

THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION
UNDER RULE 311(a)

Nos. 121939 & 121961 (consolidated)

IN THE SUPREME COURT OF ILLINOIS

IN RE THE INTEREST OF	)	On Leave to Appeal from
	)	the Appellate Court of
	)	Illinois, Third District
	)	No. 3-16-0277
)	
N.G. a/k/a N.F.,	)	There on appeal from the
	)	Circuit Court of Will County,
a minor,	)	Illinois, Twelfth Circuit,
	)	No. 11 JA 152
PEOPLE OF THE STATE OF)	
ILLINOIS,	)	Trial Judge: The Honorable
	)	Paula Gomora.
Plaintiff-Appellant,)	
	)	THIS APPEAL INVOLVES A QUESTION
v.	)	OF CHILD CUSTODY, ADOPTION,
	)	TERMINATION OF PARENTAL RIGHTS
FLOYD F.,	)	OR OTHER MATTER AFFECTING THE
)	BEST INTERESTS OF A CHILD.
Respondent-Appellee.)	

BRIEF OF RESPONDENT-APPELLEE

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E-FILED
9/18/2017 1:55 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

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ARGUMENT

The salient facts in this matter are undisputed. The state introduced *de minimus* evidence to meet its burden in proving Floyd F. an unfit parent pursuant to 750 ILCS 50/1 D(i)(West 2014), which provides that:

There is a rebuttable presumption that a parent is deprived if the parent has been criminally convicted of at least 3 felonies under the laws of this State or any other state, or under federal law, or the criminal laws of any United States territory; and at least one of these convictions took place within 5 years of the filing of the petition or motion seeking

The state admitted three convictions to meet its burden without more.

The trial court found that the state had met its burden proving Floyd F. deprived on the basis of the three exhibits. (R. 198) The court specifically relied on the conviction in 08 CF 910, in making its finding. (R. 199) The court further found that the presumption of depravity had not been rebutted. (R. 198-199)

The Third District Appellate Court, *sua sponte*, secured the circuit court documents relating to 08 CF 910,

specifically showing that the plea and judgment were entered pursuant to 720 ILCS 5/24-1.6(a)(1)(3)(West 2008). *In re. N.G.*, 2017 IL App(3d) 160277 ¶ 8-9.

The appellate court reversed, finding that the conviction was void pursuant to this Court's ruling in *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321 (Ill. 2013)

In *Aguilar*, this court held that 720 ILCS 24-1.6(a)(1)(a)(3)(A)(West 2008) is unconstitutional on its face in that it violates the defendant's right to bear arms under the United State's Constitution.

The appellate court then followed this court's precedent, in *People v. McFadden*, 2016 IL 117424 (Ill. 2016) where it was delineated that when a statute is held to be unconstitutional, it is void *ab initio*, i.e. from the beginning. Such a statute is constitutionally infirm from inception and is therefore unenforceable. *Id.* at ¶ 17.

Finding that Floyd F.'s conviction under 08 CF 910 was void *ab initio*, the appellate court followed this court's precedent in *People v. Ernest Thompson*, 209 Ill.2d 19, (2004) which stated: "A void order may be attacked at any time or in any court, either directly or collaterally. An argument that an order or judgment is void is not subject to waiver...In fact, courts have an independent duty to vacate

void orders and may *sua sponte* declare an order void." *Id.* at ¶ 27.

Pursuant to this court's precedent, the appellate court held that: "There can be no doubt that respondent's 2008 conviction was pursuant to a statute that was void *ab initio* and was, therefore a nullity." *N.G.* at ¶ 28.

Finding the conviction void, the appellate court reasoned it had the authority to vacate the conviction pursuant to Supreme Court Rule 366(a)(5)(eff. Feb. 7,1994). *Id.* at ¶ 31.

The State has correctly identified the standard of review as *de novo*. "Where, as here, the facts are undisputed and the question on appeal is limited to the application of the law to those facts, this Court's review is *de novo*." *City of Champaign v. Torres*, 214 Ill.2d 234, 241 (2005). (People's Br. 11)

The State goes in to a lengthy discussion of void versus voidable judgments. It assumes that that a judgment rendered pursuant to a constitutionally infirm statute is voidable as opposed to void, and may not be attacked collaterally. Such argument is without merit and inconsistent with this court's recent pronouncements in *People v. McFadden*, 2016 IL 117424, ("When a statute is held to be facially unconstitutional, the

statue is said to be void *ab initio*." *Id.* at ¶ 17). *People v. Dennis Thompson*, 2015 IL 118151, ("A second type of voidness challenge that is exempt from forfeiture and may be raised at any time involves a challenge to a final judgment based on a facially unconstitutional statute that is void *ab initio*." *Id.* at ¶ 32.), and its previous ruling in *People v. Ernest Thompson*, 209 Ill.2d 19 (2004) ("A void order may be attacked at any time in any court, either directly or collaterally." *Id.* at ¶ 27.)

Here the appellate court, followed this court's rulings, and properly reasoned that the conviction in 08 CF 910 was void *ab initio* and subject to collateral attack.

In essence, the State is asking this court to disregard its precedent and declare that judgments rendered pursuant to an unconstitutional statute are not void *ab initio* but rather voidable. Such a holding would not be consistent with the principle of *stare decisis* and would have unintended and undesirable consequences.

The Court need look no further than the facts of the instant case for an illustration of those undesirable consequences. Here the State introduced the conviction in 08 CF 910, which it knew or should have known was constitutionally infirm, to reach the *de minimus* technical

burden of proving Floyd F. unfit. If this Court were to adopt the State's position, even the trial judge would have been barred from inquiring into the propriety of considering a constitutionally infirm conviction in ruling on the matter of unfitness, under these circumstances. As the appellate court properly recognized, such action "would elevate form over substance, constitute an affront to judicial economy, and perhaps most importantly, result in an unfounded deprivation of a fundamental liberty interest". *N.G.*, at ¶ 27, citing *Obergefell v. Hodges*, 576 U.S. ___, ___, 135 S.Ct. 2584, 2600 (2015).

This principle is particularly applicable due to the accelerated nature of proceedings under Illinois Supreme Court Rule 311 (eff. July 1, 2017), and the fundamental liberty interests involved in a termination proceeding.

Floyd F. urges this court to issue a broad decision affirming the continued validity and vitality of the doctrine that constitutionally infirm convictions are void *ab initio* and subject to collateral attack.

In the alternative, the court could issue a narrow decision, declaring that convictions pursuant to an unconstitutional statute may be attacked in termination of parental rights proceedings due to the liberty interest

involved and the accelerated nature of the proceedings.

If the court declines to follow either of these courses, Floyd F. asks that this court affirm the appellate court's ruling reversing the termination of parental rights in this cause. As even the dissent in the lower court opinion noted, "a unique solution is required in this case to prevent a miscarriage of justice with respect to father's parental rights". *N.G.* at ¶ 36.

The dissenting Justice's concerns perfectly illustrate why this court should reject the State's argument, adhere to *stare decisis*, and affirm the appellate court's ruling.

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm The Third District Appellate Court's ruling and adopt its reasoning in reversing the Judgment of the trial court; or, in the alternative Respondent asks that this Court reverse the trial court and remand the matter for a consolidated hearing with the criminal matter pending in 2011 CF 201 pursuant to Illinois Supreme Court Rule 903 (eff. Mar. 8, 2016).

Respectfully Submitted,

/s/ Neil. J. Adams

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Respondent-Appellee.)	

 CERTIFICATE OF COMPLIANCE

Neil J. Adams certifies that the Appellee's Brief filed by Neil J. Adams in the above captioned cause conforms to the requirements of Supreme Court rules 341(a) and (b). The length of this Brief is 9 pages.

/s/ Neil J. Adams

 Neil J. Adams

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NOTICE OF FILING

To: SEE ATTACHED SERVICE LIST

Please take notice that on the 18th day of September, 2017, this firm caused to be filed with Ms. Carolyn Taft Grosboll, Clerk of the Illinois Supreme Court, the attached Appellee's Brief, notice of filing, and proof of service.

/s/ Neil. J. Adams

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 18, 2017, I electronically filed the foregoing brief of Respondent-Appellee with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, were served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by those participants on September 18, 2017.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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STATE OF ILLINOIS)
)SS
COUNTY OF WILL)

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS**

IN NO

Plaintiff

vs

NG.

Defendant

CASE NO: 11 SA 152

COURT ORDER

This matter comes on Father's motion to clarify appointment. The court finds:

1. Counsel's appointment covers representing the father before the supreme court.
2. The issue of expenses is reserved pending further order of Court.

Attorney or Party, if not represented by Attorney

Name Neil Adams

ARDC # 6215682

Firm Name _____

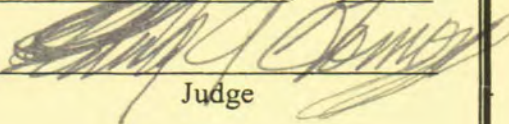
Attorney for Father

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Telephone (815) 744-8800

Dated: 5-15, 2017

Entered: 
Judge

PAMELA J. MCGUIRE, CLERK OF THE CIRCUIT COURT OF WILL COUNTY