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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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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's opening brief cited *People v. Gray*, 2016 IL App (1st) 134012, ¶ 35 (leave to appeal granted September 28, 2016), for the proposition that "[a]n as-applied constitutional challenge supported by a sufficiently developed record may be raised for the first time on appeal." (Op. Br. at 6) Without mentioning *Gray*, the State argues that "this Court should refuse to consider defendant's as-applied challenge on this record" because "there was no evidence adduced as to the 'facts and circumstances' or, in fact, any discussion at all of defendant's circumstances at sentencing related to requirement that he register in SORA." (St. Br. at 4-5, citing *People v. Mosley*, 2015 IL 115972, ¶¶ 47, 49.

Bingham acknowledges *Mosley*'s holding that a constitutional challenge must be facial in the absence of an evidentiary hearing and findings of fact. 2015 IL 115872, ¶ 49. That requirement exists because unlike a facial challenge, which "requires demonstrating that a statute is unconstitutional under any set of facts, an as-applied challenge requires demonstrating that the statute is unconstitutional under the particular circumstances of the challenging party." *Gray*, 2016 IL App (1st) 134012, ¶ 33; *see also In re M.A.*, 2015 IL 118049, ¶¶39-41 (considering as-applied challenge raised for the first time on appeal); *In re Parentage of John M.*, 212 Ill. 2d 253, 268 (2004) (trial court was not entitled to find Parentage Act unconstitutional as applied without holding an evidentiary hearing). Here, however, Bingham appealed after a trial at which the parties thoroughly explored both the circumstances of the felony theft offense of which Bingham was ultimately convicted and Bingham's background for purposes of sentencing. (Op. Br. at 3-5) Contrary to the State's argument, the evidentiary record in this case is therefore sufficient to review Bingham's claim. *See Gray*, 2016 IL App (1st) 134012, ¶ 36 ("Contrary to the State's contention, the evidentiary record is sufficient to review defendant's claim.").

Turning to the merits, Bingham contends that SORA is unconstitutional as applied to him because there is no rational relationship between the minor theft of which he was convicted and SORA's purpose of protecting the public from sex offenders where Bingham's history and the circumstances of the theft do not indicate any risk that he will commit another sex offense. (Op. Br. at 5-6) In response, the State notes that SORA is intended to help law enforcement monitor

"selected categories of offenders that the legislature believes pose particular risks to public safety" because they have been convicted "of an offense that shows that he or she is a public safety risk." (St. Br. at 6) The State then quotes research providing that "'policies aimed at public protection should also be concerned with the likelihood of any form of *serious* recidivism, not just sexual recidivism.'" (St. Br. at 9) (emphasis added, original citations omitted) But, notably, the State does not explain how the minor theft of which Bingham was convicted evidences any public safety risk or serious recidivism.

The State also asserts that Bingham's reliance on *People v. Linder*, 127 Ill. 2d 174 (1989), "is easily distinguished." (St. Br. at 10) But the State never addresses Bingham's argument that 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 another sex offense, and thus that SORA's overly broad reach renders the statute unconstitutional as applied to Bingham. (Op. Br. at 9) The State also completely ignores Bingham's argument that *People v. Johnson*, 225 Ill. 2d 573 (2007), illustrates the "irrational zeal" behind the 2012 amendment to SORA that renders it unconstitutional as applied to Bingham. (Op. Br. at 9-10) The State has therefore failed to rebut Bingham's argument. 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.

The State relies primarily on this Court's decision in *People v. Fredericks*, 2014 IL App (1st) 122122, and the Illinois Supreme Court's decision in *People v. Malchow*, 193 Ill. 2d at 413 (2000), in arguing that Illinois' SORA has not become punitive. (St. Br. at 14-17, 21) As discussed below, *Malchow* did not apply the test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to Illinois' SORA and therefore is not instructive here. And *Fredericks* upheld SORA against an *ex post facto* challenge in large measure based on deference to "federal and Illinois precedent finding that sex offender registration is not punitive for purposes of the *ex post facto* clause." *Id*. at ¶¶55, 61. But, as illustrated by *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016), that deference is unsound and *Fredericks* was wrongly decided. Although the State correctly notes that Bingham was required to register as a sex offender following his 1994 conviction, the numerous amendments to SORA throughout the years has resulted in the *ex post facto* punishment of Bingham. (St. Br. 13). This Court should thus find that application of SORA to Bingham violates the prohibition against *ex post facto* laws.

A. *Doe v. Snyder*, 834 F.3d 696, illustrates the weaknesses in the State's argument and the need for this Court to reconsider its holding in *Fredericks*.

In *Snyder*, the Sixth Circuit held that Michigan's SORA cannot be applied to prior sex offenders without violating the prohibition against *ex post facto* punishment, given its punitive effect. 834 F.3d at 705. Tracking the similarities between Michigan and Illinois law, it is evident that despite its original non-punitive

purpose, Illinois' SORA, like Michigan's, has become punitive. *Id.* at 697-706. In 1999, Michigan required in-person registration on a quarterly or annual basis, depending on the offense. *Id.* at 697-698. It also posted the offender's name, address, biometric data, and photos (in 2004) online. *Id.* In 2006, Michigan "began taking a more aggressive tack" when it prohibited registrants from living, working, or loitering within 1,000 feet of a school. *Id.* at 698. Continuing this evolution toward punishment, in 2011 Michigan divided registrants into three tiers correlating to a perceived dangerousness, based solely on the offense committed and "not on individual assessments." *Id.* Additionally, all registrants were required to appear in person "immediately" when he or she obtained a new vehicle or "internet identifier," such as an email account. *Id.* All of the amendments applied retroactively and "carr[ied] heavy criminal penalties" if violated. *Id.*

In holding that Michigan's SORA, as amended, causes a punitive effect, the Sixth Circuit focused on five considerations *Smith v. Doe*, 538 U.S. 84 (2003), identified as germane to these types of statutes: "(1) Does the law inflict what has been regarded in our history and traditions as punishment? (2) Does it impose an affirmative disability or restraint? (3) Does it promote the traditional aims of punishment? (4) Does it have a rational connection to a non-punitive purpose? (5) Is it excessive with respect to this purpose?" *Snyder*, 834 F.3d at 701, citing *Smith*, 538 U.S. at 97, and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

As to the first, Michigan's SORA meets "the general, and widely accepted, definition of punishment" where: "(1) it involves pain or other consequences typically

considered unpleasant; (2) it follows from an offense against legal rules; (3) it applies to the actual (or supposed) offender; (4) it is intentionally administered by people other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offense was committed." *Snyder*, 834 F.3d at 701, citing H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 4–5 (1968)). The law's "geographical restrictions" are "very burdensome, especially in densely populated areas," reminiscent of the "ancient punishment of banishment." *Snyder*, 834 F.3d at 701. Likewise, Michigan's SORA also "resembles the punishment of parole/probation" due to the "numerous restrictions" on where registrants "can live, and work and, much like parolees, they must report in person, rather than by phone or mail." *Id.* at 703. The failure to do so "can be punished by imprisonment, not unlike a revocation of parole."*Id.* Indeed, the "basic mechanism and effects [of Michigan's SORA] have a great deal in common [with parole/probation]." *Id.* Thus, the first factor supports the conclusion that the effect of Michigan's SORA is punitive.

As to the second factor, *Snyder* acknowledges that the U.S. Supreme Court in *Smith* upheld Alaska's SORA against an alleged *ex post facto* violation. *Id.* at 703. However, as the Court observed in *Snyder*, "surely something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound." *Id.* Moreover, while the Michigan "SORA's restrictions are in some ways not as severe as complete occupation-disbarment," the Court in *Snyder* noted that "no disbarment case we are aware of has confronted a law with such sweeping conditions or approved of disbarment without some nexus between the regulatory purpose

and the job at issue." *Id*. at 703-704.Thus, it held, Michigan's SORA is "far more onerous than [the one] considered in *Smith*." *Id*. at 704.

Snyder gives "little weight" to the question of whether Michigan's SORA promote the traditional aims of punishment, as although the Act advances "incapacitation, retribution, and specific and general deterrence," many of its goals "can also rightly be described as civil and regulatory." *Id*.

As to the relationship between Michigan's SORA and its non-punitive aims of "keep[ing] tabs on [sex offenders] with a view of preventing some of the most disturbing and destructive criminal activity" and "keep[ing] sex offenders away from the most vulnerable," the Sixth Circuit emphasizes that there is "scant support for the proposition that SORA in fact accomplishes its professed goals." *Id.* Indeed, *Smith*'s pronouncement that "[t]he risk of recidivism posed by sex offenders is 'frightening and high,'" is belied by the empirical data. *Id.* (citing *Smith*, 538 U.S. at 103). One study finds that sex offenders are "actually *less* likely to recidivate than other sorts of criminals." *Snyder*, 834 F.3d at 704, citing Lawrence A. Greenfield, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003) (emphasis in original).

In fact, the Court cited statistical support that "laws such as SORA actually increase the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities."*Snyder*, 834 F.3d at 704-705, citing J.J. Prescott & Jonah E. Rockoff, DO SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS AFFECT CRIMINAL BEHAVIOR?, 54 J.L. & Econ. 161 (2011)). This is particularly

troubling where Michigan's SORA "makes no provision for individualized assessments of proclivities or dangerousness." *Snyder*, 834 F.3d at 705. And requiring "frequent, in-person appearances before law enforcement * * * appears to have no relationship to public safety at all." *Id*. Accordingly, Michigan's SORA cannot be defended on the basis that it reasonably serves its professed goals.[1]

Finally, because of the frequent in-person appearances and the "significant restrictions on where registrants can live, work, and 'loiter,'" the punitive effects of Michigan's "blanket restrictions thus far exceed even a generous assessment of their salutary effects." *Id*. The Sixth Circuit favorably cites various state decisions—all of which Bingham brought to this Court's attention in his opening brief—holding that similar laws have a punitive effect. *Id*. (citing *Doe v. State*, 111 A.3d 1077, 1100 (2015); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008). And notably, *Snyder* holds that Michigan's SORA is punitive even under the "clearest[-]proof" standard. *Snyder*, 834 F.3d at 700. That fact is important given the State's attempt here to distinguish *Doe v. State*, 189 P.3d 999 (Alaska 2008), on the basis that it purportedly would have been decided differently had the opinion used the magic words "clearest proof." (St. Br. at 20) Accordingly, as *Snyder* holds, *Smith*

[1] In this regard, *Snyder* illustrates the erroneous premise assumed by a case relied upon by the State: *State v. Trosclair*, 89 So.3d 340, 352 (2012) (holding in error that "sex offenders present an unusually high risk of recidivism"). (St. Br. 29).

does not confer "a blank check to states to do whatever they please in this arena." *Snyder*, 834 F.3d at 705.

Illinois' SORA is notably similar to Michigan's, and the same result reached in *Snyder* should follow here. In Illinois, child sex offenders may not reside within 500 feet of a "school, park, or playground." 730 ILCS 150/8 (West 2012). The burden facing Bingham is thus comparable to a registrant in Grand Rapids, Michigan—as under Illinois' SORA, in addition to school, parks and playgrounds also determine prohibitive residential zones. Like Michigan, Illinois' SORA requires frequent in-person trips to law enforcement agencies upon various triggering events, such as moving, purchasing a new vehicle, obtaining a new job, attending school, opening a new email account, etc. 730 ILCS 150/3(a), (b), (c)(3), (c)(4) (West 2012). Like Michigan, Illinois' SORA proscribes "heavy criminal penalties" for failing to comply with the Acts onerous requirements. *Snyder*, *Snyder*, 834 F.3d at 698; 730 ILCS 150/8-5 (West 2012) (first violation of Illinois' SORA is a Class 3 felony; second violation is a Class 2 felony). And Illinois, like Michigan, does not afford registrants a mechanism for demonstrating that they do not present a current danger of recidivism and therefore should be exempt from SORA's requirements. Accordingly, just as the Sixth Circuit has done in *Snyder*, this Court should hold that the effect of Illinois' SORA has become punitive, notwithstanding its stated purpose.

B. *Malchow* does not address this issue.

The State assumes that *Malchow's* analysis of the *Notification Law* applies to the SORA. (St. Br. at 14, 15, 19) This is incorrect, although the State's brief itself shows how this mistake might happen. And while the State notes that *People*

v. Fredericks, 2014 IL App (1st) 122122*,* cited *Malchow's* use of the *Mendoza-Martinez* test to affirm the constitutionality of the SORA, respectfully, *Fredericks* erred in so doing, as has every case that cited *Malchow's Mendoza-Martinez* analysis to affirm the SORA's constitutionality. *Fredericks*, 122122 at ¶58; (St. Br. 15, 20-21). *Malchow* used the *Mendoza-Martinez* to examine the 1998 Sex Offender and Child Murderer Community Notification Law (730 ILCS 152/101 *et seq*.) – *not* the 1998 Sex Offender Registration Act (730 ILCS 150-1, *et seq*.). *Malchow*'s analysis of the 1998 Sex Offender Registration Act shows how this is so:

> Defendant further contends that the Registration Act and the Notification Law disadvantage him because they increase the punishment for previously committed offenses. Resolution of this contention turns on the question of whether the provisions of the Registration Act and the Notification Law constitute punishment. In *People v. Adams*, 144 Ill. 2d 381, 163 Ill. Dec. 483, 581 N.E.2d 637 (1991), we upheld an earlier version of the Registration Act. As part of that decision, we held that requiring sex offenders to register is not punishment. *Adams*, 144 Ill. 2d at 386-90, 163 Ill. Dec. 483, 581 N.E.2d 637.
>
> *Malchow*, 193 Ill. 2d at 419.

Thus, *Malchow*'s affirmation of the SORA's constitutionality was based solely on *Adams*'s cursory analysis. The court continued:

> *Adams* does not completely dispose of defendant's argument, however, because the community notification provisions were not in effect at the time of that decision. *We thus consider defendant's ex post facto argument as it relates to the Notification Law*.

Id. (emphasis added). As this citation makes clear, rather than conducting a detailed analysis of the SORA using the *Mendoza-Martinez* test, as it did for the Notification Law, *Malchow* merely referred back to *Adams* with no consideration of the SORA's evolution between 1987 and 1998. Thus, *Malchow*'s *Mendoza-Martinez* analysis

addressed *only* the 1998 Sex Offender and Child Murderer Community Notification Law (730 ILCS 152/101 *et seq*.). *Malchow*, 193 Ill. 2d at 421-24.[2]

This failure to conduct a complete analysis seeps into the case law following *Malchow*. In *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 209 (2009), the court failed to conduct any meaningful analysis of the effects of the SORA's evolution on its punitive nature; rather, it cited *Malchow*'s *Notification Law* analysis to affirm the *SORA*. See also, *In re A.C.*, 2016 IL App (1st) 153047, ¶77 (erroneously concluding that this Court was "bound" to follow *Malchow* in concluding that SORA was nonpunitive). Likewise, in *Fredericks*, 122122 at ¶56, this Court simply cited *Konetski* and *Malchow*, and did not conduct an independent analysis that took into account the changes to the SORA since 1991. Unfortunately, in *Fredericks*, this Court made the same error as the State in assuming that *Malchow*'s *Mendoza-Martinez* analysis applies to the SORA, and not just the Notification Law. 2014 IL App (1st) 122122 at ¶58. The portion of *Malchow* cited by this Court in paragraph 58 of *Fredericks* only discusses the Notification Law. *See Malchow*, 193 Ill. 2d at 423; see also, *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶51, fn. 1 (avoiding defendant's *ex post facto* challenge). Thus, the State's citation to *Fredericks* is misplaced. In fact, the effect of the widespread citation to *Malchow* is that no

[2] The constitutional provisions implicated by these two statutes are not the same. In any case, the Notification Law *Malchow* affirmed also no longer exists. *Malchow* affirmed the Notification Law in part because the information gathered was "not disseminated to the community as a whole," but only to "child care facilities, school boards, and those persons likely to encounter a sex offender." 193 Ill. 2d at 422. That is no longer the case; the information is published to the world on the Illinois State Police website. *See* 730 ILCS 152/115(b) (requiring ISP to publish the sex offender database on its website).

Illinois court has undertaken a detailed analysis of the SORA as it now stands using the *Mendoza-Martinez* test.

It is true that certain cases, such as *Konetski* and *Fredericks,* cite the U.S. Supreme Court's analysis in *Smith*. *See Konetski*, 233 Ill. 2d at 210; *Fredericks*, 2014 IL App (1st) 122122 at ¶54. It is also true that *Smith* employed the *Mendoza-Martinez* test to affirm the constitutionality of Alaska's SORA in effect in 2000 in the face of an *ex post facto* challenge. However, *Smith* does not address the type of registration system now in place in Illinois under the SORA Statutory Scheme, but the Alaska statute in effect in 2003, which was in many respects, less onerous than the SORA Statutory Scheme under consideration here.

As demonstrated above, Illinois' SORA is more akin to Michigan's, which cannot be applied to previous offenders without constituting an *ex post facto* violation. *Snyder*, 834 F.3d at 706. Moreover, in his opening brief, Bingham cited cases from sister state courts which have used the *Mendoza-Martinez* test to correctly conclude that the SORA schemes, similar to Illinois', were punitive. *See Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013); *Gonzalez v. State*, 980 N.E.2d 312 (Ind. 2013); and *Doe v. State*, 189 P.3d 999 (Alaska 2008); *State v. Letalien*, 985 A.2d 4 (Maine 2009). (Def. Br. *passim*). The State dismisses *Doe v. State* by suggesting that it did not employ the "clearest proof" test. (State Br. 20). This argument is a red herring—as is perhaps best demonstrated by the fact that the Sixth Circuit favorably cited *Smith v. Doe*, *Starkey*, *Gonzalez* and *Letalien*, while correctly applying the "clearest proof" test. *Snyder*, 834 F.3d at 700.

In each of these cases, the court used the *Mendoza-Martinez* factors in a thoughtful and incisive analysis of the SORA in question. It is not invocation of the magical phrase "clearest proof" (although the court in *State v. Letalien*, 985 A.2d at 16, did so) that matters, but the thorough analyses of specific statutory elements. Moreover, even those courts that invalidated retroactive sex offender registration and reporting statutes without using the *Mendoza-Martinez* test also did so after considered deliberation of specific statutory elements that are similar to those in the SORA Statutory Scheme. *See Doe v. Dept. of Public Safety and Correctional Svcs.*, 62 A.3d 123 (Md. App. Ct. 2103); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011). (Def. Br. *passim*).

Of course, the cited authority is not binding on this Court. However, "[c]omparable court decisions of other jurisdictions, while not determinative of issues before an Illinois court, are persuasive authority and entitled to respect." *In re Marriage of Raski*, 64 Ill. App. 3d 629, 633 (5th Dist. 1978). *Snyder* and the others offer analyses directly on point in the absence of any comparable decision in Illinois. Therefore, where there is no ruling from the Illinois Supreme Court beyond *Adams*—which merely affirms that it is permissible to require sex offenders to register—this Court should look to the Sixth Circuit and sister states for guidance.

In sum, *Malchow* does not control the issue *sub judice*, and *Fredericks* was premised on deference to federal and Illinois case law that should not stand. The Sixth Circuit's recent decision in *Snyder* illustrates that Illinois' SORA cannot be applied to prior offenders without violating the constitutional guarantee against *ex post facto* punishment. And Illinois' case law has not given appropriate weight

to the *Mendoza-Martinez* factors, as applied to SORA. This Court should therefore hold that SORA violates the prohibition against *ex post facto* laws and order that Bingham be relieved of the obligation to register as a sex offender.

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.

In his opening brief, Jerome Bingham argued that he 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. (Op. Br. at 29-34) In response, the State asserts that "the notice provision of section 111-3(c) does not apply when the enhancing prior conviction is already an element of the offense and was expressly included in the charging instrument." (St. Br. at 28) The State then argues that the notice provision in 113-(c) does not apply here because "[t]he Supreme Court addressed this issue in *People v. Easley*," which held that "such notice is unnecessary when the prior conviction is already a required element of the offense and only one class of felony is possible for that offense as alleged in the charging instrument." 2014 IL 115581, ¶ 24 (St. Br. at 29-30). But *Easley* is no longer good law in light of the Supreme Court's decision in *People v. McFadden*, which held that the UUWF statute "does not require the State to prove the predicate offense at trial" because the legislation is only "concerned with 'the role of that conviction as a disqualifying condition for the purpose of obtaining firearms.'" 2016 IL 117424, ¶¶ 27-29.

Moreover, *Easley* does not apply in this case. In *Easley*, where the defendant was charged with unlawful use of a weapon by a felon, the Court found that the notice provision of section 111-3(c) did not apply because the defendant's "prior conviction for unlawful use of a weapon by a felon was already included as an element of the charged offense." 2014 IL 115581, ¶ 26; 720 ILCS 5/24-1.1(a) (West 2008). In this case, however, a prior conviction is not an included element of the offense of theft. 720 ILCS 5/16-1 (West 2014). Instead, Bingham's prior retail theft conviction was a classification-and-sentence-enhancing factor under the sentencing provisions of the theft statute. 720 ILCS 5/16-1(b)(2) (West 2014). Section 111-3(c) makes it clear that such factors "are not elements of the offense." *People v. Jameson*, 162 Ill. 2d 282, 288 (1994); 725 ILCS 5/111-3(c) (West 2014). The State's argument is therefore misplaced.

Similarly misplaced is the State's argument regarding a challenge to the indictment. (St. Br. at 33) Bingham is not challenging the charging instrument for failure to state an offense. Instead, he has raised an issue as to what sort of notice is sufficient under section 111-3(c) of the Code of Criminal Procedure of 1963 for imposition of an enhanced sentence. 725 ILCS 5/111-3(c) (West 2014). He argued for plain error review because his attorney failed to raise the error. (Op. Br. at 32-34) Because the State offers no response, Bingham stands on his opening brief in this regard. Moreover, he notes that by failing to respond the State has forfeited its ability to challenge this portion of Bingham's argument on appeal. Ill. S. Ct. R. 341(h)(7)/(i) (West 2016) ("Points not argued are waived").

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.

A. $250 State DNA ID System Fee

The State concedes that the $250 DNA analysis fee should be vacated. (St. Br. at 34-35) Bingham therefore stands on his opening brief in this regard. (Op. Br. at 37-38)

B. $50 Court System Fee

The State concedes that this fee may be levied against a person who has been convicted of committing a felony offense. (St. Br. at 35) As set forth in Bingham's opening brief, this argument is contingent on the outcome of Argument III, *infra*. (Op. Br. at 38) Bingham therefore stands on his opening brief in this regard.

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

The State concedes that Bingham is entitled to pre-sentence custody credit for the $15 State Police Operations Fee and the $50 Court System Fee. (St. Br. at 36 -38) But the State argues that Bingham is not entitled to pre-sentence custody

credit for the $190 Felony Complaint Filed (Clerk) Fee. (St. Br. at 38-40) The State is wrong because, as Bingham detailed in his opening brief, the $190 charge is an arbitrary amount and its purpose is to recoup expenses for the clerk, rather than to reimburse the State for costs "incurred as the result of prosecuting the defendant." *People v. Graves*, 235 Ill. 2d 244, 250-51 (2009). (Op. Br. at 40) 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).

In response, the State cites *People v. Tolliver*, 363 Ill. App. 3d 94 (1st Dist. 2006), for the proposition that this assessment is a fee rather than a fine. (St. Br. at 38) The State then argues that *Graves* does not support a contrary conclusion because here, unlike in *Graves*, the charges "reimburse the court system where defendant's criminal proceedings actually occurred." (St. Br. at 39) But the State does not point to any evidence regarding a particular act or acts the clerk performed in this case that cost exactly $190. (Op. Br. at 40) The State cites no authority for its contention that the $190 charge "was explicitly tied to" Bingham's prosecution because he "received the benefit of his case being heard in the county's criminal court system[.]" (St. Br. at 40) Where else was the case to be heard?

When considering a comparable "fee" in *Smith*, the Second District considered whether an assessment under the Counties Code (55 ILCS 5/5-1101(c)) was a fine or a fee. 2013 IL App (2d) 120691, ¶17. The authorizing statute stated that this

fee is to be paid upon a judgment of guilty, with differing amounts depending on the severity or type of crime. *Smith* held that "*Graves* disposes of defendant's claim of error, since the assessment was not "intended or geared to compensate the State (or the county) for the cost of prosecuting a defendant," and emphasizing that "[t]he assessment is not explicitly tied to, and bears no inherent relationship to, the actual expenses involved in prosecuting the defendant." 2013 IL App (2d) 120691, ¶21. *Smith* also noted that the fact that "the amount of the assessment is correlated directly with the severity of the offense shows that the assessment is punitive and not compensatory." *Id.*

Here, too, the amount of the assessment is "correlated directly with the severity of the offense," and bears "no inherent relationship" to the expenses involved in Bingham's prosecution. Despite the State's protestations to the contrary, there is no evidence to show that the $190 assessment has any purpose except to finance the clerk's mission as a whole, rather than reimbursing the clerk for a cost specifically incurred by Bingham's prosecution. 705 ILCS 105/27.2a(2)(1)(A). It is therefore a fine. The remainder of Bingham's pre-sentenced incarceration credit should be thus be used to offset the$190 assessment.

D. Summary

In sum, the State concedes that this Court should vacate the $250 DNA ID System fee and Jerome Bingham should be given pre-sentence incarceration credit of $65 for the $15 State Police Operations Fee and the $50 Court System Fee. In addition, this Court should vacate $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*), and then apply the remainder of Bingham's $170 in pre-sentence credit against the $25 (or $50) Court System charge and the $190 Felony Complaint fee, reducing the total amount 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,

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CERTIFICATE OF COMPLIANCE

I, Deborah Nall, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 19 pages.

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