No. 121453

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>ANTOINE HARDMAN<br><br>Defendant-Appellant | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 1-14-0913.<br><br>There on appeal from the Circuit Court of Cook County, Illinois , No. 13 CR 15697 (02).<br><br>Honorable Vincent M. Gaughan, Judge Presiding. |

# REPLY BRIEF FOR DEFENDANT-APPELLANT

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## REPLY BRIEF FOR DEFENDANT-APPELLANT

### I. The State failed to prove Antione Hardman guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver within 1,000 feet of a school – a Class X felony – where it produced insufficient evidence that the building was operating as a school at the time of the offense.

Pursuant to this Court's decision in *People v. Young*, what happens within a building is critical to determining whether the building operated as a school for purposes of the statute. *People v. Young*, 2011 IL 111886 at ¶ 13; *People v. Goldstein*, 204 Ill. App. 3d 1041, 1045 (5th Dist. 1990). In Hardman's case, the State presented no testimony from anyone with *personal knowledge* of the actual operation of the building at 646 North Lawndale on July 22, 2013. (R. F79, F136) *See People v. Boykin,* 2013 IL App (1st) 112696, ¶ 15. Although the police witnesses said the offense took place in the vicinity of a "school," no one testified about what happened in the building. (R. F36, F79, F140-43) Because the State did not prove beyond a reasonable doubt that the offense occurred within 1,000 feet of a school, this Court should reverse Hardman's Class X conviction and reduce it to Class 1 possession with intent to deliver.

#### PARTICULARIZED EVIDENCE OF AN OPERATING SCHOOL

*Young* makes clear that the operation of the building determines whether the building is a school for purposes of the statute. The State does not dispute that. (St. Br. 10) The State agrees under *Young* that a barber college or truck driving school would not satisfy the school element of section 407. (St. Br. 13) Thus, contrary to the State's insinuation, Hardman is not "import[ing] an additional element

into the statute by requiring proof that the school be 'active' or 'operating' at the time of the offense." (St. Br. 12) As addressed in the opening brief, this requirement stems from this Court's decision in *Young* interpreting section 407. (Def. Br. 12-14) Because "school" for purposes of section 407 excludes certain properties, such as preschools and barber schools, to name a few, there needs to be actual evidence of what happens in the building, not just conclusory testimony that a building is a "school." *Young*, 2011 IL 111886, at ¶¶ 13, 19; (Def. Br. 11-12).

Hardman cites numerous cases interpreting section 407 – which the State fails to address – that require particularized evidence based on a witness's personal knowledge of an enhancing location's use at the time of the offense in order to justify enhancing the drug offense to a Class X. (Def. Br. 12-14) citing *People v. Morgan*, 301 Ill. App. 3d 1026, 1031 (2d Dist. 1998) (officer's testimony, based on personal knowledge and observations of the area on the day in question, established that Bedrosian Park was a public park in fact and not merely in name); *People v. Fickes*, 2017 IL App (5th) 140300, ¶ 24 (where there was no direct testimony that St. James Lutheran Church was functioning primarily as a place of worship on the day of the offense, no reasonable jury could have inferred the building was functioning as a church on that day because "as a matter of both logic and common sense, there is no inherent rational connection between a witness's mere use of the term 'church' at trial and the fact that the 'church' was or was not functioning primarily as a place of worship on a particular date prior to trial"); *People v. Sparks*, 335 Ill. App. 3d 249, 256 (2nd Dist. 2002) (in determining whether a building was a "church" for purposes of section 407 statutory enhancements, the focus should be on its use, rather than its name or appearance) *People v. Cadena,* 2013 IL App

(2d) 120285, ¶ 15 (evidence insufficient to prove the enhancing location because although the word "church" was contained within the name of the "Evangelical Covenant Church," the court held that the State was required to offer proof regarding *"how* the building was used"); *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 11 (State failed to prove the enhancing location was primarily used for worship on the date of the offense).

Of all the cases Hardman cites, the State only addresses *Boykin*, in which the court found that the State failed to prove the school element. *Boykin*, 2013 IL App (1st) 112696, at ¶ 15. The State argues *Boykin* is distinguishable because 1) the name of the building in *Boykin* did not include any signifiers such as "Academy," "Elementary," or "School," and 2) the *Boykin* officers did not testify that they lived in or regularly patrolled the neighborhood. (St. Br. 11) However, the State's attempt to distinguish *Boykin* fails.

Critically, the name on a building is not dispositive of its use.[1] In *Boykin*, as in Hardman's case, the question involved was whether the building, "Our Lady of Peace," was in operation as a school at the time of the offense, whether it was "an active school." *Boykin*, 2013 IL App (1st) 112696,¶ 15. The *Boykin* court emphasized that in order to sustain its burden to establish that the offense occurred within 1,000 feet of a school, the State needed to present evidence of "how [the testifying] officers had personal knowledge of the operation of that building." *Id.*

[1]Consider the structure at 1045 West Hollywood Avenue, Edgewater, Chicago, which was founded as a school in 1893, still has the Stickney School sign above the front door, but is now condominiums. *See* http://www.edgewaterhistory.org/ehs/articles/v14-2-6 (last accessed 8/2/2017); http://www.allchicagolofts.com/chicago-lofts/sale.nsf/Loft-Buildings-List/Stickney-School-Condos!open (last accessed 8/2/2017).

at ¶ 15. Although the police officers in *Boykin* testified to seeing a "school" 100 feet from their undercover vehicle along with a sign posted saying "Our Lady of Peace," the court held it was insufficient. *Id.* at ¶¶ 2, 16. Thus, even if the name of Our Lady of Peace did not contain "school," the key question was not the name but the operation of the building. In Hardman's case, as in *Boykin*, the State presented no evidence of how the officers had personal knowledge of the operation of the building.

**INSUFFICIENT EVIDENCE THAT 646 NORTH LAWNDALE WAS OPERATING AS A SCHOOL AT THE TIME OF THE OFFENSE**

Although the officers in Hardman's case testified that they worked many years in the police district containing 646 North Lawndale, there was no testimony about their personal knowledge of the actual operation of the building on July 22, 2013. (R. F36, F79, F136, F140-43) Indeed, the evidence showed that the building at 646 North Lawndale was undergoing changes that summer, as indicated by the change in names.(R. F36, F79, F140-41)

The State claims that the name change is not relevant to the building's status as a school in July 2013. (St. Br. 12) On the contrary, it relates to whether the officers in fact had personal knowledge of the operation of the building on July 22, 2013. The State argues that the officers' personal knowledge of the operation of the building can be inferred from the "nearly a decade and a half of their combined experience in the area." (St. Br. 11) But if the building and its use was changing around the time of the offense, then even officers familiar with the neighborhood would not have personal knowledge of the operation of the building at the time of the offense. Without personal knowledge, their testimony is not sufficient to

prove the building was a school on that day. *See Cadena*, 2013 IL App (2d) 120285, at ¶ 17-18; ILL. R. EVID. 602 (a witness must have personal knowledge of any matter he or she testifies to).

The State also maintains that the trier of fact can infer that the building was operating as a school for purposes of the statute on July 22, 2013, from the plain meaning of subsection (c) of section 407: if a building is operating as a school in Spring 2013, closes for the summer, and reopens as a school in Fall 2013, then the trier of fact can infer that the building was also a school during the summer of 2013 – including July 22 – because the "time of year and whether classes were currently in session at the time of the offense is irrelevant." 720 ILCS 570/407(c) (2013). (St. Br. 12, 14) However, no trial evidence supports this argument. A defendant must be found guilty beyond a reasonable doubt "by evidence adduced at the trial," not by assertions made after the fact. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

Contrary to the State's claim, "the evidence in this case" did not establish "that 646 North Lawndale was an elementary school in Spring and Fall 2013." (St. Br. 13) The State gives no citation to the record for this claim, and, indeed, there was no trial testimony at all about the operation of the building, particularly in Spring 2013. (St. Br. 13; R. F16-145) Nor was there evidence that Ryerson Elementary and Laura Ward merged. The State's brief cites ABC 7 Chicago for the merger, but the State presented no testimony to this effect at trial. (St. Br. 13-14) Although this Court may take judicial notice of information on a public website, such as that 47 public elementary schools closed in 2013 – *People v. Crawford*, 2013 IL App (1st) 100310, fn. 9, (Def. Br. 17) – the State cannot show

that it proved the defendant guilty beyond a reasonable doubt at trial by information on a public website that it failed to present at trial. Nor was there any trial evidence that 646 North Lawndale Avenue was a "Chicago Public School building," contrary to the State's assertion with no citation to the record. (St. Br. 5; R. F16-145) The State's brief also declares that "in fact the building remained open under a new name hosting the combined school communities of Ryerson Elementary and the old Laura S. Ward Elementary." (St. Br. 14) The State cites pages F36 and F79, but testimony on those pages only indicates that the building had different names at different times. (St. Br. 14)

In fact, the State presented no evidence at trial that "the building remained open under a new name hosting the combined school communities of Ryerson Elementary and the old Laura S. Ward Elementary." (R. F16-145) Although there was some allusion by the State before trial to reorganization happening at 646 North Lawndale, the mere assertions of the assistant State's attorney at that hearing were not evidence and certainly did not show that "the building remained open under a new name." (R. E5-7) Thus, no trial evidence supports the State's claim that the building operated as a school – let alone the *same* school – in the Spring and Fall of 2013 in order to infer that it was operating as a school for purposes of the statue on July 22, 2013.

## PUBLIC POLICY COUNSELS AGAINST FINDING CONCLUSORY EVIDENCE SUFFICIENT

Given widespread school closings, to not require evidence that a particular building is operating as a school would be inconsistent with *Young's* holding that not every possible school is a "school" under the statute. *See Young*, 2011 IL 111886,

at ¶ 19. Indeed, if particularized evidence of the operation of a building is not required to find a building a "school" for purposes of the statute, "the term could include an endless number of possible educational facilities," allowing that, for instance, even buildings that housed long-closed schools, such as Navy Pier, would suffice for establishing an enhanced Class X offense. *See Young*, 2011 IL 111886, at ¶ 13; *Goldstein*, 204 Ill. App. 3d at 1045; *People v. Toliver*, 2016 IL App (1st) 141064, ¶ 52 (Pierce, J., dissenting).

Hardman acknowledges the importance of maintaining safe environments for school children; nevertheless, to enhance a conviction to a Class X penalty, the State must bear its burden to prove the school element beyond a reasonable doubt by calling witnesses with personal knowledge of the operation of the building. *See* (Def. Br. 18-19). Accordingly, where there was insufficient evidence to establish the building at 646 North Lawndale was a school under section 407 at the time of the offense, this Court should reverse Hardman's conviction and reduce it to Class 1 possession with intent to deliver.

**II. Where the trial court improperly assessed a $500 reimbursement fee for the services of the public defender without complying with the requirements of section 113-3.1, the fee must be vacated without remand where no hearing on Hardman's ability to pay occurred and where judicial economy counsels against remand.**

## NO COMPLIANCE WITH EITHER DUE PROCESS OR SECTION 113-3.1(a)

The State concedes that the colloquy the trial court had with the public defender before imposing the $500 fee did not satisfy due process and failed to comply with the requirements of the statute. (St. Br. 15-16) It also acknowledges that the trial court failed to inquire into Hardman's ability to pay and that the court did not afford Hardman an opportunity to present evidence. (St. Br. 16) Significantly, the State completely ignores Hardman's argument that the State is unlikely to recover its cost from a defendant who is presumed indigent, even after a hearing . The State, instead, insists that the appellate court can remand a case for a proper hearing even when no hearing was held within the statutory time limit. The State's position is meritless.

## NO REMAND IS REQUIRED

As argued in the opening brief, because Hardman received no hearing on his ability to pay, the appellate court erred by ordering a remand for a proper hearing. (Def. Br. 24-27) When the trial court fails to comply with section 113–3.1(a)'s hearing requirement, in accordance with *Somers*, the remedy depends on what the trial court did the first time. If the trial court *did* conduct a hearing on the

defendant's ability to pay but that hearing was insufficient under the statute, this Court has ordered remand for a new and proper hearing. *People v. Somers*, 2013 IL 114054, ¶ 15. On the other hand, if no hearing on the defendant's ability to pay and financial circumstances took place within 90 days, this Court has held that the proper result is to vacate the fee outright. *People v. Gutierrez*, 2012 IL 111590, ¶ 28; *Somers*, 2013 IL 114054, at ¶ 15 (remanding rather than vacating because there was some sort of a hearing, not no hearing); *see also People v. Daniels*, 2015 IL App (2d) 130517, ¶ 29 (vacating outright where the court imposed the fee by written order without a hearing).

Contrary to the State's argument, in Hardman's case, the trial court's question to the public defender about how many times she appeared on the case does not qualify as a hearing under section 113-3.1(a) because it did not relate to Hardman's ability to pay. (R. H13) The State disagrees and claims the exchange satisfied *Black's Law Dictionary's* 2009 generic definition of a "hearing" as a "judicial session, *** open to the public, held for the purpose of deciding issues of fact or law, sometimes with witnesses testifying." (St. Br. 16), *quoting Black's Law Dictionary* 788 (9th ed. 2009). However, the 113-3.1(a) hearing required by the statute is not merely a generic "session open to the public." Rather, the defining characteristic of a section 113-3.1(a) hearing, as this Court has recognized, is that the focus of the hearing is the defendant's foreseeable ability to pay the fee. *People v. Love,* 177 Ill. 2d 550, 557-60 (1997); *People v. Cook,* 81 Ill. 2d 176, 186 (1980); *Fuller v. Oregon,* 417 U.S. 40, 53 (1974); (Def. Br. 26-27). This Court, in fact, stressed in *Love* that the legislature's intent in creating this statute was to satisfy due process by requiring a hearing on the "defendant's ability to pay reimbursement."

*Love*, 177 Ill. 2d at 558-59. Because there was no hearing on Hardman's ability to pay within 90 days of the final judgment, there was no 113-3.1(a) hearing.

Moreover, the "some sort of a hearing" that *Somers* found to justify remand was not just a "judicial session open to the public." Rather, it, too, was a hearing on the defendant's ability to pay. *Somers*, 2013 IL 114054, at ¶ 4. "Some sort of a hearing" at minimum requires compliance with the directive in *Somers* that the hearing "must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay." *People v. Moore*, 2015 IL App (1st) 141451, ¶ 40.

And finally, although in 2009, *Black's Law Dictionary* defined a "hearing" as a "judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or law, sometimes with witnesses testifying" (St. Br. 16), in 1982, at the time the statute was enacted, the very definition of a "hearing" included the defendant's "right to be heard." According to the 1979 edition of *Black's Law Dictionary*, a "hearing" is:

> A [p]roceeding of relative formality (though generally less formal than a trial), generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and *parties proceeded against have [a] right to be heard*, and is much the same as a trial and may terminate in [a] final order.

*Black's Law Dictionary* 649 (5th ed. 1979) (emphasis added), *quoted in People v. Williams*, 2013 IL App (2d) 120094, ¶ 49 (Jorgensen, J., dissenting in part). Hardman never addressed the court, nor was he given the opportunity. The court only asked defense counsel how many times she appeared. (R. H13) This exchange did not constitute a "hearing" under the definition current at the time the General Assembly chose to use the word. *Williams*, 2013 IL App (2d) 120094, at ¶ 49

(Jorgensen, J., dissenting in part). Where there was no hearing, there should be no remand. *Gutierrez*, 2012 IL 111590, at ¶ 28; *Somers*, 2013 IL 114054, at ¶¶ 15-17.

The State alternatively contends that, "*even had there been no hearing at all*, because the trial court imposed the public defender fee, it would be appropriate to remand for a hearing." (St. Br. 17)(emphasis added) The State claims that "this Court has never held that remand is inappropriate whenever there is no hearing within 90 days" because in *Gutierrez*, although there was no hearing, there was no remand because the circuit clerk rather than the trial court imposed the public defender fee. (St. Br. 17) However, this Court in *Somers* rejected the State's position that remand is proper as long as the trial court, not the clerk, imposed the fee. *Somers* decided that remand was appropriate only after considering the quality and content of the hearing the defendant received, it did not consider just whether the court or the clerk assessed the fee. *Somers*, 2013 IL 114054, at ¶ 15 (remanding because "the trial court did have some sort of a hearing within the statutory time period.").

Consider also *People v. Daniels*, in which the trial court made no reference to the reimbursement fee at all during the sentencing hearing but then assessed the fee in a written order later that day. *Daniels*, 2015 IL App (2d) 130517, at ¶ 29. Under the State's theory, this case should have been remanded for a hearing simply because the court, not the clerk, assessed the fee within the time limit. The *Daniels* court, however, found that this fee should be vacated outright because it was assessed without a hearing. *Id. See also Moore*, 2015 IL App (1st) 141451, at ¶ 41 (vacating without remand because asking how many times counsel appeared

did not constitute a hearing).

The State cites three readily distinguishable cases for its claim that even if there was no hearing at all, the case should be remanded: *Somers*, 2013 IL 114054, at ¶ 18; *People v. Alvine*, 192 Ill. 2d 537, 538 (2000); and *Love*, 177 Ill. 2d at 565. (St. Br. 18-19) First, the State mischaracterizes *Somers*. In *Somers*, the trial court *did* conduct a hearing on the defendant's ability to pay the fee, and the fact that there was a hearing was the reason it remanded the case. *Somers*, 2013 IL 114054, at ¶ 15 (remanding rather than vacating because there was some sort of a hearing, not no hearing). Second, in *Alvine*, where the trial judge summarily sentenced the defendant to death without holding a sentencing hearing, the court remanded for a new sentencing hearing. *Alvine*, 192 Ill. 2d at 538. However, a sentencing hearing for the imposition of the death penalty is a fundamental issue of paramount importance in the criminal justice system, and it is a stretch to compare it to a fee hearing – not least because the reimbursement fee is discretionary, whereas a sentence and sentencing hearing are not. 725 ILCS 5/113-3.1(a) (2013) (the court *may* order reimbursement). So even if a case must be remanded for a sentencing hearing in order to obtain a final judgment, it does not follow that a case must be remanded for the State to get a second chance on a motion to collect a discretionary fee.

Lastly, the State cites to *Love*, in which the defendant did not receive a hearing at all, but this Court still remanded for a hearing. (St. Br. 19), *citing Love*, 177 Ill. 2d at 565. However, in *Love*, the defendant *specifically asked* this Court to affirm the appellate court's judgment vacating the fee and remanding for a hearing. *Gutierrez*, 2012 IL 111590, at ¶ 18, *citing Love*, 177 Ill. 2d 550. In contrast,

Hardman is asking this Court to vacate the fee outright.

The State is also wrong in arguing that the case should be remanded even when no hearing occurred within the statutory time period because the 90-day limit is merely directory, not mandatory. (St. Br. 19) Whether a provision is mandatory or directory is a matter of legislative intent – whether the legislature intended for the government's action to be invalidated if the government failed to comply with the provision. *People v. Robinson*, 217 Ill. 2d 43, 51-52 (2005). One way the legislature signals its intent is by explicitly setting forth the consequences in the statute for failing to comply with the provision. *Robinson*, 217 Ill. 2d at 54. Another indication that the legislature intended the provision to be mandatory is when "negative words import[] that the acts required shall not be done in any other manner or time." *Gutierrez*, 2012 IL 111590, at ¶ 21, *quoting Robinson*, 217 Ill. 2d at 57. In section 113-3.1(a), the legislature indicated by negative words that the 90-day limitation is mandatory by stating that the hearing shall not be done at any other time: "[s]uch hearing shall be conducted *** no later than 90 days after the entry of a final order." 725 ILCS 5/113-3.1(a). Thus, the legislature intended the 90-day post-final-order deadline to be mandatory, so failing to hold the hearing within the time limit invalidates the court's action of imposing the fee.

To accept the State's interpretation that the time limit is only directory would read the 90-day language out of the statute. It is well-settled that statutes are to be read as a whole and construed to give effect to every word, clause, and sentence, and cannot be read to render any part superfluous or meaningless. *See People ex rel. Illlinois Dept. of Corrections v. Hawkins,* 2011 IL 110792, ¶23 (2010).

Here, because no hearing was held within the mandatory allotted time period, the case should not be remanded for a hearing.

Finally, the State asserts that, as long as the court *assesses* the fee within the statutory period, even without a hearing, the case should be remanded because the timely assessment satisfies the statute's timing requirement. (St. Br. 20) The State cites no support for its position that the mere assessment of the fee within the statutory period permits a remand. In contrast, the statute requires a *hearing* to be held within the statutory time period: "Such hearing shall be conducted *** no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a). When no hearing is held within 90 days of the final judgment, the discretionary fee cannot be assessed. In Hardman's case, because no hearing was held within the statutory time period, the cause cannot be remanded for a retrospective hearing.

**JUDICIAL ECONOMY AND PUBLIC POLICY COUNSEL AGAINST REMAND IN ANY CASE WHERE THE DISCRETIONARY PUBLIC DEFENDER FEE WAS NOT PROPERLY ASSESSED**.

Not only should a case not be remanded for a fee hearing when the trial court failed to conduct any hearing during the prescribed statutory period, but even when there is a hearing but it is deemed insufficient, no remand should be ordered for public policy and judicial economy reasons. The legislature has granted this Court authority under this specific statute to "provide by rule for procedures of the enforcement of orders entered under this section." 725 ILCS 5/113-3.1(d) (2017). This Court has twice told lower courts and prosecutors that it trusted the issue of non-compliance with 113-3.1 would not arise again. *See Gutierrez*, 2012

IL 111590, at ¶¶ 25-26; *Somers*, 2013 IL 114054, at ¶ 18. The time has come to reject calls for remand and only permit reimbursement under 113-3.1 where there is actual compliance.

Contrary to the State's allegation, barring remand when a hearing is not properly conducted the first time would not deprive the trial court of the full statutory period to conduct the proper hearing. The State contends that prohibiting remands would produce absurd results because if a defendant files a notice of appeal, the trial court is divested of jurisdiction and does not have the full 90 days after the final order provided by statute to hold the proper hearing. (St. Br. 21-22) However, the legislature was presumably aware of that fact and still provided for the 90-day limitation. To support its position, the State quotes one sentence from *Gen. Motors Corp. v. Pappas*, 242 Ill.2d 163, 173-74 (2011). However, *Pappas* also allows the trial court to entertain matters collateral or incidental to the judgment beyond the notice of appeal. *See Pappas*, 242 Ill. 2d at 173-74; *Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066, 1073 (2nd Dist. 1987) (circuit court could entertain a petition for attorney fees following the filing of a notice of appeal). Further, if no notice of appeal is filed, the trial court has the full 90-day statutory time period. In addition, the statutory window is much longer than 90 days. The trial court can obtain the affidavit and hold the hearing anytime after appointing counsel. 725 ILCS 5/113-3.1(a) ("Such hearing shall be conducted *** at any time after the appointment of counsel but *no later* than 90 days after the entry of a final order disposing of the case at the trial level.") (emphasis added). In Hardman's case, six months elapsed between the date the motion was filed and his sentencing hearing. (R. A1; C. 86) Thus, barring remand when a hearing is not properly

conducted the first time would not deprive the trial court of the full statutory period to conduct the proper hearing.

The State also argues that barring remands would produce absurd results because a readily correctable error would become uncorrectable on appeal. (St. Br. 21-22) The State claims there are only two types of errors that cannot be corrected on appeal by remand but cites to no statute or rule as support for its assertion. (St. Br. 23-24) In fact, multiple examples exist in which remands are not allowed, such as when a trial court wrongly dismisses a post-conviction petition at the first stage. At the first stage, the trial court has 90 days to determine whether the petition states the gist of a claim and to dismiss the petition as frivolous if it does not. *People v. Edwards*, 197 Ill.2d 239, 244 (2001). When an appellate court reverses the trial court's improper first stage dismissal of a post-conviction petition, it does not remand the cause for further first stage proceedings. Rather, the appellate court recognizes that more than 90 days have passed since the filing of the petition and remands the cause for the appointment of counsel and the commencement of second stage proceedings on the petition. *See People v. Saunders*, 261 Ill. App. 3d 700, 706 (2nd Dist. 1994) (because the trial court never determined, within the time prescribed, whether to summarily dismiss the petition, it may not do so on remand); *People v. Vasquez*, 307 Ill. App. 3d 670, 672-73 (2d Dist. 1999) (reversing the trial court's dismissal of a petition as frivolous where that dismissal occurred on remand); *People v. Porter*, 122 Ill. 2d 64, 85 (1988).

In addition, the State's claim that errors that are readily corrected at trial should be correctable on appeal is belied by the fact that the State cannot appeal sentencing errors and the appellate court cannot increase an improper sentence.

*Castleberry*, 2015 IL 116916 ¶¶ 21, 24; Sup. Ct. R. 604(a)(1). For example, in *People v. Breeden*, 2016 IL App (4th) 121049-B, ¶ 57, the trial court imposed a fine of $255 for Sexual Offender Registration, less than the minimum fine of $500 required by the statute. *Breeden*, 2016 IL App (4th) 121049-B, at ¶ 57. The appellate court held that, following the decision in *Castleberry*, 2015 IL 116916, the challenged fine was voidable rather than void and the State lacked the authority to request on appeal an increase in the amount of the fine imposed. *Id.* The appellate court thus left the $255 fine in place. *Id.* at ¶ 61.

Likewise, in *People v. Carter*, 2016 IL App (3d) 140196, ¶ 51, the appellate court concluded that after this Court abolished the void sentence rule, it could no longer remand a cause to the trial court for imposition of fines that were improperly imposed by the circuit clerk. The court concluded that it should merely vacate improperly imposed fines rather than remanding for the trial court to impose the fines. *Id.* Thus, contrary to the State's claim, it would not be an anomaly that an error correctable at trial would be uncorrectable on appeal. Similarly, although the State cites Supreme Court Rule 366(a)(5) saying the appellate court can grant any relief, including remandment (St. Br. 18), these examples show that the appellate court's power to fix errors by remand is not unbounded.

The State also asserts that prohibiting reimbursement remands "would encourage defendants to sandbag" by remaining silent in the trial court, "escap[ing] altogether the inquiry into [their] ability to repay the public for some fraction of the costs of [their] defense." (St. Br. 23) The State here is wrongly shifting its own burden onto defendants. The statute requires the court or the prosecution to initiate a reimbursement hearing: "Such hearing shall be conducted on the

court's own motion or on motion of the State's Attorney." 725 ILCS 5/113-3.1(a). In addition, the burden is on the court and on the prosecutor to make a proper record to support the reimbursement order, particularly where no attorney represents defendant's interests against the fee. *People v. Atwood*, 193 Ill. App. 3d 580, 591-92 (4th Dist. 1990); *People v. Washington*, 297 Ill. App. 3d 790, 794 (4th Dist. 1998). Thus, pursuant to the statute, the defendant cannot move for a hearing, even if he wanted to, and the court and the prosecutor bear responsibility to provide a proper hearing.

Finally, the State argues that to bar remands when the court fails to hold the proper hearing the first time would thwart the legislature's intention to recover its expenses and would release defendants from their obligation to pay. (St. Br. 21) This ignores the fact that, first, by the legislature's intent, the reimbursement fee is not mandatory, so the legislature did not intend to recover its expenses at any cost. 725 ILCS 5/113-3.1(a) ("the court *may* order the defendant to pay" (emphasis added)). Second, the State completely ignores Hardman's argument that the State is unlikely to recover its costs from indigent defendants even after a hearing. Hardman is presumed indigent. He was adjudicated indigent at trial and on appeal. When counsel was appointed, Hardman told the court that he had no money to pay for an attorney. (R. A2-3) So remand for a hearing to ascertain whether a defendant had the ability to pay within 90 days of sentencing – for Hardman and other indigent defendants – would undoubtably produce little yield while using vastly more resources. (Def. Br. 29-30).

Contrary to the State's assertion that a defendant has no right to a free defense at public expense (St. Br. 25), even an indigent criminal defendant is

guaranteed the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963); U.S. Const. Amends. VI, XIV; Ill. Const. Art I, Sec. 8. Nevertheless, the State and the court always have the opportunity to recover the cost of appointed counsel – if, unlike Hardman, the defendant has the foreseeable ability to pay – by properly conducting the reimbursement proceedings the first time, within the prescribed time period, as this Court has repeatedly urged trial courts to do. *See Gutierrez*, 2012 IL 111590, at ¶¶ 25-26; *Somers*, 2013 IL 114054, at ¶ 18.

Therefore, for the reasons stated above and in the opening brief, this Court should vacate the $500 reimbursement fee without remand.

## CONCLUSION

For the foregoing reasons, Antoine Hardman, defendant-appellant, respectfully requests that this Court reverse the decision of the appellate court, reduce Hardman's conviction to Class 1 possession with intent to deliver, and reverse the $500 public defender fee without remand.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Tonya Joy Reedy, 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/Tonya Joy Reedy
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No. 121453

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>ANTOINE HARDMAN<br><br>Defendant-Appellant | ) | Appeal from the Appellate Court of Illinois, No. 1-14-0913.<br><br>There on appeal from the Circuit Court of Cook County, Illinois , No. 13 CR 15697 (02).<br><br>Honorable Vincent M. Gaughan, Judge Presiding. |

**NOTICE AND PROOF OF SERVICE**

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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 August 4, 2017, 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 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/Joseph Tucker
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