No. 126163

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF PLAINTIFF-APPELLANT
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ORAL ARGUMENT REQUESTED

ARGUMENT

This case presents the question whether defense counsel was ineffective for failing to move to dismiss Count One — which charged defendant with driving while there was any amount of the statutorily listed drugs under 625 ILCS 5/11/501(a)(4) (2015) in his breath, blood, or urine — on statutory speedy trial grounds. The parties agree that the merits of the potential speedy trial claim depend on whether Count One, a misdemeanor initially charged by the Will County State's Attorney, and Count Two, a misdemeanor initially charged by the arresting officer, were subject to compulsory joinder**.** *See* Def. Br. 10.[1] At the time of defendant's trial, a binding Third District opinion held that the counts were not subject to compulsory joinder. *People v. Kazenko*, 2012 IL App (3d) 110529, ¶¶ 14-16. Thus, defense counsel did not perform deficiently in declining to file a motion that was foreclosed by governing precedent. Moreover, defendant was not prejudiced because under the clear rule established by the Court in *People v. Jackson*, 118 Ill. 2d 179, 192 (1987), compulsory joinder does not apply to charges brought by uniform citation and complaint and therefore his speedy trial claim is meritless. Accordingly, he cannot establish that counsel was ineffective.

[1] Citations to the People's opening brief and defendant's brief appear as "Peo. Br. __" and "Def. Br. __," respectively.

I. Defendant Received Effective Assistance of Counsel.

Under the longstanding precedent of this Court and the United States Supreme Court, defendant had no constitutional right to counsel in these misdemeanor proceedings. *People v. Scott*, 68 Ill. 2d 269, 272 (1977) (constitutional right to counsel applies only where defendant is actually sentenced to term of imprisonment), aff'd sub nom. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979). And it is equally well established that a defendant cannot succeed on a claim that counsel was constitutionally ineffective where he had no constitutional right to counsel. *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's [actions]."); *see also People v. James*, 111 Ill. 2d 283, 291 (1986) (citing *Wainwright*). Thus, defendant had only the statutory right to counsel provided by section 113-3(b) of the Code of Criminal Procedure. 725 ILCS 5/113-3(b).

This Court need not address defendant's novel attempt to expand the constitutional right to counsel, *see* Def. Br. 7-9, nor determine whether the statutory right to counsel under section 113-3(b) includes the right to effective counsel, *see* Peo. Br. 6-7, to resolve this case because defendant's claim fails even under the stringent constitutional standard set by *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Defense counsel was not deficient for declining to file a motion that would have failed under existing precedent.

Defendant cannot establish deficiency under *Strickland*'s performance prong because counsel's reliance on existing precedent cannot constitute deficient performance. Under *Strickland*, a court reviews defense counsel's performance in light of the law that existed at the time of the representation. *People v. English*, 2013 IL 112890, ¶ 34; *see also Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Accordingly, counsel is not required to predict future changes in the law in order to provide constitutionally adequate representation. *English*, 2013 IL 112890, ¶ 34.

As discussed in the People's opening brief, *see* Peo. Br. 9-16, *Jackson*, 118 Ill. 2d at 192, announced a clear, categorical rule that compulsory joinder does not apply to charges brought via a uniform citation and complaint. In 2012, the Third District applied *Jackson* to facts indistinguishable from those at issue here and held that compulsory joinder did not apply to driving under the influence charges initially charged by a police officer and subsequent, related misdemeanor charges brought by the State's Attorney. *Kazenko*, 2012 IL App (3d) 110529, ¶¶ 14-16. At the time of defendant's January 2018 trial, *Kazenko* remained binding on the Circuit Court of Will County. *See Aleckson v. Vill. of Round Lake Park*, 176 Ill. 2d 82, 92 (1997) ("[T]he circuit court is

bound by the decisions of the appellate court of the district in which it sits."). Thus, under binding precedent at the time, Counts One and Two were not subject to compulsory joinder and a motion to dismiss Count One on speedy trial grounds would have failed. Trial counsel was not required to predict that a different panel of the Third District would repudiate *Kazenko*'s holding following defendant's trial, *see English*, 2013 IL 112890, ¶ 34, and thus counsel's decision not to file a motion to dismiss did not constitute deficient performance.

Defendant suggests — without any supporting citation — that defense counsel was required to file the motion to dismiss because the trial court could have independently determined that *Kazenko* was wrongly decided. *See* Def. Br. 22. He is incorrect. Even if a trial judge believes that an appellate court decision is incorrect, the judge is bound by the higher court's ruling. *State Farm Fire & Cas. Co. v. Yapejian*, 152 Ill. 2d 533, 540 (1992). And though, despite *Kazenko*'s holding, counsel *could have* filed a motion to dismiss to preserve the issue, defense counsel was not *required to* anticipate the appellate court's departure from existing precedent. *See English*, 2013 IL 112890, ¶ 34.

Because existing, binding precedent supported defense counsel's decision not to file a motion to dismiss, his performance was not deficient. Accordingly, defendant cannot establish ineffective assistance of counsel.

People v. Cherry, 2016 IL 118728, ¶ 24 ("[T]he failure to establish either [*Strickland* prong] precludes a finding of ineffective assistance of counsel.").

B. A motion to dismiss would have failed because compulsory joinder does not apply to uniform citations issued by police officers.

Nor can defendant establish *Strickland* prejudice, because compulsory joinder does not apply to uniform citations issued by police officers; therefore, a motion to dismiss would have failed. As noted above, whether a speedy trial challenge would have been meritorious depends on whether compulsory joinder applied to Count One, charged by the State's Attorney, and Count Two, charged by the arresting officer. *See supra* at 1; *see also* Def. Br. 10. Whether joinder was required, in this instance, turns on who is the "proper prosecuting officer." *See* 720 ILCS 5/3-3(b); Def. Br. 11 (asserting that joinder issue "depends on whether a police officer can be a 'proper prosecuting officer' of a misdemeanor charge").

Section 3-3(b) provides that all offenses based upon a single act and "known to the proper prosecuting officer at the time of commencing the prosecution" must be prosecuted in a single prosecution. *Id.*; *see also People v. Hunter*, 2013 IL 114100, ¶ 10. In *Jackson*, this Court construed section 3-3(b) and focused on the phrase "proper prosecuting officer." 118 Ill. 2d at 192-93. Explaining 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," *id.* (emphasis added), the Court announced a bright-line rule that "the compulsory-joinder provisions of section 3-3 do not

apply to offenses that have been charged by the use of a uniform citation and complaint form," *id.*, and did not limit its holding to instances where the initial charges were followed by a felony charge, *see id.*

In the three decades since *Jackson*, almost every court to address the issue has repeated the same categorical rule without limitation. *See Kazenko*, 2012 IL App (3d) 110529, ¶¶ 14, 16; *People v. Mauricio*, 249 Ill. App. 3d 904, 911 (2d Dist. 1993) ("[O]ur courts have held that sections 3-3 and 3-4(b)(1) do not apply to offenses that have been charged in a uniform traffic citation."); *People v. Crowe*, 232 Ill. App. 3d 955, 960 (4th Dist. 1992); *People v. Hoskinson*, 201 Ill. App. 3d 411, 414 (1st Dist. 1990); *People v. Helt*, 175 Ill. App. 3d 332, 333 (3d Dist. 1987); *but see People v. Thomas*, 2014 IL App (2d) 130660, ¶¶ 20-22 (holding compulsory joinder applies where the subsequent charge is a misdemeanor). Nor has the legislature acted to limit or alter *Jackson*'s categorical rule by amending the relevant statutory provision. *See In re Marriage of Mathis*, 2012 IL 113496, ¶ 25 (legislature's silence following judicial interpretation of statute indicates acquiescence to the court's interpretation).

Citing *People v. Pankey*, 94 Ill. 2d 12 (1983), defendant attempts to distinguish *Jackson* by arguing that a police officer is the proper prosecuting officer in cases charged via uniform citation and complaint because the officer is authorized to commence the prosecution process. Def. Br. 12. In *Pankey*, the defendant pleaded guilty to a felony erroneously charged by uniform

citation, but was subsequently re-charged by information. 94 Ill. 2d at 13-14, 19-20. Rejecting a double jeopardy challenge, this Court found that the trial court lacked jurisdiction over the felony, because an officer may initiate a criminal action only through a uniform citation and complaint. *Id.* Defendant's argument fails because the ability to initiate a criminal action, by itself, is insufficient to render an individual the proper prosecuting officer. Indeed, in *Pankey*, this Court noted that while a police officer has a role in beginning the prosecutorial process, the officer's actions must ultimately comport with the judgment and discretion of the State's Attorney as a constitutional officer. *Id.* at 18.

As this Court recognized in *Jackson*, the ultimate authority and responsibility for criminal prosecutions resides in the State's Attorney. *See* 118 Ill. 2d at 192-93. This role is derived from our state constitution and cannot be usurped or circumscribed. *See People ex rel. Alvarez v. Gaughan*, 2016 IL 120110, ¶ 27. Thus, *Jackson* explained that the legislature did not intend for section 3-3(b) to allow a police officer's ticket to help a defendant avoid a more serious prosecution brought by the proper prosecuting officer, the State's Attorney. 118 Ill. 2d at 193. In *Jackson*, the Court considered whether a defendant could plead guilty to an offense charged by a ticket to escape a subsequent felony charge brought by the State's Attorney, *see id.*, but the same logic applies when a defendant pleads guilty to a lesser misdemeanor charged by a ticket before the State's Attorney can charge a

more serious misdemeanor. In either situation, the State's Attorney is thwarted from exercising his constitutional discretion. Thus, it is clear that the proper prosecuting officer under section 3-3(b) is the State's Attorney, regardless of whether a felony or misdemeanor is charged.

Accordingly, this Court should apply the clear rule announced in *Jackson* and hold that Counts One and Two were not subject to compulsory joinder and, consequently, any speedy trial challenge to Count One would have failed. Accordingly, defense counsel was not ineffective for failing to raise this meritless claim. *See People v. Edwards*, 195 Ill. 2d 142, 165 (2001).

CONCLUSION

This Court should reverse the appellate court's judgment and remand for further consideration of defendant's constitutional challenge to section 11-501(a)(6).

April 22, 2021

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(a), is nine pages.

/s/ Nicholas Moeller
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 22, 2021 the foregoing **Plaintiff-Appellant's Reply Brief** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

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