No. 127443

IN THE SUPREME COURT OF ILLINOIS

People of the State of Illinois, Respondent-Appellee, v. **Demetrius Johnson**, Petitioner-Appellant.	Appeal from the Appellate Court of Illinois, First District, No. 1-20-0912 Original Appeal from the Circuit Court of Cook County, No. 06 CR 18368(1) Hon. LeRoy K. Martin, Jr., Judge, Presiding

APPELLANT'S REPLY BRIEF

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E-FILED
5/10/2022 2:38 PM
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POINTS AND AUTHORITIES

INTRODUCTION

In April 2021, Demetrius Johnson was certified innocent of the June 1991 murder that served as the predicate offense for the 2006 unlawful use of a weapon by a felon (UUWF) conviction at issue in this appeal. It took Johnson three decades to obtain relief from the murder conviction because the Chicago Police Department and its notorious detective Reynaldo Guevara hid the evidence of Johnson's innocence from him for that long. The evidence certainly remained hidden in 2006 when Johnson was convicted of UUWF—it took 13 more years until it was revealed.

In its brief urging this Court to affirm Johnson's UUWF conviction, the State glosses over these two essential facts: Johnson's factual innocence and a State actor's roles in concealing the evidence of Johnson's innocence. Instead, the State asks this Court to apply the strict "felon status" framework enunciated in *People v. McFadden*, 2016 IL 117424—a position almost immediately abandoned by this Court just two years later in the case of *In re N.G.*, 2018 IL 121939. The State insists that *N.G.* has no application to the UUWF criminal statute, or at most provides a severely limited exception for predicate offenses that are void *ab initio*.

Neither is true. The proper reading of *N.G.* is that it applies to all constitutionally invalid predicate convictions, and certainly to criminal UUWF convictions. And Johnson's factual innocence of the predicate offense and the State's role in concealing that very evidence are essential analytical factors in

considering both the constitutional, statutory, and equitable claims at the heart of this appeal. This Court should reverse.

I. *N.G.* is applicable to this case.

A. *N.G.* applies to criminal convictions.

Two years after *McFadden*, this Court in *N.G.* reversed the application of the strict "felon status" framework that resulted in the termination of an individual's parental rights as a result of a constitutionally invalid conviction. The State urges this Court to ignore *N.G.,* maintaining its criticism of *McFadden* was "unwarranted," St. Br. 7, "dicta," *id.* at 2, 22, 26-27, and ultimately inapplicable to criminal convictions like the UUWF one at issue here. *Id.* at 7. The argument is meritless.

Illinois Appellate Courts across the board apply the *N.G.* holding to criminal cases and the UUWF statute in particular. *See People v. Alexander*, 2019 IL App (3d) 170168, ¶¶ 22-31 (applying *N.G.* and vacating UUWF conviction based on void predicate); *People v. Cavette*, 2018 IL App (4th) 150910, ¶ 26 (accepting State's concession that *N.G.* overruled *McFadden* and reversing defendant's armed habitual criminal conviction based on UUWF predicate); *People v. Barefield*, 2019 IL App (3d) 160516, ¶ 11 (same holding as *Cavette*). Indeed, Illinois Appellate Courts have applied *N.G.* broadly through many aspects of criminal cases. In *People v. Cross*, 2019 IL App (1st) 162108, ¶ 175, in the context of considering whether a void UUWF conviction can be used for impeachment, the First District ruled that *N.G.* "overruled"

McFadden, and, quoting *N.G.*, explained that a UUWF with a void predicate "'must be treated by the courts as if it did not exist, and it cannot be used for any purpose under any circumstances.'" *Id.* (quoting *N.G.*, 2018 IL 12939, ¶ 36). In *People v. Bridges*, 2020 IL App (1st) 170129, ¶ 36, following *N.G.*, the First District vacated a void UUWF conviction on appeal of an unrelated conviction. The UUWF conviction was used for sentencing purposes, and the First District recognized its "'independent duty to vacate the void judgment'" following the *N.G.* decision and considered whether resentencing was required after its action. *Id* (quoting *N.G.*, 2018 IL 12939, ¶ 57).

In contrast, the State fails to cite a single case—nor is there one—that limit *N.G.* to the parental rights context. Rather *N.G.* itself plainly states that all courts must treat invalid convictions like the one at issue therein "as if it did not exist" and inapplicable "for any purpose under any circumstances." *N.G.*, at ¶ 36. This, of course, includes criminal cases like the one at issue here.

B. *N.G.* is not limited to void *ab initio* convictions but rather applies to constitutionally infirm convictions like the one at issue in this matter.

Alternatively, the State argues that "at most, *N.G.* identified a limited exception to *McFadden*'s felon status rule" for predicates that are void *ab initio* only. St. Br. at 20-21. Once again, this reading cannot be squared with the plain language in *N.G.*

In *N.G.*, this Court framed the question as follows: "The dispositive question in this appeal, and the one we must therefore now address, is whether

the trial court could rely on [] a constitutionally invalid conviction" in entering judgment. *Id.* at ¶ 31. The majority used the phrase "constitutionally invalid conviction" at least four times. *See N.G.*, at ¶¶ 31, 58, 60, 81. The void *ab initio* conviction at issue in *N.G.* certainly was constitutionally invalid, but void convictions are not the only type that are constitutionally invalid.

In this case, Johnson's predicate murder conviction is certainly constitutionally invalid. It was secured through, in the State's own words, an "obvious" *Brady* violation. Sup2 C. 10. *Brady* claims, of course, lie in the Due Process clause of the Fourteenth Amendment. *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

Moreover, Johnson has been adjudicated innocent of the murder. Over the last 25 years, this Court has repeatedly emphasized that the conviction of an innocent man violates the Illinois constitution. *See People v. Washington*, 171 Ill.2d 475, 489 (1996) ("We therefore hold as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process."); *People v. Coleman*, 2013 IL 113307, ¶ 2 (reaffirming the holding in *Washington*); *People v. Reed*, 2020 IL 124940, ¶¶ 19-42 (this Court holding that the additional due process rationales at the core of *Washington* extend to individuals that plead guilty because [t]his court refuses to turn a blind eye to the manifest injustice and failure of our criminal justice system that would result" from the conviction of a "demonstrably innocence person").

Accordingly, under Illinois law, the murder conviction of an innocent Johnson secured through the State's *Brady* violation certainly violated due process.

C. Johnson's constitutionally invalid murder conviction should be treated as if it did not exist and therefore his UUWF conviction should be vacated.

Johnson's murder conviction is as constitutionally invalid as they come: The State secured the conviction of an innocent man by suppressing the very evidence of that innocence. That said, Johnson recognizes that, under *N.G.* itself, not all constitutionally deficient convictions have the same consequences. There are "two basic paths for analyzing the consequences of a constitutionally deficient criminal conviction." *Id.* at ¶ 34. The first path concerns convictions that stem from unconstitutionally deficient procedures that do not negate the possibility of the individual's culpability. *Id.* The second path includes convictions where no crime occurred—such as a conviction based on a facially unconstitutional statute like the one at issue in *N.G.* *Id.* at ¶ 36. It is those in the second category that must be treated as if they "did not exist[] and [] cannot be used for any purpose under any circumstances." *Id.*

Johnson's adjudicated innocence takes this case squarely out of the first category, as it shows he is not culpable. The constitutionally suppressed evidence of the crucial eyewitness identifying the alternative suspect (a person he knew) at point blank range not only negated Johnson's guilt—it affirmatively proved his innocence in an adjudicated proceeding. Accordingly, Johnson's constitutionally invalid conviction is firmly in the second path: He

committed no crime. The courts have found that fact by a preponderance of the evidence. This Court can and should treat his murder conviction as if it did not exist, refuse to use it for any purpose under any circumstance, and therefore vacate his 2006 UUWF conviction where it was used as a predicate.

Finally, although the State ignores *N.G.*'s citation to *United States v. Bryant*, 579 U.S. 140 (2016), this Court should not. *N.G.* explained that the use of constitutionally invalid convictions in future prosecutions "'forc[es] the defendant to suffer anew the deprivation of constitutional rights.'" *N.G.*, 2018 IL 121939, ¶ 38 (quoting *Bryant*, 579 U.S. at 140). *Bryant* was decided a mere three days before *McFadden*, which is likely why this Court did not address it. But two years later, *N.G.* relied upon this principle, which is equally apt here. Johnson should not be made to suffer in perpetuity for a constitutionally invalid conviction, especially one for which he is innocent.

II. The strict "felon status" framework is unworkable and unjust.

A. *Stare decisis* provides no basis to apply *McFadden* in a rote fashion.

Given *N.G.*'s quick abandonment of a rote application of *McFadden*'s felon status framework—coupled with the extraordinary facts in this case—Johnson proposed this Court revisit the analytical framework in *McFadden* in its entirety. Op. Br. 13-28. As noted in his opening brief, the rote application of the "felon status" framework quickly proved unworkable in *N.G.* And the uniquely troubling facts of this case only reinforce this conclusion.

Johnson argued that multiple jurisdictions have applied the opposite linear framework—i.e., that a vacated predicate (for whatever reason) should lead to a vacated UUWF conviction, which he maintains a proper reading of Illinois' UUWF statute supports. Op. Br. at 13-21. Johnson stands by this argument as delineated in his opening brief; he continues to argue that Illinois' statute is similar to the statutes in other jurisdictions that apply those rules, and certainly far more similar than to the federal statute interpreted *in Lewis v. United States,* 445 U.S. 55 (1980).[1] In the end, the contrary out-of-state cases Johnson acknowledged, *see* Op. Br. at 18, n. 5, and the State relies on, St. Br. at 11-12, all interpret their own state statutes. *See e.g.*, *Clark v. State*, 739 P.2d 777, 781 (Alaska Ct. App. 1987) ("We believe that the issue in this case is strictly one of statutory interpretation."). Same, too, of the State's additional citation to *United States v. Thompson*, 901 F.3d 785 (7th Cir. 2018), St. Br. at 25-26, which merely interprets the same federal statute at issue in *Lewis*. Illinois' statute can and should be interpreted to apply only to constitutionally valid convictions.

Johnson also proffered, alternatively, that the UUWF statute, *N.G.*, and the purpose behind the statute support a case-by-case determination that

[1] Citing *State v. Hickok*, 39 Wash. App. 664, 672-73 (Wash. App. 1985), the State notes that one of the out-of-state cases on which Defendant relies, *State v. Gore*, 101 Wash.2d 481 (1984), was superseded by statute. St. Br. 14-15. This appears true—after *Gore,* the Washington legislature revised its statute to make explicit that an individual's convicted status at the time of the gun possession is all that matters. *See Hickok*, 39 Wash. App. at 672. But this only reinforces Johnson's point. The Illinois statute at issue is hardly explicit on that issue and certainly can be interpreted as requiring a constitutionally valid conviction as the *Gore* court held about the prior version of the Washington statute.

considers multiple factors, including whether the vacatur of the predicate cast doubt on the reliability of the conviction. Op. Br. at 21-28. Were this Court to consider all factors—including Johnson's adjudicated innocence of the predicate murder—it would certainly support relief for him. And again, *Lewis* and the out-of-state cases the State urges this Court to follow appear to all concern predicate offenses that were vacated for procedural reasons, or reasons that do not negate the culpability of the defendant. *See e.g.*, *Clark*, 739 P.2d. at 778 (predicate vacated for Fourth Amendment violation); *Reynolds v. State*, 712 S.W.2d 329, 330 (Ark. Ct. App. 1986) (predicate vacated because inadequate counsel waiver or *Gideon v. Wainwright*, 372 U.S. 335 (1963), violation); *Lewis*, 445 U.S. at 57 (predicate involved a *Gideon* violation).

The State broadly dismisses Johnson's proffered analytical approaches on the basis of *stare decisis*. St. Br. 2, 10, 20. In the context of this case, however, the State's argument is misguided and flawed. *N.G.* explicitly addressed and rejected the application of *stare decisis* for *McFadden* just two years after it was decided. This Court explained that nothing is more important than reaching "the correct decision under the law," and "considerations of '[*s*]*tare decisis* should not preclude us from admitting our mistake' when we have made one and interpreting the law correctly." *N.G.*, 2018 IL 121939, ¶ 76. The reality is, *N.G.* itself explicitly says "*McFadden* is hereby overruled" to the extent the *N.G.* result conflicts with it. *Id.* at ¶ 84. *Accord Cavette*, 2018 IL App

(4th) 150910, ¶ 26; *Cross*, 2019 IL App (1st) 162108, ¶ 175 (both explicitly stating *N.G.* overruled *McFadden*).

Further, to the extent *McFadden* may still have some validity, the State's argument that Johnson has offered no "special justification" for this Court to depart from *McFadden* is folly. St. Br. at 10. Johnson's entire opening brief is premised on the idea that both *N.G.* and the facts of this case demonstrate that the *McFadden* holding is unworkable and unjust. Johnson also maintained it cannot be squared with an individual's fundamental Second Amendment right, and the strict scrutiny that should apply to regulations that curtail that right. To the extent any "special justification" is needed to abandon *McFadden*, Johnson's opening brief certainly offered the reasoning.

B. Where the State hid the evidence of Johnson's innocence for three decades, its insistence that Johnson was required to clear his felon status first is very much "absurd," "unjust," and "unreasonable."

Throughout its brief, the State repeatedly claims that Johnson should have cleared his felon status earlier. St. Br. at 8 (quoting *McFadden* on the grounds that it is not "absurd or unjust or unreasonable about requiring a person who believes he has been wrongly convicted of a felony to clear his status through the judicial process"); *id.* at 8-9 (citing *Lewis* for the same proposition); *id.* at 12 (the reasoning of the out-of-state cases is proper because "they are consistent with legislatures' intent to require convicted felons to obtain reversal of their convictions" first); *id.* at 13 ("petitioner did not lack the ability to seek to obtain relief from this status").

What the State ignores is that in this case its agents committed perjury to secure his conviction while suppressing the very evidence that provided the basis for his relief and proved his innocence. What's more, Johnson, did, in fact, unsuccessfully attempt to secure post-conviction relief before he had access to the evidence. C. 208-23. Only when the State stopped concealing the evidence of his innocence and its agent's misconduct three decades later did Johnson obtain the relief. In these circumstances, it is very much "absurd," "unjust," and "unreasonable" to fault Johnson.

Relatedly, the State faults Johnson for not applying to the Director of the Illinois State Police under Section 10 of the Firearms Owners Identification Card Act, 430 ILCS 65/10, while his murder conviction was intact. *See* 720 ILCS 5/24-1.1(a). St. Br. at 13. However, the statute would have prohibited the Director to act, as an individual must be twenty years removed from a forcible felony conviction or imprisonment to qualify for the exemption. 430 ILCS 65/10(c)(1); *People v. Rush*, 2014 IL App (1st) 123462 (upholding the constitutionality of this provision). Johnson cannot be faulted for failing to pursue an inapplicable mechanism for relief.

C. Johnson's factual innocence is extremely relevant to the constitutionality of regulating gun possession.

The State refers to Johnson's factual innocence for the murder exactly one time in its brief, and when it does so its statement is nothing short of extraordinary. The State claims that "it is irrelevant to the General Assembly's intent to keep guns out of the hands of potentially irresponsible and dangerous

people that he is 'factually innocent' of the predicate offense." St. Br. at 13. The State says his innocence does not mean that he was not "potentially irresponsible and dangerous," and that is the intent of the UUWF statute. *Id.*

The problem with this argument is that while prohibiting felons or the mentally ill from possessing firearms passes constitutional muster, forbidding individuals that the State nebulously considers "potentially irresponsible and dangerous" clearly does not. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 786 (2010); *Coram v. State of Illinois*, 2013 IL 113867, ¶ 49. Subject to other proper regulations, any law-abiding individual has a fundamental Second Amendment right to possess a firearm for self-defense purposes. *People v. Aguilar*, 2013 IL 112116, ¶¶ 20-21.

And as to that constitutional question, let's be very clear: Johnson is not claiming that at the time his 2006 conviction was entered it was unconstitutional. *Compare* St. Br. at 27-30. Johnson is claiming that circumstances have changed. Johnson has no felony convictions other than the instant one, which is based on a predicate for which he is innocent. The adjudication of his factual innocence makes his continued felon status for being a law-abiding citizen who possessed a firearm in 2006 unconstitutional. Under the circumstances of this case, this is true whether strict scrutiny or the rational basis test applies. Op. Br. at 29-31.

III. There is an independent basis for relief under section 2-1401.

In his opening brief, separate and apart from the *N.G.* analysis, Johnson argued that section 2-1401, 735 ILCS 5/2-1401, provided two independent bases for relief: (1) the State's "obvious" *Brady* violation in relation to the murder was still fraudulently concealed from Johnson when he was charged in 2006, Op. Br. at 33-35, and (2) the equitable powers inherent in section 2-1401 should cause the courts to act. Op. Br. at 35-43. The State's response only addresses the latter, not the former.

To be clear, and as stated in Johnson's opening brief, a straight-forward application of section 2-1401, including the tolling provision for fraudulent concealment, should entitle Johnson to relief. Op. Br. at 33-35. In 2006, the State was still in the midst of a three-decade long process of fraudulently concealing the evidence of Johnson's innocence of the murder. Had it disclosed that evidence prior to that time, Johnson could have immediately moved successfully for collateral relief from the murder conviction, as he did in 2019. And had he been aware to do so, he never would have been constitutionally charged—let alone convicted—of possessing a firearm. Fraudulent concealment was the basis for tolling his section 2-1401 petition that vacated his murder in 2019, C. 186-89; it is every bit as applicable to this section 2-1401 petition seeking relief from his 2006 UUWF conviction as well.

As to the equitable basis for section 2-1401 relief, the State argues that this would only apply to fact-based challenges, not legal challenges, and tries

to cabin Johnson's argument as legal only. St. Br. at 31-33. But Johnson has made very clear his basis for equitable relief lies in the unique facts at issue in this case. Op. Br. at 42-43 (highlighting the facts that "scream out for equitable relief"). The issue here is very clearly factual in nature.

Moreover, the State ignores Johnson's lengthy discussion of the historical underpinnings of the rare use of *coram nobis* relief, and thereby section 2-1401, where equity requires. Op. Br. at 35-42. Instead, without citing authority, the State simply asserts consideration of equitable principles does not absolve a party from meeting his legal burden. St. Br. at 33-34. But a reading of Johnson's cited cases, such as *Ellman v. De Ruiter*, 412 Ill. 285, 289-90 (1952), *Nikola v. Campus Towers Apartment Bldg. Corp.*, 303 Ill. App. 516 (1st Dist. 1940), and others, do stand for the rare justification for doing just what the State asserts a court cannot. Op. Br. 37-40. In those cases, even though a strict reading of a statute provided no basis for relief, the court acted "to prevent an injustice." *See Charles Austin, Ltd. v. Food Services, Inc.*, 2014 IL App (1st) 132384, ¶ 18. *Accord Messick v. Mohr*, 292 Ill. App. 69, 74 (3d Dist. 1937) (explaining courts may act in equity, in rare circumstances, "to accomplish a proper result").

Finally, the State argues "it is far from clear" that the equities favor Johnson, arguing, for example, that his possession of the gun was illegal without a FOID card anyway. St. Br. at 34. This argument is a bit circular given that his wrongful murder conviction (a forcible felony) secured by the

State's suppression of the evidence of his innocence legally prevented him from obtaining a FOID card. *See* 430 ILCS 65/1 *et seq*. Regardless, if the State wants to debate further the equities in this Court during oral argument, or upon remand on a hearing on this issue, Johnson welcomes it.

CONCLUSION

For the foregoing reasons, Demetrius Johnson respectfully requests that this Court vacate his conviction or remand to the circuit court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding the pages required for 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 appended to the brief under Rule 342(a), is 14 pages.

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PLEASE TAKE NOTICE that on May 10, 2022, Petitioner-Appellant Demetrius Johnson filed via the Odyssey E-File system in the Supreme Court of Illinois the Appellant's Reply Brief, a copy of which is hereby served upon you.

DATED: May 10, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2022, I caused a copy of the foregoing Proof of Service and accompanying Appellant's Reply Brief to be served on the following via the Court's Odyssey E-File and Serve system:

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VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

DATED: May 10, 2022

/s/ Joshua A. Tepfer
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