No. 121823

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the
	)	Appellate Court of Illinois,
Plaintiff-Appellant,	)	Second Judicial District,
	)	No. 2-14-0848
	)	
	)	There on Appeal from the Circuit
v.	)	Court of the Fifteenth Judicial Circuit,
	)	Stephenson County, Illinois
	)	No. 13 CF 73
	)	
RICARDO VARA,	)	The Honorable
	)	Michael P. Bald,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT

If a circuit clerk's electronic accounts-receivable records refer to fines not imposed by the circuit court, then those records are erroneous and should be corrected. The question presented in this case is *where* they should be corrected: in the circuit court or the appellate court. Defendant does not contest that the clerk or circuit court could easily correct extra-record clerical errors if made aware of them, but argues that such errors nonetheless should be corrected by the appellate court. But correcting extra-record clerical errors in the appellate court both violates the rules of appellate jurisdiction and wastes judicial resources to the detriment of indigent defendants.

Reviewing extra-record clerical errors on appeal from a defendant's sentence exceeds the appellate court's jurisdiction because such errors are neither orders nor part of the defendant's sentence. Because the appellate court lacks jurisdiction to review non-existent orders, it must first strain to construe an extra-record clerical error as an order, despite the fact that it does not purport to direct anyone to do anything and was never entered of record. The appellate court then must further strain to construe the extra-record clerical error as part of the sentence from which the defendant appeals, even though the sole argument for correcting the error is that it is *not* part of the defendant's sentence. Extra-record data entries are not orders, and the fines that they reference do not exist unless ordered by the circuit court. To the extent that documents outside the court record include mistaken references to fines not imposed by the circuit court, those documents should be corrected because clerical records ought to be accurate, not because such errors change the defendant's sentence absent the intervention of the appellate court.

Correcting extra-record clerical errors in the appellate court rather than the clerk's office or circuit court also wastes appellate resources to the detriment of both judicial economy and indigent defendants. In cases where defendants seek nothing more than to have data entry errors corrected, litigating those errors in the appellate court rather than bringing them to the attention of the clerk or circuit court results in unnecessary appeals. And in cases where indigent defendants seek relief beyond the correction of data entry errors, substituting briefs challenging data entry errors for *Anders* briefs denies indigent defendants their constitutionally mandated opportunity to argue in support of the substantive claims they wish counsel to pursue and prevents the appellate court from conducting its constitutionally mandated independent review of those claims for frivolousness. Accordingly, clerical errors, which are not orders, should not be vacated by appealing them to the appellate court, but rather corrected by bringing them to the attention of the clerk or the circuit court.

ARGUMENT

I. The Appellate Court Lacked Jurisdiction to Review Extra-Record Data Entries in the Clerk's Electronic Accounts-Receivable Records Because They Are Not Orders, and the Fines They Erroneously Reference Do Not Exist.

Defendant argues that the appellate court had jurisdiction to correct the fines erroneously listed in the clerk's electronic accounts-receivable records because he appealed from his conviction and sentence and "it is well-settled that a fine is considered part of a defendant's sentence." Def. Br. 5[1] (citing *People v. Jones*, 223 Ill. 2d 569, 581-82 (2006)).

[1] Citations to defendant's brief appear as "Def. Br. __"; citations to the People's opening brief appear as "Peo. Br. __"; citations to the appendix to the People's opening brief appear as "A__"; and citations to the common law record and the report of proceedings appear as "C__" and "R__," respectively.

But while a fine imposed by the circuit court is part of a defendant's sentence, an erroneous *reference* to a fine in an extra-record document is not. Indeed, defendant's sole argument for correcting erroneous data entries in the clerk's accounts-receivable records is that the fines they list are *not* part of his sentence.

Because the extra-record data entries were not part of defendant's sentence, defendant's notice of appeal could confer jurisdiction over them only if it identified them as orders appealed from. *See* Ill. S. Ct. Rule 606 (requiring identification of "nature of order appealed from" if not from conviction); Ill. S. Ct. R. 303 (requiring identification of "judgment or part thereof or other orders appealed from"). But, as defendant concedes, Def. Br. 5, his notice of appeal identified only his conviction and sentence. *See* C148. Therefore, defendant's notice of appeal from his conviction and sentence did not confer appellate jurisdiction over the extra-record data entries.

Defendant argues that the appellate court had jurisdiction to review the erroneous data entries in the clerk's electronic accounts-receivable records because void orders may be challenged at any time. Def. Br. 6-8. But erroneous data entries are not void orders because they are not orders at all, and the fines they mistakenly reference do not exist. Accordingly, the appellate court lacked jurisdiction to review the extra-record data entries because it "has no jurisdiction to consider an appeal from a non-existent judgment order." *People v. Cook*, 94 Ill. App. 3d 73, 74-75 (2d Dist. 1981).

Contrary to defendant's characterization, the fines mistakenly referenced in the extra-record data entries were neither "assessed," Def. Br. 2, nor "imposed," *id.* at 7, by the clerk. The clerk lacks the authority to impose fines and did not purport to do so. The clerk did not

sign and file-stamp a document directing defendant to pay fines not imposed by the court or even orally direct defendant on the record to do so. Rather, a clerical employee made a mistake when listing the fines imposed by the court in the clerk's electronic accounts-receivable records. To the extent that documents outside the circuit court record include mistaken references to fines not imposed by the circuit court, those documents should be corrected by the clerk or circuit court for the same reason that a clerical record incorrectly citing the statute under which a defendant was convicted should be corrected — not because such errors have the effect of changing the defendant's sentence or conviction absent the intervention of the appellate court, but because clerical records should be accurate. But extra-record data entries are not orders, void or otherwise, and the appellate court lacked jurisdiction to review them.

The cases upon which defendant relies for his voidness argument, like defendant's brief, apply the concept of voidness to clerical book-keeping errors without addressing the underlying question of whether such extra-record data entries are orders at all. Because the People typically concede that clerical records referring to fines not ordered by the circuit court are erroneous, the appellate court did not have occasion to consider the nature of the erroneous clerical records in those cases. *See, e.g.*, *People v. Breeden*, 2016 IL App (4th) 121049-B, ¶ 55 (People conceded that appearance in clerical records of fines not imposed by circuit court was erroneous); *People v. Daily*, 2016 IL App (4th) 150588, ¶ 27 (same); *People v. Hible*, 2016 IL App (4th) 131096, ¶ 7 (same); *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 117 (same); *People v. Wade*, 2016 IL App (3d) 150417, ¶ 9 (same); *People v. Walker*, 2016 IL App (3d) 140766, ¶ 7 (same). Instead, the appellate court merely accepts

the parties' agreement that the records are erroneous and "vacates" them. But when the appellate court has squarely considered whether clerical records are orders, it has recognized that they are not. *See Lindsey v. Special Adm'r of Estate of Phillips*, 219 Ill. App. 3d 372, 376 (4th Dist. 1991) (explaining that "a clerk's notation [on the docket] is not an order").

Certainly, the historical distinction between judicial and nonjudicial officers upon which defendant relies to argue that clerical orders are void does not dictate that all clerical errors are void orders. In *Hall v. Marks*, 34 Ill. 358 (1864), the case providing the basis for defendant's historical argument, *see* Def. Br. 7 (citing *People v. Hible*, 2016 IL App (4th), 131096, ¶ 11 (quoting *Hall*, 34 Ill. at 363)), this Court held that a statute granting clerks the authority to enter default judgments violated the separation of powers clause because clerks, as nonjudicial officers, have no constitutional authority to render judgments, *Hall*, 34 Ill. at 362-64. But the orders at issue in *Marks* were indisputably orders, purporting to enter judgment against a party by the authority of the clerk. *Id.* Data entries in extra-record accounts-receivable records are wholly distinguishable: they do not purport to impose a legal obligation and are not entered into the record.

Defendant further suggests that his notice of appeal from his conviction and sentence could confer jurisdiction over extra-record data entries even though they are not themselves orders because such notices confer appellate jurisdiction over issues that are not reduced to written orders, such as counsel's performance and the prosecution's conduct. Def. Br. 4-5. But the appellate court has jurisdiction to review issues such as counsel's performance and the prosecution's conduct in an appeal from a conviction and sentence because they could provide a basis to overturn the appealed-from conviction or sentence. In contrast,

defendant's notice of appeal from his conviction and sentence did not confer appellate jurisdiction to review the clerk's extra-record data entries created sometime after entry of the final judgment because they could not possibly provide a basis for overturning his sentence. To the contrary, defendant argues in *support* of the sentence from which he appeals, challenging the data entries only to the extent that they are inconsistent with it. Similarly, a defendant's notice of appeal from his conviction and sentence would not confer appellate jurisdiction over a complaint about the accuracy of the prison's records. Although inaccurate extra-record documents should be corrected, the appellate court lacks jurisdiction to do so. If one discovers that the clerk's records are inaccurate, one should bring the error to the attention of the clerk or circuit court.

II. Correcting Extra-Record Data Entries in the Appellate Court Rather Than in the Clerk's Office or Circuit Court Wastes Judicial Resources and Prejudices Indigent Defendants.

Appellate review of erroneous data entries in clerical accounts-receivable records not only exceeds the limits of appellate jurisdiction, it wastes appellate resources to the detriment of both judicial economy and indigent defendants' appellate rights. As explained in the People's opening brief, Peo. Br. 21-23, requiring the appellate court to correct clerical errors that could be resolved in the clerk's office or circuit court is a waste of limited appellate resources. In cases where defendants seek only to have data entry errors corrected, litigating those errors in the appellate court rather than correcting them in the clerk's office or circuit court results in unnecessary appeals. Defendant does not dispute that these clerical errors could be readily corrected in the clerk's office or circuit court, but argues that it would be *more* wasteful to do so because appointed counsel representing indigent defendants who wish

to pursue substantive challenges to their convictions and sentences would have to file *Anders* briefs rather than file briefs challenging the clerical errors. Def. Br. 16. As defendant explains, in cases such as this, where appointed counsel raises the propriety of fines listed in clerical records as the only issue on appeal, counsel has determined that there are no non-frivolous challenges to the defendant's conviction or sentence to pursue. *Id.* Accordingly, if counsel corrected the erroneous data entries by bringing them to the attention of the clerk or circuit court, counsel would have no issue to raise on appeal, requiring that he or she file an *Anders* brief if the indigent defendant still wished to contest his conviction or sentence on appeal. *Id.* Defendant reasons that this process is wasteful because it "will use *additional* judicial resources." *Id.* (emphasis original).

But judicial economy is not a question of expending the fewest resources *possible*, but of expending the fewest resources *necessary*. Committing appellate resources to review *Anders* briefs and indigent defendants' objections to those briefs, thereby assuring that indigent defendants receive constitutionally adequate representation, is not wasteful. "[A]n appointed counsel's constitutional duty to advocate zealously on behalf of the client does not end abruptly upon his or her conclusion that the client has no case," *McCoy v. Ct. of App. of Wisconsin, Dist. 1*, 486 U.S. 429, 447 (1988), and the Supreme Court has "flatly disapproved of a regime that permits appointed defense counsel — or anyone other than the appellate tribunal itself — to adjudge finally the worthiness of an indigent defendant's appeal." *Id.* (citing *Lane v. Brown*, 372 U.S. 477, 485 (1963); *Anders v. California*, 386 U.S. 738, 744 (1967)); *Matter of Brazelton*, 237 Ill. App. 3d 269, 271 (4th Dist. 1992) (counsel "may not act as an unbiased judge of the merits of the appeal"). Instead, counsel must provide the

court and the defendant with an explanation of the potential issues on appeal, allowing the defendant to respond in support of the issues he wishes to pursue and the appellate court to independently determine whether the appeal is frivolous such that it may be decided without the usual adversarial process. *Penson v. Ohio*, 488 U.S. 75, 81-82 (1988) ("The so-called '*Anders* brief' serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary position."); *Brazelton*, 237 Ill. App. 3d at 271 (counsel "must set out *any* irregularities in the trial process or potential error, which, although in his judgment not a basis for appellate relief, might, in the judgment of his client, another attorney, or the court, arguably be meritorious").

If appointed counsel files a brief, as here, addressing data entry errors that could be corrected in the clerk's office or circuit court in lieu of an *Anders* brief, he or she is effectively "adjudg[ing] finally the worthiness of an indigent defendant's appeal." *McCoy*, 486 U.S. at 447. "Such a procedure . . . 'cannot be an adequate substitute for the right to full appellate review available to all defendants,'" *Anders*, 386 U.S. at 742 (quoting *Eskridge v. Washington State Bd.*, 357 U.S. 214, 216 (1958)), for it denies both the indigent defendant the opportunity to argue in support of the claims he wishes to pursue on appeal and the appellate court the opportunity to conduct its constitutionally mandated independent review of those claims for frivolousness. No matter how sincerely appointed counsel believe their clients' appeals to be frivolous, the appellate court, when provided an opportunity to review the appeal, does not always agree. *See, e.g.*, *People v. Owens*, 2016 IL App (4th) 140090, ¶ 20 (noting that appellate court denied counsel's motion to withdraw pursuant to *Anders*);

In re Nathan A.C., 385 Ill. App. 3d 1063, 1067 (4th Dist. 2008) (same); *People v. Davis*, 382 Ill. App. 3d 701, 705 (2d Dist. 2008) (same); *People v. Robinson*, 343 Ill. App. 3d 910, 914 (1st Dist. 2003) (noting that appellate court had denied counsel's motion to withdraw on direct appeal, counsel filed brief, and prosecution confessed error);. *Brazelton*, 237 Ill. App. 3d at 270 (denying counsel's motion to withdraw pursuant to *Anders*); *People v. Hutson*, 13 Ill. App. 3d 775, 779 (4th Dist. 1973) (noting that appellate court denied counsel's motion to withdraw pursuant to *Anders*). Correction of extra-record data entry errors on appeal rather than in the clerk's office or circuit court thus short-circuits appellate review of indigent defendants' substantive challenges to their convictions and sentences for frivolousness. Devoting appellate resources to review *Anders* briefs instead would not be wasteful.

In contrast, committing appellate resources to correct erroneous data entries in clerical accounts-receivable records — matters that neither require nor merit the commitment of appellate resources[2] — *is* wasteful. If appointed counsel decline to correct clerical errors in the clerk's office or circuit court in favor of raising them in the appellate court instead of filing *Anders* briefs, they force the appellate court to expend resources that should have been committed to reviewing *Anders* briefs. It seems preferable that appointed counsel address clerical house-keeping matters with the clerk or circuit court, preserving the appellate court for exploration of indigent defendants' challenges to their convictions and sentences.

[2] That the People routinely concede, as they did below, A10, that clerical records referring to fines not ordered by the circuit court are erroneous demonstrates that the appellate court's intervention is unnecessary to correct such errors.

III. The Court Should Consider Whether to Amend Its Rules to Allow Correction of Statutorily Unauthorized Sentences by Motion in the Circuit Court Rather Than by Original Mandamus Actions.

Because the fines not imposed by the circuit court but referenced in the clerk's electronic accounts-receivable records are not part of defendant's sentence, defendant's sentence is statutorily unauthorized because it does not include statutorily mandated fines. Under *Castleberry*, the only way to correct such unlawful sentences is through an original mandamus action in this Court. *People v. Castleberry*, 2015 IL 116916, ¶¶ 26-27. In *Castleberry*, the Court declined to amend its rules to provide an alternative means of correcting statutorily unauthorized sentences because the parties had not argued for a rule change or briefed the matter. *Id.* at ¶ 29. But the Court expressly noted that it reserved judgment on the matter "should any amendment be proposed in the future." *Id.* Because this case is representative of a large class of cases in which a circuit court has imposed a statutorily unauthorized sentence that cannot be readily corrected without this Court's intervention, the People responded to the Court's invitation to propose a rule change. *See* Peo. Br. 17-23. Such a rule change would simplify correction of sentences that are statutorily unauthorized because they omit statutorily mandated fines, include a statutorily unauthorized MSR term, or impose a prison term longer than the statutorily maximum or shorter than the statutory minimum.

Defendant offers little reason why defendants and the People should not be allowed to correct statutorily unauthorized sentences in the circuit court. Although he suggests that one of the problems posed by the current approach — that some fines end up going unimposed and uncollected, *see* Peo. Br. 19 — could be solved by eliminating those fines

altogether on the ground that they represent unwise or unjust policy, Def. Br. 13-15, this argument is properly directed at the legislature; this Court has repeatedly declined to act as a super-legislature, upholding statutes only if it agrees that they promote wise policies. *See*, *e.g.*, *People v. Minnis*, 2016 IL 119563, ¶ 40. But defendant does not explain why it is otherwise preferable that this Court be the court of first resort for resolution of routine (and often uncontested) questions of statutory authority.

Defendant expresses concern about what procedure might be best for correcting a statutorily unauthorized sentence by motion. *See* Def. Br. 17. Such concern is unwarranted. The procedure could be practically indistinguishable from that by which a defendant currently seeks reconsideration of his sentence, with the exception that it would be a collateral challenge not limited to the thirty-day period following his sentence, could be initiated by the People, and would address only the narrow legal issue of whether a sentence violates a statutory requirement. If the People or a defendant discovered that the defendant's sentence was not authorized by statute — because it included or omitted a statutorily required term or included a term that is greater or less than authorized — they would file a motion in the circuit court. The circuit court would then conduct a hearing, with the defendant present and represented by retained or appointed counsel, determine whether the sentence in fact was unauthorized by statute, and correct the sentence as necessary. If the parties disagreed with the court's ruling, they could appeal from that order. That this process will result in some appellate litigation does not reduce the benefits to judicial economy, for that briefing would take place in straightforward appeals in the appellate court rather than original mandamus actions in this Court.

IV. The Circuit Court Imposed a $1,000 Fine, Two $500 Fines, and a $200 Fine.

Defendant argues that notwithstanding the circuit court's written sentencing order imposing mandatory fines of $1,000, $500, $200, and $500, A27, the court actually imposed only a $1,000 fine.[3] Def. Br. 18-19. The circuit court sentenced defendant in two cases at the same sentencing hearing — the child pornography case at issue here and a grooming case — and defendant argues that the court imposed the two $500 fines and the $200 fine only in the grooming case. *Id.* But this argument is belied by the record. At the sentencing hearing, the circuit court began with the child pornography case, sentencing defendant to a three-year prison term and stating that "[t]here is a mandatory fine of $1,000 that is ordered assessed here." R614. The court then turned to defendant's grooming case, sentencing him to a concurrent two-year prison term. R615. Finally, the court noted that there was a "$500 sex offender payment per statute, $200 sheriff's office fine,[4] and I believe there's an additional $500 assessment as well," and stated that it was "ordering those requirements in both of these" — that is, in both cases — "along with the requirement of following through with

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[3] In this, defendant disagrees with the appellate court, which found that the circuit court imposed "(1) a $1,000 fine; (2) a mandatory $500 sex-offender fine (see 730 ILCS 5/5-9-1.15(a) (West 2014)); (3) a mandatory $30 '[a]dditional fine to fund expungement of juvenile records,' (730 ILCS 5/5-9-1.17(a) (West 2014)); and (4) a mandatory $500 '[a]dditional child pornography fine[ ]' (730 ILCS 5/5-9-1.14 (West 2014))." A11. As explained in the People's opening brief, Peo. Br. 4 n.3, the appellate court appears to have misread the written sentencing order's assessment of a fine pursuant to the 730 ILCS 5/5-9-1.7 (requiring that defendants convicted of child pornography be assessed a $200 sexual assault fine) as an assessment pursuant to 730 ILCS 5/5-9-1.17 (requiring that all criminal sentences include a $30 fine to fund expungement of juvenile records).

[4] The written sentencing order dated that same day clarifies that the circuit court misspoke; the $200 fine the court intended to impose was not a sheriff's fine, but the mandatory sexual assault fine. *See* A27; 730 ILCS 5/5-9-1.7 (2014).

registering for lifetime as indicated as is required by statute." R615. Thus, the circuit court made clear that it was imposing the mandatory $500, $200, and $500 fines in both defendant's child pornography and grooming cases. *See* 720 ILCS 5/11-20.1(c) (2014) (mandatory $1,000 child pornography fine); 730 ILCS 5/5-9-1.15 (2014) (mandatory $500 sex offender fine); 730 ILCS 5/5-9-1.7 (2014) (mandatory $200 sexual assault fine); 730 ILCS 5/5-9-1.14 (2014) (mandatory $500 additional child pornography fine). Later that day, the court signed its written sentencing order consistent with that oral judgment. *See* A27 (written sentencing order dated August 8, 2014, although file-stamped August 19, 2014).

Although defendant is correct that when there is a variance between oral and written judgments, the oral judgment governs, Def. Br. 19; *People v. Smith*, 242 Ill. App. 3d 399, 402 (4th Dist. 1993), there is no variance here. Defendant's construction — that the trial court recognized that the two mandatory $500 fines and the mandatory $200 fine were required in both cases but decided to impose them only in one case and to defy the legislative mandate in the other — is implausible. There is no reason to believe that the circuit court would refuse to impose the mandatory fines in defendant's child pornography case at the sentencing hearing only to impose them in its written sentencing order later that day. To the extent that the circuit court's oral judgment is at all ambiguous with respect to the fines the court intended to impose in this case, the written order resolves that ambiguity. *See Smith*, 242 Ill. App. 3d at 402 ("When the written order of judgment is arguably inconsistent with an oral pronouncement of the court in rendering a judgment, but is consistent with the court's intent in rendering the judgment, the written order will be enforced."). Moreover, even if the court had not fully identified all of the mandatory fines it was imposing in open court — as

courts routinely decline to recite the litany of mandatory five- and ten- and fifty- dollar fines when proceeding through their crowded dockets — its subsequent identification of those fines in its written order would represent not a contradiction of its incomplete oral judgment, "but rather its full articulation." *People v. Tackett*, 130 Ill. App. 3d 347, 351 (2d Dist. 1985) (distinguishing between variances arising from affirmative statements in oral judgment and those arising from silence at oral judgment).

Accordingly, the appellate court's vacatur of the $200 sexual assault fine imposed by the circuit court on the ground that it was not imposed by the circuit court should be reversed.

CONCLUSION

The People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court or, in the alternative, reverse the appellate court's vacatur of the $200 sexual assault fine, affirm its vacatur of the remaining fines listed on the Payment Status Information, and remand to the circuit court for reimposition of those fines. Finally, the People respectfully request that the Court adopt a new Supreme Court rule providing that a statutorily unauthorized sentence may be corrected at any time by motion in the circuit court.

December 11, 2017

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the 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 4,254. In preparing this certificate, I relied on the word count of the WordPerfect X4 word-processing system used to prepare this brief.

/s/ Joshua M. Schneider
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PROOF OF FILING AND SERVICE

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 December 11, 2017, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail address of the person named below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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