IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
	)	No. 14-3150
v.	)	
JEROME BINGHAM,	)	
Defendant-Appellant.	)	

PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and says that he served 3 copies of the Brief and Argument for Plaintiff-Appellee in the above entitled cause by personal service on the below-named defense counsel, on the 30th day of November, 2016.

PATRICIA G. MYSZA
Deputy Defender
Office of the State Appellate Defender
203 N. LaSalle Street, 24th Floor
Chicago, Illinois 60601

Attention: **DEBORAH NALL**
Assistant Appellate Defender

STATE OF ILLINOIS
COUNTY OF COOK
Signed or Attested Before Me
this 30th day of November, A.D., 2016.
JOSEPH LANIER

(Seal)

OFFICIAL SEAL
IRIS SANTIAGO
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:03/29/20

Signature of Notary Public

No. 1-14-3150

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PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

JEROME BINGHAM,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County, Third Municipal District
Honorable **BRIDGET JANE HUGHES**, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

ANITA ALVAREZ,
State's Attorney,
County of Cook,
Room 309 - Richard J. Daley Center,
Chicago, Illinois 60602
eserve.CriminalAppeals@cookcountyil.gov
(312) 603-5496

Attorney for Plaintiff-Appellee

ALAN J. SPELLBERG,
MARY L. BOLAND,
HALEY PECK,
Assistant State's Attorneys,
Of Counsel.

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PEOPLE OF THE STATE OF ILLINOIS,

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JEROME BINGHAM,

Defendant-Appellant.

POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

Defendant, Jerome Bingham was charged with theft from an incident occurring at K-Mart in Norridge, Illinois on May 3, 2014. (C. 19; R. D3-9) The matter proceeded to a bench trial before the Honorable Bridget Jane Hughes where defendant was convicted of a Class 4, Felony Theft. (R. D32) Defendant was sentenced to 3 years in the Illinois Department of Corrections. (C.L. 114)

The indictment stated that defendant committed the offense of theft:

> "in that he, knowingly obtained or exerted unauthorized control over property, to wit: pallets, of a value of 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 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.L. 19)

The evidence established that on May 3, 2014, K-Mart store security guard Ali Sahtout was on duty at the K-Mart located at 4201 North Harlem Avenue in Norridge, Illinois. (R. D5) At approximately 6:30 p.m., Mr. Sahtout was in the security office assigned to monitor the cameras. (R. D6) Mr. Sahtout observed as defendant drove into the back open entrance of K-Mart, selected six pallets, put the pallets on his truck and drove off. (R. D6) Mr. Sahtout testified that these pallets are storage units that belong to K-mart. (R. D6) Mr. Sahtout explained that each pallet has a value of $12. (R. D7) Mr. Sahtout did not give defendant permission to take the pallets. (R D9) Mr. Sahtout explained that there were two people working the receiving area at that time – a female who was Indian and a male who was Caucasian. (R. D9)

After Mr. Sahtout observed the incident in the receiving area, he contacted the Norridge Police Department. (R. D7) Norridge Polcie Officer Giannakoupolous received a description of the offender, his vehicle and the license plate. (R. D13-14) Officer Giannakoupolous located defendant within two minutes right near K-Mart. (R. D13-14) He curbed defendant's vehicle and then contacted Mr. Sahout to come to the location for an identification. (R. D15) Mr. Sahtout identified defendant as the person he saw earlier in the receiving area. (R. D8) Mr. Sahtout identified the video and photographs contained in People's Exhibits #1-5 and testified that they truly and accurately depicted the events that occurred on May 3, 2014. (R. D9-10)

The parties stipulated that defendant had a prior retail theft conviction in Case No. 00125524901. (R. D20) The People entered their exhibits into evidence and rested. (R. D21) The court denied defendant's motion for a directed finding. (R. D21)

Defendant testified that he worked a metal scrapper. (R. D22) Defendant testified that six months before the incident, he had a conversation with someone who was driving a forklift in the back of the yard at K-Mart. (R. D23) According to defendant, during that conversation, the forklift driver told defendant that it would be okay to take the broken pallets. (R. D24) Defendant could not recall the forklift driver's name and described him as African-American and bald. (R. D26) The trial court found defendant guilty of theft. (R. D32)

The court denied defendant motion for a new trial and the case proceeded to sentencing. (R. E2) The pre-sentence investigation report reflected that defendant was convicted of attempted criminal sexual assault and sentenced to 4 years' in the Illinois Department of Corrections. (C.L. 34) The pre-sentence investigation report further

detailed defendant's prior criminal history:

Case Number	Offense	Date of Sentencing	Sentence
07 CR 1936001	Possession of a Controlled Substance	1/17/2008	1 year IDOC
05 CR 2623701	Possession of a Controlled Substance	1/18/2006	1 year IDOC
05120521	Possess title/registration	3/14/2005	2 days' jail
04 C 330118001	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 of a Controlled Substance (VOP)	5/10/1993	1 year IDOC
83 CR 148	Attempted criminal sexual assault	6/10/1983	4 years' IDOC

(C.L. 33-34)

At sentencing, the People presented evidence that the day before this theft, on May 2, 2014, defendant had taken additional pallets from K-Mart. (R. E4-6) The trial court noted that it considered that defendant had seven felony convictions and five misdemeanor convictions. (R. E14) The trial court sentenced defendant to 3 years' imprisonment. (R. E11) The trial court denied defendant's motion to reconsider sentence. (R. E13) Because defendant was sentenced for a felony after he had a prior sex conviction, defendant was required to register as a sex offender. This appeal follows

ARGUMENT

I.

THE SEX OFFENDER REGISTRATION ACT ("SORA") BEARS A RATIONAL RELATIONSHIP TO THE IMPORTANT STATE INTEREST OF ENHANCING PUBLIC SAFETY.

Defendant argues that SORA, 730 ILCS 150/1 et. seq., is unconstitutional as applied to him. (Def. Br. 5) He specifically argues that SORA violates his due process rights because "there is no rational relationship between the minor theft of which [defendant] was convicted and SORA's purpose of protecting the public from sex offenders where [defendant's] history and the circumstances of the theft in this case do not indicate that he is at risk of committing another sex offense." (Def. Br. 5-6) Defendant argues that because SORA violates due process as applied to him, he should be relieved of his obligation to register as a sex offender. (Def. Br. 11) The People maintain that SORA's provisions are rationally related to a legitimate state interest – enhancing public safety.

Initially, it must be noted that defendant makes an as-applied challenge to SORA. (Def. Br. 5) However, 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 his requirement that he register in SORA. As our Supreme Court has stated: in People v. Mosley, 2015 IL 115872: "'A court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact. [Citation.] Without an evidentiary record, any finding that a statute is unconstitutional 'as applied' is premature.'" Mosley, 2015 IL 115872, ¶47, quoting In re

Parentage of John M., 212 Ill. 2d 253, 268 (2004). When there has been no evidentiary hearing and no findings of fact, the constitutional challenge must be facial." Mosley, 2015 IL 115872, ¶49. Yet, here defendant has made no facial challenge to SORA. Thus, this Court should refuse to consider defendant's as-applied challenge on this record.

Even if this Court chooses to review defendant's as-applied challenge that he, a convicted sex offender, who had not been required to previously register pursuant to SORA, became subject to registration upon his conviction for a felony after July 1, 2011, it should find that a rational relationship exists between the State's interest in close monitoring of sex offenders like defendant who continue to commit felony offenses.

Whether a statute is constitutional is a question of law that is reviewed *de novo*. People v. Garvin, 219 Ill. 2d 104, 116 (2006); People v. Malchow, 193 Ill. 2d 413, 418 (2000). "Constitutional challenges carry the heavy burden of successfully rebutting the strong judicial presumption that statutes are constitutional. In addition, courts have a duty to uphold the constitutionality of a statute whenever reasonably possible, resolving any doubts in favor of its validity." People v. Patterson, 2014 IL 115102, ¶90. The party challenging the statute bears the "heavy burden of demonstrating a clear constitutional violation." Garvin, 219 Ill. 2d at 116 (citation omitted); People v. Cornelius, 213 Ill. 2d 178, 189-90 (2004) (challenging party must "clearly establish a constitutional violation").

Constitutional challenges to statutes are subject to only the minimal scrutiny of the "rational-basis" test unless they affect a fundamental constitutional right or involve a suspect class. People v. Reed, 148 Ill. 2d 1, 7-8 (1992). Here, it is undisputed that the rational basis test applies. (Def. Br. 6) See also In re J.W., 204 Ill. 2d 50, 67 (2003) (analyzing SORA using rational basis test); People v. Beard, 366 Ill. App. 3d 197 (1st

Dist. 2006) (rational relationship analysis applies to SORA); People v. Fuller, 324 Ill. App. 3d 728, 731-732 (1st Dist. 2001) (same). Under this test, review is limited and deferential, asking whether the means employed by the legislature are rationally related to the legislative purpose of the statute. In re J.W., 204 Ill. 2d at 67. A court must first determine whether there is a legitimate state interest or goal sought to be achieved by the statute, and, if so, whether there is a reasonable relationship between that goal and the means the legislature chose to obtain it. People v. Johnson, 225 Ill. 2d 573, 584-85 (2007). Under rational basis review, the statute will be upheld if there is any conceivable set of facts to show a rational basis for the statute. Id. at 585.

In examining the substance of his argument, it is clear that defendant fundamentally mischaracterizes the statute when he identifies SORA as a "[s]entencing provision." (Def. Br. 6) SORA is not a sentencing statute; it is a non-penal regulation. Registration laws, like SORA, are designed to prevent future danger to the public. It is beyond dispute that crime prevention is a compelling government interest. Schall v. Martin, 467 U.S. 253, 264-65 (1984). Preventing harm is a proper regulatory goal. United States v. Salerno, 481 U.S. 739, 747 (1987) ("There is no doubt that preventing danger to the community is a legitimate regulatory goal."). SORA extends a level of law enforcement monitoring to selected categories of offenders that the legislature believes pose particular risks to public safety. The registries facilitate law enforcement's immediate access to crucial information of the identity and location of a person who has been proven guilty beyond a reasonable doubt of an offense that shows that he or she is a public safety risk. In re J.W., 204 Ill. 2d at 67, citing People v. Adams, 144 Ill. 2d 381, 390 (1991) (identifying purpose of SORA as providing officers ready access to

information on known sex offenders); cf. Miranda v. Madigan, 381 Ill. App. 3d 1105, 1109 (4th Dist. 2008) (like SORA, "the legislature's intent in enacting the Violent Offender registry was to provide additional protection to the public").

Here, when defendant was convicted of attempt criminal sexual assault in 1983, he was not required to register. However, Illinois has evolved considerably in its sex offender registration laws over the past 30 years, with the Act being amended at least 30 times during its existence. Originally enacted as the Habitual Child Sex Offender Registration Act (P.A. 84-1279, eff. Aug. 15, 1986), the title of the Act was amended to the "Child Sex Offender Registration Act" in 1993 (P.A. 87-1064). The Act was subject to various amendments, applied retroactively, and expanded to include enumerated sex offenses and attempts against adult victims and certain sexual and nonsexual offenses against child victims; it was renamed to its present title of the "Sex Offender Registration Act" ("SORA") by 1996. *See* P.A. 89-8 eff. Jan. 1, 1996. One of the major evolutionary changes to SORA occurred in 1999, when sex offenders who were convicted of attempt criminal sexual assault, were designated as sexual predators and required to register for life. *See* P.A. 91-48, eff. July 1, 1999, amending 720 ILCS 150/2(E), 150/7. However, P.A. 91-48 only applied to convictions after its effective date of July 1, 1999, and even then, an offender convicted of attempt criminal sexual assault was designated as a sexual predator only if the victim was under 12 years old. By January 1, 2006, SORA had evolved to remove the requirement that the victim be under 12. *See* P.A. 94-168, eff. Jan. 1, 2006.

Additionally, P.A. 97-578, eff. Jan. 1, 2012, amended SORA to add the following provision:

> **(2.1) 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. Notification of an offender's duty to register under this subsection shall be pursuant to Section 5-7 of this Act [730 ILCS 150/5-7].

730 ILCS 150/3 (c)(2.1) (emphasis added).

Since defendant was convicted of the instant felony after July 1, 2011 and since he had a prior qualifying sex offense that designated him as a sexual predator, defendant's class 4 felony conviction from 2014 subjects him to SORA. (CL.114) Defendant has, in fact, registered pursuant to SORA. *See Illinois State Police, Sex Offender Information Sheet*, attached hereto as People's Exhibit A, and *Illinois Dep't of Corrections, Internet Inmate Status Sheet*, attached hereto as People's Exhibit B. This Court may properly take judicial notice of the Illinois State Police sex offender registry printout and the Illinois Department of Corrections Internet Inmate Status printout, because these documents fall within the public records exception to the hearsay rule set forth in Illinois Rule of Evidence 803(8) (eff. Jan. 1, 2011). *See* Cordrey v. Prisoner Review Board, 2014 IL 117155, ¶ 12 (taking judicial notice of IDOC inmate status sheet); In re Nylani M., 2016 IL App (1st) 152262, ¶36 (taking judicial notice of ISP sex offender registry printout, and noting that 730 ILCS 152/115(a) of the Sex Offender Community Notification Law imposes a duty on the Illinois State Police to create and maintain the sex offender database). Defendant does not claim otherwise.

As can be seen from the evolution of SORA, Illinois has a strong governmental

interest in preventing recidivism through increased monitoring of sex offenders who recidivate. The 2011 amendment to SORA surely enjoys a legitimate state interest—namely, enhancing public safety. See Malchow, 193 Ill. 2d at 420. SORA rationally promotes that interest by requiring defendants to re-register if their prior sex offense currently mandates lifetime registration, even if they previously completed a shorter registration period or register if they were never previously required to register before. Commission of subsequent felonies by sex offenders increases the risk to public safety, and lifetime monitoring by law enforcement of such offenders is rationally related to preventing recidivism by this class of sex offenders, because "defendants who have committed a new felony have thus shown general tendency to recidivate." People v. Fredericks, 2014 IL App (1st) 122122, ¶60. Indeed, research published by the U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, identifies that while recidivism rates for sex offenders are poorly reflected in official records, "sex offenders are far more likely to reoffend for a nonsexual crime than a sexual crime and, as Hanson and Morton-Bourgon (2004, p. 4) have aptly stated, 'policies aimed at public protection should also be concerned with the likelihood of any form of serious recidivism, not just sexual recidivism.'" Roger Przybylski. Sex Offender Management Assessment and Planning Initiative (SOMAPI), Research Brief: *Recidivism of Adult Sexual Offenders,* p.4 (July, 2015). Washington, DC: U.S. Department of Justice, Office of Justice Programs (quoting Hanson, R.K., & Morton-Bourgon, K. (2004). *Predictors of Sexual Recidivism: An Updated Meta-Analysis.* Ottawa, Ontario, Canada: Public Safety and Emergency Preparedness Canada). Avail at: http://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf. That is

exactly what the 2011 SORA amendment sought to do in requiring a convicted sex offender who commits a subsequent felony to become subject to the increased law enforcement scrutiny of registration requirements in SORA.

Illinois' strong interest in deterring recidivism is not limited to SORA's expansion that requires inclusion in the registry of sex offenders who commit subsequent felonies. In fact, the Illinois DNA indexing statute has also evolved and expanded the collection of DNA samples from only sex offenders to all felons. 730 ILCS 5/5-4-3. Our Supreme Court in People v. Garvin, 219 Ill. 2d 104, 124-125 (2006), upheld expanded DNA collection from nonsexual felony offenders, given that the State had a strong interest in deterring and solving crime. Similarly, in SORA, the Illinois legislature has rationally determined that sex offenders who recidivate increase the risk to public safety and warrant increased law enforcement monitoring.

Defendant's reliance upon People v. Lindner, 127 Ill. 2d 174 (1989), is easily distinguished. (Def. Br. 8-9) In Lindner, the Court held that the specific legislative intent of the vehicle code provisions for revocation or suspension of a driver's license was directly tied "to offenses involving the use of a motor vehicle." Id. at 181-82. Thus, where Lindner's sex offenses did not involve the use of a motor vehicle, the disability was not rationally related to the conduct, and the vehicle code provisions were unconstitutional. Here, however, the behavior the legislature seeks to deter is felony recidivism by sex offenders, and given that defendant's felony recidivism increases the risk to public safety by this convicted sex offender, registration, which brings increased law enforcement monitoring, is rationally related to that legitimate state interest. Therefore, SORA was constitutionally applied to this defendant.

II.

THE SEX OFFENDER REGISTRATION ACT DOES NOT VIOLATE THE PROHIBITION AGAINST *EX POST FACTO* LAWS.

Defendant contends that the amendments to the Sex Offender Registration Act, 730 ILCS 150/1 et seq. ("SORA") violate *ex post facto* principles. (Def. Br. 11). Specifically, he claims that "[a]t the time of his 1983 conviction for attempt aggravated criminal sexual assault, "he was not subject to any reporting requirement." (Def. Br. 11) Defendant argues that the reporting requirements that were added to SORA in 2012 violate federal and Illinois constitutional prohibitions against *ex post facto* laws because "the 2012 SORA[1] is not merely a regulatory scheme, but rather a new and ongoing punishment for an attempted sex offense that [defendant] was convicted of more than three decades before his conviction in this case." (Def. Br. 11) Defendant, however is mistaken as SORA has been repeatedly held not to be a punishment. See e.g., In re A.C., 2016 IL App (1st) 153047, ¶77 (SORA's evolution reflects "social changes and do not manifest a punitive bent"); People v. Pollard, 2016 IL App (5th) 130514 (declining to revisit precedent finding SORA and the Notification Law nonpunitive); People v. Avila-Briones, 2015 IL App (1st) 132221 (same).

Defendant's conviction for felony theft on September 11, 2014, triggered the application of SORA to him. (R. D32) Although SORA's provisions have been amended over the years through various amendments and expansions to keep up with the changing societal needs of public safety, the Illinois Supreme Court has repeatedly held

[1] There is no "2012" SORA. However, it was the provisions of P.A. 97-578, eff. Jan. 1, 2012, that operated to subject defendant, a convicted sex offender, to the requirements of SORA as a result of his 2014 felony conviction.

that SORA's registration requirement does not constitute punishment and retroactive application of SORA's amended provisions therefore do not violate *ex post facto* principles.

Here, defendant does not challenge the fact that he qualifies for registration under the amended SORA. Rather, he contends that the 2012 amendment to SORA (P.A. 97-578) is unconstitutional in that it violates *ex post facto* principles of the Illinois and United States Constitutions. (Def. Br. 11) Specifically, he contends that the amended SORA retroactively punished him for an offense for which he was not subject to any reporting requirements at the time of conviction. (Def. Br. 11) Defendant's claim fails because the retroactive application of these amendments do not constitute "punishment" prohibited by the *ex post facto* clause.

Whether a statute is constitutional is a question of law, which is reviewed *de novo*. People v. Dabbs, 239 Ill. 2d 277, 291 (2010). A statute is presumed constitutional, and the party challenging it bears the burden of rebutting that presumption. Id. at 291. The court has a duty to construe a statute in a manner that upholds its validity and constitutionality if it reasonably can be done. People v. Malchow, 193 Ill.2d 413, 418 (2000). The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature. In re B.C., 176 Ill. 2d 536, 542 (1997). The best indication of legislative intent is found in the language of the statute. In re B.L.S., 202 Ill.2d 510, 515 (2002). Where the language of the statute is clear and unambiguous, it will be given effect without resort to other aids for construction. In re D.L., 191 Ill.2d 1, 9 (2000).

A law violates *ex post facto* principles if it increases punishment for a crime after it is committed. People ex rel. Birkett v. Konetski, 233 Ill. 2d 185, 208 (2009). The

United States and the Illinois Supreme Courts have consistently held that retroactive application of SORA does not constitute "punishment" prohibited by the ex post facto clause. Smith v. Doe, 538 U.S. 84 (2003); Konetski, 233 Ill. 2d at 210; Malchow, 193 Ill. 2d 413, 424 (2000); People v. Adams, 144 Ill. 2d 381, 389 (1991). Instead, the purpose of SORA is to enhance public safety, not to punish the offenders required to register. Malchow, 193 Ill. 2d at 420; Adams, 144 Ill.2d at 387. Even though registration does impose a burden on people required to register, the burden is not substantial enough to constitute punishment. Malchow, 193 Ill. 2d at 420; Adams, 144 Ill. 2d at 388.

For instance, in Malchow, the Supreme Court considered the constitutionality of the community notification provisions. The Supreme Court held that an amendment to SORA did not violate *ex post facto* principles where it retroactively imposed registration on the defendant even though he had no duty to register at the time he was convicted of the qualifying sex offense. Malchow, 193 Ill. 2d at 424. Further, in Konetski, our Supreme Court found no *ex post facto* violation where an amendment to SORA retroactively reclassified a juvenile offender, from a "sex offender" to a "sexual predator," and thereby increased his registration period from 10 years to natural life, after the juvenile had been adjudicated guilty of criminal sexual assault. Konetski, 233 Ill. 2d 185, 210–11.

Defendant nonetheless argues that the seven-factor test used in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) provides the appropriate analytical framework for determining whether the application of SORA in this case constitutes an *ex post facto* violation. (Def. Br. 15) The application of the intent-effects test identified in Mendoza-Martinez, is one of statutory construction. The relevant inquiry is focused on Illinois'

SORA and a review of controlling Illinois authority construing our SORA statute demonstrates that the 2012 SORA remains non-punitive.

This Court has recently applied the Mendoza-Martinez framework to the 2012 version of SORA in People v. Fredericks, 2014 IL App (1st) 122122, to find that lifetime registration for a defendant who had a prior sex offense and then committed a later nonsex felony that triggered SORA registration did not convert SORA into punishment in violation of *ex post facto* prohibitions. Id. at ¶¶58-60. This Court's conclusion was the same as that reached by the Illinois Supreme Court in Malchow, 193 Ill.2d at 421 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (concluding that the Notification Law was non-penal). Fredericks, 2014 IL App (1st) 122122 at ¶58, *citing* Malchow, at 421-24. Defendant does not address Fredericks in his brief. However, consistent with the decisions of Illinois authorities, defendant's argument that the 2012 SORA is punitive should be rejected.

The intent-effects test of Mendoza-Martinez is a two-step inquiry. First, the "focus of the inquiry is upon whether the Illinois legislature, in passing the statute, meant the statute to establish civil proceedings. If the intent was to enact a statutory scheme that is non-punitive and civil, the inquiry becomes whether that scheme is so punitive either in effect or purpose so as to negate the legislature's intent to deem it civil." People v. Cornelius, 213 Ill. 2d 178, 208 (2004), citing Smith v. Doe, 538 U.S. 84, 92 (2003). From the earliest versions of SORA, the purpose was to create a method of protection from the increasing incidence of sexual assault and sexual abuse. See Adams, 144 Ill. 2d at 387. Accordingly, Illinois reviewing courts have repeatedly construed the provisions of SORA as non-punitive civil regulations that are not related to the length or nature of

the sentence imposed for the criminal offense. See People v. Cardona, 2013 IL 114076, ¶24 ("it is worth repeating that sex offender registration is not punishment"); Konetski, 233 Ill. 2d at 203 ("This court has repeatedly held, though, that [SORA's] requirements do not constitute punishment . . . it is a regulatory statute"); In re J.W., 204 Ill. 2d 50, 73 (2003) (same); Malchow, 193 Ill. 2d at 420 (same). Defendant does not challenge that the intent of SORA is nonpunitive. (Deft. Br. 15)

In the second step of the inquiry, the Mendoza-Martinez framework examines seven factors to determine the effect of a statute: (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as punishment; (3) whether the sanction comes into play only on a finding of scienter; (4) whether operation of the sanction will promote retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which the sanction may rationally be connected is assignable to it; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned. Fredericks, 2014 IL App (1st) 122122, ¶58 citing Malchow, 193 Ill. 2d at 421 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

The Mendoza-Martinez factors are "neither exhaustive nor dispositive, but are useful guideposts." Smith, 538 U.S. at 97 (internal quotation marks and citations omitted); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 n.7 (1984) (list of considerations is "neither exhaustive nor dispositive"). Illinois has adopted these guideposts as analyzed by the United States Supreme Court in Smith in its analysis of our Sex Offender Notification law. Cornelius, 213 Ill. 2d 178 (applying the Smith analysis to conclude that the Notification Law is non-punitive under United States and Illinois

constitutions); see also Malchow, 193 Ill. 2d at 421 (applying Mendoza-Martinez test). As a result, defendant must show by the "clearest proof" that the effects of SORA are sufficiently punitive to overcome the General Assembly's preferred categorization that it is a civil statute. Malchow, 193 Ill. 2d at 421, citing Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

This Court in Fredericks, 2014 IL App (1st) 122122, applied the Mendoza-Martinez seven-factor test and rejected the same argument defendant makes here. In Fredericks, this Court held that section 3(c)(2.1) of SORA does not violate *ex post facto* principles. Id. at ¶61. In that case, the defendant was convicted of attempted aggravated criminal sexual abuse in 1999 and was required to register for 10 years as a sex offender. Id. at ¶4. The defendant completed his 10-year registration period without reoffending. Id. In 2012, the defendant pleaded guilty to a felony drug offense and received two years of probation. Id. at ¶5. The defendant was subsequently required to register as a sex offender for life. Id. The defendant therefore sought to withdraw his guilty plea, arguing that the retroactive application of the lifetime sex offender registration under section 3(c)(2.1) of SORA violated the constitutional prohibition of *ex post facto* laws. Id. at ¶52.

Fredericks found that the first five factors weighed in favor of finding that SORA did not impose punishment. Id. at ¶58. With respect to the sixth and seventh factors, this Court found that "[t]he need to protect the public from sex offenders [wa]s diminished with respect to defendant, who ha[d] not been convicted of a sex offense since 1999," and that "[t]he imposition of lifetime sex offender registration [was] more excessive in its impact on defendant, since he already completed a 10-year registration period without

reoffending, and his later conviction was for a drug offense rather than a sex offense." Id. at ¶59. Even though these two factors weighed more in the defendant's favor because they appeared "more punitive," this Court in Fredericks upheld SORA. Id. at ¶60. Specifically, this Court stated that:

> These facts do not persuade us, however, that this case is distinct from our supreme court's precedent. Even though the sixth and seventh factors weigh more in defendant's favor in this case than in Malchow, they are insufficient to change nature of sex offender registration from a civil regulatory scheme to a punishment. Section 3(c)(2.1) still serves the purpose of protecting the public from sex offenders: it requires both that a defendant be previously convicted of a sex offense and that the prior sex offense now be one with a longer registration period. 730 ILCS 150/3(c)(2.1) (West 2012). Section 3(c)(2.1) also limits its applications to defendants who have committed a new felony and have thus shown a general tendency to recidivate. Id. The fact that the Act did not require defendant to commit another sex offense before subjecting him to lifetime registration is insufficient reason to now conclude that sex offender registration is punitive.
>
> We adhere to federal and Illinois precedent finding that sex offender registration is not punitive for purposes of the *ex post facto* clause. Although it has a more punitive effect in this case, where defendant has not committed another sex offense since completing his 10-year registration requirement, this fact alone does not make retroactive sex offender registration punitive. We thus reject defendant's *ex post facto* claim.

Id. at ¶¶60-61.

As such, this Court has recently explicitly rejected an *ex post facto* challenge to SORA. This Court should likewise affirm the constitutionality of the SORA, because SORA imposes no punishment on defendant.

Nonetheless, defendant argues that SORA constitutes affirmative disabilities and restraints similar to probation or mandatory supervised release, warranting a finding that

SORA is punitive under the first Mendoza-Martinez factor. (Def. Br. 16) However, courts have consistently found that the legislature's intent behind SORA was to enhance public safety, not to punish the offenders required to register. Malchow, 193 Ill. 2d at 420; Adams, 144 Ill. 2d at 387. In Adams, the Illinois Supreme Court held that the registration requirement "impose[d] no restraints on liberty or property." Adams, 144 Ill. 2d at 387. The Supreme Court in Adams further declined to analyze the registration requirement under the Mendoza-Martinez factors, because the Court had found that that those factors should only be used where "conclusive evidence of legislative intent [wa]s unavailable." Id. at 388. The Court explicitly found that, as a preliminary matter, the legislative intent with respect to SORA was "clearly nonpenal in nature, focusing not on the burden to any particular defendant, but rather on the advantages given to law enforcement agencies in the protection of children." Id. In Malchow, the Illinois Supreme Court reaffirmed its holding in *Adams* that requiring sex offenders to register does not constitute punishment. Malchow, 193 Ill. 2d at 424; People v. Downin, 394 Ill. App. 3d 141, 145 (3d Dist. 2009).

Defendant nonetheless claims that the Supreme Court in Malchow relied on Adams to "dispose of that defendant's *ex post facto* challenge to the 1998 SORA and did not employ the Mendoza-Martinez test to affirm SORA. (Def. Br. 15) It is true that Adams, 144 Ill. 2d 381, did not employ the intent-effects test first identified in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), in finding the precursor to SORA constitutional. Adams did consider whether to apply Mendoza-Martinez to that defendant's eighth amendment challenge, but determined that the clear purpose of SORA's precursor was non-penal and so it did not have to reach consideration of the

Mendoza-Martinez factors. 144 Ill. 2d at 388. Malchow involved an *ex post facto* challenge. 144 Ill. 2d at 418. It relied on Adams in holding that SORA's precursor was not punitive in nature, then Malchow applied the Mendoza-Martinez framework to examine whether the related Sex Offender Community Notification Law was a regulation or punishment and concluded that the Notification Law was a non-penal statute. 144 Ill. 2d at 421-24.

In Malchow, the Illinois Supreme Court found that four of the first five Mendoza-Martinez factors weighed in favor of finding that the Notification Law did not impose punishment. Malchow, 193 Ill. 2d at 421-23. With respect to the sixth factor, the Supreme Court stated that sex offender registration and community notification legitimately served the "purpose [of] protection of the public rather than punishment." Id. at 423. With respect to the seventh factor, the Supreme Court found that notifying the public of a defendant's sex-offender status was not an excessive means to achieve that end. Id. at 423-24. Consequently, defendant's claim that the Supreme Court in Malchow did not address the *ex post facto* argument fails.

Defendant contends that the 2012 amendment to the Act is more onerous than the requirements of probation and mandatory supervised release (Def. Br. 21) Specifically, defendant claims that SORA imposes "similar" and sometimes even more requirements on offenders than probation or mandatory supervised release. (Def. Br. 20) Contrary to defendant's claim, the registration requirement is not more punitive than the requirements placed on probationers or individuals on mandatory supervised release. In fact, the United States Supreme Court in Smith v. Doe has already squarely rejected this argument. Smith v. Doe, 538 U.S. 84 (2003). Specifically, the Supreme Court found that

in contrast to probationers and those on supervised release, offenders subject to the registration requirements are free to move where they wish and to live and work as other citizens, with no supervision. Id. at 102. Although registrants must inform the authorities after they change their facial features, borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. Id.

Defendant argues that after Smith was decided, the Alaska Supreme Court, analyzing the same law as the U.S. Supreme Court and utilizing the Mendoza-Martinez framework, came to the opposite conclusion that its state's SORA was punitive. (Deft. Br. 19, citing Doe v. State, 189 P.3d at 1009). But a review of the Alaska court's opinion shows that it offers no support to the analysis here. As the Alaska Supreme Court explained in Doe v. State, while it used the Mendoza-Martinez factors, it adopted a lower standard of proof in analyzing the law under its state constitution than the "clearest proof" standard articulated by the U.S. Supreme Court. Id. Illinois, however, has adopted the Smith "clearest proof" standard. Cornelius, 213 Ill. 2d 178 (applying the Smith majority's analysis to SORA's Notification Law).

Additionally, Alaska followed the dissent in Smith v. Doe, 538 U.S. at 111, in finding "significant affirmative obligations" in its state SORA's registration, disclosure and dissemination provisions. Id., 189 P.3d at 1009, 1011. For the same reason, defendant's citations to out of state cases offer no support. (Deft.Br.18-20) For example, whereas Illinois Courts have followed the majority in Smith, Oklahoma and Indiana adopted the rationale of the dissent in Smith, 538 U.S. at 111. See Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1022-23 (Okla. 2013) (in-person registration "significant and intrusive," and analogizing the registration duties to be "similar to treatment received by

probationers subject to continued supervision" and therefore punitive); Gonzalez v. State, 980 N.E.2d 312, 317 (Ind. 2013) (registry imposes "significant affirmative obligations" and stigma). Defendant also argues that Maine, in State v. Letalien, 985 A.2d 4, 24-25 (Me.2009), has found that "in-person" registration is a "form of significant supervision by the state." (Deft.Br.18) However, in Maine's version of SORA, the registration duty is a part of the sentence and thus the supervision component is a part of the sentencing structure, so the analysis in Letalien, 985 A.2d at 24-25 offers defendant no support as Illinois' SORA is not a part of the sentence.

As to the second factor, regular, mandatory in-person appearances are consistent with the goal of public safety and do not limit a registrant's freedom. Clearly these cannot be the equivalent of parole or mandatory supervised release conditions as defendant claims. (Deft. Br. 22) Illinois reviewing courts have already determined that lifetime registration is not an affirmative restraint. People v. Downin, 394 Ill. App. 3d 141, 146 (3d Dist. 2009); *and see* In re J.W., 204 Ill. 2d 50 (2003) (lifetime registration of juveniles is not punitive). And even if a lifetime registration period has more impact on defendant, it still serves the purpose of protection of the public from convicted sex offenders. Fredericks, 2014 IL App (1st) 122122, ¶60 (finding that although there is more of a punitive effect where a defendant becomes subject to SORA by the commission of a non-sex offense after having completed his 10-year registration requirement, SORA was not converted into a punitive statute). Other "restraints," such as restricting sexual predators from certain employment or regulating their presence in parks and playgrounds are not direct restraints of SORA, but secondary and collateral independent limits in furtherance of Illinois' compelling interest in protecting children.

Cf. Commonwealth v. Perez, 2014 PA Super 142 (Pa. Super. Ct. 2014).

Illinois is free to recognize that in-person appearance is not an affirmative restraint and the act of registering is no more onerous than showing up at the required times in person at the Secretary of State's office to get a driver's license. *See* Logan, 302 Ill. App. 3d at 329 (finding registration requirement to be *de minimis*). Appearing in-person is rationally related to ensuring that the registrant is actually the sex offender who is required to register and cannot be equated with physical restraint or a loss of freedom.

Defendant nonetheless argues that for the second factor, registration is similar to "conditions of supervised release or parole," and that SORA is punitive because of the "shaming" aspect of its provisions. (Def. Br. 22) However, as the Supreme Court in Adams noted, the registration requirement "was designed to aid law enforcement agencies" and not to punish. Adams, 144 Ill. 2d at 387. "With the registration requirement, the habitual offender's address is readily available to law enforcement agencies, which may then question and, if necessary, detain him under appropriate circumstances." Id. The registration requirement is merely "an innocuous duty" placed on the repeat offender, while it brings tremendous benefits to law enforcement agencies by allowing them to monitor the movements of the recidivist offender. Id. at 388. Thus, the purpose of SORA is not to shame, but to aid law enforcement and protect the public.

Defendant again bypasses the Illinois controlling authority and instead relies on out of state cases as he did in analyzing the first factor, and his reliance suffers from the same infirmity – that these states follow the *Smith* dissent unlike Illinois that follows the majority. Defendant's view has been rejected by the United States Supreme Court in Smith, 538 U.S. 84, when the Court concluded in reversing the Ninth Circuit:

> The Court of Appeals held that the registration system is parallel to probation or supervised release in terms of the restraint imposed. This argument has some force, but, after due consideration, we reject it. Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.

Smith at 101-102 (internal citations omitted). *Smith* construed the Alaska version of SORA that provided for lifetime registration for an aggravated sex offense and required offenders to notify police if they moved, and if they failed to comply with the law, registrants were subject to criminal prosecution. Id. at 90. Illinois SORA is comparable in that no supervising officer is assigned to monitor a registrant and a registrant does not have to seek permission of law enforcement before undertaking various activities, nor can any officer seek to "revoke" registration. Thus, SORA does not resemble punishment.

Regarding the third factor – scienter – defendant acknowledges that SORA can be applied where scienter has not been shown and agrees that this factor has little weight. (Def. Br. 23-24) Indeed, in Smith, the Supreme Court concluded that the scienter factor in the Alaska SORA statute was entitled to "little weight" in its analysis because "[t]he regulatory scheme applies only to past conduct, which was, and is, a crime." Smith, 538

U.S. at 105. Illinois has followed this analysis and thus this Court should not depart from the Supreme Court's direction that it does not weigh in favor of concluding that SORA is punitive in nature.

On the fourth factor - retribution and deterrence – defendant argues that SORA promotes the traditional aims of punishment.[2] (Def. Br. 24) However, SORA remains non-punitive where it has a rational connection to a legitimate non-punitive purpose - public safety. *See* Smith, 538 U.S. at 102-03 (public safety is a legitimate purpose of registration law). "Where a legislative restriction is an incident of the state's power to protect the health and safety of its citizens, the restriction will be considered to evidence an intent to exercise that regulatory power, and not a purpose to add to a punishment." People v. Leroy, 357 Ill. App. 3d 530, 538 (5th Dist. 2005), citing Smith, 538 U.S. at 93-94. It is true that SORA can operate to deter future crime, but a deterrent effect does not negate the overall remedial and regulatory nature of an act and deterrence can serve both criminal and civil goals. As the Supreme Court has observed, "[t]o hold that the mere presence of a deterrent purpose renders such sanctions criminal ... would severely undermine the Government's ability to engage in effective regulation." Smith, 538 U.S. at 102. Thus, this factor does not override the clear regulatory purpose of SORA.

Defendant nonetheless cites Justice Souter's concurrence in Smith in support, and notes that Oklahoma and Kentucky have also cited to Justice Souter's concurrence in Smith. (Def. Br. 24, citing Smith, 538 U.S. at 108-09 (Souter, J., concurring)) However,

[2] In this regard, defendant cites to Com. v. Baker, 295 S.W.3d 437, 445 (Ky.2009), but that case involved an *ex post facto* application of a residency provision within Kentucky's SORA that operated to expel registrants from their homes and thus equated to "banishment." (Def. Br. 24) Illinois' SORA does not include any residency prohibitions.

Justice Souter was not making a finding but instead commenting on the fact that if a SORA is too broad in scope, then it could "outpace the law's stated civil aims." Illinois has carefully limited its scope to sex offenses and sexually-motived crimes against children. For example in 2006, Illinois created a separate Illinois Murderer & Violent Offender Against Youth Registration Act (730 ILCS 154/1 *et seq.*) to move out of SORA those violent crimes that were beyond SORA's regulatory aims. *See* P.A. 94-945, § 1025 (eff. June 27, 2006). And Illinois has added a termination provision to SORA for juveniles adjudicated guilty of sex offenses who pose no risk of harm (such as no-force sex between teens), thus recognizing the need to limit the scope of SORA with regard to youthful offenders. 730 ILCS 150/3-5 (permitting a hearing after 5 years if a felony or 2 years if adjudication is of equivalent misdemeanor sex offense). Clearly, Illinois has carefully addressed and limited the scope of SORA and this factor does support that SORA has a non-punitive effect.

On the fifth factor – whether SORA applies to conduct that is already criminal - defendant again turns to Alaska, Maine and Oklahoma for support (Def. Br. 26, citing Doe, 189 P.3d at 1014; Letalien, 985 A.2d at 22; and Starkey, 305 P.3d at 1028), however, like the third factor, there is clear guidance from the Supreme Court as it concluded that this factor is of "little weight." Smith, 538 U.S. at 105. Malchow did find that this was the only factor in favor of defendant (193 Il.2d at 423), but SORA is triggered at the time of conviction, because recidivism is the statutory concern. The duties imposed by SORA are not predicated upon a present violation but a concern for the high rate of recidivism. No doubt this is why Smith declared that this factor is entitled to "little weight."

Defendant concedes that on the sixth factor – an alternative nonpunitive purpose – SORA has a legitimate public safety purpose, but he argues that this factor is entitled to little weight (Def. Br. 26, citing Adams, 144 Ill.2d at 388) There is no question that from its inception the rationale for SORA has been clear: "the welfare and protection of minors has always been considered one of the State's most fundamental interests." People v. Huddleston, 212 Ill. 2d 107, 133 (2004). There can be no doubt that Illinois has a compelling interest in seeking to prevent sex offenses. This factor weighs against finding SORA to be punitive in nature.

Finally, on the seventh factor -- whether the sanction appears excessive in relation to the alternative purpose assigned - defendant ignores the fact that Smith rejected the notion that the Alaska version of SORA was excessive and instead again cites to the dissent in that case. (Def. Br. 27, citing Smith, 538 U.S. at 116-17, (Ginsburg, J., dissenting). But in rejecting the notion that the Alaska SORA was excessive, Smith found that the legislature could reasonably regulate the grave concerns of recidivism of sex offenders as a class and was not required to provide individual mechanisms for risk assessment. Smith, 538 U.S. 103-04. Indeed, Smith observed that: "[c]ontrary to conventional wisdom, most re-offenses do not occur within the first several years after release," but may occur "as late as 20 years following release." Id. at 104, citing National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, *Child Sexual Molestation: Research Issues* 14 (1997). Thus, SORA is not excessive and this factor weighs in favor of the State.

Having considered each of the seven *Mendoza-Martinez* factors, it is clear that the impact of SORA does not transform the civil regulation into a criminal one. While

SORA has evolved, it remains a non-punitive regulation. Defendant heavily relies on cases from other states as well as dissenting opinions to support his claims that SORA violates the prohibition against *ex post facto* laws. However, dissents and holdings from other states are not applicable or relevant in the matter at hand. As the above-cases make clear, each state engages in statutory construction of its state registries based upon its own principles and constitutional analysis. Further, "[i]t is well settled that the appellate court must follow the law as declared by our supreme court." Rockford Financial Systems, Inc. v. Borgetti, 403 Ill. App. 3d 321, 331 (2d Dist. 2010). *See also* People v. Fountain, 2012 IL App (3d) 090558, ¶ 23 ("As an intermediate appellate court, we are bound to honor our supreme court's conclusion on [an] issue unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court.").

This Court has already squarely rejected a sex offender's claim that SORA violates *ex post facto* principles. Fredericks, 2014 IL App (1st) 122122, at ¶¶ 60-61. This Court should likewise affirm the constitutionality of SORA because it imposes no punishment. Defendant has not demonstrated 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. Similarly, applying the "clearest proof" Smith standard consistent with the analysis of Illinois, the Louisiana Supreme Court determined that its SORA did not subject a registrant to an affirmative disability or restraint sufficient to render it punitive. State v. Trosclair, 89 So.3d 340, 352, 357 (2012) ("sex offenders present an unusually high risk of recidivism, and that stringent registration, reporting, and electronic surveillance requirements can reduce that risk and thereby protect the public without 'punishing'

offenders") (internal quotations omitted). *Cf.* United States v. Young, 585 F.3d 199, 204-05 (5th Cir. 2009) (citing cases and agreeing with the 4th, 6th, 8th, 9th, 10th and 11th Circuits that have found federal sex offender registration law to be civil and not punitive). Defendant's claim that the 2012 amendment's requirements are more onerous is therefore without merit.

III.

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.

Defendant argues that the State failed to comply with 725 ILCS 5/111-3(c) when it "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." (Def. Br. 29) According to defendant, the State was required to "specifically state its intent to increase the classification of offense from a Class A misdemeanor to a Class 4 felony." (Def. Br. 31) Defendant argues that because the State failed to do so, this court should reduce defendant's convicted to a Class A misdemeanor and remand his case for resentencing. (Def. Br. 30) The People maintain 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.

Pursuant to section 111-3(c), "[w]hen 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 2008). Moreover,

> "[f]or 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; it does not include an increase in the sentence applied within the same level of classification of offense." Id.

As this Court has observed, "[t]he legislature enacted section 111-3(c) to ensure that a defendant received notice, before trial, of the *offense* with which he is charged." People v. Jameson, 162 Ill. 2d 282, 290 (1994) (emphasis in original).

Here, defendant was convicted of theft pursuant to Section 16-1(a)(1) of the Criminal Code of 1961, which provides:

> "A person commits theft when he or she knowingly: Obtains or exerts unauthorized control over property of the owner." 720 ILCS 16-1(a)(1).

Defendant was sentenced as a Class 4 offender pursuant to section 16-1(b)(2) of the Criminal Code. Section 16-1(b)(2) provides:

> 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, robbery, armed robbery, burglary, residential burglary, possession of burglary tools, home invasion, forgery, a violation of Section 4-103, 4-103.1, 4-103.2, or 4-103.3 of the Illinois Vehicle Code [625 ILCS 5/4-103, 625 ILCS 5/4-103.1, 625 ILCS 5/4-103.2, or 625 ILCS 5/4-103.3] relating to the possession of a stolen or converted motor vehicle, or a violation of Section 17-36 of the Criminal Code of 1961 or the Criminal Code of 2012, or Section 8 of the Illinois Credit Card and Debit Card Act [720 ILCS 5/17-36 or 720 ILCS 5/1-1 et seq. or 720 ILCS 250/8 (now repealed)] is guilty of a Class 4 felony.

The Supreme Court addressed this issue in People v. Easley, 2014 IL 115581. In Easley, the defendant was convicted of two counts of unlawful use of a weapon by a felon as a Class 2 offense, based on his previous conviction for the felony offense of unlawful use of a weapon by a felon. Id. at ¶ 10. On appeal, the defendant argued amongst other things, that pursuant to 111-3(c), the State was required to notify the

defendant of its intention to seek an enhanced charge. Id. at ¶13. In ruling on the issue, the Supreme Court stated, "In construing the language of section 111-3(c), it is clear that the notice provision applies only when the prior conviction would enhance the sentence is not already an element of the offense." Id. at ¶19. The court continued, "If the legislature had intended section 111-3(c) to apply even when the prior conviction is an element of the offense, it would have clearly said so. Logically, 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." Id. at ¶24.

Thus, here the notice provision in 113-(c) similarly does not apply. The indictment put defendant on notice that the current charge of theft was premised on his already having committed the offense of retail theft, and by extension, that he was facing a Class 4 offense. Here, the indictment charged defendant as follows:

> "Jerome Bingham committed the offense of 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 Complied Statutes 1992 as amended. . ." (C.L. 19) (emphasis added).

Only one offense level and sentencing range is allowed for a defendant charged with theft when that defendant has a prior retail theft offense: a Class 4 offense with a prison term between 1 and 3 years. 720 ILCS 5/16-1(a)(1) ("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, robbery, armed robbery, burglary, residential burglary, possession of burglary tools, home invasion, forgery[...] is guilt of a Class 4 felony." Tellingly, there was no dispute during the sentencing hearing that defendant was facing a Class 4 sentence and not a Class A misdemeanor. (E8-11) Section 111-3(c) did not apply in this case because the People did not seek to enhance defendant's sentence beyond the Class 4 sentence that he was required to receive for committing the offense of theft with a prior retail theft as alleged in the indictment. See Powell, 2012 IL App (1st) 102363, ¶12 (rejecting the argument that UUW by a felon can be "enhanced" from a Class 3 to a Class 2 when the prior conviction alleged in the indictment requires a Class 2 sentence).

In contrast, the offense of violating an order of protection, and the analysis of that offense in People v. Brooks, 2012 IL App (4th) 100929, is an example of when section 111-3(c) applies. The defendant in Brooks was charged with violating an order of protection under 720 ILCS 5/12-30(a)(1) (West 2008).[3] 2012 IL App (4th) 100929, ¶ 3. By its own terms, a prior conviction of unlawful restraint is not an element of that offense. Subsection (d) of that statute sets forth the possible sentences. Normally, a violation of an order of protection is a Class A misdemeanor. 720 ILCS 5/12-3.4(d) (West 2012). A violation of an order of protection is enhanced to a Class 4 felony, however, if the defendant has a prior conviction for unlawful restraint. Id. Section 111-3(c) required that the People notify the defendant of their intent to seek an enhanced sentence based on his prior conviction for unlawful restraint because that prior conviction was not—and could not—be an element of the offense. Brooks, 2012 IL App (4th)

[3] This offense was renumbered as 720 ILCS 5/12-3.4 (West 2012), effective July 1, 2011.

100929, ¶¶ 18, 21, 26. The People satisfied section 111-3(c) by charging the defendant by indictment with "'violation of order of protection—subsequent offense felony.'" Id. at ¶ 3 (quoting indictment). Without that notification, the elements as alleged in the indictment could only have resulted in a conviction of a Class A misdemeanor. In order to legally convict the defendant of a Class 4 felony, the People were required by section 111-3(c) to notify the defendant of their intent to seek such an enhanced sentence. Id. at ¶ 21. Since the indictment included the language "subsequent offense felony" and that prior conviction was disclosed to the trial court outside of the jury's presence, the appellate court affirmed defendant's Class 4 felony conviction and his five-year extended-term sentence. Id. at ¶¶ 18, 21, 26, 28.

In Brooks, section 111-3(c) applied because the elements of violation of an order of protection as charged would have resulted in a misdemeanor. The offense could be enhanced to a felony only through the use of a prior conviction that was not already an element of the offense, and thus the words "subsequent offense felony" were used in the indictment. In contrast, section 111-3(c) does not apply here because the elements of the offense theft predicated on a prior retail theft provided notice that it was a mandatory Class 4 felony offense, as that is the only classification of offense. See 720 ILCS 5/16-1(a)(1); Powell, 2012 IL App (1st) 102363, ¶ 12.

As explained above, a Class 4 sentence was the only possible sentence classification defendant could have received after being charged with theft with a prior retail theft. It would be redundant to require the indictment to also state that the charge was a Class 4 felony offense. Section 111-3(a), which sets forth what must be included in a charge, does not require that the charging instrument also state what class of offense is

being charged. 725 ILCS 5/111-3(a) (West 2008). Defendant can determine what class of offense he has been charged with by consulting the statute that he has been charged with violating. See People v. Evans, 2013 IL 113471, ¶ 13 (holding that the defendant presumptively knew that every Class X sentence must include a three-year term of mandatory supervised release because "all citizens are charged with knowledge of the law"). Here, section 16-1(b)(2) expressly provided that "[a] person who has been convicted of theft of property...not exceeding $500 in value who has been previously convicted of any type of theft...is guilty of a Class 4 felony." 720 ILCS 5/16-1(b)(2).

The indictment here put defendant on notice of the charge he was facing and the elements of that charge. (C.L. 19) He was not prejudiced in any way by the form of the indictment. Defendant did not challenge the sufficiency of the indictment before trial, but did so for the first time on appeal, which is significant. People v. Cuadrado, 214 Ill. 2d 79, 86 (2005). While an indictment challenged before trial must strictly comply with the pleading requirements of section 111-3, People v. Nash, 173 Ill. 2d 423, 429 (1996), a defendant who challenges an indictment for the first time on appeal must show that he was prejudiced in preparing his defense. People v. Rowell, 229 Ill. 2d 82, 93 (2008). But defendant has not demonstrated prejudice. In fact, defendant argues for plain error review which is not the standard for challenging on indictment on appeal. (Def. Br. 32) At trial, defendant argued that he took the pallets with permission from a K-Mart employee. (R. D23-24) See People v. Fowler, 72 Ill. App. 3d 491, 493-496 (4th Dist. 1979) (where the defendant alleged that the information did not validly charge him with theft under the statute, the court found that "the manner of charging the offense did not mislead the defendant or deprive him of adequate notice of the nature of the charge for he defended

solely upon the contention that he did not endorse the check in evidence or receive the money.") Here, defendant has not demonstrated he was prejudiced whatsoever in preparing his defense.

In conclusion, a defendant charged and convicted of theft with a prior retail theft can, by statute, receive only one felony classification and sentence—a Class 4 sentence between one and three years in prison. The notice provision of section 111-3(c) does not apply when only one class of sentence is possible under the elements as charged and cannot be enhanced any further. For these reasons, this Court should affirm defendant's conviction and sentence for theft, a Class 4 felony.

IV.

THE FINES AND FEES AND COSTS ORDER SHOULD BE CORRECTED

A. The Fee for DNA Testing, Analysis and Storage Pursuant to 730 ILCS 5/5-4-3(j) Should be Vacated.

Defendant contends that the trial court improperly assessed the DNA analysis fee pursuant to 730 ILCS 5/5-4-3(j) because he has a prior conviction for which his DNA was obtained and placed in the Illinois State Database. (Def. Br. 37) The People agree that pursuant to People v. Marshall, 242 Ill. 2d 285 (2011), the charge should be vacated. In Marshall, the Supreme Court held that the section 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 databank. 242 Ill. 2d at 301-02. To vacate the fee under Marshall, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998. See People v. Leach, 2011 IL App (1st) 090339, ¶ 38 ("Because section 5-4-3

mandates that anyone convicted of a felony must submit a DNA sample and be assessed the DNA analysis fee, we presume that the circuit court imposed this requirement as part of defendant's sentence following at least one of his prior convictions."). Here, defendant was convicted of a felony after the DNA requirement went into effect and accordingly should not be subject to the $250 DNA fee. Additionally, as defendant has shown in the appendix to his brief, his DNA profile is already in the DNA database. Therefore, this charge should be vacated.

B. The $50 Court System Fee Was Properly Assessed Against Defendant

Defendant claims that he was incorrectly charged $50 where he should have been charged $25 because he alleges he was convicted of a misdemeanor, not a felony. (Def. Br. 29, 34) Defendant is incorrect. The statute authorizing the Court System Fee provides for the imposition of a:

> (c) A fee to be paid by the defendant on a judgment of guilty or a grant of supervision, as follows:
>
> (1) for a felony, $ 50 ...

55 ILCS 5/5-1101(c). Thus, the Court System fee may be levied against a person for a judgment of guilt or grant of supervision for committing any felony. This charge was properly assessed against defendant because he was found guilty of a felony offense. People v. Mimes, 2011 IL App (1st) 082747, ¶ 86, vacated and remanded on other grounds.

Defendant was charged with violating 720 ILCS 5/16-1(A)(1) 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[.]" (C.L. 19) The trial court found defendant guilty of theft on September 11, 2014. (R. D32) The sentencing portion of the theft statute states, "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**, robbery, armed robbery, burglary, residential burglary, possession of burglary tools, home invasion, forgery, a violation of Section 4-103, 4-103.1, 4-103.2, or 4-103.3 of the Illinois Vehicle Code [625 ILCS 5/4-103, 625 ILCS 5/4-103.1, 625 ILCS 5/4-103.2, or 625 ILCS 5/4-103.3] relating to the possession of a stolen or converted motor vehicle, or a violation of Section 17-36 of the Criminal Code of 1961 or the Criminal Code of 2012, or Section 8 of the Illinois Credit Card and Debit Card Act [720 ILCS 5/17-36 or 720 ILCS 5/1-1 et seq. or 720 ILCS 250/8 (now repealed)] **is guilty of a Class 4 felony**." 720 ILCS 5/16-1(b)(2). (emphasis added) Thus, the $50 Court System fee was properly assessed against defendant.

C. Defendant Is Entitled to Pre-Sentence Incarceration Credit for the $15 State Police Operations Fee and for the $50 Court System Fee

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

The People agree that defendant is entitled to pre-sentence incarceration credit for $15 State Police Operations charge pursuant to 705 ILCS 105/27.3a-1.5. Pursuant to the Supreme Court's reasoning in People v. Jones, 223 Ill. 2d 569, 581-82 (2006), the charge constitutes a fine (a "fee" is a charge that "seeks to recoup expenses incurred by the state" or to compensate the state for some expenditure incurred in prosecuting the defendant whereas a "fine" is "punitive in nature" and is "a pecuniary punishment imposed as part

of a sentence on a person convicted of a criminal offense"). The State Police Operations Fee does not reimburse the state for expenses incurred in a defendant's prosecution and therefore is a fine. People v. Milsap, 2012 IL App (4th) 110668, ¶ 31.

Because the charge under to 705 ILCS 105/27.3a-1.5 is a fine, defendant is entitled to a pre-sentence incarceration credit toward it. Section 110-14(a) of the Code of Criminal Procedure provides:

> Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $ 5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine.

725 ILCS 5/110-14(a).

Defendant is correct that the Court System Fee is a Fine. (Def. Br. 39-40) The Court System fee may be levied against a person for a judgment of guilt or grant of supervision for committing any felony. This charge was properly assessed against defendant because he was found guilty of a felony offense. People v. Mimes, 2011 IL App (1st) 082747, ¶ 86, vacated and remanded on other grounds.

However, despite the fact that this charge compensates the county court system where defendant was prosecuted, and is intended to reimburse the county for a small portion of the cost of maintaining a court system that is essential to the administration of justice and prosecuting society's offenders, the appellate court has repeatedly held that the charge is really a fine that is offset by presentence incarceration credit. People v. Smith, 2013 IL App (2d) 120691, ¶ 21; People v. Ackerman, 2014 IL App (3d) 120585, ¶¶ 25-30; People v. Wynn, 2013 IL App (2d) 120575, ¶ 17. Therefore, defendant is

entitled to pre-sentence incarceration credit toward the $50 Court System Fees under 725 ILCS 5/110-14(a). Thus, $65 should be applied against these costs.

(ii) Felony Complaint File Clerk Fee

Defendant argues that he is entitled to presentence incarceration credit toward the Felony Complaint Filed Clerk Fee. (Def. Br. 40) According to defendant, this charge constitutes a fine, entitling him to offset the charge with presentence credit. The People maintain that this charge is a fee and defendant is not entitled to apply presentence credit earned pursuant to 725 ILCS 5/110-14(a).

705 ILCS 105/27.2a(w)(1)(A) provides that:

> (1) The clerk shall be entitled to costs in all criminal and quasi-criminal cases from each person convicted or sentenced to supervision therein as follows:
>
> (A) Felony complaints, a minimum of $ 125 and a maximum of $ 190.

This charge reimburses the state for some cost incurred in defendant's prosecution, the expense of prosecuting a criminal complaint. The Supreme Court in People v. Jones, 223 Ill. 2d 569, 581-82 (2006), specifically held that a charge such as a filing fee, is a fee. Additionally, this Court has held that the Felony Complaint Filing fee is a fee, not a fine, and not eligible for presentence incarceration credit. See People v. Tolliver, 363 Ill. App. 3d 94, 97 (1st Dist. 2006) (finding that the cost for filing of the felony complaint is compensatory, a collateral consequence of the defendant's conviction, and as such, a fee to which the credit in *section 110-14* of the Code cannot be applied).

Defendant's challenge to this charge is premised on the notion that the costs and

fees enacted by the legislature must be specifically attributable to the prosecuting agency or prosecutor's office as they relate to defendant case, in order to be fees and costs due "the state" for the expense of prosecuting a defendant. Relying on People v. Graves, 235 Ill. 2d 244 (2009), defendant asserts that charges that reimburse the clerk or the court system do not reimburse the state for the cost of prosecuting defendant, and therefore, are fines to which he is entitled presentence credit. (Def. Br. 40) However, Graves does not support a conclusion that the charges at issue are fines.

In Graves, the Supreme Court concluded that two assessments imposed under the same section of the Counties Code were fines, not fees. 235 Ill. 2d at 248, 255. Specifically, the Court held that under the principles set forth in Jones, 223 Ill. 2d 569, charges for the Mental Health Court and the Youth Diversion/Peer Court, despite their label as fees, are fines. Graves, 235 Ill. 2d at 255. The charge that defendant contests here, unlike the charges assessed in Graves, reimburse the court system where defendant's criminal proceedings actually occurred. In Graves, the charges went to fund other courts, and therefore could not be considered to reimburse the state for some or any cost related to prosecuting the defendant. Graves does not stand for the proposition that the charge at issue here is a fine because it does not reimburse the court system where defendant's criminal proceedings occurred.

Relying on People v. Smith, 2013 IL App (2d) 120691, defendant takes issue with the $190 fee for the prosecutions of a felony complaint. (Def. Br. 40) He asserts that because the $190 fee a flat fee, and not tied to the actual expense in prosecuting him, imposed only on those who are convicted, it is a pecuniary punishment or fine. (Def. Br. 41) The flat $190 charge does not indicate that the charge is a fine, as the legislature has

authorized fines of flat amounts as well as ranges of amounts. See e.g. 720 ILCS 570/401(e)-(i) (authorizing varying amounts of fines up to $150,000); 720 ILCS 570/402(b) (authorizing a fine of up to $200,000); 720 ILCS 570/402(c) (authorizing a fine of up to $25,000). Therefore, the fact that the charge is a flat $190 fee does not suggest that the charge is a really a fine. Similarly, where defendant received the benefit of his case being heard in the county's criminal court system, it cannot be said that the charge of $190 is not explicitly tied to or bears no relationship to his prosecution. Moreover, like many fees assessed against a defendant, the actual expense of prosecuting a felony complaint is far more than the cost assessed to a defendant, as it costs far more than $190 to administer justice and provide proper and efficient court support in a felony criminal case. For instance, a defendant is assessed $50 for each day actually employed in the trial of a case, even though it costs more than $50 per day to try a defendant. 55 ILCS 5/4-2002.1(a). There is no question that the per diem for days of trial is a fee. Therefore, the fact that $190 fee is not for the actual cost of prosecuting a criminal complaint does not mean the charge is actually a fine. Finally, the fact that the charge is payable only upon a conviction of a criminal offense does not mean it is a fine. The same is true of all fees and costs in criminal cases, where charges are assessed at the conclusion of proceeding finding an accused guilty and imposing judgment.

Therefore, because the felony complaint charge is a fee, defendant is not entitled to presentence incarceration credit toward it.

D. Conclusion.

In sum, the People submit that the fines, fees and costs order should be corrected as follows:

(1) the $250 DNA analysis fee imposed pursuant to 730 ILCS 5/5-4-3(j) should be vacated;

(2) the $50 court system fee was properly assessed against defendant

(3) defendant should be awarded $65 in pre-sentence incarceration credit for the $15 State Police Operations Charge and for the $50 Court System Fee; and

(4) The $190 Felony Complaint File Clerk Fee defendant should remain as defendant is not entitled to apply presentence credit toward it.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court affirm defendant's conviction for theft; that he is required to register pursuant to the Sex Offender Registration Act; and modify his fees and credits.

Pursuant to People v. Nicholls, 71 Ill. 2d 166 (1978) and relevant statutory provisions 725 ILCS 5/110-7(h) (1992); 725 ILCS 130/13 (1992); 55 ILCS 5/4-2002.1 (1992), the People of the State of Illinois respectfully request that this Court grant the People costs and incorporate as part of its judgment and mandate a fee of $100.00 for defending this appeal. In addition, pursuant to People v. Agnew, 105 Ill. 2d 275 (1985) and ILCS 5/4-2002.1 (1992), the People respectfully request that this Court also grant the People an additional fee of $50.00 in the event oral argument is held in this case.

Respectfully Submitted,

ANITA ALVAREZ,
State's Attorney,
County of Cook,
Room 309 – Richard J. Daley Center,
Chicago, Illinois 60602
eserve.CriminalAppeals@cookcountyil.gov
(312) 603-5496

Attorney for Plaintiff-Appellee

ALAN J. SPELLBERG,
MARY L. BOLAND,
HALEY PECK,
Assistant State's Attorneys,
Of Counsel.

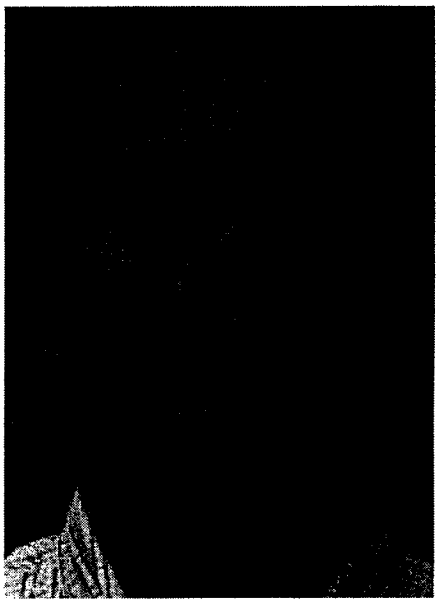
PEOPLE'S EXHIBITS

Illinois Sex Offender Information

Bruce Rauner, Governor

Illinois Adult Sex Offender

Adult Sex Offender Information



Name: JEROME BINGHAM

Alias Name(s): JEROME,JAMES
BINGHAM,GRACION
JAMES,JEROME

Date of Birth: 1/16/1958

Height: 6 ft. 00 in. **Weight:** 230 lbs. **Sex:** M **Race:** B

Address: 2054 N NAGLE AVE
CHICAGO , IL 60707

Sexual Predator

Crime Information

VICTIM WAS 18 YEARS OF AGE
OFFENDER WAS 24 AT THE TIME OF THE OFFENSE

Crimes: RAPE
FELONY CONVICTION AFTER 7/1/2011

County of Conviction: COOK

Back to List | Print this Record

Print options may also be found under the 'File' menu from the browser or hit CTRL+P.

Criminal History Information

Criminal history information may be available for sex offenders on parole or mandatory supervised release through the Illinois Department of Corrections. Click on The link, select 'inmate search' and type in the offender's name or other identifying information.

Additional information about a sex offender's conviction can be obtained by contacting the circuit clerk's office of the county in which the offender was convicted to get a copy of the offender's court case information. Additionally, criminal history information on an offender may be obtained through the Uniform Conviction Information Act.

Peoples Exhibit A

ND. 14-3150

Press for Printer Friendly Version (no graphics)

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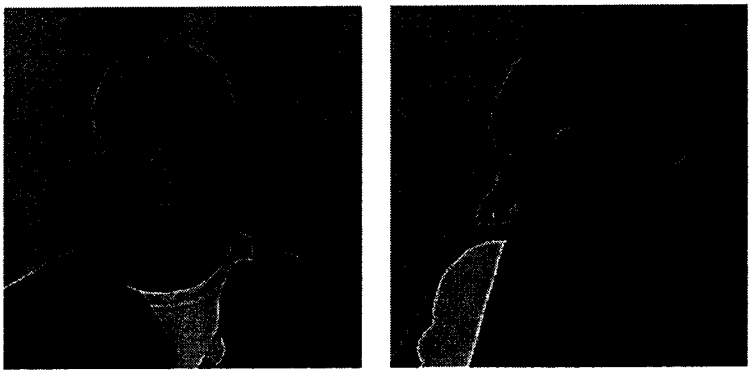


N32301 - BINGHAM, JEROME

Parent Institution: LAWRENCE CORRECTIONAL CENTER
Offender Status: PAROLE
Location: PAROLE DISTRICT 1

Sex Offender Registry Required

Click here to register for notification of any [illegible] to this offender's custody status

PHYSICAL PROFILE

Date of Birth: 01/16/1958
Weight: 180 lbs.
Hair: Black
Sex: Male
Height: 6 ft. 01 in.
Race: Black
Eyes: Brown

MARKS, SCARS, & TATTOOS

TATTOO, HAND, RIGHT - 35

ADMISSION / RELEASE / DISCHARGE INFO

Admission Date: 10/17/2014
Parole Date: 09/07/2016
Projected Discharge Date: 09/07/2017

SENTENCING INFORMATION

MITTIMUS:	14CR1133601
CLASS:	4
COUNT:	1
OFFENSE:	THEFT/CON/PRIOR CONVIC <300
CUSTODY DATE:	09/07/2014
SENTENCE:	3 Years 0 Months 0 Days
COUNTY:	COOK
SENTENCE DISCHARGED?:	NO
MITTIMUS:	14CR0723202
CLASS:	4
COUNT:	1
OFFENSE:	THEFT/<$300/SCHOOL/WORSHIP
CUSTODY DATE:	09/07/2014
SENTENCE:	1 Years 0 Months 0 Days

People Exhibit B

ND. 14-3150

COUNTY:	COOK
SENTENCE DISCHARGED?:	NO
MITTIMUS:	07CR1936001
CLASS:	4
COUNT:	1
OFFENSE:	POSS AMT CON SUB EXCEPT(A)/(D)
CUSTODY DATE:	12/02/2008
SENTENCE:	1 Years 0 Months 0 Days
COUNTY:	COOK
SENTENCE DISCHARGED?:	YES
MITTIMUS:	05CR2623701
CLASS:	4
COUNT:	1
OFFENSE:	POSS AMT CON SUB EXCEPT(A)/(D)
CUSTODY DATE:	09/07/2005
SENTENCE:	1 Years 0 Months 0 Days
COUNTY:	COOK
SENTENCE DISCHARGED?:	YES
MITTIMUS:	00CR0559001
CLASS:	2
COUNT:	1
OFFENSE:	AID/ABET/POSS/SELL STOLEN VEH
CUSTODY DATE:	09/07/2005
SENTENCE:	3 Years 0 Months 0 Days
COUNTY:	COOK
SENTENCE DISCHARGED?:	YES
MITTIMUS:	96CR0035901
CLASS:	4
COUNT:	1
OFFENSE:	POSS AMT CON SUB EXCEPT(A)/(D)
CUSTODY DATE:	07/25/1997
SENTENCE:	1 Years 0 Months 0 Days
COUNTY:	COOK
SENTENCE DISCHARGED?:	YES
MITTIMUS:	93CR2100
CLASS:	4
COUNT:	1
OFFENSE:	CONT SUBS ACT-UNAUTH POSS
CUSTODY DATE:	10/18/1994
SENTENCE:	1 Years 0 Months 0 Days
COUNTY:	COOK
SENTENCE DISCHARGED?:	YES
MITTIMUS:	83I48
CLASS:	1
COUNT:	1
OFFENSE:	ATTEMPT RAPE
CUSTODY DATE:	12/16/1982

SENTENCE:	4 Years 0 Months 0 Days
COUNTY:	COOK
SENTENCE DISCHARGED?:	YES

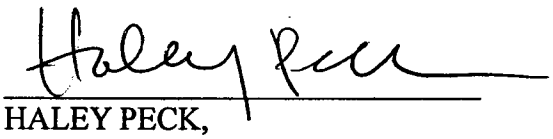
www.jpay.com

www.westernunion.com

www.gtl.net/ilstate

CERTIFICATE OF COMPLIANCE

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

By: 

HALEY PECK,
Assistant State's Attorney