No. 126163

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- ROBERT J. ROGERS, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-18-0088. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 15 DT 1703. Honorable Chrystel Gavlin, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether Robert Rogers received ineffective assistance of counsel when compulsory joinder applied such that the speedy trial term should have expired, but counsel did not file a motion to dismiss.

STATUTES INVOLVED

720 ILCS 5/3-3 Multiple Prosecutions for Same Act (2016):

* * *

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

725 ILCS 5/103-5 Speedy Trial (2016):

* * *

(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. * * *

STATEMENT OF FACTS

On November 25, 2015, defendant Robert Rogers was charged by ticket with driving under the influence of drugs or a combination of drugs (C6). The ticket, a "citation and complaint," cited Section 11-501(a)(4) of the Vehicle Code (C6). Rogers posted bond on the ticket (C6). On December 14, 2015, retained counsel (see C9) filed a written speedy trial demand (C16).

On April 6, 2016, the State filed a two-count supplanting information (C46-47). Count 1 alleged that Rogers drove with "any amount" of cannabis, a controlled substance, an intoxicating compound, or methamphetamine in his blood, breath, or urine, in violation of the then-current Section 11-501(a)(6) (C46). Count 2 alleged that he drove under the influence to a degree that rendered him incapable of safely driving, in violation of Section 11-501(a)(4) (C47). Both were charged as class A misdemeanors (C46-47).

On September 12, 2016, the State filed a motion to continue on the basis that the driving under the influence statute had been amended (C63). On September 20, it explained that Section 11-501(a)(6) had changed, and that it needed additional test results in order to "potentially set the charge" under the new Section 11-501(a)(7) (R53-54). Counsel objected and announced ready for trial (C65; R55, 56, 58-59).

On October 28, 2016, the trial court allowed the State to file a new information over counsel's objection (C73; R78). The new information re-alleged counts 1 and 2 (C74-75). It added a count 3, alleging that Rogers drove within two hours of having a THC concentration in his whole blood or other bodily substance "as defined in paragraph 6" of Section 11-501.2(a), in violation of the new Section 11-501(a)(7) (C75).

On December 1, 2016, the parties agreed to a continuance and to tolling the speedy trial term (C84; R98).

On March 16, 2017, counsel filed a motion to declare Section 11-501(a)(6) unconstitutional (C90-94). Counsel filed an amended motion on May 31 (C100-04). The State moved to dismiss the new count 3 on the same day (R125). The trial court denied the amended motion on November 2 (C117; R169).

On January 17, 2018, the parties entered into a stipulated bench trial (R172, *et seq.*). The State moved to dismiss all counts except count 1, alleging a violation of former Section 11-501(a)(6) (C121; R181). The trial court found Rogers guilty and sentenced him to 12 months' supervision (C118; R185, 187). On February 1, counsel filed a motion to reconsider the denial of his amended motion to declare the statute unconstitutional, or for a new trial (C125-30). That motion was denied on February 14 (C132; R194).

On May 7, 2020, the Appellate Court reversed the judgment in a published opinion. *People v. Rogers*, 2020 IL App (3d) 180088. Initially, it found that Rogers did not have a constitutional right to the effective assistance of counsel when he was not ultimately incarcerated, but that he had a statutory right to the effective assistance of counsel under Section 113-3(b) of the Code of Criminal Procedure. *Rogers*, 2020 IL App (3d) 180088, ¶ 16. It then found that Rogers was denied his right to effective assistance. Specifically, compulsory joinder applied to the period between the written speedy trial demand and the superceding information, resulting in a 114-day delay attributable to the State. *Rogers*, 2020 IL App (3d) 180088, ¶¶ 20-34. The 72-day period between September 20, 2016, and December 1 of that year was also attributable to the State. *Rogers*, 2020 IL App (3d) 180088, ¶ 34.

Counsel was therefore ineffective for failing to move to dismiss on the basis that the 160-day statutory speedy trial term ended on November 6, 2016. *Rogers*, 2020 IL App (3d) 180088, ¶ 34. The Court declined to reach the constitutional challenge to former Section 11-501(a)(6). *Rogers*, 2020 IL App (3d) 180088, ¶ 43.

This Honorable Court allowed the State's petition for leave to appeal on September 30, 2020. This appeal follows.

ROBERT ROGERS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COMPULSORY JOINDER APPLIED SUCH THAT THE SPEEDY TRIAL TERM SHOULD HAVE EXPIRED, BUT COUNSEL DID NOT FILE A MOTION TO DISMISS.

Robert Rogers was convicted of driving with "any amount" of cannabis, a controlled substance, an intoxicating compound, or methamphetamine in his blood, breath, or urine, in violation of the former version of Section 11-501(a)(6) of the Vehicle Code (C46). 625 ILCS 5/11-501(a)(6) (2015). The Appellate Court granted relief on the basis that Rogers received ineffective assistance of counsel when the 160-day speedy trial term expired well before the stipulated bench trial, but counsel did not move to dismiss. *People v. Rogers*, 2020 IL App (3d) 180088, ¶ 34. The State disagrees that Rogers received ineffective assistance, arguing that a motion to dismiss would have been meritless. Because Rogers was entitled to, but did not receive, effective assistance of counsel, this Honorable Court should affirm the judgment of the Appellate Court.

Standard of review.

Initially, the State is correct that issues of statutory interpretation are reviewed *de novo* (St. Br. 6). *People v. Hardman*, 2017 IL 121453, ¶ 19. For the sake of maintaining a consistent body of law, however, Rogers must point out that the State is not precisely correct when it cites *People v. Moore*, 207 Ill. 2d 68, 75 (2003), and *People v. Bates*, 2018 IL App (4th) 160255, ¶ 46, for the proposition that ineffective assistance claims are also reviewed *de novo* when the claim was not originally raised in the trial court (St. Br. 6).

In *Moore*, "the trial court operated under the legal misapprehension that defendant's [ineffective assistance] claim could be resolved by appointment of different counsel on appeal." *Moore*, 207 Ill. 2d at 75. This Honorable Court explained that "[a] trial court must exercise its discretion within the bounds of the law," and that "[a] reviewing court determines a legal question independently of the trial court's judgment." *Moore*, 207 Ill. 2d at 75. It said nothing about the standard of review that applies to the underlying ineffective assistance claim.

The citation in *Bates* can be traced to *People v. Berrier*, 362 Ill. App. 3d 1153 (2d Dist. 2006), which explained that ineffective assistance claims are subject to a bifurcated standard of review, wherein a reviewing court defers to findings of fact unless they are against the manifest weight of the evidence, but reviews the ultimate legal issue *de novo*. *Berrier*, 362 Ill. App. 3d at 1166-67; see also *Bates*, 2018 IL App (4th) 160255, ¶ 46 (citing *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24, itself citing *Berrier*, 362 Ill. App. 3d at 1166-67). It further explained that, because there were no undisputed facts before it, and because the claim was not raised in the trial court, it would review the issue *de novo*. *Berrier*, 362 Ill. App. 3d at 1167. It did not cite any authority for this conclusion and made no attempt to justify it as a bright-line rule. There simply was nothing to which to defer.

Thus, Rogers must agree that review in this case is *de novo*, but only because there are no disputed facts, not because the claim was not raised in the trial court. That is, this Honorable Court should apply the bifurcated standard, recognizing that the first step of that standard is an analytical formality when there are no facts to which to defer.

Robert Rogers had a right to the effective assistance of counsel.

The State claims that this Honorable Court has never determined whether the statutory right to counsel that applies to certain misdemeanor charges includes the right to effective counsel (St. Br. 7). See 725 ILCS 5/113-3(b) (2015). It declines to brief the question on the basis that Rogers did, in fact, receive effective assistance (St. Br. 7). The point is consequently forfeited. Ill. S. Ct. Rule 341(h)(7) (2021). Raising a doubt about the level of assistance that applies telegraphs an effort to limit the rights of Illinois citizens charged with misdemeanors, and it has the potential to cause confusion in this case. Furthermore, this doubt has already been dangerously normalized, with even the Appellate Court in this case writing that Rogers's right to counsel was purely statutory. *Rogers*, 2020 IL App (3d) 180088, ¶ 16. Consequently, Rogers will briefly respond, despite the forfeiture.

Both the State's point, and the Appellate Court's description of the rights involved, are based on a fundamental misunderstanding about the structure of the right to counsel. The Sixth Amendment reads, in relevant part, "*In all criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const., amend. VI (emphasis added). "There is considerable doubt that the Sixth Amendment itself . . . contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott v. Illinois*, 440 U.S. 367, 370 (1979). That is in part because the English common law affirmatively barred the aid of counsel to felony defendants in most cases, a position the Colonies largely, but not completely, rejected. *Argersinger v. Hamlin*, 407 U.S. 25, 30 (1972). Subsequently, the historical debate over the right to counsel for defendants charged with "petty

crimes" was about whether such defendants had the right to the appointment of counsel, not about whether such a defendant had the right to bring an attorney into the courtroom. See *Scott*, 440 U.S. at 370-72 (tracing the development of the right to counsel for misdemeanor defendants). In fact, historically, these defendants had a greater entitlement to bring an attorney into the courtroom than did felony defendants, and the Supreme Court has explicitly stated that the Sixth Amendment was not meant to be a "retraction" of the rights granted by the common law. *Argersinger*, 407 U.S. at 30; see also *Scott*, 440 U.S. at 375 (J. Brennan, dissenting) (emphasizing that the Sixth Amendment applies to all criminal prosecutions, and that it was indigent defendants' right to be provided counsel that was later extended to incarcerated misdemeanor defendants by *Argersinger*). Illinois could not, for example, repeal Section 113-3(b) and then forbid a defendant who was not ultimately incarcerated from being represented in court by an attorney. It is therefore not true that such a defendant does not have a constitutional right to counsel, even if such a defendant has no constitutional right to the *appointment* of counsel.

It is the entitlement to bring counsel into the courtroom that is the source of the right to effective counsel. See *Evitts v. Lucey*, 469 U.S. 387, 395 (1985) ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair," quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). It does not matter how the individual attorney comes to be involved in the case. Hiring a private attorney, for example, obviously does not implicate the right to appointed counsel at issue in *Scott*, but it still entitles

the defendant to effective assistance. *Lucey*, 469 U.S. at 395; *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).

Thus, Illinois does not grant a "statutory right to counsel" to defendants charged with a crime punishable by anything more than a fine. Instead, Illinois mitigates a gap in the right to *appointed* counsel by authorizing the appointment of the Public Defender to indigent defendants if the potential sentence could be more than a fine. 725 ILCS 5/113-3(b). But neither the right to counsel *per se*, nor the level of assistance to which a defendant is entitled, are tied to whether the defendant has a constitutional right to *appointed* counsel.

In this case, Rogers hired counsel (see C9). He exercised his Sixth Amendment right to bring an attorney into the courtroom to act as an advocate, not his statutory right to the appointment of the Public Defender. The right to the assistance of counsel is the right to the assistance of effective counsel. See *Lucey*, 469 U.S. at 395 (citing *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970)). The State's point, forfeited though it is, is not well taken.

Robert Rogers received ineffective assistance of counsel.

Rogers was denied the effective assistance of counsel when counsel failed to move to dismiss the charges on the basis of a statutory speedy trial violation. A defendant is denied the right to effective assistance of counsel when his or her attorney's representation falls below an objective standard of reasonableness, and when the deficiencies in counsel's performance undermine confidence in the outcome of the proceeding or deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687-88, 692, 694 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984).

In Illinois, criminal defendants have both constitutional and statutory rights

to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. art. I, § 8; 725 ILCS 5/103-5 (2016); *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). The statutory provision relevant to this appeal provides that "[e]very person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant . . . ." 725 ILCS 5/103-5(b) (2016). When a defendant is not tried within the speedy trial term, he or she is entitled to dismissal of the charges. *People v. Kliner*, 185 Ill. 2d 81, 114-15 (1998). "Proof of a violation of the statutory right requires only that the defendant has not been tried within the period set by statute and that defendant has not caused or contributed to the delays." *People v. Staten*, 159 Ill. 2d 419, 426 (1994). "Defendants who rely on the statutory right are not required to show prejudice resulting from the delay in trial or other factors that are part of the burden of establishing a violation of the constitutional right to a speedy trial." *Staten*, 159 Ill. 2d at 426-27.

The Appellate Court held that counsel in this case performed deficiently when the speedy trial term exceeded 160 days, but counsel failed to file a motion to dismiss. *Rogers*, 2020 IL App (3d) 180088, ¶ 34. The State responds that counsel cannot have been ineffective when the underlying speedy trial claim is meritless (St. Br. 7-8). It concedes up to 72 days of the speedy trial term (St. Br. 8). It contests only whether the 114 days between the original charge and the supplanting charges are attributable to the State through principles of compulsory joinder (see St. Br. 9), and whether, if they are, the trial court was authorized to grant a motion to dismiss (St. Br. 17-18). Note that the State makes no other meaningful argument concerning either prong of *Strickland*. This case therefore comes down to whether compulsory joinder applied, and if so, whether it was a proper basis for a speedy-trial motion to dismiss under the circumstances.

Whether compulsory joinder applies in this case depends on whether a police officer can be a "proper prosecuting officer" of a misdemeanor charge. By statute, "[i]f the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution," unless it is in the interests of justice to try the offenses separately. 720 ILCS 5/3-3(b) (2016). When this compulsory joinder statute applies, all of the charges in the single prosecution are subject to the same speedy trial term, regardless of when they were actually filed. *People v. Quigley*, 183 Ill. 2d 1, 13 (1998). Furthermore, any delays attributable to the defendant that accrued before the filing of a subsequent charge subject to compulsory joinder must be attributed to the State in relation to the subsequent charge. *People v. Williams*, 204 Ill. 2d 191, 207 (2003).

The phrase "proper prosecuting officer" is not defined by the statute. The State assumes the phrase means the licensed attorney fulfilling the role traditionally known as "prosecutor," that is, that "prosecuting" literally means in-court litigation of criminal matters (see St. Br. 14-15 (linking "proper prosecuting officer" to the State's Attorney's responsibility to charge and litigate on behalf of Illinois)). In fact, the phrase is a term of art describing the authority to charge offenses.

As a matter of statutory interpretation, a police officer can be a "proper prosecuting officer" of a misdemeanor charge. In Illinois, all felony prosecutions must be commenced by information or indictment. 725 ILCS 5/111-2(a) (2015). "All other prosecutions" may be commenced by indictment, information, or complaint. 725 ILCS 5/111-2(b) (2015); see also 725 ILCS 5/111-1(a)-(c) (2015) ("When authorized by law a prosecution may be *commenced* by: (a) A complaint; (b) An

information; (c) An indictment.") (emphasis added). Indictments must originate from a grand jury, informations must originate from the State's Attorney, and complaints, including in the form of a uniform citation, may originate with a peace officer. 725 ILCS 5/111-3(b) (2015). Thus, the plain language of the charging statutes allow police officers to "commence" misdemeanor "prosecutions." See *Lawler v. University of Chicago Medical Center*, 2017 IL 120745, ¶ 12 ("The most reliable indication of legislative intent is the plain language of the statute, which must be given its plain and ordinary meaning."). Furthermore, when a uniform citation is filed in the circuit court, it "constitutes a complaint to which the defendant may plead[.]" 725 ILCS 5/111-3(b). Consequently, it is possible for a complaint to be fully resolved, *i.e.*, "prosecuted," based solely on a uniform citation. By the plain language of the statutes setting out the charging scheme, a police officer is a "proper prosecuting officer" for a misdemeanor charged by citation.

The cases support this interpretation. On their face, the charging statutes appear to cause a "mis-match" in charging authority when a single incident involves both misdemeanor and felony conduct. It is possible for a defendant to resolve the misdemeanor complaint before the State's Attorney's Office has the opportunity to charge the felony. This "mis-match" led this Honorable Court in *People v. Jackson*, 118 Ill. 2d 179 (1987), *overruled on other grounds*, *People v. Stefan*, 146 Ill. 2d 324 (1992), to determine that a police officer was not a "proper prosecuting officer" for a subsequently-charged felony. In *Jackson*, the defendant was charged by uniform citation with driving under the influence and illegal transportation of alcohol after a fatal accident; after pleading guilty in traffic court, he was charged by indictment with reckless homicide, a felony. *Jackson*, 118 Ill. 2d at 183. This Court rejected

a double jeopardy challenge based on compulsory joinder, finding that, because the compulsory joinder statute "contemplates active involvement by a proper prosecuting officer," it did not apply. *Jackson*, 118 Ill. 2d at 192-93. But the reasoning that led to this conclusion did not tie "proper prosecuting officer" to the identity of the litigator representing the government. Instead, it tied the phrase to charging authority. "The language of the compulsory-joinder statute requires joinder of offenses only if the several offenses are known to the proper prosecuting officer *at the time of the commencement of the prosecution*." *Jackson*, 118 Ill. 2d at 192-93 (emphasis added). As established above, the plain language of the statutes that set out the charging scheme explicitly allow police officers to "commence" "prosecutions" for misdemeanors. 725 ILCS 5/111-1(a); 725 ILCS 5/111-2(b); 725 ILCS 5/111-3(b). This Court acknowledged that fact, observing that certain misdemeanors and petty offenses can be charged by police officers by uniform citation, and that such citations are "complaint[s] to which defendant may plead." *Jackson*, 118 Ill. 2d at 192. While this Court said that the State's Attorney "has the responsibility to commence and prosecute all actions in which the people of the State or the county may be concerned" under the Counties Code, the "actions" it was referring to were necessarily felonies, as it recognized that only felonies must be commenced by information or indictment. *Jackson*, 118 Ill. 2d at 192-93.

Furthermore, this Honorable Court observed that the compulsory joinder statute is very old, pre-dating the unified circuit court and its own rules for traffic and conservation offenses. *Jackson*, 118 Ill. 2d at 193. It cited "proper prosecuting officer" and other antiquated terms in the compulsory joinder statute as evidence that the statute simply did not contemplate the current system, in which a minor

traffic ticket might be resolved before an assistant State's Attorney in a felony courtroom can evaluate the case. That is, it emphasized that its concerns, and its analysis, revolved around the "mis-match" in charging authority identified above:

> We do not believe that the legislature intended that a driver could plead guilty to a traffic offense on a traffic ticket issued by a police officer and thereby avoid prosecution of a serious offense brought by the State's Attorney, such as reckless homicide, through the use of [the compulsory joinder statues].

Jackson, 118 Ill. 2d at 193. Thus, the evil to which the *Jackson* holding was directed was the windfall of a defendant avoiding a felony prosecution a police officer would not have been allowed to commence.

This Honorable Court's reliance in *Jackson* on *People v. Pankey*, 94 Ill. 2d 12 (1983), makes this emphasis on felony charging authority explicit. See *Jackson*, 118 Ill. 2d at 192. In *Pankey*, this Court rejected a double jeopardy challenge when the defendant pleaded guilty to a felony that had been illegally charged by uniform citation, but was subsequently re-charged with the same offense by information. *Pankey*, 94 Ill. 2d at 13-14, 19-20. The guilty plea had been taken on the citation with no involvement from the State's Attorney's Office. *Pankey*, 94 Ill. 2d at 13. This Court held that the trial court had no jurisdiction over the felony at the time of the plea because there simply was no felony prosecution by the State at that point. *Pankey*, 94 Ill. 2d at 17, 19. Critically, this Court contrasted the facts in front of it with an offense validly charged by uniform citation: "This case does not involve a traffic or misdemeanor offense which can be charged by a police officer on a uniform traffic ticket form in the name of the People of the State of Illinois." *Pankey*, 94 Ill. 2d at 18. In the same paragraph, it juxtaposed a police officer's

role in a case charged by uniform citation with that of the State in a felony: "Since the police officer was without authority to prosecute the [felony] charge . . . it cannot be said that the circuit court ever acquired jurisdiction over the State in the original proceeding." *Pankey*, 94 Ill. 2d at 19. This implies that the police officer *did* have authority to "prosecute" a traffic or misdemeanor case, not only in the sense that he or she can commence that type of prosecution, but also in the sense that such a prosecution can legitimately be resolved based solely on the citation issued by the officer, without the involvement of the State's Attorney (and again, despite the duties of the State's Attorney set out in the Counties Code).

In light of the citation to *Pankey*, this Honorable Court's holding in *Jackson* was limited to subsequent felony charges. A basic tenet of *stare decisis* is that it is a case's reasoning, in light of its material facts, that determines its precedential effect on subsequent cases. See *People v. Willoughby*, 2019 IL App (2d) 160729, ¶ 11 (citing *Kelley v. Sheriff's Merit Comm'n*, 372 Ill. App. 3d 931, 934 (2d Dist. 2007), and *Panchinsin v. Enterprise Cos.*, 117 Ill. App. 3d 441, 444 (1st Dist. 1983)). Rogers must concede that the *Jackson* decision contained what appears, on its face, to be what the State calls a "categorical rule" (see St. Br. 13): "We hold today that the compulsory-joinder provisions . . . do not apply to offenses that have been charged by the use of a uniform citation and complaint form provided for traffic offenses." *Jackson*, 118 Ill. 2d at 192. But the State must similarly concede that the very next two sentences, supported by citation to *Pankey*, read: "These uniform citation and complaint forms are intended to be used by a police officer in making a charge for traffic offenses and certain misdemeanors and petty offenses. An accused cannot be charged with a felony by the use of a uniform citation form." *Jackson*,

118 Ill. 2d at 192 (citing *Pankey*, 94 Ill. 2d at 17). That is, the material fact that drove the analysis in *Jackson* was that the police officer who charged the original complaint was not legally authorized to charge the more serious felony. As a matter of basic jurisprudential theory and practice, *Jackson* is distinguishable from cases in which the police officer was authorized to charge both the initial and subsequent offenses.

Lower courts of review have recognized this point. In *People v. Kazenko*, 2012 IL App (3d) 110529, the Third District applied *Jackson* to a case in which both the initial charge (by uniform citation) and the subsequent charge (by information) were misdemeanors. *Kazenko*, 2012 IL App (3d) 110529, ¶¶ 3-4, 14, 16; accord, *People v. Helt*, 175 Ill. App. 3d 332, 334 (3d Dist. 1987); *cf. People v. Hogan*, 186 Ill. App. 3d 267, 269 (3d Dist. 1989) (interpreting *Jackson* as holding that compulsory joinder does not apply to police-issued tickets at all, even as to other tickets). Justice Schmidt, specially concurring, recognized that *Jackson* was distinguishable, in that the police officer in *Kazenko* could have charged the subsequent offense by ticket, whereas the police officer in *Jackson* could not. *Kazenko*, 2012 IL App (3d) 110529, ¶ 22 (Justice Schmidt, specially concurring). Thus, "[w]hile a felony is not subject to compulsory joinder with a charge made by uniform citation . . . [i]t would seem that the same logic which supports the [S]upreme [C]ourt's decision in *Jackson* would not apply here in the case of two almost identical misdemeanors." *Kazenko*, 2012 IL App (3d) 110529, ¶ 22. That is absolutely true: the logic in *Jackson* does not apply to these types of cases.

In *People v. Thomas*, 2014 IL App (2d) 130660, the Second District criticized *Kazenko* on the same basis:

> The *Kazenko* majority mechanically applied *Jackson* without examining the reality of how criminal cases are charged. *Kazenko*, citing to *Jackson*, averred that the compulsory-joinder rule does not apply to charges brought via a uniform citation and complaint form, "because the language of the compulsory-joinder statute requires joinder only if the several offenses are known to the proper prosecuting officer, *i.e.*, the State's Attorney, when the prosecution began." [*Kazenko*, 2012 IL App (3d) 110529,] ¶ 14. *Jackson* involved the subsequent filing of felony charges; the State's Attorney had to file the additional charges because felony charges could not be brought by a police officer. Here, again, we are faced with a misdemeanor charge brought by a sheriff's deputy and the State's attempt to file another misdemeanor count that could have been charged by the deputy at the same time that he filed the original charge.

Thomas, 2014 IL App (2d) 130660, ¶ 22. The *Thomas* Court went on to describe the serious policy considerations that rendered the *Kazenko* majority's interpretation of the statute untenable:

> The vast majority of traffic and criminal misdemeanor cases are charged by police officers, not by assistant State's Attorneys. Reading *Jackson* to say that compulsory joinder can never apply where the original charge is brought by a police officer would mean that compulsory joinder would almost never apply to misdemeanor charges. Such an outcome is absurd and ill-advised.

Thomas, 2014 IL App (2d) 130660, ¶ 22; see also *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, 12 ("That said, a court also will presume that the legislature did not intend absurd, inconvenient, or unjust results.").

The State preemptively responds to these policy concerns by suggesting that the situations they would apply to are rare (St. Br. 16). This is a factual conclusion with no support in the record. This Honorable Court does not know how often misdemeanor citations are supplanted by misdemeanor informations. More importantly, the State cites no authority for the proposition that the rarity of the event is at all relevant to whether the compulsory joinder statute applies. In *Jackson*, this Court said that the purpose of the compulsory joinder statute

is "to curtail abuses of prosecutorial discretion." *Jackson*, 118 Ill. 2d at 193. "Abuses" is the key word. Police officers have prosecutorial discretion – they are explicitly allowed by the plain language of the charging statutes to commence prosecutions of misdemeanors – and abuses of prosecutorial discretion can occur even when police officers are the initial charging authority. This case is such an example. Rogers was subjected to the expense and trauma of criminal litigation that was prolonged in part because of the State's bizarre charging decisions, including of charging an offense that did not exist at the time of the alleged conduct (see C76). This is one of several types of abuses the compulsory joinder statute is meant to prevent. The State of Illinois does not get to violate Rogers's rights just because he might be in small company. The rarity of the event is not relevant.

The State argues that the legislature could have addressed the holding in *Jackson*, but has signaled approval by not doing so (St. Br. 15). This argument is circular. Logically, it presupposes that *Jackson* is not distinguishable, despite the fact that this Court's analysis turned on the notion that the police officer involved was not authorized to charge the subsequent offense. Again, the charging statutes explicitly give police officers prosecutorial discretion in misdemeanor cases. In this case, because the police officer was authorized to charge the subsequent offense, but exercised his discretion not to do so, *Jackson* does not actually apply, and the legislature's action or inaction on the *Jackson* holding is not relevant.

The State expresses concerns that applying compulsory joinder here would allow a police officer to hinder the State's Attorney's charging authority (St. Br. 14-15). These concerns are unrealistic. As set out extensively above, a police officer can already commence a misdemeanor prosecution, while he or she cannot commence a felony prosecution. That is, when the subsequent charge is a felony, the State

controls every aspect of the prosecution, because no felony prosecution was, or could have been, pending. But when the subsequent charge is a misdemeanor, a misdemeanor prosecution is already ongoing. The application of compulsory joinder does not limit the State's Attorney's ability to involve itself in that prosecution. It obviously could override the police officer's decisions by supplanting the complaint (which it could always do, and which it did here), so long as it did not violate the defendant's right to a speedy trial. The involvement of the two charging authorities are not mutually exclusive, and the State cites no authority to say that they would be if compulsory joinder applied. All that applying the compulsory joinder statute to these situations would prevent is something else that happened here, being delays in an active, ongoing misdemeanor prosecution that was properly commenced by a police officer, when those delays were caused by the State's subsequent, abusive charging decisions.

Finally, Rogers must address a case not cited by the State. *People v. Pohl*, 47 Ill. App. 2d 232 (4th Dist. 1964), is the only case Rogers is aware of that actually attempts to define "proper prosecuting officer." In *Pohl*, the question was whether information learned by a police officer while serving a summons was known to the "proper prosecuting officer." *Pohl*, 47 Ill. App. 2d at 134. The *Pohl* Court determined that the term referred to the State's Attorney. See *Pohl*, 47 Ill. App. 2d at 241. It relied on definitions of "officer" and of forms of the word "prosecute" from a wide variety of sources, and on its belief that "[i]t would be quite improbable that a person who lacked training in the legal profession would be able to determine whether a certain set of facts did or did not constitute a certain offense or offenses." *Pohl*, 47 Ill. App. 2d at 236-42.

Pohl does not control this case for several reasons. No cases have cited *Pohl* in the relevant context. It is roughly contemporaneous with the passage of the compulsory joinder statute, and as such, predates the current constitutional and sentencing schemes that grant police officers limited prosecutorial discretion to commence misdemeanor prosecutions. It is distinguishable on its face, in that the officer in *Pohl* was merely serving a summons and was not involved in charging the defendant. *Pohl*, 47 Ill. App. 2d at 233-34. That officer was not a prosecuting officer in any sense. The reasoning that only a lawyer can possibly know what constitutes an offense does not reflect the law: all persons are charged with knowledge of the law, *People v. Evans*, 2013 IL 113471, ¶ 13, and while police officers are allowed to make reasonable mistakes of law in certain contexts, they are expected to be able to determine what facts constitute an offense. *Cf. Heien v. North Carolina*, 574 U.S. 54, 66-67 (2014) ("The Fourth Amendment tolerates only reasonable mistakes, and those mistakes – whether of fact or of law – must be objectively reasonable. . . . Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."). Finally, the *Pohl* Court acknowledged that the words "prosecute" and "prosecution" do not necessarily refer to an attorney taking a case to final adjudication, but often refer specifically to the commencing of a charge or suit, and, as established above, even the definitions involving a final adjudication can apply to police involvement in modern misdemeanor prosecutions, where the prosecution can be commenced by a citation to which the defendant can plead. *Pohl*, 47 Ill. App. 2d at 236, 239.

In summary, the statutes that set out the charging scheme in the Illinois criminal justice system explicitly and by their plain language allow police officers

to commence prosecutions of misdemeanors by way of complaints to which defendants can plead. That is, police officers are, by statute, "proper prosecuting officers." The cases support this interpretation, where fundamental rules of *stare decisis* require courts to examine the reasoning behind a decision when applying the holding of that decision. Despite some absolutist language in *Jackson*, it is clear that the decision was based on the inability of the police officer who initially charged the case to charge the subsequent felony. *Jackson's* reliance on *Pankey* leads to the conclusion that, while it is true that the State's Attorney is the "proper prosecuting officer" of a felony, it is also true that a police officer is a "proper prosecuting officer" of an offense properly charged by uniform citation. Consequently, *Jackson* is distinguishable from cases in which the subsequent charge is also a misdemeanor that could have been charged by citation. In those cases, the police officer who initially "prosecuted" the case by commencing the prosecution could have "prosecuted" the subsequent offense at the same time, but exercised prosecutorial discretion not to do so. Put another way, there are multiple "proper prosecuting officers" in such a case, one of which is the police officer.

Since the police officer in this case was a "proper prosecuting officer," compulsory joinder applied to the 114-day period between the written speedy trial demand and the supplanting information. Consequently, counsel was ineffective for failing to move to dismiss, and this Honorable Court should affirm the Appellate Court's judgment.

The State argues that, even if this Honorable Court agrees going forward that compulsory joinder applies in these situations, Rogers did not receive ineffective assistance because the trial court would have been bound by *Kazenko*. The theory

is that trial counsel's performance cannot be deficient for failing to file a motion that would not have succeeded (St. Br. 17-18). This theory fails for the same basic reasons set out above. *Kazenko* misread the applicable law. The trial court would not have been bound to follow *Kazenko*, when *Kazenko* was contrary to the reasoning set out in *Jackson* and *Pankey*. If this Honorable Court agrees that compulsory joinder applies here, it can and should affirm the Appellate Court's judgment granting relief on the basis of counsel's failure to file a motion to dismiss.[1]

[1]In the event that this Honorable Court does not affirm the judgment of the Appellate Court, Rogers agrees with the State that this Court should remand the case to the Appellate Court for consideration of his constitutional challenge (St. Br. 18). See *People v. Givens*, 237 Ill. 2d 311, 339 (2010).

CONCLUSION

Because he had a right to the effective assistance of counsel, but was denied that right when compulsory joinder applied, the speedy trial term should have expired, and counsel did not move to dismiss, Robert J. Rogers, defendant-appellee, respectfully requests that this Honorable Court affirm the judgment of the Appellate Court.

Respectfully submitted,

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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 pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 23 pages.

/s/Sean Conley
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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- ROBERT J. ROGERS, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-18-0088. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 15 DT 1703. Honorable Chrystel Gavlin, 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 March 26, 2021, the Brief and Argument 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-appellee in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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