No. 120407

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, First District. No. 1-14-1256
Respondent-Appellant,	)	
v.	)	There on Appeal from the Circuit Court of Cook County, Illinois
DAVID HOLMES,	)	No. 12 CR 11423
Petitioner-Appellee.	)	The Honorable Dennis J. Porter, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

ARGUMENT

The People's opening brief demonstrated that defendant's warrantless arrest did not violate the Fourth Amendment of the United States Constitution because there was probable cause at the time of his arrest to believe he was committing the then-valid felony offense of aggravated unlawful use of a weapon (AUUW) by carrying a loaded, uncased, immediately accessible firearm. Peo. Br. 5-7.[1] Furthermore, to the extent this Court's subsequent invalidation of portions of the AUUW statute rendered defendant's arrest invalid, the good faith exception to the exclusionary rule applies, and the evidence obtained should not be suppressed. Peo. Br. 7-11. Neither this Court's decision in *People v. Carrera*, 203 Ill. 2d 1 (2002), nor the void *ab initio* doctrine dictates a different outcome. Peo. Br. 11-12. Alternatively, to the extent *Carrera* prevents application of the good faith exception in this case, it should be overturned. Peo. Br. 12-15.

I. This Court Need Not Alter Its Void *Ab Initio* Jurisprudence to Hold that Evidence Obtained During Defendant's Arrest Is Admissible.

Notwithstanding defendant's contrary assertion, Def. Br. 13, the People are not asking this Court to limit the void *ab initio* doctrine. When this Court declares a statute unconstitutional and, therefore, void *ab initio*, it means only that the statute was unenforceable from the moment of its enactment. *People v. Blair*, 2013 IL 114122, ¶ 30. The People do not suggest that this Court allow for retroactive enforcement of the unconstitutional provisions of AUUW. Indeed, following the Court's opinion in *People v. Aguilar*, 2013 IL 112116, the parties agreed that counts I and III should be dismissed because

[1] "Peo. Br." denotes the People's opening brief before this Court; and "Def. Br." denotes defendant's appellee's brief.

subsection (a)(3)(A) of the AUUW statute was unconstitutional. C42-47, 49. But this does not settle the question of whether there was probable cause to arrest defendant at the time of his arrest. *People v. Grant*, 2013 IL 112734, ¶ 11 (probable cause exists when facts known to officer under totality of circumstances *at time of arrest* are sufficient to cause reasonably cautious person to believe that arrestee has committed crime).

As demonstrated in the People's opening brief, Peo. Br. 5-6, there was probable cause at the time of the arrest to believe that defendant was committing a crime — specifically, carrying a loaded, uncased, easily accessible firearm. The trial court agreed. RA15. Even defendant conceded, "At the time, yes, the officer did have the right to place [defendant] under arrest." RA11. Because defendant's arrest was valid based on the totality of the circumstances at the time, no Fourth Amendment violation occurred. *See Grant*, 2013 IL 112734, ¶ 11; *see also United States v. Charles*, 801 F.3d 855, 861 (7th Cir. 2015) (arrest and search incident to arrest based on subsection of AUUW subsequently held unconstitutional did not violate Fourth Amendment). Even before this Court, defendant has made no effort to contradict this analysis, which is dispositive here.

Defendant does not contest that probable cause existed at the time of his arrest because there is no colorable basis to do so. Instead, he suggests that the void *ab initio* doctrine may independently "result in the exclusion of evidence." Def. Br. 14. But that is not so. Defendant is conflating this Court's void *ab initio* jurisprudence with its case law relating to the Fourth Amendment to the United States Constitution and Article I, Section 6 of the Illinois Constitution of 1970. Each guarantees Illinois citizens the right to be free from unreasonable searches and seizures. *See People v. Gaytan*, 2015 IL 116223, ¶ 20. It is a

violation of this right that can result in the exclusion of evidence seized pursuant to an illegal arrest.

The question of whether evidence must be suppressed is separate from whether the search was legal. *People v. Sutherland*, 223 Ill. 2d 187, 227 (2006). Even when a Fourth Amendment violation has occurred, the evidence obtained will not be suppressed where the good faith exception applies. *People v. LeFlore*, 2015 IL 116799, ¶ 17. The exclusionary rule asks the Court to balance a defendant's constitutional rights against the "heavy toll" on the judicial system and society at large of requiring courts to ignore reliable, trustworthy evidence bearing on a defendant's guilt and setting a criminal loose in the community without punishment. *Id.* at ¶ 23 (citing *United States v. Stephens*, 764 F.3d 327, 335 (4th Cir. 2014) (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011))). As this Court has held, exclusion of evidence should be a "last resort," not a "first impulse." *LeFlore*, 2015 IL 116799, ¶ 22 (quoting *Herring v. United States*, 555 U.S 135, 140 (2009)).

The good-faith exception applies when a reasonably well-trained officer would not have known that the search was illegal in light of all of the circumstances. *Id.* at ¶ 25 (quoting *Herring*, 555 U.S. at 145). The General Assembly has specifically defined "good faith" to include an arrest or search for a violation of a statute later declared unconstitutional. 725 ILCS 5/114-12(b)(2)(ii). Controlling precedent at the time of defendant's arrest upheld the relevant portions of AUUW as constitutional. *See, e.g., Montyce H.*, 2011 IL App (1st) 101788, ¶¶ 20-34. A well-trained officer determining whether he had probable cause to arrest defendant could not have known that those same portions of the AUUW statute would subsequently be declared unconstitutional. *See Michigan v. DeFillippo*, 443 U.S. 31, 37-38

(1979); *see also Charles*, 801 F.3d at 861. Under these circumstances, applying the exclusionary rule would not serve the purpose of the rule and might deter an officer in a future situation from doing his job. *See LeFlore*, 2015 IL 116799, ¶ 27 (quoting *Davis*, 564 U.S. at 241); *see also DeFillippo*, 443 U.S. at 38 (an officer's job is "to enforce laws until and unless they are declared unconstitutional").

Defendant does not contest this straight forward application of the good faith exception. Instead, he contends that the void *ab initio* doctrine requires the abandonment of these well-established principles. To be sure, this Court is not in lockstep with the United States Supreme Court on application of the good-faith exception, but this case does not implicate the areas where the courts' approaches to the exception diverge. In departing from lockstep on the good faith exception, this Court recognized the distinction between the invalidation of a procedural statute authorizing searches and seizures and the invalidation of a substantive statute defining the underlying criminal offense. *People v. Krueger*, 175 Ill. 2d 60, 74-75 (1996) (citing *DeFillippo*, 443 U.S. at 39). That distinction is dispositive here.

The United States Supreme Court applies the good-faith exception even to procedural statutes governing searches and seizures. *See Illinois v. Krull*, 480 U.S. 340, 356 (1987) (applying good-faith exception to evidence seized by officer relying on Illinois statute authorizing warrantless searches that this Court subsequently held unconstitutional). In contrast, this Court has declined to apply the good-faith exception where evidence was obtained pursuant to an unconstitutional statute, which by its own terms purported to authorize particular kinds of searches or seizures that violate the Fourth Amendment. *See People v. Krueger*, 175 Ill. 2d 60, 74-75 (1996) (holding *Krull* exception did not apply in

Illinois and excluding evidence obtained pursuant to a then-valid statute authorizing no-knock warrants).

But this case does not involve a statute that authorizes searches or seizures. Here the statute declared unconstitutional was a substantive criminal statute that violated the Second Amendment by banning the carriage of all personal firearms. So contrary to defendant's assertion, Def. Br. 20, 24, application of the good-faith exception in this case does not require that this Court overturn *Krueger*.

Defendant also argues that the People are seeking to overturn *People v. Carrera,* 203 Ill. 2d 1 (2002). Def. Br. 13. *Carrera*, like *Krueger*, dealt with an invalidated procedural statute governing searches and seizures, as opposed to this case, which deals with an invalidated substantive criminal statute. Therefore, resolving this case in the People's favor will not require the Court to disturb *Carrera*. The First District held, and defendant argues, that *Carrera* holds that the invalidation of any criminal statute retroactively invalidates every arrest for which the violation of that statute provided probable cause and requires exclusion of all evidence obtained incident to those arrests. *People v. Holmes*, 2015 IL App (1st) 141256, ¶ 31 (quoting *Carrera*, 203 Ill. 2d at 16); Def. Br. 10. To the extent they are correct, *Carrera* should be overturned.

The *Carrera* dissent correctly points out that the Illinois Constitution should not prohibit application of the good-faith exception unless the invalidated statute violates the Fourth Amendment:

> Our concern in *Krueger* was with a statute authorizing police conduct that was, in itself, unconstitutional. This case does not pose the same threat to liberty as the statute at issue in *Krueger*, which purported to authorize

> unconstitutional no-knock entries by the police when executing a search warrant.

Carrera, 203 Ill. 2d at 25-26 (Garman, J., dissenting, joined by Fitzgerald and Thomas, JJ.). The core Fourth Amendment principles implicated by a statute authorizing unconstitutional police conduct, such as the one at issue in *Krueger*, do not prevent application of the good-faith exception to statutes like the ones in both *Carrera* and this case, which do not purport to authorize conduct that violates the Fourth Amendment. Furthermore, application of the exclusionary rule under such circumstances offers no deterrent against future Fourth Amendment violations by either law enforcement officers or the General Assembly. And because application of the exclusionary rule is a last resort reserved for cases where that deterrent effect outweighs the cost to society of allowing criminals to go unpunished, the exclusionary rule should not be employed in cases involving the subsequent invalidation of a substantive criminal provision.

Nor does this Court's void *ab initio* jurisprudence require a different result. Contrary to defendant's assertion, Def. Br. 9, it is defendant who "urges this Court to turn back the clock" on the void *ab initio* doctrine. If that doctrine ever asked this Court to pretend a subsequently invalidated statute never existed, recent decisions have made clear that it no longer does. In *People v. Blair*, this Court held that declaring a statute unconstitutional does not render it nonexistent, nor could it do so consistent with separation of powers priciples. 2013 IL 114122, ¶ 30. As the *Blair* Court observed, "The actual existence of a statute, prior to a determination that the statute is unconstitutional, is an operative fact and may have

consequences which cannot be justly ignored." *Id.* ¶ 29 (quoting *Perlstein v. Wolk*, 218 Ill. 2d 448, 461 (2006)).

The question here is whether probable cause existed at the time of defendant's arrest. In determining whether the facts known to the arresting officer at that time were sufficient to cause a reasonable person to believe defendant had committed a crime, this Court cannot justly ignore that the statute criminalizing carrying a loaded, uncased, immediately accessible weapon existed at that time and had yet to be declared unconstitutional. This Court's analysis in *People v. McFadden*, 2016 IL 117424, is instructive in that the Court made clear that a finding of unconstitutionality does not erase all prior actions taken when a law was still presumptively valid. *McFadden* held that the People may obtain a conviction for unlawful possession of a weapon by a felon (UPWF) where the defendant's predicate felony conviction was a violation of the unconstitutional portion of the AUUW statute. *See id.* at ¶ 37.[2] Although *Aguilar* declared a portion of the AUUW statute void *ab initio*, it did not require courts to pretend that it never existed. Similarly, the void *ab initio* doctrine does not require this Court to pretend the relevant portion of AUUW never existed when it conducts its probable cause and good-faith analyses.

The void *ab initio* doctrine dictates, as the People concede, that defendant could not be convicted for carrying a loaded, uncased, easily accessible firearm. For this reason, there

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[2] Defendant contends that *McFadden* 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." Def. Br. 12. But *McFadden* explicitly found that such a conviction for UPWF was constitutionally valid.

is no merit to defendant's argument that application of the good-faith exception here would endorse a "grace period" during which the State would be free to enforce unconstitutional gun laws with "impunity." *See* Def. Br. 11, 20. From the moment the relevant portions of AUUW were declared unconstitutional, the State could no longer charge or convict someone for carrying an uncased, loaded, immediately accessible handgun. Any convictions for violating that portion of AUUW could be vacated retroactively. And, indeed, an arrest made subsequent to *Aguilar* based solely on probable cause to believe the suspect had violated the pre-amendment version of the AUUW statute[3] would violate the United States and Illinois Constitutions, and the good faith exception would not prevent the exclusion of evidence obtained pursuant to such an arrest. But because defendant's arrest did not occur post-*Aguilar*, his grace period argument is a red herring.

The law against carrying an uncased, loaded, immediately accessible handgun was presumptively valid at the time of defendant's arrest. *See, e.g., Montyce H.*, 2011 IL App (1st) 101788, ¶¶ 20-34. It would be unwise to ask officers to attempt to guess which substantive criminal laws might be invalidated in the future. *DeFillippo*, 443 U.S. at 38 ("Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.").

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[3] Effective July 9. 2013, the General Assembly amended 720 ILCS 5/24-1.6 to remove the categorical ban on carrying a firearm and allow carriage of an uncased, loaded, immediately accessible handgun or pistol where the person possessing the weapon has a currently valid license under the Firearm Concealed Carry Act. *See* Pub. Act 98-0063 (eff. July 9, 2013). *Aguilar* did not invalidate the amended version of the AUUW statute, which cured the constitutional infirmity. *See Aguilar*, 2013 IL 112116, ¶ 22 n.4.

At the time of defendant's arrest, probable cause existed to believe that he was violating a then-valid law. Therefore, no violation of the United States or Illinois Constitutions occurred. Even if the subsequent invalidation of a portion of the AUUW statute renders an arrest unconstitutional, evidence obtained pursuant to that arrest should not be excluded under the good-faith exception to the exclusionary rule. And application of the good-faith exception in this case would not conflict with the void *ab initio* doctrine. Therefore, this Court should reverse the judgment of the appellate court and remand for further proceedings.

CONCLUSION

For these reasons, and those stated in their opening brief, the People respectfully request that this Court reverse the judgment of the appellate court.

February 15, 2017

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, 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 ten pages.

/s/ Garson S. Fischer
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on February 15, 2017, the foregoing **Reply Brief of Plaintiff-Appellant** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail twelve (12) copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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