IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>JEROME BINGHAM,<br><br>Petitioner-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-14-3150<br><br>There heard on Appeal from the Circuit Court of Cook County, Illinois, No. 14 CR 11336.<br><br>Honorable Bridget Jane Hughes, Judge Presiding. |

# PETITION FOR LEAVE TO APPEAL



MICHAEL J. PELLETIER
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

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

COUNSEL FOR PETITIONER-APPELLANT

IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>JEROME BINGHAM,<br><br>Petitioner-Appellant. | ) | Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-14-3150<br><br>There heard on Appeal from the Circuit Court of Cook County, Illinois, No. 14 CR 11336.<br><br>Honorable Bridget Jane Hughes, Judge Presiding. |

## PETITION FOR LEAVE TO APPEAL

## PRAYER FOR LEAVE TO APPEAL

Jerome Bingham, petitioner-appellant, hereby petitions this Court for leave to appeal, pursuant to Supreme Court Rules 315 and 612, from the judgment of the Appellate Court, *People v. Bingham*, 2017 IL App (1st) 143150, holding that the Sex Offender Registration Act violates neither due process nor the proscription against *ex post facto* punishment, and affirming Bingham's theft conviction and his sentence of 3 years' imprisonment.

## PROCEEDINGS BELOW

The appellate court affirmed Jerome Bingham's conviction on February 10, 2017. No petition for rehearing was filed. A copy of the appellate court's judgment is appended to this petition.

## COMPELLING REASONS FOR GRANTING REVIEW

1. After completing his sentence for the minor theft conviction in this case, Jeremy Bingham was required to register as a sex offender pursuant to the 2012 version of Illinois's Sex Offender Registration Act ("SORA"). When SORA was originally enacted, in 1996, Bingham was not required to register for an attempt sex offense committed in 1983. But, in 2011, the legislature amended the statute by requiring registration under SORA for anyone convicted of any felony after having been previously convicted of a sex offense. Bingham is therefore being required to register as a sex offender not because his behavior suggests he is at high risk for committing sex offenses in the future, but because he was convicted of stealing 6 wooden pallets from a K-Mart parking lot, which triggered application of the 2011 amendment.

In *People v. Lindner*, this Court held that the Legislature could not constitutionally take licenses away from drivers who had committed offenses not involving vehicles because "[i]f the legislature may punish these offenses with revocation, nothing prohibits it from imposing that penalty for violating *any* provision of the Criminal Code, a result that would be plainly irrational." 127 Ill. 2d 174, 185 (1989) Here, as in *Lindner*, there is absolutely no connection between the minor theft of which Jeremy Bingham was convicted in this case and the threat that he is likely to commit a sex offense in the future. Yet, without mentioning *Lindner*, the appellate court held that it was reasonable for the legislature to determine that defendants who commit a new felony after committing a sex offense in the past pose "the potential threat of committing a

new sex offense in the future." *People v. Bingham*, 2017 IL App (1st) 143150, ¶ 24. This Court should grant review because the appellate court's published rejection of Bingham's as-applied due process challenge to SORA's newly adopted registration requirements, which this Court has never considered, condones the precise sort of legislative overreaching that this Court condemned in *Lindner*. *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J.1071, 1073 (May 2012) ("Initially anchored by rational basis, registration schemes have spiraled out of control because legislators, eager to please a fearful public, have been given unfettered freedom by a deferential judiciary.").

2. Jerome Bingham acknowledges that both this Court and the United States Supreme Court "have consistently held that the retroactive application of sex offender registration is not 'punishment' prohibited by the *ex post facto* clause." *People v. Fredericks*, 2014 IL App (1st) 122122, ¶ 55 (citing cases). However, this Court has not yet addressed Illinois's current SORA scheme, which, as the appellate court recently recognized, is much more intrusive than the version this Court previously considered and "certainly does place affirmative disabilities and restraints on registrants by restricting their movements and activities." *People v. Parker*, 2016 IL App (1st) 141597, ¶63. Persuasive authority from other jurisdictions has held that similar statutory schemes constitute punishment under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See, e.g.*, *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *petition for cert. filed*, 834 F.3d 696 (U.S. Dec. 14, 2016) (No. 16-768) (Michigan SORA);

*Doe v. State*, 189 P.3d 999 (Alaska 2008); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Gonzalez v. State*, 980 N.E.2d 312 (Ind. 2013). In light of these developments, this Court should grant review to reconsider whether the punitive effects outweigh the nonpunitive nature of the legislature's intent.

## STATEMENT OF FACTS

Jerome Bingham was convicted of theft based on evidence that he took 6 pallets valued at $12 each from the unfenced yard of a K-Mart. (C. 19, 29; R. D3-9, D32) The defense theory was that although Bingham took the pallets, it was not a theft because Bingham believed that he had permission. (R. D4) The case proceeded to sentencing after the court denied Bingham's motion for a new trial. (C. 106; R. E2)

The presentence investigation report ("PSI") reflects that Bingham had the following criminal history:

| **Case Number** | **Offense** | **Date of Sentencing** | **Sentence** |
|---|---|---|---|
| 07 CR 1936001 | Possession controlled substance | 1/17/2008 | 1 year IDOC |
| 05 CR 2623701 | Possession controlled substance | 1/18/2006 | 1 year IDOC |
| 05120521 | Possess title/registration | 3/14/2005 | 2 days' jail |
| 04 C 33018001 | Theft (reduced) | 6/2/2004 | 70 days' jail |
| 00 C 44053201 | Retail theft | 11/4/2002 | 30 months' probation |

| | | | |
|---|---|---|---|
| 00 CR 55901 | Possession stolen vehicle | 3/8/2000 | 18 months' probation |
| 01225524901 | Retail theft | 11/28/2000 | 20 days' jail |
| 99129034301 | Retail theft < $150 | 7/23/1999 | 15 days' jail |
| 99144265801 | Violate order of protection | 7/21/1999 | 1 year conditional discharge, 60 days' jail |
| 96 CR 210002 | Possession controlled substance (VOP) | 5/10/1993 | 1 year IDOC |
| 83 CR 148 | Attempted criminal sexual assault | 6/10/1983 | 4 years' IDOC |

(C. 33-34) Based on Bingham's criminal history as well as video evidence showing that he took additional pallets from the same K-Mart one day earlier, on May 2, 2014, the court sentenced the 56-year-old Bingham to the maximum of 3 years' imprisonment. (C. 30, 111-113; R. E5-14) Illinois's "Sex Offender Information" website shows that Bingham, who has completed his term of imprisonment, is registered as a sexual predator. (available at http://bit.ly/2nxhios, last visited on March 14, 2017)

In addition to arguments that are not at issue here, Bingham also raised two challenges to Illinois's Sex Offender Registration Act ("SORA") that the appellate court rejected on appeal. First, Bingham argued that SORA violates due process 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 in this case do not indicate that he is at risk of committing another sex offense. In rejecting Bingham's argument, the appellate court first found that the theft conviction that triggered the registration requirement exhibited Bingham's "general tendency to return to his prior criminal behavior," which included a single conviction for attempted criminal sexual assault in a case from nearly three decades earlier. *Bingham*, 2017 IL App (1st) 143150, ¶ 24. The court then held it was reasonable for the legislature to determine that Bingham posed a "potential threat of committing a new sex offense in the future" because he had "committed a sex offense in the past for which he was not then required to register and has shown a recent, general tendency to recidivate by committing a new felony since the amendment of the Act in 2011[.]" *Id.* The appellate court held that SORA's registration requirement did not violate due process as applied to Bingham based on this analysis. *Id.*

Second, Bingham argued that application of SORA to him violates the prohibition against *ex post facto* laws where the 2012 version of SORA is not merely a regulatory scheme, but rather a new and ongoing punishment for an attempted sex offense that Bingham was convicted of more than three decades before his conviction in this case. The appellate court rejected Bingham's argument based on this Court's decisions holding "that the registration requirement is not a punishment and, thus, that the Act does not violate the *ex post facto* clauses." *Id.* at ¶¶ 28-30.

## ARGUMENT

**I. This Court should grant review to decide if the 2011 Amendment to the Sex Offender Registration Act (SORA) is unconstitutional as applied to Jerome Bingham where 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 and Bingham is eligible for SORA based only on a single sex offense conviction that took place more than 30 years before the minor theft that led to this case.**

Jerome Bingham was convicted of theft based on evidence that he drove into the unfenced yard of a K-Mart in Norridge, Illinois, loaded 6 wooden pallets into his truck, and drove away. (C. 19; R. D3-16) As a result of this conviction, he is required to register as a sex offender for the rest of his life pursuant to the 2012 version of Illinois's Sex Offender Registration Act ("SORA"), which this Court has never addressed and which is the only SORA provision that imposes registration requirements when defendants are convicted of non-sex-related felonies. 730 ILCS 150/2(E) (West 2015); 730 ILCS 150/7 (West 2015). Subjecting Bingham to the SORA violates due process because in this case there is no rational relationship between the minor theft of which Bingham was convicted and SORA's purpose of protecting the public from sex offenders, where Bingham's history and the circumstances of the theft in this case do not indicate that he is at risk of committing another sex offense.

Sentencing provisions, like all statutory enactments, must be reasonable. Due process mandates that statues have a basic rationality. *See People v. Steppan*, 105 Ill. 2d 310, 318-19 (1985); U.S. CONST., amend. XIV; ILL. CONST. 1970, art. 1, § 2. Rational basis review has several levels. A statute must have a reasonable purpose, must reasonably relate to that purpose, and must

reasonably further the purpose. *Boeckmann*, 238 Ill. 2d at 7. Further, a sentencing statute must be "reasonably designed to remedy the evils" the Legislature seeks to address. *People v. Bradley*, 79 Ill. 2d 410, 417 (1980). As Bingham's claim turns on the legal question of whether SORA is unconstitutional as applied to him, this Court's review is *de novo*. *See People v. Boeckmann*, 238 Ill. 2d 1, 7 (2010).

SORA was not enacted until 1996 (Pub. Act 87-1064, eff. January 1, 1996), more than ten years after Bingham's 1983 conviction for attempted criminal sexual assault. (C. 34) Bingham was not required to register under SORA or under its predecessors, and he has committed no other sex offenses since 1983. But, in 2011, Public Act 97-578 amended the statute by adding subsection (c)(2.1), which states:

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

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

Contrary to the appellate court's decision, this new, broad provision of SORA violates due process as applied in this case because using a minor theft offense that involved no threat of sexual violence to bring Bingham within SORA's ambit does not sufficiently fit the statute's purpose where neither Bingham's history nor the circumstances of the minor theft that triggered SORA suggest that he is any more likely to commit a sex offense than anyone else. In this case, "[j]udicial deference to legislative authority [therefore] is no longer an appropriate response to ever-harshening registration schemes" like Illinois's 2012 SORA. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J.1071, 1076 (May 2012) (hereinafter referred to as Carpenter).

Indeed, the 2012 amendment to SORA is the precise kind of legislative overreaching that this Court condemned in *Lindner*. In *Lindner*, the defendant's driver's license became subject to mandatory revocation under several provisions of the Illinois Vehicle Code after Lindner pled guilty to three sex offenses, none of which involved a vehicle. 127 Ill. 2d at 176-177. The trial court granted Lindner's motion to declare applicable provisions of the Illinois Vehicle Code unconstitutional in violation of his due process rights. *Id*. at 177.

On appeal, this Court first identified the purpose of the challenged statute: to protect against drivers who threatened the safety of others, and drivers who had abused the privilege of driving either by doing so illegally or by using a vehicle to commit a criminal act. *Id*. at 182. This Court then determined that revocation of the defendant's driver's license bore no reasonable

relationship to that purpose because "a vehicle was not involved in any way in the commission of the offenses for which defendant was convicted[.]" *Id*. Continuing, this Court held that the method used to further the public interest was not reasonable because taking licenses away from drivers who had committed offenses not involving vehicles was "not a reasonable means of ensuring that the roads are free of drivers who operate vehicles unsafely or illegally." *Id*. at 183.

> To the contrary, the means chosen are arbitrary, not only because the offenses specified in section 6-205(b)(2) have no connection to motor vehicles, but also because the inclusion of those offenses and no others is arbitrary. That is, no reason suggests itself as to why the legislature chose the particular offenses enumerated in section 6-205(b)(3), as opposed to other offenses not involving a vehicle.

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

Here, as in *Lindner*, there is absolutely no connection between the minor theft of which Bingham was convicted and the threat that Bingham is likely to commit a sex offense. Instead, as the legislative history reflects, Public Act 97-578 added subsection (c)(2.1) to SORA in an effort to ensure that everyone who had previously been convicted of a sex offense would be required to register under SORA if they subsequently committed *any* felony or misdemeanor offense,

regardless of how long ago the original offense took place and whether they had since committed any new sex offenses. *See* 97th Ill. Gen. Assem., House Proceedings, March 31, 2011, at 151, 155. (Appendix, A-9) The appellate court erred in holding otherwise.

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

Unlike the situation in *Johnson*, however, here the legislative history shows no such rationale. Instead, it demonstrates an irrational zeal that cannot be condoned where Bingham was convicted of attempted sexual assault when he was 25 years old and has never been convicted of any other sex offense but

is nonetheless being required to register as a sex offender for the rest of his life because, more than 30 years later, he was convicted of theft after he drove into the unfenced yard of a K-Mart, loaded 6 pallets that were worth $12 each onto his truck, and took the pallets without permission. (C. 19, 29, 30, 33-34; R. D3-16) Indeed, at trial, the defense theory was that although Bingham took the pallets, it was not a theft because Bingham believed that he had permission to take the broken pallets that were leaned up against the wall. (R. D4, 23-26)

There is absolutely nothing about these facts to suggest that Bingham poses any more risk of committing another sex offense than a person who was not convicted of theft. Yet, as a result of the theft conviction, he is now required to register as a sex offender under SORA for the rest of his life. The requirement violates due process because there is no rational connection between the theft offense of which Bingham was convicted and SORA's purpose of protecting the public from sex offenders. "Without judicial intervention to set boundaries, legislators will continue to respond to the community's collective fear with expanding laws that punish the sex offender." Carpenter at 1076. Moreover, the appellate court's published decision to the contrary expressly approves the precise style of legislative overreaching that this Court condemned in *Lindner*. This Court should therefore grant leave to appeal, reverse the appellate 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.

**II. This Court should grant review to reconsider whether the punitive effects of Illinois's current SORA scheme, which, as the appellate court recently recognized, is much more intrusive than the versions this Court previously considered, outweigh the nonpunitive nature of the legislature's intent.**

In *People v. Malchow*, this Court held that Illinois's 1998 Sex Offender and Child Murderer Community Notification Law was not so punitive that it defeated the Legislature's intent to protect the public and therefore did not violate the proscription against *ex post facto* legislation in part because the law "d[id] not place an *affirmative* disability or restraint on sex offenders[.]" 193 Ill.2d 413, 419-421 (2000) (emphasis in original). However, as the appellate court recently observed, "[t]he current SORA Statutory Scheme certainly does place affirmative disabilities and restraints on registrants by restricting their movements and activities." *People v. Parker*, 2016 IL App (1st) 141597, ¶ 63. Yet *Parker* declined to explicitly decide whether the SORA Statutory scheme has evolved to become primarily punitive in nature. 2016 IL App (1st) 141597, ¶ 66. And, in this case, the appellate court rejected Bingham's *ex post facto* claim in reliance on this Court's precedent without even acknowledging the legislative changes that have taken place since *Malchow*. *People v. Bingham*, 2017 IL App (1st) 143150, ¶¶ 27-30. In fact, no Illinois court has undertaken a detailed analysis of the current version of SORA. Where the appellate court considers itself bound by this Court's decisions and this Court has not yet considered the current version of SORA, this Court's review is necessary to consider whether the punitive effects outweigh the nonpunitive nature of the legislature's intent.

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

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

SORA was enacted in 1996, but Bingham was not required to register until his theft conviction in this case, which triggered application of the 2011 amendment. (See Argument I, *infra*) There is no question that SORA is retroactive. *See* 97th Ill. Gen. Assem., House Proceedings, March 31, 2011, at

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

Bingham acknowledges that both this Court and the Supreme Court of the United States have answered this question in the negative, holding that earlier versions of sex offender registration and community notification statutes did not violate the *ex post facto* clauses of the U.S. and Illinois constitutions because the notification requirements do not constitute punishment. *See Malchow*, 193 Ill.2d at 420-424; *Smith v. Doe*, 538 U.S. 84, 93 (2003); *Konetski*, 233 Ill. 2d at 210. And some Illinois courts have cited the U.S. Supreme Court's analysis in *Doe*, which 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. *SeeKonetski*, 233 Ill. 2d 185, 210 (2009); *People v. Fredericks*, 2014 IL App (1st) 122122 at ¶54. But *Smith* addresses an Alaska statute that was in effect in 2003 and was in many respects less onerous than the SORA Statutory Scheme under consideration here. *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration*

*Laws*, 63 HASTINGS L.J.1071, 1074 (May 2012) ("Despite significant changes to registration schemes over the past several years, courts and legislative bodies continue to rely on two Supreme Court opinions from the 2003 term to define the parameters of constitutionality in sex offender registration laws.").

This Court's review is necessary because Illinois' SORA is more akin to Michigan's version of the statute, which was recently held to violate the proscription against *ex post facto* laws and which "bears many resemblances to the Illinois SORA Statutory Scheme." *Parker*, 2016 IL App (1st) 141597, ¶ 64; *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016). Michigan's SORA cannot be applied to prior sex offenders without violating the prohibition against *ex post facto* punishment, given its punitive effect). A petition for certiorari is currently pending in *Snyder*. 834 F.3d 696 (U.S. Dec. 14, 2016) (No. 16-768).

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. *Snyder*, 834 F.3d 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 relevant factors that the United States Supreme Court identified in *Smith v. Doe*, 538 U.S. 84 (2003): "(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.

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

This Court should grant review and then reverse the appellate court because the current version of Illinois' SORA, which no court has yet analyzed in accordance with the *Mendoza-Martinez* factors, is notably similar to Michigan's. 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*, 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 grant review and then hold that the effect of Illinois' SORA has become punitive, notwithstanding its stated purpose, and that its retroactive application violates the Federal and Illinois constitutional prohibitions against *ex post facto* laws

## CONCLUSION

Jerome Bingham, petitioner-appellant, respectfully requests that this Court grant leave to appeal.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

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

COUNSEL FOR PETITIONER-APPELLANT

## CERTIFICATE OF COMPLIANCE

I, Deborah Nall, certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 315(d). The length of this petition, excluding pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters to be appended to the petition under Rule 315(c) is 5,434 words.

/s/Deborah Nall
DEBORAH NALL
Assistant Appellate Defender

IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>JEROME BINGHAM,<br><br>Petitioner-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-14-3150<br><br>There heard on Appeal from the Circuit Court of Cook County, Illinois, No. 14 CR 11336.<br><br>Honorable Bridget Jane Hughes, Judge Presiding. |

**NOTICE AND PROOF OF SERVICE**

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

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

Mr. Jerome Bingham, 2054 N Nagle, Chicago, IL 60707

Under the penalties provided in law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that an electronic copy of the Petition for Leave to Appeal in the above-entitled cause was submitted to the Clerk of the above Court for filing on March 14, 2017. On that same date, we personally delivered three copies to the Attorney General of Illinois, personally delivered three copies to opposing counsel and mailed one copy to the petitioner in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. The original and twelve copies of the Petition for Leave to Appeal will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped petition.



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

# APPENDIX

## Jerome Bingham, Petitioner

## Appellate Court Decision

***** Electronically Filed *****

122008

03/14/2017

Supreme Court Clerk

**********

State app. Lieutenant

2017 IL App (1st) 143150

SIXTH DIVISION
February 10, 2017

No. 1-14-3150

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

JUSTICE ROCHFORD delivered the judgment of the court, with opinion.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment and opinion.

## OPINION

¶ 1 Following a bench trial in September 2014, the trial court convicted defendant, Jerome Bingham, of theft, which was elevated to a Class 4 felony due to a previous retail theft conviction, and sentenced him to three years' imprisonment. Defendant had a prior conviction in 1983 for attempted criminal sexual assault for which he had not been required to register as a sex offender because the conviction occurred prior to enactment of the Sex Offender Registration Act (Act) (730 ILCS 150/1 *et seq.* (West 2012)), in 1986. Under section 3(c)(2.1) of the Act (730 ILCS 150/3(c)(2.1) (West 2012)), as amended in 2011, defendant's 2014 felony theft conviction in this case required him to register as a sex offender for the 1983 attempted criminal sexual assault. On appeal, defendant contends (1) the Act is unconstitutional as applied to him; (2) the Act violates the *ex post facto* clauses of the United States and Illinois Constitutions; (3) his theft conviction was improperly elevated from a Class A misdemeanor to a Class 4 felony, and the trial court improperly imposed an enhanced three-year sentence for the Class 4 felony conviction; and (4) the trial court erroneously imposed a DNA analysis fee and failed to apply the $5 per day credit for presentence incarceration to several charges that qualify as fines. We

affirm defendant's conviction, three-year sentence, and the requirement that he register as a sex offender. We vacate his DNA analysis fee, credit him with $65 as against his fines, and direct the clerk of the circuit court to modify the fines and fees order accordingly.

¶2 I. Defendant's Theft Conviction

Defendant was charged with theft after a surveillance camera recorded him taking several pallets from the unfenced yard of a Kmart in Norridge, Illinois at approximately 6:30 p.m. on May 3, 2014. The indictment alleged that defendant committed theft "in that he, knowingly obtained or exerted unauthorized control over property, to wit: pallets, of a value less than five hundred dollars, the property of Kmart, intending to deprive Kmart, permanently of the use or benefit of said property, and the defendant has been previously convicted of the offense [of] retail theft under case number 00125524901, in violation of Chapter 720 Act 5 section 16-1(a)(1) of the Illinois Compiled Statutes 1992 as amended."

¶3 The cause proceeded to a one-day trial on September 11, 2014. At trial, Ali Sahtout testified he works as a security guard at the Kmart at 4201 North Harlem Avenue in Norridge. At approximately 6:30 p.m. on May 3, 2014, Mr. Sahtout was in the Kmart security office monitoring the video cameras when he saw defendant drive his truck to the receiving area in the back of the store, where storage units and pallets belonging to Kmart are located. Defendant exited his truck, grabbed a total of six pallets (two pallets at a time), and put them on the back of his truck. Then he drove away. The pallets were valued at $12 each. Defendant was never given permission to take the pallets.

¶4 Mr. Sahtout contacted the Norridge police department. About five minutes later, the police called him back and asked him to come to a location a half block from the receiving area

of the store. Mr. Sahtout went there and saw that the officers had pulled defendant over and placed him in a squad car.

¶5 Mr. Sahtout identified People's exhibit No. 1 as the video depicting defendant taking the pallets and putting them in the back of his truck. Mr. Sahtout identified People's exhibits Nos. 2 through 5 as photographs truly depicting how defendant's truck appeared on May 3, 2014.

¶6 Officer Peter Giannakopoulos of the Norridge police department testified that at approximately 6:30 p.m. on May 3, 2014, he was patrolling the 4200 block of Harlem Avenue. He was dispatched to the Kmart store a half block away because there was a report that an African-American man in a black pickup truck with registration plate 1129940 B had taken some pallets from the rear of the property.

¶7 Officer Giannakopoulos arrived at the Kmart receiving area about two minutes later, and he saw a black pickup truck with registration plate 1129940 B leaving the area. Defendant was the driver. The officer curbed the truck and saw several pallets on the truck's open bed.

¶8 Officer Giannakopoulos asked Mr. Sahtout to come to his location to make an identification. Mr. Sahtout came and identified defendant as the person who had taken the pallets from the rear of the Kmart. Defendant was placed under arrest.

¶9 Following the testimony of Officer Giannakopoulos, the parties stipulated that defendant had a previous conviction for retail theft in case No. 00125524901. The State entered its exhibits into evidence, and the trial court viewed the video depicting defendant taking the pallets from the Kmart receiving area. The State then rested.

¶10 Defendant testified he was a retired truck driver, who now works as a metal scrapper, and that, about six months before the incident at issue, he had a conversation with a person who was driving a forklift in the back of the Kmart at 4201 North Harlem Avenue. The forklift driver told

defendant that it would be okay for him to take broken pallets from behind the Kmart for scrapping purposes. Pursuant to this conversation with the forklift driver, defendant took several broken pallets from the Kmart receiving area on May 3 and was subsequently pulled over by the police. Defendant testified he believed he had permission from the forklift driver to take the broken pallets, and therefore he did not believe he was guilty of theft.

¶ 11 On September 11, 2014, following defendant's testimony, the trial court convicted defendant of theft. The cause proceeded to sentencing. The presentence investigation report (PSI) detailed defendant's prior criminal history, including attempted criminal sexual assault in 1983, possession of a controlled substance in 1993 and 1996, violation of an order of protection in 1999, retail theft of less than $150 in 1999, possession of a stolen vehicle in 2000, two retail thefts in 2000, theft in 2004, and possession of a controlled substance in 2005 and 2007. At sentencing, the State presented evidence that on May 2, 2014 (the day before the theft of which he was convicted here), defendant had stolen additional pallets from the Kmart located at 4201 North Harlem Avenue.

¶ 12 The trial court sentenced defendant to three years' imprisonment on his theft conviction, which was elevated to a Class 4 felony due to his previous conviction for retail theft, plus $699 in various fines, fees, and costs.

¶ 13 II. Defendant's Sex Offender Registration

¶ 14 The PSI indicated that defendant was convicted of attempted criminal sexual assault in 1983 and sentenced to four years' imprisonment. At the time of defendant's offense in 1983, he was not required to register as a sex offender because the Act had not yet been enacted. The Act was subsequently enacted in 1986 and amended in 2011 to provide that "[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." 730 ILCS 150/3(c)(2.1) (West 2012). Defendant's 2014 felony conviction for theft now requires him to register as a sex offender for his commission of attempted criminal sexual assault in 1983.

¶ 15 III. Defendant's Appeal

¶ 16 First, defendant contends the Act is unconstitutional as applied to him. Specifically, defendant contends his history of nonviolent and nonsexual offenses (since his 1983 conviction for attempted criminal sexual assault) and the circumstances of the 2014 felony theft of six pallets from the Kmart do not indicate he is at risk of committing another sex offense. Therefore, defendant argues the Act violates his substantive due process rights by requiring him to register as a sex offender because on these facts there is no reasonable relationship between the registration requirement and the Act's purpose of protecting the public from sex offenders.

¶ 17 A statute is presumed constitutional, and defendant, as the party challenging the statute, bears the burden of demonstrating its invalidity. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). Courts have the 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. We review *de novo* the constitutionality of a statute. *Id.*

¶ 18 "When confronted with a claim that a statute violates the due process guarantees of the United States and Illinois Constitutions, courts first must determine the nature of the right purportedly infringed upon by the statute. [Citation.] Where the statute does not affect a fundamental constitutional right, the test for determining whether the statute complies with substantive due process is the rational basis test. [Citation.] To satisfy this test, a statute need only bear a rational relationship to the purpose the legislature sought to accomplish in enacting the statute. [Citation.] Pursuant to this test, a statute will be upheld if it bears a reasonable

relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective." (Internal quotation marks omitted). *In re J.W.*, 204 Ill. 2d 50, 66-67 (2003). The rational basis test is highly deferential; if there is any conceivable set of facts showing a rational basis for the statute, it will be upheld. *People v. Johnson*, 225 Ill. 2d 573, 585 (2007).

¶ 19 The parties make no argument that the Act affects a fundamental right; accordingly, we analyze the statute using the rational basis test. See *In re J.W.*, 204 Ill. 2d at 67 (analyzing the constitutionality of the Act using the rational basis test).

¶ 20 Initially, the State argues we lack a sufficient evidentiary record to review defendant's "as-applied" constitutional challenge, in the absence of an evidentiary hearing and findings of fact. In support, the State cites *People v. Mosley*, 2015 IL 115872, which held that a court is not capable of making an "as-applied" determination of constitutionality where there has been no evidentiary hearing and no findings of fact, and that in the absence of such an evidentiary hearing and findings of fact, the constitutional challenge must be facial. *Id.* ¶¶ 47, 49. The requirement of an evidentiary hearing and findings of fact for an "as-applied" challenge exists because unlike a facial challenge that "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." *People v. Gray*, 2016 IL App (1st) 134012, ¶ 33. "Because as-applied challenges are dependent on the particular facts, it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." (Internal quotation marks omitted). *Id.*

¶ 21 In the present case, the particular circumstances of defendant's as-applied, due process challenge centers around whether the Act's requirement that he register as a sex offender for

committing a 2014 felony theft more than 30 years after his 1983 conviction for attempted criminal sexual assault is rationally related to the Act's purpose of protecting the public from sex offenders, where his criminal background (other than the 1983 conviction) shows no other violent or sexual offenses. The record on appeal is sufficient for us to review defendant's as-applied challenge to the constitutionality of the Act, as the record contains the transcript of the bench trial at which the parties thoroughly explored the circumstances of the 2014 felony theft offense of which he ultimately was convicted, as well as the transcript of the sentencing hearing that explored his criminal history, including his 1983 attempted criminal sexual assault. The appellate record also contains the PSI, which further discussed defendant's criminal history, including his 1983 conviction for attempted criminal sexual assault. The record on appeal is sufficient to enable us to consider whether the Act, as applied to the particular facts of defendant's case, is unconstitutional. See *e.g.*, *Gray*, 2016 IL App (1st) 134012, ¶ 36 (holding that the evidentiary record established at trial was sufficient for appellate review of defendant's as-applied challenge). We proceed to address defendant's as-applied, due process argument which, as discussed, is reviewed here under the rational basis test.

¶ 22 Under the rational basis test, "our inquiry is twofold: we must determine whether there is a legitimate state interest behind the legislation, and if so, whether there is a reasonable relationship between that interest and the means the legislature has chosen to pursue it." *Johnson*, 225 Ill. 2d at 584.

¶ 23 Our supreme court has held that the purpose of the Act "is to aid law enforcement by facilitating ready access to information about sex offenders and, therefore, to protect the public" and that "[t]his is obviously a legitimate state interest." *Id.* at 585. Defendant does not dispute the legitimacy of the State's interest in protecting the public from sex offenders. Rather, defendant

argues that, as applied to him, the Act's requirement that he register as a sex offender for committing the "minor" 2014 felony theft after having committed the attempted criminal sexual assault in 1983 bears no reasonable relationship to the Act's purpose, where his history of nonviolent and nonsexual offenses (other than the 1983 conviction) and the circumstances of the 2014 felony theft do not indicate he is at risk of committing another sex offense.

¶ 24 We disagree. Defendant's lengthy criminal history from 1983 to 2014, including attempted criminal sexual assault in 1983; possession of a controlled substance in 1993, 1996, 2005, and 2007; violation of an order of protection in 1999; retail theft in 1999 and 2000; possession of a stolen vehicle in 2000; and theft in 2004, coupled with his felony conviction for theft in this case in 2014, shows his general tendency to recidivate, *i.e.*, to return to a habit of criminal behavior. One of defendant's prior criminal behaviors was for attempted criminal sexual assault, which is currently defined as a sex offense under the Act. See 730 ILCS 150/2(B) (West 2012). Defendant's sex offense was committed more than 30 years ago, in 1983, prior to the enactment of the Act's registration requirement, but his recent felony theft conviction in this case came in 2014, after the Act's enactment. Under section 3(c)(2.1) of the Act, as amended in 2011, his 2014 felony theft conviction now requires him to register as a sex offender for committing the 1983 attempted criminal sexual assault. Even though the 2014 felony theft was nonviolent and nonsexual ("minor" according to defendant), it still exhibited (along with defendant's other crimes committed since 1983) his general tendency to return to his prior criminal behavior, and as discussed, one of those prior criminal behaviors involved a sex offense. The legislature reasonably could determine that where, as here, defendant has committed a sex offense in the past for which he was not then required to register and has shown a recent, general tendency to recidivate by committing a new felony since the amendment of the Act in 2011, he poses the

potential threat of committing a new sex offense in the future. Such a threat is magnified in the instant case, where defendant has committed no less than 11 crimes (six felonies and five misdemeanors), in addition to the 2014 felony theft at issue here, since his attempted criminal sexual assault in 1983. The Act's requirement that defendant register as a sex offender for committing the 2014 felony theft after having committed the 1983 attempted criminal sexual assault is a reasonable method for accomplishing the desired legislative objective of protecting the public from sex offenders. Accordingly, the Act as applied to defendant satisfies the rational basis test and is constitutional, and therefore, defendant's as-applied due process challenge to the Act fails.

¶25 Next, defendant contends section 3(c)(2.1) of the Act violates the *ex post facto* clauses of the United States and Illinois constitutions by imposing a new and ongoing punishment (the registration requirement) for the attempted criminal sexual assault offense he committed more than 30 years ago.

¶26 The *ex post facto* clauses in the United States and Illinois Constitutions prohibit the retroactive application of laws inflicting greater punishment than the law in effect at the time a crime was committed. *People v. Fredericks*, 2014 IL App (1st) 122122, ¶54. Whether a law constitutes "punishment" or not hinges on whether the legislature intended the law to establish civil proceedings or impose punishment. *Id.* Even where the legislative intent was to enact a civil regulatory scheme instead of a punitive scheme, the law may violate the *ex post facto* clauses when the clearest proof shows it is so punitive, either in purpose or effect, as to constitute punishment. *Id.*

¶27 The Illinois Supreme Court "has consistently held that the Act's registration requirement is not a punishment." *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 207 (2009) (citing *In re*

*J.W.*, 204 Ill. 2d at 75; *Malchow*, 193 Ill. 2d at 424; and *People v. Adams*, 144 Ill. 2d 381, 386-90 (1991)). Defendant argues that we should disregard this precedent and look to *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), which sets forth the following seven factors to determine whether an ostensibly civil statute has a punitive effect: (1) whether the sanction involves an affirmative disability or restraint, (2) whether the sanction historically has been regarded as punishment, (3) whether the sanction applies only on a finding of *scienter*, (4) whether operation of the sanction promotes 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 (applying *Mendoza-Martinez* factors).

¶ 28 Defendant contends that, applying the *Mendoza-Martinez* factors, we should find that the registration requirement is a punishment and that the Act therefore violates the *ex post facto* clauses by retroactively imposing the registration requirement upon him for a crime (attempted criminal sexual assault) committed more than 30 years ago. "We, however, are bound by the decisions of the Illinois Supreme Court" that have held that the registration requirement is not a punishment and, thus, that the Act does not violate the *ex post facto* clauses. *People v. Jenk*, 2016 IL App (1st) 143177, ¶ 26.

¶ 29 Further, we note that in considering an *ex post facto* challenge to the Sex Offender and Child Murderer Community Notification Law (Notification Law) (730 ILCS 152/101 *et seq.* (West 1998)), which requires the Illinois State Police to maintain a sex offender database to identify sex offenders and make information about them available to certain specified persons, the Illinois Supreme Court in *Malchow* expressly considered the *Mendoza-Martinez* factors.

*Malchow*, 193 Ill. 2d at 421-424. The Illinois Supreme Court concluded that the *Mendoza-Martinez* factors did not weigh in favor of a conclusion that the Notification Law constituted punishment, and thus, the *ex post facto* claim failed. *Id.* at 424.

¶ 30 In *Fredericks*, the appellate court considered an *ex post facto* argument regarding the Act at issue here and examined the *Mendoza-Martinez* factors. The appellate court held that *Malchow*'s analysis of the *Mendoza-Martinez* factors with regard to the Notification Law also applies to the Act at issue here and concluded that the sex offender registration is not punishment and, thus, that the Act does not violate the *ex post facto* clauses. *Fredericks*, 2014 IL App (1st) 122122, ¶¶ 58-61. We adhere to *Fredericks* and reject defendant's *ex post facto* claim.

¶ 31 Next, defendant contends the trial court improperly elevated his theft conviction from a Class A misdemeanor to a Class 4 felony and then improperly imposed an "enhanced" three-year sentence on him as a Class 4 felony offender, meaning the court imposed a lengthier sentence based on the higher classification of the offense. Section 16-1(b)(1) of the Criminal Code of 2012 provides that "[t]heft of property not from the person and not exceeding $500 in value is a Class A misdemeanor." 720 ILCS 5/16-1(b)(1) (West 2012). However, defendant here was expressly charged by indictment with theft after having "been previously convicted of the offense [of] retail theft." Therefore, defendant's theft conviction was elevated to a Class 4 felony offense pursuant to section 16-1(b)(2) of the Criminal Code of 2012, which states in pertinent part, "A person who has been convicted of theft of property not from the person and not exceeding $500 in value who has been previously convicted of any type of theft *** is guilty of a Class 4 felony." 720 ILCS 5/16-1(b)(2) (West 2012). As a Class 4 felony offender, defendant was subject to a one- to three-year term of imprisonment. See 730 ILCS 5/5-4.5-45(a) (West 2012).

¶ 32 Defendant contends he should not have been given an enhanced three-year sentence as a Class 4 felony offender because the State failed to comply with section 111-3(c) of the Code of Criminal Procedure of 1963 (Code), which provides:

> "When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial. For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections (730 ILCS 5/5-4.5-10); it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c) (West 2012).

¶ 33 Defendant argues that the indictment failed to comply with section 111-3(c) because it did not expressly state the intention to seek the enhanced three-year sentence for a Class 4 felony and, thus, defendant contends we should reduce his theft conviction to a Class A misdemeanor and remand his case for resentencing. The State counters that defendant has failed to show any prejudice by the alleged defect in the indictment.

¶ 34 The timing of the challenge to the indictment determines whether defendant must show he was prejudiced by the defect in the charging instrument. *People v. Stephenson*, 2016 IL App (1st) 142031, ¶ 18. "If an indictment or information is challenged in a pretrial motion, it must strictly comply with the pleading requirements of section 111-3." (Internal quotation marks

omitted.) *Id.* However, if the defendant challenges the sufficiency of the charging instrument for the first time on appeal, he must show he was prejudiced by the defect in the indictment. *Id.*

¶ 35 Defendant here challenges the sufficiency of the indictment under section 111-3(c) for the first time on appeal and, thus, must show he was prejudiced thereby, *i.e.*, that the indictment failed to notify him that he was being charged with a Class 4 felony theft. See *People v. Jameson*, 162 Ill. 2d 282, 290, 291 (1994) (holding that "[s]ection 111-3(c) ensures that a defendant receives pretrial notice that the State is charging the defendant with a higher classification of offense because of a prior conviction," and that "[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" (emphasis in the original)).

¶ 36 Initially, we note that defendant makes no argument that he was not on notice before trial that he was being charged with a Class 4 felony theft. Nor could he make such an argument, as the indictment informed him that he was being charged with theft after having been previously convicted of retail theft. Only one offense level and sentencing range is allowed for a defendant charged with theft who has a prior conviction for retail theft: a Class 4 offense with a prison term of between one and three years. See 720 ILCS 5/16-1(b)(2) (West 2012); 730 ILCS 5/5-4.5-45(a) (West 2012). Accordingly, as defendant was on notice before trial that he was being charged with Class 4 felony theft subject to a potential three-year term of imprisonment, his challenge to the sufficiency of the indictment fails.

¶ 37 Next, defendant argues that the trial court erred in its assessment of certain fines and fees. Defendant forfeited review by failing to object during sentencing. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). We choose to review the issue as plain error under Illinois Supreme Court Rule 615(a).

¶ 38 First, defendant argues, and the State agrees, that the $250 DNA analysis fee was improperly imposed on him by the trial court and should be vacated because defendant is currently registered in the DNA database. See *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Accordingly, we vacate the $250 DNA analysis fee and direct the clerk of the circuit court to modify the fines and fees order accordingly.

¶ 39 Next, defendant argues the trial court improperly imposed a $50 fine on him pursuant to section 5-1101(c) of the Counties Code (55 ILCS 5/5-1101(c) (West 2012)). Section 5-1101(c) provides for defendant to be charged $50 after being found guilty of a felony. Defendant was convicted of a felony, and therefore we affirm the $50 fine pursuant to section 5-1101(c).

¶ 40 Next, defendant argues, and the State agrees, that he is entitled to (1) a $15 presentence incarceration credit to be applied to the $15 State Police operations fine and (2) a $50 presentence incarceration credit to be applied to the $50 court system fine. Thus, we direct the clerk of the circuit court to modify the fines and fees order to reflect a reduction of defendant's fines by a total of $65. See section 110-14(a) of the Code (725 ILCS 5/110-14(a) (West 2012) (providing that a defendant who is assessed a fine is allowed a credit of $5 for each day he was in custody on a bailable offense for which he did not post bail).

¶ 41 Finally, defendant contends the $190 fee imposed on him for the filing of a felony complaint is actually a fine subject to the $5 per day presentence incarceration credit. The $5 per day presentence incarceration credit applies to "fines," which are pecuniary punishments imposed as part of a criminal sentence. *People v. Tolliver*, 363 Ill. App. 3d 94, 96-97 (2006). The $5 per day presentence incarceration credit does not apply to "fees." *Id.* at 96. A "fee" "is a charge for labor or services, and is a collateral consequence of the conviction which is not punitive, but instead, compensatory in nature." *Id.* at 97.

¶ 42 In *Tolliver*, we held that the charge imposed on a defendant for the filing of a felony complaint is a fee, not a fine and, therefore, the $5 per day presentence incarceration credit provided for in section 110-14(a) of the Code does not apply. *Id.* Accordingly, we affirm defendant's $190 fee for the filing of the felony complaint.

¶ 43 For all the foregoing reasons, we affirm the judgment of the circuit court and direct the clerk of the circuit court to modify the fines and fees order pursuant to Illinois Supreme Court Rule 615(b)(1).

¶ 44 Affirmed as modified.