 (2009). This Court should not simply defer to how the assessment is denominated, because "[t]he legislature's label is strong evidence, but it cannot overcome the actual attributes of the charge at issue." *Jones*, 223 Ill. 2d at 599.

(i) $15 State Police Operations and $50 Court System charges

Illinois courts have already determined the following charges are fines subject to the $5 per day credit: $15 for the State Police Operations Fee under 705 ILCS 105/27.3a(1.5); and $50 for Court System under 55 ILCS 5/5-1101(c). (C. 111-113); *see Graves*, 235 Ill. 2d at 253-54; *People v. Moore,* 2014 IL App (1st) 112592-B, ¶46; *Wynn*, 2013 IL App (2d) 120575, ¶¶13, 17; *People v. Millsap*, 2012 IL App (4th) 110668, ¶31. As set forth above, the $50 Court

System fee should be reduced to $25 because Bingham was convicted of a Class A misdemeanor, not a felony. Either $40 ($15 + $25) or $65 ($15 + $50) of the $170 in presentence credit should therefore be applied against these costs.

(ii) Felony Complaint Filed (Clerk) "Fee"

Bingham was assessed a $190 charge for "Felony Complaint Filed, (Clerk)." *See* 705 ILCS 105/27.2a(w)(1)(A) (West 2012); (C. 135). Considering that the statute imposing this charge reflects an ascending schedule of eleven assessments (ranging from "Minor traffic or ordinance violations" to "Felony complaints"), its apparent purpose is to recoup expenses for the clerk, not to reimburse the State for costs "incurred as the result of prosecuting the defendant." *Graves*, 235 Ill. 2d at 250-51. Indeed, the clerk has no prosecutorial function, is not a prevailing party, and is a neutral ministerial officer of the court. *See People ex rel. Pardridge v. Windes*, 275 Ill. 108, 113 (1916).

Even if a clerk could incur expenses of prosecution, the record is devoid of evidence regarding any particular act or acts the clerk performed in this case that cost exactly $190. *See Graves*, 235 Ill. 2d 244 at 250-51. The $190 is an arbitrary figure imposed with the purpose of financing the clerk's mission as a whole, rather than reimbursing the clerk for a cost specifically incurred by Bingham's prosecution. This dollar amount "is not explicitly tied to, and bears no inherent relationship to, the actual expenses involved in prosecuting the defendant," and the fact "that the amount of the assessment is correlated directly to the severity of the offense shows that the assessment is punitive and not compensatory." *See People v. Smith*, 2013 IL App (2d) 120691, ¶ 21

(discussing a similar assessment). This assessment is also only imposed on persons who are "convicted." 705 ILCS 105/27.2a(w)(1)(A); *see also, Graves*, 235 Ill. 2d at 251 (charges that are "only imposed after conviction" are more likely to be fines).

The $190 "Clerk" charge is therefore a fine, not a fee. *See Graves*, 235 Ill. 2d at 250-51; *see also, Breeden*, 2014 IL App (4th) 121049, ¶¶ 140-44 (Appleton, J., concurring and dissenting) (finding that court should have *sua sponte* considered whether a similar charge was a fine, and concluding that it was a fine under *Graves*). Therefore, the remainder of Bingham's pre-sentence incarceration credit ($105 - $130, depending on the outcome of Argument I) should be used to offset the $190 assessment.

C. Summary

In sum, this Court should vacate the $250 DNA ID System fee and $25 of the Court System fee imposed pursuant to 55 ILCS 5/5-1101(c) where Bingham was convicted of a Class A misdemeanor rather than a felony. (See Argument III, *supra*). This Court should also apply Bingham's $170 in pre-sentence credit against the $15 State Police Operations charge, the $25 (or $50) Court System charge, and the $190 Felony Complaint charge, reducing the total amount of his fees from $699 to either $254 or $279, depending on the outcome of Argument III.

CONCLUSION

For the foregoing reasons, Jerome Bingham, defendant-appellant, respectfully requests that this Court hold that SORA violates due process as applied to Bingham and order that he be relieved of the obligation to register as a sex offender pursuant to Argument I; hold that SORA violates the prohibition against *ex post facto* laws and order that he be relieved of the obligation to register as a sex offender pursuant to Argument II; reduce his conviction for theft to a Class A misdemeanor, and remand his case for resentencing on that lesser offense, pursuant to Argument III; and, pursuant to Argument IV, reduce the total amount of Bingham's fees from $699 to either $254 or $279.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

DEBORAH NALL
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-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Deborah Nall, 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(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 42 pages.

_____

DEBORAH NALL
Assistant Appellate Defender