No. 125738

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RECARDO JOHNSON, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-16-3169. There on appeal from the Circuit Court of Cook County, Illinois , No. 07 CR 17223. Honorable Alfredo Maldonado, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

The circuit court erred in summarily dismissing a *pro se* petition solely on the basis that Mr. Johnson lacked standing.

As an initial matter, the State asserts that both the First and Second District of the Illinois Appellate Court have held that lack of standing is an appropriate matter for first-stage summary dismissal. (St. Br. at 14 n.3) However, the State conflates two distinct issues—whether standing is met and whether lack of standing is an appropriate grounds for summary dismissal. *People v. Vinkour*, 2011 IL App (1st) 090798, ¶¶ 10, 14. Only the First District has considered and decided that lack of standing can properly be decided at the first stage of proceedings. *Id.* at ¶¶ 11-14; *People v. Steward*, 406 Ill. App. 3d 82, 89-90 (1st Dist. 2010). In the Second District case cited by the State, the type and timing of the dismissal was not raised or discussed. *People v. Huerta-Perez*, 2017 IL App (2d) 161104, ¶¶ 10-16. Thus, only the First District of the Illinois Appellate Court has actually extended summary dismissal to include lack of standing.

A. The Post-Conviction Hearing Act does not permit summary dismissal on standing grounds at the first stage of proceedings.

The parties agree that this issue turns on whether the legislature intended for lack of standing to be included as grounds for summary dismissal under section 122-2.1 of the Post-Conviction Hearing Act. (St. Br. at 7) Relying on *People v. Blair*, the State argues that the legislature intended to permit a standing analysis within the "frivolous and patently without merit" review. (St. Br. at 7-8) (citing *Blair*, 215 Ill. 2d 427 (2005)). But the analysis in *Blair* does not apply to standing issues.

In *Blair*, this Court found that the legislature "granted the courts the ability

to make [] determinations [of *res judicata* and forfeiture] in sections 122-2.1(a)(2) and 122-2.1(c). *Blair*, 215 Ill. 2d at 445-46. In reaching this conclusion, this Court first noted that section 122-2.1(a)(2) did not bar summary dismissals based on "conclusions of law." *Id*. Turning then to section 122-2.1(c), this Court reasoned, "[m]ore importantly, when evaluating a petition, a trial court 'may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding.'" *Id*. at 446 (quoting 725 ILCS 5/122-2.1(c)). This is precisely the information needed for a trial court to determine what was actually litigated, what could have been litigated, and what was actually decided on direct appeal. *Id*. at 446. Thus, on the basis of section 122-2.1(c), this Court found that the legislature "emphatically intended" dismissal of claims on the basis of *res judicata* and waiver. *Blair*, 215 Ill. 2d at 446-47.

The same cannot be said of claims of a lack of standing. Even the State concedes that trial courts may need to go beyond the petition and the contents of subsection (c) to determine standing. (St. Br. at 12-15) In an attempt to overcome this obstacle, the State asserts that the legislature intended to allow trial courts to seek and rely on outside sources subject to judicial notice during summary dismissal. (St. Br. at 13) This argument should be rejected.

First and foremost, nothing in section 122-2.1 hints at permitting courts to engage in fact-finding among outside sources even if limited to judicially-noticed facts. This is unsurprising as there should be no fact-finding or credibility determinations at the dismissal stage since "all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true." *People*

v. Coleman, 183 Ill. 2d 366, 385 (1998).

Furthermore, *sua sponte* judicial notice is a rare phenomenon. *People v. Barham*, 337 Ill. App. 3d 1121, 1129 (5th Dist. 2003). When it is used, the well-established "concepts of fair play require that all parties * * * be given fair opportunity to confront and to rebut any evidence that might be damaging to their position." *Id*. Of course, that is impossible when *sua sponte* judicial notice is used to summarily dismiss a *pro se* petition. The petitioner has no chance to argue against the trial court's fact-finding. That distinguishes the use of judicial notice during summary dismissal from appellate cases where the parties invited it or, at least, had counsel who could understand and object to it. (St. Br. at 13) (citing cases approving judicial notice of the IDOC website on appeal); see, *e.g.*, *People v. Young*, 355 Ill. App. 3d 317, 321 n.1 (2d Dist. 2005) (the defendant requested and the State objected).

Judicial notice aside, the State asserts that, for some cases, lack of standing can and should be determined from the petition itself and the documents listed within the summary dismissal provision. (St. Br. at 13-14) Implicit in this assertion is an assumption that it is possible to firmly calculate a latest possible custody date based on the original sentencing documents. But even then, the court must necessarily make assumptions.

For example, the original sentencing documents cannot show whether a consecutive sentence was later added under a different case number. See, e.g., 730 ILCS 5/5-8-4(d)(6)(mandating consecutive sentencing for crimes committed while in IDOC custody). Under *People v. Pack*, this would extend the outdate and change the custody and standing analysis. *People v. Pack*, 224 Ill. 2d 144, 145-46,

152 (2007); (Op. Br. at 13-14). Under the State's approach, trial courts could regularly and erroneously find that petitioners lacked standing at the first stage of proceedings because of a failure to realize they were serving consecutive sentences that were not apparent in the original case file.

There are also other discrepancies that arise between sentencing and release. In cases of inadvertent early release or escape, more recent facts would be required to determine whether and for how long the prisoner was returned to custody. See, e.g., *Vega v. United States*, 493 F.3d 310, 321-23 (3d Cir. 2007)(examining the question of how to determine custody length when a prisoner is inadvertently released early). Illinois has had a case within the past five years where someone was kept in prison past their outdate due to an apparent error in DOC records. *Brzowski v. Pierce*, 2017 IL App (3d) 160228-U, ¶¶ 15-22.[1] Indeed, this Court is no stranger to the regularity with which sentencing errors can arise in any given case—including credit miscalculations and incorrect supervised release terms. C.J. Karmeier, *Overcoming the Chronic Challenge of Correcting Sentencing Errors: Help is on the Way*, (Feb. 25, 2019) (announcing new rules to ease sentence corrections), http://illinoiscourts.gov/Media/enews/2019/022519_chief_article.asp.

Given these possibilities, it would be foolhardy to make a final determination on standing based solely on the petition and the original case file and record. The trial judge would necessarily be assuming that there were no irregularities or changes in how the sentence was served in calculating an outdate to analyze

[1] This unpublished decision is not cited for its analysis or reasoning. It is but an example of the unexpected custody issues that cannot be anticipated from a cold record. See *People v. Carr*, 2013 IL App (3d) 110894, ¶ 29 n.2 (citing unpublished decisions for as an "example" of court actions).

standing. And the appeal would not provide the proper space to rebut lack of standing with additional facts. *People v. Porter*, 122 Ill. 2d 62, 71 (1988) (making clear no amendments could be made on appeal). Surely, the legislature did not intend to create space for erroneous fact-finding during summary dismissal.

Next, the State refers to the purpose of section 122-2.1 in arguing that the legislature intended to allow summary dismissal on the grounds of lack of standing. (St. Br. at 8-9) Citing to *People v. Rivera*, 198 Ill. 2d 364 (2001), and *Blair,* the State relies on quotes and analysis of the legislative debates to support its point. (St. Br. at 8-9) However, this legislative history contains no indication that the legislature intended to include a review of standing during the summary dismissal stage. 83d Ill. Gen. Assem., Senate Proceedings, May 19, 1983, at 171-74; 83d Ill. Gen. Assem., House Proceedings, June 21, 1983, at 87-96.

On the contrary, the legislative history makes clear that the legislators were focused on empowering judges to review the petition and prior proceedings in order to dismiss particular types of resource-wasting petitions. First, legislators wanted judges to be able to get rid of petitions which were "repetitive of issues already litigated." *Blair*, 215 Ill. 2d at 447-48 (citing to *Rivera*, 198 Ill. 2d 364 (2001), and quoting the legislative history); 83d Ill. Gen. Assem., Senate Proceedings, May 19, 1983, at 171 (statements of sponsor Senator Sangmeister); 83d Ill. Gen. Assem., House Proceedings, June 21, 1983, at 89 (statements of Representative Johnson)(explaining the purpose of the bill was avoiding expending resources on the many petitions that allege "matters that were raised at the trial" and "can't be raised again"). Second, legislators wanted judges to be able to get rid of petitions where "a quick look at the record * * * will show the petition is absolutely untrue"

like when a petitioner complains about being forced to use a public defender when the record shows he had counsel of choice. 83d Ill. Gen. Assem., House Proceedings, June 21, 1983, at 89. Nothing related to standing or custody was discussed at all.

The State's analysis seemingly forgets that the overarching purpose of the Post-Conviction Hearing Act was to make it easier for *pro se* petitioners to bring claims of constitutional error before the courts. See *People v. Bean*, 389 Ill. App. 3d 579, 587-9 (5th Dist. 2009) (Stewart, J., dissenting) (describing the historical context and development of the Post-Conviction Hearing Act). In *Marino v. Ragen,* Justice Rutledge specially concurred to clarify the contours of the problem with Illinois's post-conviction proceedings:

> The trouble with Illinois is not that it offers no procedure. It is that it offers too many, and makes them so intricate * * * that in practical effect they amount to none. The possibility of securing effective determination on the merits is substantially foreclosed by the probability * * * that the case will go off on the procedural ruling that the wrong one of several possible remedies has been followed.
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> * * *
>
> If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court.

Marino v. Ragen, 332 U.S. 561, 565-70 (1947). The Act was specifically designed to make it easier for *pro se* prisoners to get access to proceedings on the merits on their underlying constitutional claims. *People v. Slaughter,* 39 Ill. 2d 278, 284-85 (1968). In context, the summary dismissal provision was intended as a limited exception to the Act's overarching goal of getting *pro se* petitioners a ruling on their underlying claims. Thus, the provision should be not be expanded to include lack of standing where nothing in the Act or legislative history indicates the

legislature intended for it to be included.

In the opening brief, Mr. Johnson argued that the standing requirement should be analyzed like the timeliness requirement in *People v. Boclair,* 202 Ill. 2d 89 (2002), and the verification requirement in *People v. Hommerson*, 2014 IL 115638. (Op. Br. at 10-12) The State attempts to distinguish only *Boclair*. (St. Br. at 11-12) But the State's reasons for not following the *Boclair* analysis are unpersuasive.

First, the State focuses on the discussion of whether timeliness was an "inherent element of the right to bring a post-conviction petition." (St. Br. at 11-12) (citing *Boclair*, 215 Ill. 2d at 100-01 and *People v. Wright*, 289 Ill. 2d 1 (1999)). This discussion, which originates in *Wright*, is of limited usefulness, because it arose from a now-defunct jurisdictional argument. Previously, time requirements were considered jurisdictional if they were "an inherent element" of a statutory right. *Wright*, 289 Ill. 2d at 7-8 (quoting *Fredman Bros. Furniture Co. v. Dep't of Revenue*, 109 Ill. 2d 202, 209 (1985)). This Court has since clarified that statutory requirements, including timeliness, are not jurisdictional in nature. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 338-42 (2002).

What was important to the *Boclair* court was that untimeliness was considered an affirmative defense to be forfeited by the State, or even waived "by a dutiful prosecutor" convinced of constitutional error. *Boclair*, 215 Ill. 2d at 101-02. Like untimeliness, lack of standing is not jurisdictional and is thus subject to waiver and forfeiture by the State. *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 252-53 (2010).

The State agrees that post-conviction petitions are civil, but it asserts that

the legislature likely intended for standing to be treated differently under the Act than in other civil proceedings. (St. Br. at 11) Namely, the State does not think lack of standing should be treated as an affirmative defense as would be typical. (St. Br. at 11) The State has little support for this argument. It cites only to section 122-2.1(c) of the Act which contains no mention of standing, custody, or the materials necessary to analyze standing. 725 ILCS 5/122-2.1(c). Notably, section 122-2 gives the necessary "contents" of the petition, and it includes no mention of the standing requirement. 725 ILCS 5/122-2. This supports the idea that the legislature did not intend for standing to be pled, but instead expected it to be raised as an affirmative defense.

The State also attempts to distinguish timeliness from standing on the grounds that the subsection on timeliness includes a "safety valve" in the form of the "culpable negligence" standard. (St. Br. at 12) This argument is weak since no safety valve was required when a similar analysis was used in discussing the verification requirement in *Hommerson*. *Hommerson*, 2014 IL 115638, ¶ 11.

Under section 122-1(b), post-conviction proceedings "commence" with the filing of a petition "verified by affidavit." 725 ILCS 5/122-1(b). The requirement of a verification affidavit includes no "safety valve" akin to the culpable negligence standard. *Compare* 725 ILCS 5/122-1(b) *with* 725 ILCS 5/122-1(c). Nonetheless, this Court held that a lack of a verification affidavit should not be considered at the summary dismissal stage. *Hommerson*, 2014 IL 115638, ¶ 11. This Court reasoned that focusing on the lack of a verification affidavit was contrary to the purpose of reaching the underlying "constitutional claim for relief." *Id.* Additionally, the fact that the Act separated the timeliness and verification requirements from

the summary dismissal section showed "legislative intent to draw a distinction between them." *Id*. Any problems with timeliness and verification could be raised by the State at the second stage of proceedings. *Id.* In short, this Court reaffirmed its *Boclair* analysis even when there is no so-called safety value.

The State also argues that timeliness is uniquely unsuitable for summary dismissal, because it requires a credibility finding on culpable negligence. (St. Br. at 12) Again, this distinction was not vital to this Court's analysis in *Boclair* as shown by the fact that it did not come into play in *Hommerson*. *Hommerson*, 2014 IL 115638, ¶ 11. Additionally, this very case shows that the trial court may end up discrediting factual allegations when ruling on standing. Here, Mr. Johnson alleged that he was "presently incarcerated" when filing his successive petition. (R.C36) This should have been the only allegation required to satisfy section 122-1(a). But the trial judge discredited it by engaging in *sua sponte* fact-finding in a separate case file and on the IDOC website. (R.C43) (finding the petitioner was incarcerated but under a different case number).

There is no reason to diverge from this Court's analysis in *Boclair* and *Hommerson*. Timeliness, a verification affidavit, and standing all arise in the same section of the Act—a section which is separate from and not mentioned in the summary dismissal section. *Compare* 725 ILCS 5/122-1(a),(b),(c) *with* 725 ILCS 5/122-2.1. All three issues are ones that the State can raise affirmatively at the second stage, or forfeit, or waive. (Op. Br. at 10-11) None of the issues are tied to the underlying constitutional claim. Further, a definitive standing analysis requires assumptions and judicial fact-finding not contemplated by the Act. Thus, like in *Hommerson* and *Boclair*, this Court should find that the legislature never

intended for standing to be analyzed during the brief summary dismissal stage.

As a final note, the State ends it argument by citing a handful of trial-level federal habeas cases. (St. Br. at 16-17) This suggested analogy to federal cases should be rejected. Though the Post Conviction Hearing Act and the federal habeas statute have some similarities, there is a fundamental difference between standing under the Illinois Act and standing under the federal habeas statute. Standing under the federal system is an issue of subject matter jurisdiction. See, *e.g.*, *Wunderlich v. City of Flushing*, 2014 WL 7433411, at **1-3 (E.D. Mich. Dec. 31, 2014). As a result, it is not subject to waiver and can be raised at any time. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). In each case cited by the State, the dismissal was due to a lack of subject matter jurisdiction. *Wunderlich*, 2014 WL 7433411, at *3; *Fordjour v. Stewart*, 2003 WL 22384780, at *1 (N.D. Cal. Oct. 16, 2003); *Chavez v. Superior Court of California*, 194 F. Supp. 2d 1037, 1039 (C.D. Cal. 2002); *Brown v. Wenerowicz*, 2013 WL 2404152, at *2 (W.D. Pa. May 31, 2013); *Yuen v. Lee*, 2010 WL 299277, at *1 (W.D. Ky. Jan. 19, 2010).

Under the Illinois Act, standing is not (and has never been) jurisdictional. 725 ILCS 5/122-1(a); *Belleville Toyota, Inc.*, 199 Ill. 2d at 336-38 (citing *Estate of Mears*, 110 Ill. App. 3d 1133, 1137 (4th Dist. 1982) (describing the revolution of the Judicial Article made effective on January 1, 1964)). Instead, lack of standing has long been considered an affirmative defense in Illinois. *Hermes v. William F. Meyer Co.*, 65 Ill. App. 3d 745, 747 (2d Dist. 1978); *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 508 (1988). Thus, there is a fundamental difference in how standing *must* be treated under the federal system and how the legislature intended for it to be treated under the Illinois system.

It is vital to remember why the Act was created and who is filing petitions under the Act. It is *pro se* people with limited education who may not be literate but who have some notion that their constitutional rights have been violated. *People v. Hodges*, 234 Ill. 2d 1, 9-10 (2009); see also *Porter*, 122 Ill. 2d at 73 (finding the summary dismissal does not violate due process because of how little is required to pass to second-stage proceedings); *Porter*, 122 III. 2d at 91 (Simon, J., dissenting) (discussing the practical realities of summary dismissals and the risk for those pro se defendants, "often illiterate, who have only the vaguest notion of what their constitutional rights are"). The purpose of the Act is to get to the merits of the constitutional claims with only limited exceptions for obvious liars and repeat filers. *People v. Slaughter,* 39 Ill. 2d 278, 284-85 (1968); *Hommerson*, 2014 IL 115638, ¶ 11. Mr. Johnson is neither. Where the Act, its structure, and its history do not show any legislative intent to bar first-stage filers on the grounds of lack of standing, this Court should find that this legal defense is best reserved for second- and third-stage proceedings.

B. Alternatively, this Court should find that summary dismissal was inappropriate in Mr. Johnson's case given the unusual situation created by registry requirements.

The State argues that it was obvious that Mr. Johnson lacked standing in the challenged conviction. (St. Br. at 17) To make this argument, the State emphasizes that standing is limited to those who are "actually being deprived of their liberty" and does not extend to those who only "wish to purge their records of past convictions." (St. Br. at 5, 17)

Importantly, this Court has always emphasized "the importance of a person's

liberty interest" in interpreting who has standing as "imprisoned" under the Act. *People v. Pack*, 224 Ill. 2d 144, 150 (2007). Even those not in prison, but "merely subject to confinement" are considered imprisoned. *Id*. at 151 (internal quotation omitted). This Court provided an analogy: was the person "always on a string" that the State could "pull" when it pleased? *Id*. (internal quotation omitted). If so, then the restraint on the person's liberty was significant enough to provide standing to challenge the constitutionality of the conviction leading to their tether. *Id.* (discussing standing while on an appeal bond).

Here, Mr. Johnson was suffering under the most severe deprivation of liberty that Illinois has—he was in an Illinois prison when he filed his petition. (R.C36) And he was not seeking merely to purge an unrelated conviction from his record. He was seeking to contest the precise conviction which led to his later imprisonment by transforming otherwise innocent behavior into felony offenses. 730 ILCS 154/10, 30 (listing the duties to register and report travel, school, and address changes); 730 ILCS 154/60 (listing the felony penalties); 720 ILCS 5/11-9.3; 720 ILCS 5/11-9.4-1. Behavior like standing too close to a park or school, or staying an extra night on at a friend's house. 730 ILCS 154/10 (requiring reporting for any residence where the registrant spends five days over the course of year); 720 ILCS 5/11-9.4-1.

Even where Mr. Johnson can live when he is released is impacted by his long ago Class 4 felony. 720 ILCS 5/11-9.3(b-5), (b-10); (R.C30). As the current pandemic and its attendant economic consequences have highlighted, not everyone has the luxury of multiple housing choices. How much worse when one cannot stay with the friends or family members who might have a spare room because their home is too close to a school, park, part-time day care center, or any of the

other facilities within the registry restrictions. 720 ILCS 5/11-9.3(b-5), (b-10). And homelessness means weekly, in-person visits to the police to avoid felony liability. 730 ILCS 154/10(a). Any mistake in negotiating these shifting rules means sitting back in prison once again. It is disingenuous to pretend that Mr. Johnson seeks merely to clean up his criminal record or that his long ago conviction cannot impact his liberty daily. And prison is not some hypothetical in this case. Mr. Johnson wrote his petition in this case while incarcerated due to a registry violation. (R.C41)

The State relies *Carrera* and *West* to argue that a registry requirement and violation can never provide standing because registry requirements are a collateral rather than a direct consequence of the original conviction. (St. Br. at 18-9)(citing *People v. West*, 145 Ill. 2d 517 (1991), and *People v. Carrera*, 239 Ill. 2d 241 (2010)). Both *Carrera* and *West* are distinguishable.

In both cases, the State of Illinois was not involved in the restraints on the petitioner's liberty at the time of filing the petition. In *West*, the petitioner was attempting to overcome the effect of an Arizona sentencing law by challenging an old Illinois conviction many years later. *People v. West*, 145 Ill. 2d 517, 518-19 (1991). This Court held that imprisonment in Arizona on an Arizona conviction did not provide standing under the Illinois Post-Conviction Hearing Act. *Id*. at 519.

In *Carrera*, the petitioner was complaining about the custody attendant to deportation proceedings initiated due to an Illinois conviction. *People v. Carrera*, 239 Ill. 2d 241, 245 (2010). Though this Court mentioned the distinction between direct and collateral consequences, it did not rely on this ground to find that

deportation proceedings did not confer standing to challenge the Illinois conviction. *Id*. at 256-57. Instead, this Court focused on *who* was detaining the petitioner—namely, not the State of Illinois. This Court explained:

> Because the state has nothing to do with defendant's deportation, and has no control over the actions of the INS, we cannot say that defendant's possible deportation renders defendant a person "imprisoned in the penitentiary" as required in order to proceed with his postconviction petition under the Act. Defendant's custody in the INS is not pursuant to a judgment of a state court.

Id. at 257. Thus, this Court focused on the fact that the State of Illinois had nothing to do with the current restraints on the petitioner's liberty in rejecting the standing argument.

Here, it is an Illinois conviction that led to the registry requirements and to Mr. Johnson's incarceration at the time he filed his petition. (A.2-6);(R.C30) It is Illinois statutes that continually add to the restraints attendant to registering. It is Illinois that chooses whether and when to pull the string when Mr. Johnson walks too slowly past a park or stays on a forbidden friend's couch. And it was an Illinois prison that Mr. Johnson sat in and when he sought to petition for a court to evaluate the constitutionality of how this all began. (R.C35-36) Thus, Mr. Johnson had every reason to use the Illinois Post-Conviction Hearing Act to complain about the constitutionality of his present imprisonment and its undeniable connection to a low-level guilty plea.

This case is akin to *People v. Pack*. In *Pack*, the petitioner "was serving the *second* of two consecutive sentences" when he filed a post-conviction petition challenging the conviction leading to his *first* sentence. *People v. Pack*, 224 Ill. 2d 144, 145 (2007)(emphasis added). This Court first noted that the "plain language of the statute" indicated that the petitioner had standing where he was

"unquestionably a prisoner of the state at the time he filed his petition." *Id*. at 147. This Court went on to reject the State's argument that he did not have standing to challenge his *first* conviction, because he was no longer serving any portion of the sentence for it. *Id*. at 148-52. This Court recounted the "paramount importance" of the petitioner's "liberty interest" whenever courts interpret standing under the Act. *Id*. at 150-51. It then explained, the petitioner's "liberty [was] certainly curtailed by the State due to his status as a prisoner." *Id*. at 152. Additionally, the correction of the constitutional error in his initial conviction would "have an effect on his liberty" a*s* success would lessen his overall sentence. *Id*. Thus, this Court found that the petitioner still had standing to challenge his first conviction. *Id*.

Here, like in *Pack*, Mr. Johnson meets the plain language of the statute where he was a state prisoner when filing his petition. (R.C35-36) Also, like in *Pack*, even though he had already served the original sentence on the first conviction, his liberty was still clearly curtailed by his then imprisonment. Finally, Mr. Johnson has a clear liberty interest in cutting the string that can be pulled by Illinois authorities if he shows constitutional error in the plea that caused his registry requirements. Thus, as in *Pack*, this Court should find that Mr. Johnson has made an adequate showing for standing at this early stage.

The State also argues that *People v. Bingham*, has effectively decided the issue of standing based on imprisonment due to violations of registry requirements. (St. Br. at 19-20) (citing *Bingham*, 2018 IL 122008). But *Bingham* is inapposite.

In *Bingham*, this Court was determining whether to consider an as-applied challenge to registry requirements on direct appeal. *Bingham*, 2018 IL 122008,

¶ 14. Central to this Court's conclusions was the procedural posture of the case—namely, a direct appeal from a criminal conviction. This Court first found that the judgment on direct appeal after a criminal conviction did not include the registry requirements. *Id*. at ¶¶ 15-17. As a result, this Court concluded that there was no jurisdiction to consider the imposition of registry requirements on direct appeal. *Id*. at ¶¶ 15-18. This Court then further chastised the attempt to raise an as-applied challenge on direct appeal where there could be no factual development. *Id*. at ¶ 22.

Here, unlike in *Bingham*, there is no attempt to expand the jurisdiction of reviewing courts. Instead, the question of standing under the Act is a question of the liberty restraints on the petitioner at the time of filing. See *Pack*, 224 Ill. 2d at 147-52; 725 ILCS 5/122-1(a). *Bingham* contains no analysis of standing or the term "imprisoned" as it is used in the Post-Conviction Hearing Act. As discussed above, *Pack* provide the most analogous example of what liberty restraints and standing mean under the Act. Like in *Pack*, Mr. Johnson filed his petition while his actual liberty was curtailed as a prisoner of Illinois. Thus, like in *Pack*, this Court should find that he has adequately alleged standing.

Even if this Court is not prepared to find standing on the present record, a final determination is unnecessary at this early stage. With further post-conviction proceedings, a trial court could consider specific facts about what the registry requirements look like in Mr. Johnson's daily life: Is he homeless because of the requirements? Does he live with his mom on a park-lined street where he can't leave his door without being accused of a felony? Mr. Johnson, a *pro se* petitioner, followed the letter of the Act in alleging standing, and the record does not rebut

his claims. Second-stage proceedings would allow an attorney to marshal additional facts on liberty constraints and new case developments in his favor. Though the State encourages this Court to foreclose any standing argument based in any way on registry violations, this would mean prematurely choosing a side on an issue that is currently dividing federal courts and has had little development in the Illinois Appellate Court. See (St. Br. at 21-22). In short, if this Court is not yet prepared to find that registry violations provide standing then it should permit further post-conviction proceedings to develop a fuller record. Allow a trial court to contemplate the full contours of liberty restraints on Mr. Johnson, before shutting the courthouse doors on his sole post-conviction petition.

C. Conclusion

In sum, this Court should find that the legislature never intended to include lack of standing as a grounds for summary dismissal. The standing requirement is found in a separate subsection of the Act and a finding of no standing requires judicial fact-finding which is inappropriate for a *sua sponte* dismissal. Alternatively, this Court should find that Mr. Johnson has adequately alleged standing where he was actually imprisoned in an Illinois prison on a registry violation when he alleged a constitutional defect in the plea that led to subsequent imprisonment for otherwise innocent behavior. In the least, this Court should reverse the summary dismissal and remand for further factual development and the assistance of an attorney to shape his petition into more nuanced form.

CONCLUSION

For the foregoing reasons, Recardo Johnson, petitioner-appellant, respectfully requests that this Court reverse the summary dismissal and remand for further post-conviction proceedings. This Court should find that the legislature did not intend for lack of standing as one of the limited grounds for summary dismissal. Alternatively, this Court should find that Mr. Johnson adequately showed standing for a first-stage petition where he was an Illinois prisoner when he filed the petition challenging the constitutionality of the plea that ultimately led to his imprisonment for a registry violation. In the least, this Court should not opt to create a far-reaching standing rule without the benefit of the more detailed record that can be created on remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 18 pages.

/s/Maggie A. Heim
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No. 125738

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PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RECARDO JOHNSON, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-16-3169. There on appeal from the Circuit Court of Cook County, Illinois , No. 07 CR 17223. Honorable Alfredo Maldonado, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

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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 January 4, 2021, 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 petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, 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/Carol M. Chatman
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