No. 123052

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- AARON RIOS-SALAZAR Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0524. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 10-CF-2114. Honorable Carla Alessio-Policandriotes, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Trial counsel deprived defendant of the effective assistance of counsel by failing to challenge as *ex post facto* violations defendant's $100 Violent Crime Victim Assistance fine and $25 judicial facilities fine.

In his opening brief, defendant argued that he was deprived of the effective assistance of counsel because trial counsel failed to challenge as *ex post facto* violations defendant's $100 Violent Crime Victim Assistance (VCVA) fine and $25 judicial facilities fine (Op. Br. at 5–20). The State concedes that "the court incorrectly assessed a $100 VCVA fine, rather than the $68 amount mandated by the statutory language in effect in 2010, when defendant committed his crime" (State's Br. at 2). The State also concedes that this error "financially harmed defendant" (State's Br. at 4). Notwithstanding these concessions, the State insists that defendant was not deprived of the effective assistance of counsel, making several arguments to support its claim.

A. The $25 judicial facilities assessment is a fine.

First, the State argues that the $25 judicial facilities assessment was not an *ex post facto* violation because it is a fee, not a fine (State's Br. at 5–8). The State argues that it is a fee because "[t]he legislature expressly termed the assessment a fee"; it is "intended to compensate the counties for the use of judicial facilities during the prosecution," *i.e.*, "the depreciation of the current judicial facility"; the assessment is "not dependent solely on conviction, because it also applies to civil litigants"; the assessment does not apply in ordinance, traffic, or conservation cases where a party pays a fine in full without using judicial facilities to make a court appearance; and the legislature intended the assessment to be a "user fee" (State's Br. at 7–8). The State's argument lacks merit.

This Court has explained that "the label attached by the legislature is not necessarily definitive" of whether an assessment is a fine or a fee. *People v. Jones*, 223 Ill.2d 569, 599 (2006). The legislature's label cannot overcome the assessment's actual attributes. *People v. Graves*, 235 Ill.2d 244, 250 (2009). The judicial facilities assessment has the actual attributes of a fine.

The "most important" factor is whether the assessment is intended to "compensate the state for any costs incurred as the result of prosecuting the defendant." *Jones*, 223 Ill.2d at 600. "A charge is a fee *if and only if* it is intended to reimburse the state for some cost incurred in defendant's prosecution." *Id.* (emphasis added). By the plain language of section 5-1101.3 of the Counties Code, the judicial facilities assessment is intended to generate revenue "for the building of new judicial facilities" in Will County. 55 ILCS 5/5-1101.3 (2015). This is confirmed by the legislative proceedings that the State cites on pages 7 and 8 of its brief. During those proceedings, Representative Walsh repeatedly referred to the assessment as one of several "revenue sources" for the building of a new Will County courthouse, estimated to cost at least $150 million. Representative Walsh and other representatives stated that a new courthouse was needed because the current courthouse was not sufficient to handle the workload of populous Will County, did not have space for additional judges, and was a dated building suffering from structural problems. 98th Ill. Gen. Assemb., House Proceedings, May 21, 2014, at 85–89. The need to build new judicial facilities, and the consequent need for a source of revenue to build those facilities, was not an expense incurred by the State in defendant's case. For this reason alone, the judicial facilities assessment is not a fee. *Jones*, 223 Ill.2d at 600. See also *Crocker v. Finley*, 99 Ill.2d 444, 452

(1984) (explaining that in a civil context, a charge imposed on a litigant is a fee if it is assessed to defray the expenses of his or her litigation but is a tax if it is assessed to provide "general revenue rather than compensation").

With that said, the assessment possesses other attributes of a fine. Although it is payable to a county fund rather than the state treasury, the assessment furthers the State's interest in financing the court system, which is an attribute of a fine. *Graves*, 235 Ill.2d at 252. Furthermore, it may only be assessed against a defendant in a criminal case "upon the entry of a judgment of conviction, an order of supervision, or a sentence of probation . . . ." 55 ILCS 5/5-1101.3(a)(2) (2015). If a criminal case against a defendant were to be dismissed, or if a defendant were to be acquitted, the assessment would not apply. See *id.* Thus, the assessment is not a "user fee" imposed on every defendant who goes to court. Rather, it is a penalty in criminal cases where a defendant has been found to have committed a crime. See *Graves*, 235 Ill.2d at 249–52 (stating that a fine is punitive in nature, having a tendency to be exacted only after conviction for a criminal offense). Finally, the assessment's application in civil cases, payable "by each party at the time of filing the first pleading, paper, or other appearance," does not illustrate that the assessment is a fee. 55 ILCS 5/5-1101.3(a)(1) (2015). A charge to a civil litigant may be a fee *or a tax*. *Crocker*, 99 Ill.2d at 452. Similar to the dichotomy between a fee and a fine, "court charges imposed on a [civil] litigant are fees if assessed to defray the expenses of his litigation" but are taxes if they have "no relation to the services rendered" and are "assessed to provide general revenue rather than compensation[.]" *Id.*

Accordingly, the judicial facilities assessment is a fine.

B. Defense counsel performed deficiently.

Next, the State argues that defense counsel performed reasonably because "it is 'entirely likely' that defense counsel chose not to object to either assessment where such an objection would have drawn the judge's or the prosecutor's attention to a larger error in defendant's favor": the court's failure to impose a mandatory $170 surcharge under section 5-9-1(c) of the Unified Code of Corrections (State's Br. at 10–11). This Court should not be persuaded.

The State assumes that defense counsel actually considered the propriety of the assessments imposed against defendant. The record does not indicate whether counsel did so. The record also does not indicate why counsel did not object to the *ex post facto* violations, so the State is speculating that counsel failed to do so as a matter of strategy. The State is also speculating that had counsel raised the *ex post facto* violations, it would have drawn the trial judge's or the prosecutor's attention to the neglected $170 mandatory surcharge. If anything, the record suggests otherwise. Both the prosecutor and the trial court neglected the surcharge once (C124), so it was more likely that they would have done so again in the event counsel raised the *ex post facto* violations.[1]

In any event, what matters is not speculation but whether defense counsel acted reasonably under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Defendant argued in his opening brief that prevailing

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[1] The State argues that because the *ex post facto* claim drew Justice Wright's attention to the neglected $170 surcharge, any argument that the trial court might have overlooked the surcharge a second time is undermined (State's Br. at 11–14). This is not an appropriate consideration under *Strickland*. *Strickland* requires this Court to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*." *Strickland*, 466 U.S. at 690 (emphasis added).

professional norms required defense counsel to protect defendant's interests at sentencing in the pursuit of the least burdensome sentence possible (Op. Br. at 9–14). The State does not dispute this in its brief. Protecting defendant's interests at sentencing and pursuing the least burdensome sentence possible included minimizing defendant's financial loss resulting from the imposition of monetary assessments. By failing to challenge the *ex post facto* violations, defense counsel failed to do so.

The trial court imposed $57 in assessments in violation of *ex post facto* principles. Thus, defendant was entitled to have $57 deducted from his total financial obligation so that his financial loss would be minimized. This is true regardless of whether the trial court imposed a $170 surcharge.

Assuming *arguendo* that the trial court had not neglected the $170 surcharge, defense counsel would have faced two options: (1) raise the *ex post facto* violations and save defendant $57 or (2) not raise them so that defendant would have to pay $57. Only one option minimizes defendant's financial loss: raising the *ex post facto* violations.

Even if a mandatory $170 surcharge has been neglected, as it was in this case, raising the *ex post facto* violations in the trial court ensures that defendant's financial obligation is at its minimum and is in defendant's best interest. Although the surcharge was neglected, there is a risk that the surcharge will be imposed upon defendant at a later time. For example, the trial court could impose it *sua sponte* or at the State's request at a later time so long as the court has jurisdiction. See *People v. Richards*, 394 Ill. App. 3d 706, 708 (explaining that a trial court may impose fines so long as it has jurisdiction). The State could seek its imposition

through *mandamus*. See *People ex rel. Ward v. Salter*, 28 Ill.2d 612, 613–16 (1963) (Cook County State's Attorney successfully obtains through *mandamus* an order from this Court directing a circuit judge to increase a fine); *People ex rel. Birkett v. Jorgensen*, 216 Ill.2d 358, 362 (2005) (stating that it is "quite settled" that sentencing provisions of the Unified Code of Corrections are mandatory and that *mandamus* will lie to compel compliance with them). Or, the circuit clerk could even impose the surcharge upon defendant, albeit unlawfully. See, *e.g.*, *People v. Vara*, 2018 IL 121823, ¶¶ 5, 23 (circuit clerk assessed several mandatory fines not included in the judgment about 18 months after the judgment's entry).

Importantly, the risk of the surcharge being imposed at a later time exists regardless of whether defense counsel raises the *ex post facto* violations. The fatal flaw in the State's argument is that it assumes the $170 surcharge will never be imposed if counsel decides to forego raising the *ex post facto* violations. An attorney acting reasonably under prevailing professional norms must account for the possibility that any overlooked mandatory fine will be imposed even if the *ex post facto* violations are not challenged. Electing to forego the *ex post facto* challenge due to a fear of alerting the trial court that it overlooked the surcharge does not shield defendant from the surcharge.

Defense counsel has no control over whether the court or the prosecutor pursue the surcharge. But counsel does have control over the $57 to which defendant is legally entitled under *ex post facto* principles. Rasing the $57 in *ex post facto* violations ensures that defendant's financial obligation is at its minimum, *i.e.*, that defendant is in the best financial position, regardless of whether the surcharge is eventually imposed. More specifically, counsel obtains the $57 for defendant

and eliminates the potential worst-case scenario: the $170 surcharge is later imposed and defendant does not receive the $57 *ex post facto* remedy.

Accordingly, prevailing professional norms required that counsel raise the *ex post facto* violations and obtain the $57 for defendant. Counsel did not, so he performed deficiently under *Strickland*.

C. Defendant was prejudiced.

Finally, the State contends that defendant cannot establish prejudice under *Strickland* for several reasons.

First, the State argues that defendant "cannot show that there was a reasonable probability that had counsel objected, he ultimately would have benefited" (State's Br. at 13). The State is wrong. Had counsel raised the *ex post facto* violations, there is a reasonable probability that the circuit court would not have allowed the $100 VCVA and the $25 judicial facilities fines to remain. Both fines violated *ex post facto* principles, so the court would have struck the $25 judicial facilities fine and reduced the $100 VCVA fine to $68. Defendant would have been better off by $57. If the court at that time or at a later date imposed the neglected mandatory $170 surcharge, defendant would still be better off by $57 as opposed to if counsel had not raised the *ex post facto* violations.

Next, the State argues, "Although defendant is arguably worse off under a strict-outcome determinative calculus, he cannot show that his sentencing was rendered fundamentally unfair as required to demonstrate *Strickland* prejudice" (State's Br. at 13). The State insists that "*Strickland* prejudice is not merely an outcome-determinative test; 'defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceedings

fundamentally unfair,'" quoting this Court's opinion in *People v. Richardson*, 189 Ill.2d 401, 411 (2000), and the Supreme Court of the United States' opinion in *Lockhart v. Fretwell*, 506 U.S. 364 (1993) (State's Br. at 12). This is not a correct statement of the law.

In *Lockhart*, the defendant was sentenced on the basis of an aggravating factor (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). *Lockhart*, 506 U.S. at 366–67. At the time of trial, a decision of the United States Court of Appeals for the Eighth Circuit (*Collins*) provided that such "double counting" was error; nevertheless, the defendant's attorney failed to object at sentencing. *Id.* at 367. The defendant filed a federal habeas petition, claiming that counsel was ineffective for not objecting to the "double counting." *Id.* Subsequently, *Collins* was overruled. *Id.* at 368. The Supreme Court of the United States held that the defendant "suffered no prejudice from his counsel's deficient performance." *Id.* at 372. The Court opined that a prejudice "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.* at 369–70. The Court concluded that because the *Collins* rule was erroneous, the result of the defendant's sentencing proceeding was neither unfair nor unreliable. *Id.* at 371. It explained, "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372.

Seven years after it decided *Lockhart*, and two months after this Court's decision in *Richardson*, the Supreme Court of the United States decided *Williams v. Taylor*, 529 U.S. 362 (2000), where it held that a state supreme court unreasonably applied clearly established federal law (*Strickland*) when the state court concluded that "'an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.'" *Williams*, 529 U.S. at 394 (quoting *Williams v. Warden of the Mecklenburg Correctional Center*, 254 Va. 16, 25 (1997)). The Supreme Court explained that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel-claims"; however, there are "situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'" *Id.* at 391–92. The Court discussed two examples of such situations: *Lockhart* and *Nix v. Whiteside*, 475 U.S. 157 (1986).[2] *Id.* at 392–93. It then explained that *Lockhart* and *Nix* "do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him," including a "constitutionally protected right." *Id.* at 393 (emphasis in original). The Court concluded that the state supreme court erred when it "relied on the

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[2] In *Nix*, the Court held that a defendant cannot establish prejudice under *Strickland* on the basis that trial counsel refused to present perjured testimony at trial, evan assuming the jury might have believed the perjury. The Court opined that the "benchmark" for a claim of ineffective assistance is the fairness of the proceeding and that a defendant is not entitled to the "luck of a lawless decisionmarker." The Court stated that because counsel treated the proposed perjury in accord with professional standards and the defendant's truthful testimony could not have prejudiced the result of the trial, the defendant was not prejudiced. *Nix v. Whiteside*, 475 U.S. 157, 175–76 (1986).

inapplicable exception recognized in *Lockhart*" to "require a separate inquiry into fundamental fairness even when [the defendant] is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." *Id.* at 393, 397. The Court characterized as "erroneous" the state court's "view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Id.* at 397.

Accordingly, *Strickland*'s outcome-determinative prejudice test applies—without a separate inquiry into fairness or reliability—if counsel's deficiency deprived the defendant of a substantive or procedural right to which the law entitles him. *Williams*, 529 U.S. at 393. A separate inquiry into fairness or reliability is appropriate only when a defendant argues that counsel should have sought relief by using "an incorrect legal principle or a defense strategy outside the law," as the defendants argued in *Lockhart* and *Nix*. *Lafler v. Cooper*, 566 U.S. 156, 167 (2012).

In this case, counsel's deficiency prevented defendant from receiving $57 as a remedy to two *ex post facto* violations. The right to be free of *ex post facto* punishments is a substantive constitutional right. See U.S. Const., art. I, § 9; Ill. Const. 1970, art. I, § 16. Thus, counsel's deficiency deprived defendant of a substantive right to which the law entitles him. *Strickland*'s outcome-determinative prejudice test applies in this case, without a separate inquiry into fairness or reliability. *Williams*, 529 U.S. at 393.

Next, the State argues that "the only prejudice [defendant] has identified is that counsel's inaction prevented him from receiving a windfall . . ." (State's Br. at 13). The State characterizes defendant's prejudice argument as defendant

undeservedly claiming that "he received only a $113 windfall from the court's failure to assess the [mandatory $170 surcharge fine], rather than the full $170" (State's Br. at 13). The State is incorrect.

Again, the actual prejudice defendant has identified is counsel's failure to remedy two *ex post facto* violations, which left defendant facing an additional $57 in erroneous fines. That is not a windfall. Rather, it is a deprivation of a substantive constitutional right. The State's argument would be correct if defendant were arguing that but for counsel's deficiency, the trial court would not have imposed a mandatory $170 surcharge. In such circumstances, defendant would be requesting a windfall to which he is not entitled; relying on "the luck of a lawless decisionmaker," *i.e.*, presuming that the trial court would not follow the law; and failing to claim that counsel's deficiency deprived him of a "right to which the law entitles him." *Strickland*, 466 U.S. at 694–95; *Williams*, 529 U.S. at 393. But that is not defendant's argument in this case. He is not arguing that counsel should have sought relief by using "an incorrect legal principle or a defense strategy outside the law." *Lafler*, 566 U.S. at 167.

Indeed, defendant's prejudice analysis presumes that he will not receive a "windfall" due to "the luck of a lawless decisionmaker" and that the mandatory $170 surcharge will eventually be imposed as the law requires. Ironically, it is the State who presumes that the law will not be followed by assuming that the mandatory $170 surcharge would never be imposed so long as defense counsel failed to challenge the *ex post facto* violations. It is the State, as holder of the remedy of *mandamus*, who can eliminate the $170 "windfall." And it is the State who would

be receiving a windfall should the $170 surcharge be imposed without defendant receiving his $57.

Finally, the State argues that its ability to pursue the neglected $170 surcharge through *mandamus* "does not affect the prejudice analysis" because "it is extremely unlikely that the People would now expend additional government resources years after defendant's conviction to pursue such a small sum" (State's Br. at 14). The State's argument should not persuade. The State does not dispute that it may obtain the $170 surcharge through *mandamus*. To be sure, the State has used *mandamus* in the past to obtain additional fines. See, *e.g.*, *Salter*, 28 Ill.2d at 613–16. It has also filed petitions for leave to appeal to pursue additional fines. See, *e.g.*, *People v. Vara*, 2018 IL 121823, ¶¶ 1–8. Moreover, either the Attorney General's Office or the Will County State's Attorney's Office may pursue the surcharge through *mandamus*. See *People ex rel. Alvarez v. Gaughan*, 2016 IL 120110, ¶¶ 22–32 (explaining that the Attorney General and state's attorneys may bring a *mandamus* action). Thus, even if this Court were to assume from the Attorney General's argument that the State will not pursue the $170 surcharge through *mandamus*—which is not exactly what the Attorney General is arguing—the Attorney General does not speak for the Will County State's Attorney's Office.

For these reasons, defendant has established prejudice under *Strickland*. Trial counsel deprived defendant of the effective assistance of counsel. And this Court should vacate defendant's $25 judicial facilities fine and reduce his $100 VCVA fine to $68.

CONCLUSION

Defendant, Aaron Rios-Salazar, respectfully requests that this Court reverse the Illinois Appellate Court's judgment, vacate his $25 judicial facilities fine, and reduce his $100 VCVA fine to $68 because defense counsel deprived him of the effective assistance of counsel by failing to challenge the fines as *ex post facto* violations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Dimitri Golfis, 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 13 pages.

/s/Dimitri G. Golfis
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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 31, 2018, 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 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 Reply Brief to the Clerk of the above Court.

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