No. 122325

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- SHANE D. HARVEY Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-14-0576. There on appeal from the Circuit Court of the Eighth Judicial Circuit, Adams County, Illinois, No. 13-CF-394. Honorable Scott H. Walden, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

JACQUELINE L. BULLARD
Deputy Defender

MARIAH K. SHAVER
ARDC No. 6308148
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

E-FILED
3/23/2018 3:05 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ARGUMENT

I.

Improper fees can be reviewed as plain error, and can also be modified under Supreme Court Rule 615(b)(1).

1.

The DNA Identification fee was unauthorized.

The State argued below that assessing Shane Harvey a DNA fee was not error. (St. App. Ct. Br., 21-22) It now concedes that imposition of this fee was error, and had the clerk vacate the fee. (St. Br., 4, n. 2) Although the issue of whether an improperly assessed DNA fee should be reviewed as plain error is moot, review is appropriate under the public interest exception to the mootness doctrine.

The State characterizes the improper assessment of a DNA fee as a simple error in the clerk's record keeping, and essentially argues that it was simply correcting a mistake when it contacted the clerk and requested the fee be removed from Harvey's financial obligations. (St. Br., 4-6); see *People v. Warren*, 2017 IL App (3d) 150085, ¶ 23, appeal denied, judgment vacated, No. 122639, 2017 WL 5635959 (Ill. Nov. 22, 2017) (citing *In re Derrico G.*, 2014 IL 114463, ¶ 107) (clerical miscalculations may be corrected by the clerk without a court order).

The State notes that the court did not order the DNA fee. (St. Br., 1-2, 4, 6) This is irrelevant to the determination of whether the fee was assessed or a clerical error, as this assessment is a fee, not a fine, and a clerk can impose a fee. See *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 151 (DNA assessment is a fee that the clerk could properly impose); *People v. Smith*, 2014 IL App (4th) 12118, ¶ 18 (circuit clerks can have statutory authority to impose a fee, though they lack authority to impose a fine). A "clerical error" is:

> "[a]n error resulting from a minor mistake or inadvertence and not from judicial reasoning or determination; esp., a drafter's or typist's

> technical error that can be rectified without serious doubt about the correct reading. Among the numberless possible examples of clerical errors are omitting an appendix from a document; typing an incorrect number; mistranscribing or omitting an obviously needed word; and failing to log a call. A court can correct a clerical error in the record at any time, even after judgment has been entered. *See* Fed. R. Civ. P. 60(a); Fed. R. Crim. P. 36. - Also termed *scrivener's error*; *vitium clerici*."

Black's Law Dictionary (10th ed. 2014). A clerical error is inadvertently adding a "0" to a fee, changing it from $250 to $2,500, not purposefully assessing it.

Despite the fact that Harvey's PSI indicated he had already provided a DNA sample, the court did not inform the clerk of this. (R. R460-61; SC C3) Without that information, the clerk intentionally imposed the DNA fee.

Even if this were a clerical miscalculation, encouraging, as a general practice, a party to unilaterally contact the clerk to correct perceived errors, with no input from the other party or court, creates an array of potential problems, ranging from honest mistakes to abuse. As demonstrated in this case, where the State disputed Harvey's claim below, it cannot be assumed that the State will not oppose the correction. For example, if appellate counsel had asked the clerk to vacate the fee, the State would have been denied the opportunity to present this argument, and may even have considered that act unethical.

Furthermore, a defense attorney may not receive the same response as an Assistant Attorney General when asking a clerk to vacate an improperly assessed fee without a court order. Because the Attorney General's office does not review the financial assessments of every defendant in the State, and then contact the clerk to vacate improper assessments, the issue of whether an unauthorized DNA fee can be reviewed as plain error should be addressed pursuant to the public interest exception to the mootness doctrine, as this error is likely to occur again, and, as discussed *infra*, at17-20, appellate review is the most efficient resolution.

Regardless of how or why a fee is erroneously assessed, a defendant is still responsible for paying it until the error is corrected. Even though Harvey's DNA fee has been vacated, this case provides a clear example of how this error is likely to recur. See *People v. Griffin*, 2017 IL App 143800; ¶ 5, *petition for leave to appeal granted*, No. 122549 (November 22, 2017) (in 2016 alone there were 137 cases in this court challenging the imposition of fines and/or fees). Because it is understandable that fines and fees are not the primary focus during a sentencing hearing where a defendant is sentenced to prison, it is equally understandable that a judge may forget to inform the clerk that a defendant has previously submitted a DNA sample. See *People v. Smith* 2018 IL App (1st) 151402, ¶ 9.

"When intervening events preclude a reviewing court from granting effective relief to a complaining party, an appeal is rendered moot." *Holly v. Montes*, 231 Ill. 2d 153, 157 (2008). "Generally, courts of review do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *People v. McCoy*, 2014 IL App (2d) 130632, ¶ 11 (citing *In re Barbara H.*, 183 Ill. 2d 482, 491(1998)).

Notwithstanding this general rule, a court may review an otherwise moot issue pursuant to the public interest exception to the mootness doctrine, which permits review where the "magnitude or immediacy of the interests involved warrant[s] action by the court." *In re Shelby R.*, 2013 IL 114994, ¶ 16. Application of this exception, which is narrowly construed, requires a clear showing of each of the following criteria: (1) the question presented is of a public nature; (2) an authoritative determination is desirable for the future guidance of public officers; and (3) the question is likely to recur." *Shelby R.*, 2013 IL 114994, ¶ 16.

This case satisfies all three prongs of the public interest exception test. With respect to the first criterion, "where the issue is one of general applicability,

such as the proper construction of a statute, the exception is implicated." *McCoy*, 2014 IL App (2d) 130632, ¶ 17. Here, the issue of whether the improper assessment of a DNA fee can be reviewed under the plain error rule squarely fits the exception. See *People v. Campbell*, 224 Ill. 2d 80, 84 (2006) (the same principles that govern the interpretation of statutes govern the interpretation of Supreme Court Rules, with the goal being to ascertain and give effect to the intention of the drafters).

Moreover, this is a broad public issue that poses a substantial public concern. See *Griffin*, 2017 IL App 143800; ¶ 5. In *Holly v. Montes*, 231 Ill. 2d 153, 157-58 (2008), this Court reviewed the issue of whether the Prisoner Review Board could require a condition of electronic home confinement (EHC) for an individual on MSR, even though the issue was moot. Because, by statute, every convicted felon was required to serve a term of MSR, a large group of felons would be on MSR at least once, exposing them to the possibility of being placed on EHC. *Id*., at 158. The vast number of felons potentially affected by the imposition of EHC satisfied the first prong of the test. *Id.* Here, an unauthorized second DNA fee can be imposed on even a larger population, as a DNA fee can be assessed for anyone with a felony conviction, including, those sentenced to probation, in addition to those sentenced to terms of incarceration. See 730 ILCS 5/5-4-3(a), (j) (2013).

Regarding the second criterion, issues of first impression make an authoritative decision desirable. *McCoy*, 2014 IL App (2d) 130632, ¶ 18. The issue of whether improperly assessed DNA fees, can be reviewed as plain error is a matter of first impression, making an authoritative decision desirable. Furthermore, as discussed in Harvey's opening brief, there is disagreement among the districts of the appellate court regarding the applicability of plain error review to erroneously imposed fees. (Def. Br., 17-18); See *In re Andrew B.*, 237 Ill. 2d 340, 347 (2010) (second criterion is satisfied where the appellate court is divided).

The third criterion is fulfilled where it is demonstrated that either the defendant himself, or other individuals, might be placed in the same circumstances again. See *McCoy*, 2014 IL App (2d) 130632, ¶ 19. Any defendant who has previously provided a DNA sample, and is later convicted of a felony, might be assessed a subsequent DNA fee. This is an ongoing problem. See *People v. Marshall*, 242 Ill. 2d 285, 290, 302 (2011); *Smith*, 2018 IL App (1st) 151402, ¶¶ 12, 17; *Warren*, 2016 IL App (4th) 120721-B, ¶ 153; *People v. Williams*, 2013 IL App (2d) 120094, ¶¶ 27-29 (all involving defendants being assessed improper second DNA fees).

2.

The Sheriff's fee exceeds the statutorily defined limits.

While acknowledging that the Sheriff's fee was not accurately assessed, the State maintains that it was still substantively correct. (St. Br., 2, 11-12)

The statute states that a $10 fee may be assessed "for serving or attempting to serve a subpoena,"and $5 for returning each process, "except when increased by county ordinance under this Section." 55 ILCS 5/4-5001 (2013).

Adams County adopted an ordinance that increases fees "[f]or each civil process service and return" to a combined fee of $40. Adams County Ordinance to Increase Fees in the Sheriff's Office 2011-09-024-001.The ordinance did not increase the fee for service, or return, of a subpoena. Adams County Ordinance.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *People v. Whitney*, 188 Ill. 2d 91, 97 (1999). The best way to determine legislative intent is the language of a statute, which should be given its plain and ordinary meaning. *Whitney*, 188 Ill. 2d at 97. "Where statutory language is clear and not ambiguous, its plain meaning will be given effect." *Id*.

As it relates to service of process, "criminal" is defined as "relating to, or involving the part of the legal system that is concerned with crime; connected

with the administration of penal justice," whereas "civil" is defined as "of, relating to, or involving private rights and remedies that are sought by action or suit, as distinct from criminal proceedings." Black's Law Dictionary (10th ed. 2014).

The Cost of Service Study that the fee increase references indicates "most" papers are served using the same method, and that "[p]apers of the same priority that are served using the same method were classified generically as 'Civil Process' and the cost of activity was determined as a group." Adams County Ordinance. "The costs of these services are applicable to each and every type of civil paper included in the group." Adams County Ordinance. Though two types of process were excluded, there is no list of what was included. Adams County Ordinance.

It is the State's interpretation of the ordinance that requires departing from the plain language. (St. Br., 11-13) If the drafters intended to include service of criminal subpoenas in the fees being increased, they would have done so. Instead, the drafters referred only to civil process. The word "civil" should be given its plain meaning.

Presumably, in order to become aware of the necessary steps to increase the county's Sheriff's fees, the ordinance's drafters examined 55 ILCS 5/4-5001. In so doing, they necessarily reviewed the listed actions and corresponding fees in determining if the information in the Cost of Service Study provided justification to increase those fees. 55 ILCS 5/4-5001. Service of a subpoena is one of the statute's listed items. 55 ILCS 5/4-5001. After completing this process, the drafters chose five categories of fees to increase. Service of subpoenas was not one of them.

The imposition of a $515 Sheriff's fee was unauthorized. The State argues that the fee for service of each of the15 subpoenas in this case should have been $41. (St. Br., 12) Even if the State were correct on that point, ten of the subpoenas were assigned an amount other than $41.

The State contends that the ten $31 subpoenas are based on the 2003 fee for service and return of civil process. (St. Br., 12) The State cites no authority providing for assessing a Sheriff's fee pursuant to a superceded version of an ordinance, or otherwise allowing for a $31 fee.

Regardless of the cause of the discrepancy, there is no authority for assessing a fee that is not explicitly provided for in 55 ILCS 5/4-5001, or an increase based on the steps provided by the statute. Because there was no authorized increase for the service of a criminal subpoena, the $10 service and $5 return amounts in 55 ILCS 5/4-5001 apply to all 15 subpoenas in this case. Even if this Court agrees with the State, and finds that the amount was properly increased by the ordinance to $40, any amount that is not consistent with the $40 total for service and return was unauthorized, and the $10 and $5 from 55 ILCS 5/4-5001 apply.

B.

Fees are subject to plain error review.

The State agrees that this Court conducted the equivalent of a second-prong plain error analysis of an improperly imposed public defender fee in *People v. Love*, 177 Ill. 2d 550 (1997). (St. Br., 10) Yet the State argues that review of erroneously imposed fees as plain error would be contrary to the plain error test. (St. Br., 14)

Second-prong plain error review is appropriate where the challenged issue impacts the fairness of the proceedings or the integrity of the judicial system. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Holding a defendant accountable to pay a fee there is no authority to assess challenges the integrity of the judicial process.

The State argues the unauthorized imposition of a financial assessment does not, in and of itself, deny a defendant a fair sentencing hearing, and thus is not reviewable as second-prong plain error. (St. Br., 9-11,13-19) Citing to *Love* and *Lewis*, the State suggests that only statutes requiring some additional bit

of information to determine the amount of the fine or fee being assessed must be complied with to avoid a due process violation. (St. Br., 14-15)

This, of course, is not true, as due process is violated when *any* statute is improperly applied at sentencing. The appellate court in *People v. Mullen*, 2018 IL App (1st) 152306, ¶ 38, addressed this distinction, noting the situation in *Lewis* was "more than a simple mistake in setting the fine," and instead was a failure to provide a fair process for determining the fine. "But here, too, the issue is more than a 'simple mistake in setting the fine.' [The defendant] contends that the assessment against him of fees not subject to set-off was arbitrary and not authorized by law. We find that any distinction between this case and *Lewis* is one without a difference. We can and should review these legal errors in the assessments of fines and fees as plain error." *Mullen*, 2018 IL App (1st) 152306, ¶ 38.

In *Lewis*, this Court found that imposition of a street value fine, without the statutorily required evidence of the value of the controlled substance, was reversible second-prong plain error. 234 Ill. 2d at 47-49. Plain-error review was appropriate because the error challenged the integrity of the judicial process and undermined the fairness of defendant's sentencing hearing. *Id*. Imposing the fine without evidentiary support contravened the statute and implicated the right to a fair sentencing hearing. *Id.* at 48. "The integrity of the judicial process is also affected when a decision is not based on applicable standards and evidence, but appears to be arbitrary." *Id*. Similarly, in *Love*, failure to comply with the statutory requirement that a defendant's ability to pay a public defender fee be considered before assessing the fee required vacatur, despite the defendant's failure to object. 177 Ill. 2d at 563-65. In both cases it was failure to comply with the statute that implicated the right to a fair sentencing hearing.

According to the State, Harvey was afforded adequate process because he could have contested his improper financial assessments at his sentencing hearing, in a post-sentencing motion, or at the hearing on such a motion. (St. Br., 10)

What matters is not the fact that Harvey was afforded a sentencing hearing, but whether that sentencing hearing complied with the applicable statutory requirements. See *Mullen*, 2018 IL App (1st) 152306, ¶¶ 5, 14-15, (where hearing regarding public defender fee was insufficient, but some sort of a hearing occurred, remand for a compliant hearing was appropriate); *People v. Glass*, 2017 IL App (1st) 143551 ¶ 9 (where the only information presented at hearing regarding public defender fee was the number of times counsel appeared, not the defendant's ability to pay, hearing was inadequate); *People v. M.I.D.*, 324 Ill. App. 3d 156, 159-61 (3rd Dist. 2001) (where the information presented at the public defender fee hearing was limited to how much time counsel spent on the case, not the defendant's ability to pay, fee was vacated); *People v. Johnson*, 2017 IL App (4th) 160920, ¶¶ 55-56 (reversing defendant's sentence under the second prong of the plain error rule where two of four aggravating factors considered were inherent in the offense).

The State contends that even though the Sheriff's fee was incorrect, it cannot be reviewed as second-prong plain error, because its imposition was not so egregious as to deny Harvey a fair sentencing hearing. (St. Br., 13) The State attempts to characterize this failure to comply with the statute as a simple mistake. (St. Br., 13) A simple mistake would be accidentally counting a subpoena fee twice while calculating the total amount owed. Here, the amounts reflected on the majority of the subpoenas were not authorized by 55 ILCS 4/5001. The proper procedure for determining when a Sheriff's fee should be assessed, and in what amount, is outlined in 55 ILCS 4/5001. Imposing any fee inconsistent with the statute violated Harvey's right to due process, and denied him a fair sentencing hearing, just as the failure to follow the street value fine statute did in *Lewis*. 234 Ill. 2d at 47-48.

The same logic applies to the assessment of a DNA fee. The statute only provides for the submission of one DNA sample. *Marshall*, 242 Ill. 2d at 303. Because subsequent DNA fees are in direct contravention of the statute, it is inherently part of the process in determining if the fee applies to confirm whether a previous sample has been submitted. Failure to do so is a failure to comply with the statute.

Regardless of whether the improper assessment was a "simple mistake" or not, the deprivation for the defendant remains the same; and plain error review in a case already on appeal is the efficient way to remedy an error that might otherwise go uncorrected. See *People v. Gutierrez*, 2012 IL 111590, ¶ 14 n. 1 ("It is obviously much more efficient for the appellate court to simply take care of the matter while the case is on review than to have the defendant initiate a separate proceeding to have the fine vacated.")

Furthermore, the State's position that these errors are too simple to merit plain-error review is inconsistent with this Court's holding in *Lewis* that there are no *de minimus* limitations to errors that can affect the integrity of the judicial process and fairness of the proceeding. (St. Br., 18-19); *Mullen*, 2018 IL App (1st) 152306, ¶ 35 ("Our supreme court has made it clear that there is no *de minimus* exception to a plain-error analysis.") (citing *Lewis*, 234 Ill. 2d at 48; *People v. Sebby*, 2017 IL 119445, ¶ 69 ("Plain errors by definition are substantial.")).“An error may involve a relatively small amount of money or unimportant matter, but still affect the integrity of the judicial process and the fairness of the proceeding if the controversy is determined in an arbitrary or unreasoned manner." *Id.*

The State also argues that allowing a defendant to "ignore" his monetary assessments until reaching the appellate court wastes resources on matters that could have been corrected if brought to the attention of the trial court. (St. Br., 20) This case demonstrates why allowing review of improperly assessed fees on

appeal is necessary. As the State conceded below, the record does not suggest Harvey was notified he had been assessed a DNA fee. (St. App. Ct. Br., 13) Because a clerk can assess fees, these assessments may not be noted on the record, or appear in a signed order, but exist only in the clerk's accounts receivable records. Because a defendant has no way to know such a fee has been imposed, appellate counsel may be the first person with the opportunity to discover the error.

Here, even if Harvey had been made aware of all of the fees he was assessed, in order to file an adequate post-sentencing motion to address his two improperly assessed fees, he would have needed, within 30 days of sentencing: (1) access to the necessary legal research tools, from his position of being transferred from the county jail to IDOC; (2) copies of all 15 subpoenas; (3) a copy of the Adams County ordinance; and (4) proof that he had previously provided a DNA sample. It is questionable if such a feat would be possible under those circumstances, particularly for an indigent defendant who lacks the financial resources to acquire necessary items such as paper, stamps, photocopies, and phone cards. See *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 19 ("the facts of this case highlight the all-too-frequent futility of Illinois' labyrinthine system of fines and fees for criminal defendants").

Harvey was represented by counsel, yet, as is often the case with fines and fees issues, his attorney did not raise these errors. If these errors cannot be addressed as plain error, when appellate counsel notices such an issue, counsel would be limited to addressing them by raising a claim of ineffective assistance of counsel, and conducting an analysis pursuant to *Strickland* v. *Washington*, 466 U.S. 668 (1984), regarding trial counsel's failure to address the erroneously imposed fee. See *People v. Cherry*, 2016 IL 118728, ¶ 24 (to prevail on a claim of ineffective assistance, a defendant must show counsel's performance was deficient and that he was prejudiced by the deficient performance). Requiring appellate

counsel to raise these issues in this manner would only consume more resources, as counsel would spend additional time presenting arguments under the *Strickland* framework, and the State and court would then have to respond. See *Mullen*, 2018 IL App (1st) 152306, ¶ 23 (as an alternative to plain error review, defendant claimed his attorney was ineffective for failing to object to erroneously imposed assessments); but see *People v. Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 8 (trial counsel's failure to object to $57 in improperly imposed fines was *de minimus*, and did not constitute constitutionally deficient performance).

Because any failure to follow statutory requirements results in an unfair sentencing hearing, improperly assessed fees can be reviewed as plain error.

C.

Fees can be modified under Illinois Supreme Court Rule 615(b).

The State suggests that Rule 615 should be read as a whole, where section (a) prescribes reviewable errors, and section (b) prescribes potential remedies. (St. Br., 21-22)

Harvey respectfully suggests this Court follow the reasoning in *People v. McGee*, 2015 IL App (1st) 130367, ¶ 82, and find that Rule 615(b) permits a reviewing court to modify the fines and fees order without remand.

Harvey otherwise stands on the arguments presented in his Opening Brief regarding this issue. (Def. Br., 9-36)

II.

Improper fines are reviewable as plain error.

The State concedes, as it did below, that imposition of a Crime Stoppers fine was unauthorized. (St. App. Ct. Br., 22-23); (St. Br., 6) However, the State now argues that this issue is moot because the Crime Stoppers fine was fully offset by presentence credit. (St. App. Ct. Br., 22-23); (St. Br., 6-8)

The State is correct that Harvey's presentence credit covered his applicable fines, with adequate surplus to satisfy the Crime Stoppers fine.[1] (St. Br., 6-8) The State is also correct that the Crime Stoppers fine did not change the amount of the Lump Sum fine.[2] (St. Br., 7) Accordingly, Harvey agrees that the issue is moot. (St. Br., 6-8)

---

[1] The State calculates a total of $330 in fines that can be offset by presentence credit, including the $10 Domestic Battery fine. (St. Br., 7, n. 5) Because this fine cannot be satisfied with presentence credit, Harvey actually has $320 in fines that can be satisfied with credit. See 730 ILCS 5/5-9-1.6 (2013) (Domestic Battery fine "shall not be considered a part of the fine for purposes of any reduction in the fine for time served either before or after sentencing").

[2] The State contends that Harvey has $440 in fines that can be considered in calculating the Lump Sum fine. (St. Br., 7, n. 6) The State includes the $100 VCVA fine. (St. Br., 7, n. 6) Under the previous version of the VCVA statute, requiring calculation of the VCVA fine, the Lump Sum was to be calculated before the VCVA was determined. See *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 131. It logically follows that the Lump Sum fine continues to be calculated without including the VCVA. Thus, the Lump Sum should have included the following fines: $10 Medical, $20 CASA, $50 Court, $15 CAC, $5 State Police Operations, $30 Juvenile Records, $200 Domestic Violence, and $10 Domestic Battery, totaling $340. Though the State did not include the $10 Medical fine in its calculation, this assessment is a fine, and should be included. See *People v. Larue*, 2014 IL App (4th) 120595, ¶ 57 (arrestee's medical fee is actually a fine). Thus, the calculation would be $340 ÷ 40 = 8.5. Including the $10 Crime Stoppers fine, the calculation would be $350 ÷ 40 = 8.75. Because the Lump Sum is calculated as $10 for each $40 increment, or fraction thereof, the additional $10 from the Crime Stoppers fine does not change the total of the Lump Sum fine, as both calculations result in a $90 fine. See 730 ILCS 5/5-9-1(c) (2013). Harvey was assessed an $80 Lump Sum fine. (R. C79)

An issue is moot if no actual controversy exists or where the court cannot grant effectual relief. *Dixon v. Chicago and North Western Transp. Co.*, 151 Ill. 2d 108, 116 (1992). As argued *supra*, at 3, an otherwise moot issue can be reviewed pursuant to the public interest exception to the mootness doctrine.

Because the State challenges the premise that improperly assessed fines can be reviewed as plain error, and this is a recurring issue, it should be reviewed under the public interest exception to the mootness doctrine. (St. Br., 14-19)

Regarding the first criterion, the issue of whether improperly assessed fines can be reviewed under the plain error rule invokes the public interest exception. See *People v. McCoy*, 2014 IL App (2d) 130632, ¶ 17 ("[W]here the issue is one of general applicability, such as the proper construction of a statute, the exception is implicated."); *People v. Campbell*, 224 Ill. 2d 80, 84 (2006) (same principles govern interpretation of statutes and Supreme Court Rules, with the goal being to ascertain and give effect to the drafters' intention). Moreover, this is a broad public issue that poses a substantial public concern, as any defendant convicted of a felony or misdemeanor offense can be assessed a wide variety of fines. See *Griffin*, 2017 IL App (1st) 143800, ¶ 5; *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 19.

As it relates to the second criterion, the appellate court is divided on the issue, requiring an authoritative determination. See *In re Andrew B.*, 237 Ill. 2d 340, 347 (2010); see also *People v. Anderson*, 402 Ill. App. 3d 186, 194 (3rd Dist. 2010); *People v. Cox*, 2017 IL App (1st) 151536, ¶¶ 95-102; *People v. Vara*, 2016 IL App (2d) 140848 ¶ 7, *petition for leave to appeal granted*, No. 121823 (March 29, 2017); *People v. Mullen*, 2018 IL App (1st) 152306, ¶ 26 (all reviewing unauthorized fines as plain error); but see *People v. Smith*, 2018 IL App (1st) 151402, ¶ 5; *People v. Frazier*, 2017 IL App (5th) 140493, ¶ 34; *People v. Wilson*, 2017 IL App (3d) 150165, ¶ 24 (finding fines are not reviewable as second-prong plain error).

The third criterion is fulfilled based on the frequency with which the appellate court has been asked to review the improperly assessed fines as plain error. See *McCoy*, 2014 IL App (2d) 130632, ¶ 19 (where it is demonstrated that either the defendant or other individuals might be placed in the same circumstances again the third criteria is fulfilled); see also *Griffin*, 2017 IL App 143800; ¶ 5; *Anderson*, 402 Ill. App. 3d at 194; *Cox*, 2017 IL App (1st) 151536¶¶ 95-102; *Vara*, 2016 IL App (2d) 140848 ¶ 7; *Smith*, 2018 IL App (1st) 151402, ¶ 5; *Frazier*, 2017 IL App (5th) 140493, ¶ 34; *Wilson*, 2017 IL App (3d) 150165, ¶ 24.

The Crime Stoppers fine is provided for by the statute regarding conditions of probation and conditional discharge. 730 ILCS 5/5-6-3(b)(13) (2013). Pursuant to the statute, the court may order a defendant on probation or conditional discharge to contribute to a local anti-crime program. 730 ILCS 5/5-6-3(b)(13). "No similar provisions authorize imposition of such a fine when a sentence of incarceration is imposed." *People v. Beler*, 327 Ill. App. 3d 829, 837 (4th Dist. 2002). Therefore, imposition of a Crime Stoppers fine on a defendant sentenced to prison, "has no basis in the statute or the evidence and will be arbitrary," just as the imposition of a street value fine will be where there is no evidence regarding the value of the controlled substance. See *People v. Lewis*, 234 Ill. 2d 32, 47-48 (2009).

The State argues that *People v. Lewis*, 234 Ill. 2d 32 (2009), rejected a blanket exemption of fines from the ordinary rules of forfeiture. (St. Br., 15) *Lewis* made no such ruling. In fact, in *People v. Fort*, 2017 IL 118966 ¶ 19, this Court found "'[t]he imposition of an unauthorized sentence affects substantial rights' and, thus, may be considered by a reviewing court even if not properly preserved in the trial court." *Fort*'s parenthetical citation to *Lewis* stated "plain error review is appropriate to consider the imposition of a fine in contravention of the statute because it implicates a defendant's right to a fair sentencing hearing." 2017 IL 118966 ¶ 19.

This Court's summary of its own holding could not have been any clearer that *Lewis* provides for the review of any improperly assessed fine as plain error.

Indicating that several courts have not so interpreted *Lewis*, the State cites *People v. Smith*, 2018 IL App (1st) 151402, ¶ 5, where the defendant sought review of monetary issues as plain error. (St. Br., 15-16) Though the parties agreed that his claims could be reviewed as plain error, the court did not, finding that because the defendant did not claim that he was denied a fair process for determining his fines and fees, his substantial rights were not affected. *Id.*, ¶¶ 4-5.Nonetheless, as the State waived any forfeiture argument, the errors were reviewed. *Id.* ¶ 7.

The State also cites *People v. Wilson*, 2017 IL App (3d) 150165 ¶¶ 17, 20-24, which found that the improper assessment of a Crime Stoppers fine was not reversible as second-prong plain error. *Wilson* held that, in contrast to *Lewis*, the imposition of the Crime Stoppers fine did not deny a defendant fair process as no hearing or factual determination is required before imposing the fine, and therefore the fairness concerns at issue in *Lewis* were not implicated. *Id.*, ¶ 24. *Wilson*'s interpretation of *Lewis* squarely contradicts this Court's description of *Lewis* in *Fort*. 2017 IL 118966 ¶ 19 (citing *Lewis*, 234 Ill. 2d at 48-49).

Though there does appear to be a recent trend of not reaching improperly assessed fines as plain error, the appellate court has also relied on *Lewis*, as this Court intended, to reach such issues. See *Anderson*, 402 Ill. App. 3d at 194; *Cox*, 2017 IL App (1st) 151536¶¶ 95-102; *Mullen*, 2018 IL App (1st) 152306, ¶¶ 26, 42 (all reviewing issues related to the improper assessment of fines as plain error). The State's argument only highlights the need for clarification.

Moreover, this recent trend is motivated by the appellate court's concern with the volume of monetary issues presented for review following the abolishment of the void sentence rule in *People v. Castleberry* 2015 IL 116916, ¶ 19. See *Griffin*,

2017 IL App (1st) 143800, ¶¶ 5-9; *Smith*, 2018 IL App (1st) 151402, ¶¶ 8-11; *Mullen*, 2018 IL App (1st) 152306, ¶ 27-32. The problem overlooked by cases like *Griffin*, that suggest the appellate court should not review these matters, is that not allowing plain error review would only hinder efficiency. 2017 IL App (1st) 143800, ¶¶ 6-9,

In *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶¶ 47-48, 50, the appellate court went a step further, complaining of the State and appellate counsel's failure to resolve the alleged errors regarding fees by moving for an agreed order in the trial court. The problem with this proposal is that, where the Office of the State Appellate Defender (OSAD) is appellate counsel, as in the majority of criminal appeals, counsel is unable to file a motion in the trial court. See Admin. Off. of the Ill. Cts., 2015 Annual Report of the Illinois Courts, 24, at http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2015/2015_Admin_Summary.pdf.; Ofc. of the St. App. Defender, Annual Report Fiscal Year - 2015, 28, at http://www.illinois.gov/osad/AboutUs/AnnualReports/AnnualReportFY2015.pdf. (of the 3,311 criminal appeals filed in 2015, OSAD represented 3,128 of those defendants); 725 ILCS 105/10 (a) (2018) (OSAD shall represent indigent persons on appeal in criminal and delinquent minor proceedings).

If this Court determines that a motion in the trial court is appropriate, given that OSAD is prohibited from filing such a motion, would a defendant have a right to have counsel appointed? If not, *pro se* filings are often confusing, burdening trial judges, and creating still more appeals.

Furthermore, it is unclear what tools would be available to resolve these matters. For example, there is a dispute as to whether a *nunc pro tunc* motion can resolve such issues. *People v. Coleman*, 2017 IL App (4th) 160770, ¶ 22, found that because "[t]he purpose of a *nunc pro tunc* order is to make the present record correspond with what the court actually decided in the past," issues requiring more than correction of an error in arithmetic are not properly resolved in this

manner. *Coleman*, 2017 IL App (4th) 160770, ¶ 22. Where a fine, or fee, is improperly assessed, the path to correction is not to make the record correspond with the previous erroneous assessment, which is all a *nunc pro tunc* order allows. However, *Griffin* suggests that a defendant may petition the trial court for such relief. 2017 IL App (1st) 143800, ¶ 26.

Creating a rule that such issues be raised only by separate motion in the trial court will require additional judicial resources. Even if OSAD were permitted to practice in the trial court, requiring OSAD attorneys to travel hours to the counties where these motions would be filed to litigate them would require an extraordinary time expenditure. And, OSAD would still be appointed on the original appeal, which would require additional filings to resolve, such as a brief on non-monetary issues, a motion to dismiss, or an *Anders* brief. See *Anders v. California*, 386 U.S. 738 (1967); *People v. Jones*, 38 Ill. 2d 384 (1967).

Also, as evidenced in this case, some monetary issues will not be agreed upon, and would still require briefing. The State contested two of Harvey's claims below, and though it conceded that the Crime Stoppers fine was improperly imposed, the appellate court declined to accept the concession, further proving that agreed motions in the trial court are not the appropriate solution to this problem.

The *Mullen* court, concurring with its previous decisions that the amount of time and effort expended in resolving erroneous financial assessments is inefficient, encouraged the parties to resolve these errors at the trial level and through agreed orders, but found that even though consideration of these issues for the first time on appeal is "neither desirable nor efficient," plain error is applicable. 2018 IL App (1st) 152306, ¶ 29-32, 34. Few prosecutors and public defenders, no matter how conscientious, will routinely "review judgment orders upon entry to ensure that fines and fees are correctly assessed." See *Griffin*, 2017 IL App (1st) 143800, ¶ 7; *Smith*, 2018 IL App (1st) 151402, ¶ 9 (it is understandable

that the focus at a sentencing hearing is not fines and fees). This is what appellate lawyers do. Finding that monetary issues can be reached as plain error would actually improve efficiency, as it would pave the way for more agreed motions to dispense with monetary issues in the appellate court. See *Smith*, 2018 IL App (1st) 151402, ¶ 10 (noting that the State regularly concedes fines and fees errors, although typically not until the matter is fully briefed, and that the parties could easily stipulate to presentence credit against such assessments).

It is most efficient to include monetary issues in a brief when other issues are already being raised, rather than have separate filings to address those issues. See *People v. Gutierrez*,2012 IL 111590, ¶ 14 n. 1. The additional time it may take to review these issues cannot outweigh a defendant's right to be free from unauthorized financial burdens. See *People v. Bailey,* 364 Ill. App. 3d 404, 411 (4th Dist. 2006) (Knecht, J., specially concurring) (all defendants deserve a measure of respect and attention lest they believe that we are on an assembly line). The cost of not addressing these issues is born by some of the poorest and most disadvantaged members of our community.

One of the reasons there is no *de minimus* exception to the plain error rule is that each of the dollars in question matters a great deal to the person expected to pay them. See *Mullen*, 2018 IL App (1st) 152306, ¶ 31 (even though many fines and fees are not collectable, their imposition matters to defendants, as unpaid fines can have lasting repercussions) (citing *Grigorov*, 2017 IL App (1st) 143274, ¶ 20; *Smith*, 2018 IL App (1st) 151402, ¶ 9).

Because the imposition of a fine that has no statutory basis affects the integrity of the judicial process and fairness of the sentencing hearing, the unauthorized imposition of all fines should be reviewable as plain error.

Mr. Harvey otherwise stands on the arguments presented in his Opening Brief on this issue. (Def. Br., 37-39)

CONCLUSION

For the foregoing reasons, Shane D. Harvey, defendant-appellant, respectfully requests this Court exercise its discretion under Rule 615(b) to revise the Sheriff's fees to comport with the statutory limits, or, in the alternative, remand this matter with direction that the Appellate Court review Harvey's alleged errors pursuant to the plain error doctrine.

Respectfully submitted,

JACQUELINE L. BULLARD
Deputy Defender

MARIAH K. SHAVER
ARDC No. 6308148
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Mariah K. Shaver, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 20 pages.

/s/Mariah K. Shaver
MARIAH K. SHAVER
ARDC No. 6308148
Assistant Appellate Defender

No. 122325

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-14-0576.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Eighth Judicial
-vs-	)	Circuit, Adams County, Illinois, No. 13-CF-394.
SHANE D. HARVEY	)	Honorable Scott H. Walden,
Defendant-Appellant	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Shane D. Harvey, Register No. S10932, Hill Correctional Center, P. O. Box 1700, Galesburg, IL 61401

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 23, 2018, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Natasha Wallace
LEGAL SECRETARY
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240
Service via email will be accepted at
4thdistrict.eserve@osad.state.il.us
(217) 782-3654