No. 120407

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff - Appellant,

-vs-

DAVID HOLMES,

Defendant - Appellee.

On Appeal from the Appellate Court of Illinois, First District
No. 1-14-1256

There Heard on Appeal from the Circuit Court of Cook County, Illinois
Criminal Division, No. 12 CR 11423

The Honorable DENNIS J. PORTER, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

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BRIEF AND ARGUMENT FOR APPELLEE

POINT AND AUTHORITIES

I.

The Trial Court Properly Granted David Holmes' Motion To Suppress For Lack Of Probable Cause For An FOID Card Violation Where The Firearms Statute Which Formed The Officer's Justification For His Arrest And Search Had Subsequently Been Declared Unconstitutional And Thus Was Void Ab Initio.

A.

Where The Conceal Carry Statute Relied Upon By The Officer Was Unconstitutional On Its Face And Thus Void Ab Initio, There Was No Probable Cause For The Arrest Of David Holmes.

B.

This Court Should Reject The State's Invitation To Limit The Void Ab Initio Doctrine To Statutes Which Authorize The Police To Make Arrests As It Would Radically Constrict The Rights Of Citizens Under The Illinois Constitution And Deprive Them Of A Means To Correct The Wrongs Suffered From Unconstitutional Legislation.

C.

In The Alternative, This Court Should Reject The State's Invitation To Create A Legislative Grace Period Of Impunity For Violation Of Constitutional Rights.

ISSUE PRESENTED

Where the conceal carry statute which formed the justification for the officer's arrest and search of David Holmes subsequently had been declared unconstitutional on its face and thus void ab initio, did the trial court properly grant Holmes' motion to suppress for lack of probable cause, and thereby properly reject the State's invitation to create a legislative grace period of impunity for violation of constitutional rights?

STATEMENT OF FACTS

In 2008, the United States Supreme Court struck down a ban on handguns in the District of Columbia. District of Columbia v. Heller, 554 U.S. 570 (2008). That ruling was applied to the States in 2010. McDonald v. Chicago, 561 U.S. 742 (2010).

In 2012, the Seventh Circuit Court of Appeals noted that "[r]emarkably, Illinois is the only state that maintains a flat ban on carrying ready-to-use guns outside the home." Moore v. Madigan, 702 F.3d 933, 940 (2012).

David Holmes was arrested on the same day that oral argument was held in the Moore case. He was charged by information with 4 counts of aggravated unlawful use of a weapon for carrying a firearm outside of his home on June 8, 2012. CLR. 27-30. Two

of the counts alleged that he had not been issued a currently valid firearm owner's identification card. CLR. 28, 30.

Later that year, the Seventh Circuit held Illinois gun laws to be unconstitutional but stayed the mandate in order to give the legislature time to pass amended conceal carry legislation. Moore, supra, 702 F.3d 933. The State subsequently sought further extensions on the stay of the mandate because the legislature delayed passing amended conceal carry legislation. No amended legislation was passed until the day on which the Seventh Circuit issued its mandate, July 9, 2013. See Shepard v. Madigan, 958 F. Supp. 2d 996, 997 (S.D. Ill. 2013).

On September 12, 2013, the Illinois Supreme Court decided the case of People v. Aguilar, 2013 IL 112116, and released a modified opinion on December 19, 2013. The Aguilar court followed the Seventh Circuit's opinion in Moore and held that "on its face, the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution." 2013 IL 112116 at par. 22.

While not differentiated by type of weapons violation, statistics maintained by the Federal Bureau of Investigation's website under the Uniform Crime Reporting Act indicate that, in 2012 alone, thousands of persons were arrested in Illinois for offenses involving possession of a weapon.[1]

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[1] https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/resource-pages/cius2012datatables.zip, at Table 69, Arrests by State, listing total of 3982 arrests in Illinois for "Weapons, carrying, possessing, etc."

After Aguilar was released, Holmes moved to dismiss, and the State agreed that the counts not involving an FOID card should be dismissed. CLR. 42-54.

Holmes then filed a motion to quash his arrest and suppress evidence based on the finding of unconstitutionality. CLR. 55-57.

At hearing on the motion to suppress, Officer Barrera testified that he was working on June 8, 2012 at 9:00 p.m. along the Chicago lakefront at 63rd Street Beach. R. A4.

Officer Barrera saw David Holmes there leaning over to talk into the window of a car. R. A4-A5. When Holmes' shirt pulled up, Officer Barrera saw half a revolver sticking out of his waistband. R. A4-A5.

Officer Barrera approached Holmes and told him to place his hands on his head. R. A6. Berrera then removed the pistol from his waistband. R. A6. Berrera's partner placed Holmes into custody. R. A6.

Subsequent to the arrest, Officer Barrera learned Holmes' name. R. A6. Another officer looked up the status of Holmes' firearm owner's identification card. R. A6.

After being arrested, Holmes stated that the gun belonged to the driver of the car and that he thought it was legal. R. A7

In its findings, the trial court held that the officer did not have probable cause for Holmes' arrest because the firearms statute was void ab initio. R. A15. The trial court specifically noted that the facts of the case showed that the officers were unaware of any FOID violation at the time Holmes was placed under arrest. R. A15-A16. Accordingly,

the trial court granted the motion. R. A16. After its motion to reconsider was denied, the State filed a notice of appeal and signed a certificate of impairment. CLR. 65-66.

The Appellate Court affirmed in an opinion issued on November 25, 2015. People v. Holmes, 2015 IL App (1st) 141236, rehearing denied December 31, 2015. The Appellate Court concluded that, under the binding precedent of People v. Carrera, 203 Ill.2d 1, 783 N.E.2d 15 (2002), the void ab initio doctrine precluded application of the good faith exception to the exclusionary rule. 2015 IL App (1st) 141236 at par. 30. The opinion noted that the facts of the case implicated concerns about a legislative grace period during which individuals would have been subject to arrests for violating the invalidated conceal carry law. 2015 IL App (1st) 141236 at par. 30.

ARGUMENT

I.

The Trial Court Properly Granted David Holmes' Motion To Suppress For Lack Of Probable Cause For An FOID Card Violation Where The Firearms Statute Which Formed The Officer's Justification For His Arrest And Search Had Subsequently Been Declared Unconstitutional And Thus Was Void Ab Initio.

At the motion to suppress, Officer Barrera testified that the only reason he arrested and conducted a search of David Holmes was for a weapons violation. However, the statute which criminalized the use of a weapon in the instant circumstances was subsequently declared unconstitutional on its face. The Appellate Court here correctly followed long and well-settled precedent in Illinois which holds that a violation of a statute which is void ab initio cannot furnish probable cause for an arrest.

This Court has applied the void ab initio doctrine to ensure broad protection of this State's citizens in both civil and criminal cases, with strict application for constitutionally protected rights of criminal defendants. That protection has not been limited by which provision of the Constitution was violated. Nor has that protection been limited by whether the law in question defined the substance of an offense or set forth procedure. Likewise, this Court has departed from the lockstep doctrine in application of the good faith exception to the exclusionary rule to protect Illinois citizens from legislative grace periods for statutes unconstitutional on their face. As with the void ab initio doctrine, departure from the lockstep doctrine has not been limited by the substance of the law or by the specific constitutional provision violated.

In its Brief, the State urges this Court to turn back the clock on these years of precedent regarding the void ab initio doctrine and the good faith exception to the exclusionary rule. According to the State, only the Fourth Amendment is worth protecting and only the deterrence of police officers matters in considering whether a facially unconstitutional statute may furnish probable cause for an arrest and search. The State's Brief merely rehashes arguments long rejected and offers nothing new to counter this Court's well-reasoned prior opinions which were relied upon here by the trial and Appellate Court. Accordingly, this Court should reject the State's invitation to abandon important systemic protections for our citizens under the Illinois Constitution. People v. Almond, 2015 IL 113817, par. 55 (two-part standard of review applies to trial court's ruling on a motion to quash arrest and suppress evidence: deference is afforded to findings of fact whereas ultimate legal ruling is reviewed de novo).

A.

Where The Conceal Carry Statute Relied Upon By The Officer Was Unconstitutional On Its Face And Thus Void Ab Initio, There Was No Probable Cause For The Arrest Of David Holmes.

The Appellate Court here correctly ruled that no probable cause existed for the arrest and search of David Holmes based on violation of a conceal carry statute later found to be unconstitutional on its face. Under the void ab initio doctrine, that statute cannot be used to furnish probable cause and the State presented no other facts in support of the arrest and search.

The State argues that the trial court should have applied the good faith exception to the exclusionary rule because the arrest of Holmes pursuant to an unconstitutional statute violated only his substantive constitutional rights. As the State acknowledges, in People v. Carrera, 203 Ill. 2d 1, 783 N.E.2d 15 (2002), this Court previously rejected the argument that the void ab initio doctrine applies only to certain provisions of the Illinois constitution. Opening Brief at p. 12.

In Carrera, supra, the defendant had been arrested pursuant to a statute which gave police officers extraterritorial authority. Subsequent to his arrest, the extraterritorial statute was declared unconstitutional for violation of the single subject rule provision. The Carrera court rejected the State's argument about the good faith exception to the exclusionary rule and resolved the case instead on grounds of the void ab initio doctrine. "[T]o apply the good-faith exception would run counter to our single subject clause and void ab initio jurisprudence - specifically, that once a statute is declared facially unconstitutional, it is as if it had never been enacted." 203 Ill.2d at 16, 783 N.E.2d at 24. An unconstitutional law confers no right, imposes no duty and affords no protection. It is as though no such law had ever been passed. Carrera, 203 Ill.2d at 14, 783 N.E.2d at 21-22.

In so ruling, the Carrera court emphasized not just procedural or Fourth Amendment rights, but the importance of other constitutional provisions such as the single subject rule. Accordingly, "[t]he void ab initio doctrine applies equally to legislative acts which are unconstitutional because they violate substantive constitutional guarantees ... and those that are unconstitutional because they are adopted in violation of

the single subject clause of our constitution." 203 Ill. 2d at 14-15, 783 N.E.2d at 23. Applying the void ab initio doctrine ensured that violations of the single subject rule would be treated with sufficient seriousness. 203 Ill. 2d at 15, 783 N.E.2d at 23-24.

The Carrera opinion also voiced concern over abuse of a legislative grace period. It specifically rejected the State's argument that probable cause for a search could be based upon the "historical fact" that the statute subsequently declared unconstitutional had been in effect at the time of the search. "In our estimation, to give effect to the historical fact that the amendment existed at the time of defendant's arrest would effectively resurrect the amendment and provide a grace period (in this case four years between the effective date of the amendment and the date of our opinion ...) during which our citizens would have been subject to extraterritorial arrests without proper authorization." 203 Ill.2d at 16, 783 N.E.2d at 24.

Here, the recent history of concealed carry law in Illinois demonstrates legislative abuse of precisely such a "grace period" of impunity. Thousands of people were arrested and convicted under a law which for many years was obviously unconstitutional. The Illinois legislature was the last in the country to pass concealed carry legislation in the wake of definitive United States Supreme Court rulings in 2008 and 2010. See Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012) (noting that in 2012, Illinois was the only state to maintain a flat ban on carrying ready-to-use guns outside the home); District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. Chicago, 561 U.S. 742 (2010). When the Seventh Circuit Court of Appeals held Illinois gun laws to be unconstitutional in 2012, the State sought extensions of time on a stay of the mandate because the

legislature delayed passing amended conceal carry legislation. Shepard v. Madigan, 958 F. Supp. 2d 996, 997 (S.D. Ill. 2013). Finally, this Court struck down the statute in late 2013. People v. Aguilar, 2013 IL 112116.

Clearly, David Holmes was caught here in a web created by a legislature which was recalcitrant about making necessary amendments to a politically popular but obviously unconstitutional statute. As recognized here by the Appellate Court, to allow the State to reap the benefits of that legislative misbehavior by relying on the "grace period" for an unconstitutional statute would violate the policies behind the void ab initio doctrine. People v. Holmes, 2015 IL App (1st) 141236 at par. 30.

The State further contends this Court's recent decision in People v. McFadden, 2016 IL 117424, has abandoned Carrera's holding that no effect should be given to the "historical fact" that an invalidated statute had been in existence at the time of arrest. Opening Brief at pp. 13-14. Contrary to the State's assertions, McFadden did not curtail the reach of the void ab initio doctrine nor preclude the defendant from obtaining relief. Instead, it addressed only the question of the procedural mechanism to challenge a conviction for unlawful use of a weapon by a felon where the underlying felony conviction had been based upon a statute later found unconstitutional. Here, there is no dispute that Holmes followed the proper procedure by filing a motion to suppress challenging his arrest without probable cause. Nor does People v. Blair, 2013 IL 114122, support the State's position as the statute found unconstitutional for a proportionate penalties violation was effectively revived by amendment of the comparison statute. Here, there is no question of revival.

As the State notes, the Appellate Court opinion did not reach the question of the validity of Section 114-12 of the Code of Criminal Procedure, which codified the good faith exception to the exclusionary rule set forth in United States v. Leon, 468 U.S. 897 (1984). Opening Brief at p. 11. This Court also need not reach that question as the statute's plain language states that the good faith exception to the exclusionary rule applies only to evidence which is "otherwise admissible." 725 ILCS 5/114-12(1). Evidence which is barred by the void ab initio doctrine is not "otherwise admissible."

Where the Appellate Court's ruling fell squarely within Carrera, supra, this Court should affirm the trial court's granting of the motion to suppress for lack of probable cause.

B.

This Court Should Reject The State's Invitation To Limit The Void Ab Initio Doctrine To Statutes Which Authorize The Police To Make Arrests As It Would Radically Constrict The Rights Of Citizens Under The Illinois Constitution And Deprive Them Of A Means To Correct The Wrongs Suffered From Unconstitutional Legislation.

The State urges this Court to overturn its precedent in Carrera, supra, and limit application of the void ab initio doctrine to "statutes that authorize police to make arrests." Opening Brief at p. 12. This Court should reject the State's invitation to radically constrict the rights of citizens under the Illinois constitution as the reasons cited in Carrera, supra, remain persuasive.

In support of this proposed retrenchment, the State argues that only Fourth Amendment concerns are serious enough to warrant protection by the void ab initio doctrine. Opening Brief at pp. 12-13. The State's Brief does not discuss the history of the void ab initio doctrine. Nor does the State address the broad application of the void ab initio doctrine in civil cases and in other areas of criminal law which have nothing to do with the Fourth Amendment.

The State's argument fundamentally confuses the exclusionary rule with the void ab initio doctrine. Opening Brief at pp. 11-13. While its application incidentally may result in the exclusion of evidence, the void ab initio doctrine did not originate as an exclusionary rule for criminal cases. See Perlstein v. Wolk, 218 Ill. 2d 448, 460, 844 N.E.2d 923, 933 (2006) (void ab initio doctrine has roots in Norton v. Shelby County, 118 U.S. 425, 442 (1886), which was dispute over issuance of bonds). Indeed, recognition of the void ab initio doctrine predates adoption of the exclusionary rule in Illinois. Compare Board of Highway Commissioners v. City of Bloomington, 253 Ill. 164, 176, 97 N.E. 280 (1911) (applying void ab initio doctrine to lawsuit over tax levy), with People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923) (recognizing exclusionary rule).

As shown by its history, void ab initio is a separate and independent doctrine. Significantly, the State does not recognize this distinction. Instead, its Brief discusses only exclusionary rule cases when it contends that application of the void ab initio doctrine should be subject to a balancing test where exclusion is a "last resort" and deterrence of police officers the primary consideration. Opening Brief at pp. 8-9, 12-13.

Those cases have no import for the void ab initio doctrine. See e.g. Carrera, supra, 203 Ill.2d at 16, 783 N.E.2d at 24 (applying good faith exception would run counter to void ab initio jurisprudence); see also State v. Vickers, 1998 MT 201, par. 23 (1998) (where void ab initio doctrine applies, the inquiry stops and all other issues pertaining to the validity of the search, such as whether the purpose of the exclusionary rule is served, are moot).

With respect to vindicating the constitutionally protected rights of criminal defendants, this Court has not employed a balancing test, but has strictly applied the void ab initio doctrine without consideration of other equitable or practicable factors. Perlstein, supra, 218 Ill. 2d at 466-467, 844 N.E.2d at 933. Indeed, in People v. Gersch, 135 Ill.2d 384, 399-401, 553 N.E.2d 281, 288 (1990), this Court acknowledged that the void ab initio doctrine had a potentially harsh result in instances where an officer relied in good faith on the validity of a statute, yet nevertheless found "no persuasive policy arguments" for departing from strict application of the doctrine in criminal cases. Strict application helped ensure that similarly situated defendants were treated alike. Gersch, 135 Ill.2d at 400, 553 N.E.2d at 288. As discussed supra, the Carrera court also found that the policy of deterring legislature grace periods of impunity warranted strict application of the void ab initio doctrine without engaging in the balancing test urged here by the State. 203 Ill.2d at 16, 783 N.E.2d at 24.

The State here has not presented any persuasive reasons for this Court to abandon strict application of the void ab initio doctrine in criminal cases. This Court has long recognized that the purposes of the void ab initio doctrine range far beyond the concerns of law enforcement or the Fourth Amendment:

> A constitutionally repugnant enactment suddenly cuts off rights that are guaranteed to every citizen ... and instantaneously perverts the duties owed to those citizens. To hold that a judicial decision that declares a statute unconstitutional is not retroactive would forever prevent those injured under the unconstitutional legislative act from receiving a remedy for the deprivation of a guaranteed right. This would clearly offend all sense of due process under both the Federal and State Constitutions.

Gersch, supra, 135 Ill.2d at 397-98, 553 N.E.2d at 287 (citations omitted). The Gersch court concluded that "where a statute is violative of constitutional guarantees, we have a duty not only to declare such a legislative act void, but also to correct the wrongs wrought through such an act by holding our decision retroactive." 135 Ill.2d at 399, 553 N.E.2d at 288.

Notably, the focus of the void ab initio doctrine is expressly remedial so that it may "correct the wrongs." Compare Illinois v. Krull, 480 U.S. 340, 373 (1987) (primary purpose of exclusionary rule is deterrence). Those wrongs cannot be limited to procedural statutes or Fourth Amendment concerns. As Carrera pointed out, treating a facially unconstitutional statute as if it never existed advances the interests of preserving rights under the constitutional provision which itself was violated, such as the single subject rule, without regard to whether the provision is substantive or procedural. 203 Ill.2d at 14-15, 783 N.E.2d at 23. Moreover, even in civil cases where the courts may consider equitable factors, the void ab initio doctrine has been applied more strictly where the constitutional right violated was substantive rather than procedural. See Yakubinis v.

Yamaha Motor Corp., U.S.A., 365 Ill. App. 3d 128, 135-136, 847 N.E.2d 552 (1st Dist. 2006), appeal denied, 221 Ill. 2d 676, 857 N.E.2d 685 (2006).

Here, strict application of the void ab initio doctrine helped ensure that Holmes' rights under the Second Amendment were protected and that he had an effective remedy for violation of his constitutional rights when he was arrested and searched based on conduct which could not be a crime. Limiting the reach of the void ab initio doctrine to statutes which authorize arrests would significantly reduce protections for citizens under all provisions of the Illinois Constitution and constitute a marked departure from this Court's strict application of the doctrine in criminal cases.

As the reasons advanced by the State do not warrant overturning of this Court's decision in Carrera, this Court should affirm the Appellate Court's decision upholding the trial court's dismissal of the charges brought against David Holmes.

C.

In The Alternative, This Court Should Reject The State's Invitation To Create A Legislative Grace Period Of Impunity For Violation Of Constitutional Rights.

As discussed supra, this Court need not reach the question of the good faith exception to the exclusionary rule unless it overrules this Court's prior decision in Carrera. In that event, the State further urges this Court to abandon its decision in People v. Krueger 175 Ill.2d 60, 675 N.E.2d 604 (1996), cert. denied 522 U.S. 809 (1997), and to follow federal law lockstep by applying the good faith exception to a statute held unconstitutional on its face. This Court should refuse this invitation to apply the good

faith exception in a manner which would reward the legislature for maintaining a blatantly unconstitutional law which was used to arrest thousands of people.

The State expends much ink discoursing on the good faith exception and police procedures under the Fourth Amendment. But Illinois has long taken a more systemic approach under our Constitution which recognizes that the conduct of police officers in the street is not the only institutional consideration for application of the good faith exception. Where probable cause is based on violation of a statute unconstitutional on its face, deterrence can be effective only if aimed at the legislators who passed the law, and not solely at the officer who took steps to enforce it. Expansion of the good faith exception in lockstep with federal law and in contravention of Krueger would remove that important deterrent.

In Krueger, supra, this Court considered whether to apply the good faith exception upon finding that the no-knock entry statute was unconstitutional. Krueger noted a procedural/substantive distinction in federal cases, but did not adopt that reasoning when it departed from the lockstep doctrine to hold that application of the good faith exception to a statute unconstitutional on its face failed to comport with article I, section 6 of the Illinois Constitution. 175 Ill.2d at 70, 675 N.E.2d at 610. In so doing, the Court voiced concerns about abuse of a "grace period" for unconstitutional legislation:

> Decisions involving the exclusionary rule and the Illinois Constititons's article I, section 6, require that we carefully balance the legitimate aims of law enforcement against the rights of our citizens to be free from unreasonable governmental intrusions ... In performing this duty here, we

> conclude that our citizens' rights prevail. We are not willing to recognize an exception to our state exclusionary rule that will provide a grace period for unconstitutional search and seizure legislation, during which time our citizens' prized constitutional rights can be violated with impunity. We are particularly disturbed by the fact that such a grace period could last for several years and affect large numbers of people. This is simply too high a price for our citizens to pay.

175 Ill.2d at 75, 675 N.E.2d at 612.

The Krueger court relied heavily on the opinion of Justice O'Connor in Illinois v. Krull, 480 U.S. 340 (1987), which dissented from the majority's extension of the Leon good faith exception to provide a grace period for unconstitutional legislation. 175 Ill.2d at 73, 675 N.E.2d at 610-611. O'Connor examined the history of the Fourth Amendment and concluded that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate. She pointed out that legislation sweeps more broadly than the act of an individual impacting only one person at a time, and thus poses "a greater threat to liberty." 480 U.S. at 365. Unlike neutral judicial officers who are not part of a law enforcement team, legislatures may find it politically expedient to compromise Fourth Amendment rights. 480 U.S. at 366. In her view, providing the legislature with a grace period was unduly tempting and created a positive incentive to promulgate unconstitutional laws. 480 U.S. at 365-366. Moreover, application of the exclusionary rule was necessary to provide individual criminal defendants with an incentive to

challenge an unconstitutional statute and to ensure retroactive application in a manner which assured fairness to similarly situated defendants. 480 U.S. at 368-69.

Although concerns about a legislative grace period for unconstitutional legislation animated this Court's decisions in Krueger, supra, and Carrera, supra, the words "grace period" are glaringly absent from the argument section of the State's Brief. The State advances scant discussion of the role of the legislature as a relevant actor in weighing application of the good faith exception to the exclusionary rule. Instead, the State urges this Court to depart from its prior decision in Krueger and apply the good faith exception for any statute which does not "by its own terms purport[] to authorize searches or seizures." Opening Brief at p. 9. The State advances no convincing reasons for this Court to overrule Krueger.

The State suggests that procedural statutes authorizing searches and seizures pose a greater threat to liberty than unconstitutional substantive criminal laws. Opening Brief at p. 14. However, the State does not address the fact that thousands of people were arrested during the unwarranted grace period of conceal carry. See e.g. Krull, 480 U.S. at 353 (number of individuals affected may be considered when weighing the costs and benefits of applying exclusionary rule). Contrary to the State's assertions, courts have long recognized that procedural statutes have a "more speculative connection to innocence" than substantive law. See e.g. People v. Davis, 2014 IL 115595, par. 36, cert. denied 135 S.Ct. 710 (2014), quoting Schirro v. Summerlin, 542 U.S. 348 (2004). "'[C]onstitutional determinations that place particular conduct ... beyond the State's power to punish ... necessarily carry a significant risk that a defendant stands convicted of

an act that the law does not make criminal.'" Davis, supra, 2014 IL 115595, at par. 36. In contrast, rules of procedure merely "'raise the possibility that someone convicted with use of the invalidated procedure may have been acquitted otherwise.'" Davis, supra, 2014 IL 115595, at par. 36. Here, likewise, while an arrest effectuated by means of an improper procedural statute may offend a citizen's rights and raise the possibility of acquittal, it does not pose the greater threat to liberty of being arrested for conduct which itself cannot be constitutionally punished as a crime.

Moreover, while the State argues that only procedural statutes implicate Fourth Amendment concerns, determination of whether probable cause exists under the Fourth Amendment cannot be divorced from the substantive law. Probable cause is defined as existing "where the arresting officer has knowledge of facts and circumstances that are sufficient to justify a reasonable person to believe that the defendant has committed or is committing a crime." People v. Jones, 215 Ill.2d 261, 273-74, 830 N.E.2d 541, 551 (2005), citing Brinegar v. United States, 338 U.S. 160 (1949). Where the conduct observed by the officer cannot be a crime under the substantive law, there can be no probable cause, and an arrest based on that conduct clearly violates the Fourth Amendment.

The State claims that the exclusionary rule provides no additional incentive for a defendant to challenge an unconstitutional statute which was the basis of a search because the defendant already has an incentive to seek dismissal of the charges. Opening Brief at p. 11. This argument presumes that a criminal defendant is always charged with the same offense which provided the police officer with probable cause for an arrest. But

determination of which charges to bring is within the discretion of the prosecutor. Defendants are often stopped and searched for traffic or loitering violations, but are prosecuted only for greater offenses which are discovered as the fruit of that search. See e.g. People v. Lee, 345 Ill. App. 3d 782, 803 N.E.2d 640 (3rd Dist. 2004) (defendant indicted only for drug possession offenses brought motion to suppress which argued that probable cause for his arrest had been based on unconstitutional loitering ordinance), vacated on other grounds 214 Ill.2d 476, 828 N.E.2d 237 (2005). Application of the exclusionary rule gives criminal defendants an incentive to challenge the constitutionality of those substantive offenses used for arrest even if the prosecution chooses not to bring those charges.

The State further argues that application of the exclusionary rule here offers no deterrent to the legislature because it allegedly "did not set out to authorize searches." Opening Brief at pp. 10-11. As discussed supra, by passing an unconstitutional substantive criminal law, the legislature has authorized arrests and searches based on probable cause that a person has committed a crime as defined under that statute. Nor is there historical support for the State's contention that the legislature will not be tempted to draft unconstitutional substantive criminal laws with an eye to facilitate arrests and searches for other purposes. As this Court has noted, despite the well-settled unconstitutionality of broadly-worded loitering laws, "[l]oitering and vagrancy statutes have been utilized throughout American history in an attempt to prevent crime by removing "undesirable persons" from public before they have the opportunity to engage in criminal activity." City of Chicago v. Morales, 177 Ill. 2d 440, 450, 687 N.E.2d 53,

60 (1997), aff'd 527 U.S. 41 (1999). Abandoning Krueger would remove an important deterrent against the passage of unconstitutional substantive laws aimed at "street sweeping" or harassment of "undesirable" citizens through unwarranted arrests and searches. See e.g. Lee, supra, 345 Ill. App. 3d at 787, 803 N.E.2d at 645 (following Krueger for arrest based on uncharged loitering ordinance held to violate the First Amendment).

As discussed supra at subsection A, Section 114-12 of the Code of Criminal Procedure does not apply where a statute has been found void ab initio because the evidence is not "otherwise admissible." The State notes that Section 114-12 was adopted to codify the Leon good faith exception to the exclusionary rule. Opening Brief at p. 8. The legislature debated Section 114-12 shortly after the United States Supreme Court released its opinion in Krull, supra, 480 U.S. 340 (March 9, 1987), but made no reference to Krull or to unconstitutional statutes. 85th Ill. Gen. Assem., Senate Proceedings, June 23, 1987, at 57; 85th Ill. Gen. Assem., House Proceedings, June 27, 1987, at 74-77. Section 114-12 refers only to the "conduct of a peace officer in obtaining the evidence" and not to the conduct of the legislature in passing laws. This Court has repeatedly held that its subsequent decisions did not impact the Leon good-faith exception as different concerns are presented when the relevant actor is the legislature and not the police or the judiciary. See Krueger, supra, 175 Ill.2d at 76, 675 N.E.2d at 612 (rejecting Krull); People v. LeFlore, 2015 IL 116799, par. 66 (same), cert. denied, 136 S.Ct. 225 (2015); McFadden, supra, 2016 IL 117424 at par. 67 (same).

While Section 114-12(ii) defines "good faith" as an arrest pursuant to statutes "later declared unconstitutional or otherwise invalidated," that provision may be harmonized with Krueger, supra, and Carrera, supra, by limiting it to instances where a statute is found unconstitutional as applied to particular facts. See Oak Park Federal Sav. & Loan Asso. v. Oak Park, 54 Ill. 2d 200, 203, 296 N.E.2d 344, 347 (1973) (court may adopt harmonizing construction which gives meaning to all parts of a statute). However, if Section 114-12(ii) were to be construed as intending to codify Krull for statutes found to be unconstitutional on their face, it would be unconstitutional under this Court's opinion in Krueger, supra, which refused to extend the Leon good faith exception.

Finally, the majority opinion in Krull, supra, held that the good faith exception would not apply where the legislature wholly abandoned its responsibility to enact constitutional laws or where a reasonable police officer should have known that the statute was not constitutional. 480 U.S. at 355. In the event this Court accepts the State's invitation to overrule Carrera and Krueger to allow the State to invoke the good faith exception to the exclusionary rule, Holmes requests that this matter be remanded so that he may have the opportunity to make a showing of obvious abandonment. As discussed supra, the Illinois legislature maintained a concealed carry law on the books in direct conflict with United States Supreme Court rulings and even sought extensions of time on issuance of a mandate from the Seventh Circuit for amendment of the law. In 2012, Illinois was the only state to maintain a conceal carry law. At the very least, these unique facts raise the possibility that Holmes may be able to demonstrate abandonment sufficient to preclude application of the good faith exception to the exclusionary rule.

In short, this Court should affirm the Appellate Court's holding which is a straight forward application of precedent. The State has presented no compelling reasons for this Court to abandon strict application of the void ab initio doctrine in criminal cases or to deviate from its departure from the lockstep doctrine where application of a good faith exception to the exclusionary rule would threaten to expose citizens to a legislative grace period of impunity for statutes which are unconstitutional on their face.

CONCLUSION

For all of the above reasons, Defendant-Appellee David Holmes respectfully requests that this Court affirm the judgment of the Appellate Court or, in the alternative, remand for further proceedings.

Respectfully submitted,

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Of Counsel

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APPENDIX

PROOF OF SERVICE

IN THE ILLINOIS SUPREME COURT

_____TERM, AD., 2016

No. 120407

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

vs.

DAVID HOLMES,

Defendant-Appellee.

CERTIFICATION OF SERVICE

I, Eileen T. Pahl, attorney for defendant-appellee, certify that on the 14th day of December 2016, I caused 20 copies of the BRIEF AND ARGUMENT FOR APPELLEE to be served by depositing same in the U.S. Mail at 69 West Washington with proper postage prepaid to the following:

Carolyn Taft Grosboll
Clerk of the Supreme Court
Illinois Supreme Court Building
Springfield, IL 62701

and also served 3 copies of said Brief on:

Lisa Madigan
Attorney General
100 W. Randolph
Chicago, IL 60601

and one copy of said Brief on: David Holmes, 9030 S. Ridgeland Avenue, Chicago, IL 60617

Eileen T. Pahl

PROOF OF SERVICE

IN THE ILLINOIS SUPREME COURT

_____TERM, AD., 2016

No. 120407

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

vs.

DAVID HOLMES,

Defendant-Appellee.

AMENDED CERTIFICATION OF SERVICE

I, Eileen T. Pahl, attorney for defendant-appellee, certify that on the 14th day of December 2016, I caused 20 copies of the BRIEF AND ARGUMENT FOR APPELLEE to be served by depositing same in the U.S. Mail at 69 West Washington with proper postage prepaid to the following:

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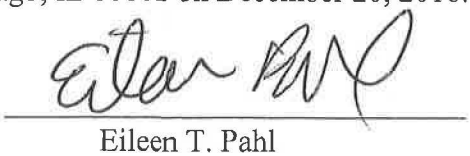
Lisa Madigan
Attorney General
100 W. Randolph
Chicago, IL 60601

and one copy of said Brief on: David Holmes, 9030 S. Ridgeland Avenue, Chicago, IL 60617. I further certify that I served a courtesy copy of the Brief on Kim Foxx, Cook County State's Attorney, Richard J. Daley Center, Room 309, Chicago, IL 60602 on December 20, 2016.



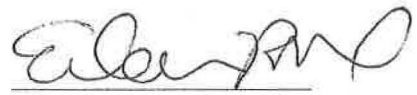
Eileen T. Pahl

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellant	)	
	)	
vs.	)	No. 120407
	)	
DAVID HOLMES,	)	On Appeal
Defendant-Appellee.	)	from 1-14-1256

CERTIFICATION OF BRIEF OF DEFENDANT-APPELLEE

I, Eileen T. Pahl, certify that this Brief of Defendant-Appellee conforms to the requirements of Supreme Court Rules 341(a) and 341(b). The length of the Opening Brief excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 22 pages.



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