No. 126978

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- KEVIN SROGA, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-1992. There on appeal from the Circuit Court of Cook County, Illinois, No. 1212 474 1801. Honorable Diann K. Marsalek, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

ADRIENNE N. RIVER
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

E-FILED
2/15/2022 2:09 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

ARGUMENT

Section 3-703 of the Illinois Vehicle Code, a Class C misdemeanor prohibiting the displaying of an incorrect license plate on a vehicle, should be interpreted as requiring a mental state because (1) the offense is punishable by imprisonment and a high fine; and (2) the statute does not evince the legislature's clear intent to impose absolute liability. Section 4-104(a)(4) is an identical offense but is punished more harshly, and so Kevin Sroga's sentence under section 4-104(a)(4) violates the proportionate-penalties clause.

The State contends that the license-plate offense in section 3-703 of the Vehicle Code is an absolute-liability offense, but the State neither identifies language that clearly shows such legislative intent nor identifies a public policy important enough to make a mental state irrelevant. Alternatively, the State argues that the mental state of recklessness should be inferred, but the offense does not involve the risk of physical harm that typically arises from offenses that are committed recklessly. The mental state of knowledge logically applies to the identical license-plate offenses of sections 3-703 and 4-104(a)(4).

The State also argues that this Court should overrule its holding in *People v. Hauschild*, 226 Ill. 2d 63 (2007), that the remedy for a proportionate-penalties violation based on offenses having identical elements is resentencing under the statute as it existed prior to the unconstitutional amendment. But this Court has reaffirmed the *Hauschild* remedy, and the State does not cite apt authority for its contention that when, for the offense of which defendant was convicted, there is no prior version with a lower sentence that does not violate the proportionate-penalties clause, a court can sentence defendant instead to the lower sentence available for the identical

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

offense despite it not being charged.

This Court should reverse the appellate court and vacate Kevin Sroga's conviction under section 4-104(a)(4).

A. Sections 3-703 and 4-104(a)(4) of the Vehicle Code, which both prohibit one from displaying on a vehicle a license plate that is not registered to the vehicle, are identical offenses.

1. The statutes prohibit identical conduct.

The State agrees that the two statutes prohibit identical conduct. (State's Br. at 6)

2. Section 4-9 of the Criminal Code of 2012 provides strict limits on when a statute that omits a mental state can be interpreted as creating an absolute-liability offense.

The State's primary position is that section 3-703 should be interpreted as imposing absolute liability. (State's Br. at 10) The State notes that if reasonably possible, a court must construe a statute as to affirm its constitutionality. (State's Br. at 8) The State concludes from that general principle that (1) Sroga must therefore show there is no way to reasonably construe sections 3-703 and 4-104(a)(4) as requiring different mental states; and (2) Sroga must identify something in the statutory language or history that compels this Court to construe the two sections as requiring the same mental state. (State's Br. at 8) These conclusions conflict with the statute that specifically governs when absolute liability is imposed. 720 ILCS 5/4-9 (2012).

Under section 4-9, a statute that is a misdemeanor punishable by

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

incarceration or fine over $1,000 must "clearly" indicate the purpose to impose absolute liability. 720 ILCS 5/4-9 (2012). And, consistent with this statute, this Court has held that a court will infer a mental state if at all possible. *In re K.C.*, 186 Ill. 2d 542, 546 (1999). Thus, the standard to be applied in this case is not whether it is reasonable to construe section 3-703 as imposing absolute liability. Nor must section 3-703 compel the legislature's implication of a mental state. Rather, the high standard that applies is whether it is *clear* that section 3-703 imposes absolute liability. 720 ILCS 5/4-9 (2012); *see People v. Gean*, 143 Ill. 2d 281, 285-86 (1991) (the section was intended to establish "rather strict limitations" on interpreting a statute as imposing absolute liability).

3. Section 4-104(a)(4) should not be interpreted as an absolute-liability offense, and the mental state of knowledge should be implied.

Preliminarily, it should be noted that the caption for section A.3. in the original brief inadvertently omitted the word "not" before "be interpreted." (Defendant's Br. at 13) Sroga contends that section 4-104(a)(4) should *not* be interpreted as an absolute-liability offense.

The State agrees that the mental state of knowledge should be the implied mental state for section 4-104(a)(4). (State's Br. at 10)

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

4. Section 3-703's license-plate offense that is identical to section 4-104(a)(4) should not be interpreted as absolute liability as it is a Class C misdemeanor and as there is no clear indication that the legislature intended innocent conduct to be punished. The mental state of knowledge should be inferred.

a. The punishment for section 3-703's license-plate offense is too great under section 4-9 to impose absolute liability.

Under section 4-9, the punishment for a violation of the section 3-703 license-plate offense is too harsh to infer absolute liability absent clear legislative intent. 720 ILCS 5/4-9 (2012). The State contends that (1) the presumption against absolute liability is "rebuttable" and "ceases to apply altogether" to an offense punishable as a Class C misdemeanor; and (2) an offense being a Class C misdemeanor "does not weigh so heavily in favor of absolute liability" as does a business offense. (State's Br. at 13) But these contentions are contrary to the clear terms of section 4-9.

Section 4-9 applies the same rule to any misdemeanor that is punishable by imprisonment or a fine over $1,000; thus, section 4-9 does not provide for less of a presumption of a mental state for the lowest class of misdemeanor. Nor does section 4-9 provide for a rebuttable presumption against absolute liability. (State's Br. at 13) Rather, section 4-9 provides for a presumption that the applicable statutes require a mental state–in other words, the *presumption is against absolute liability*. *See People v. Molnar*, 222 Ill. 2d 495, 519 (2006) (a presumption of a mental state applies unless the intent is clear for absolute liability or unless an important public policy favors absolute liability).

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

b. The use of the word "shall" in section 3-703 does not indicate absolute liability.

The State argues that the mere use of the word "shall" in the section 3-703 offense at issue shows an intent to impose absolute liability. (State's Br. at 11) The State does not provide reasoning, relying only on *People v. O'Brien*, 197 Ill. 2d 88 (2001). (State's Br. at 11) But *O'Brien* involved a business offense not governed by section 4-9. Thus, *O'Brien* did not hold that the word "shall" in a *misdemeanor* statute shows the intent to impose absolute liability.

Also, *O'Brien* did not cite supporting authority for its holding that the word "shall" showed the "unquestionable" legislative intent was to impose a mandatory obligation to obtain insurance and therefore to provide absolute liability. 197 Ill. 2d at 92-93. The State does not respond to Sroga's argument that a mandatory obligation can be imposed without absolute liability. (Defendant's Br. at 16-17) For example, liability for failing to do a required act could be imposed only if the person knew of the obligation and intentionally did not fulfill it.

The State argues that the statute in *O'Brien,* 197 Ill. 2d at 89, was phrased "identically" to section 3-703 by including the language "[n]o person shall." (State's Br. at 14) But the State ignores the distinction between an obligation and a prohibition, the latter of which is involved in Sroga's case and the former of which was involved in *O'Brien.* The use of the word "shall" in a prohibition punishable as a misdemeanor does not clearly indicate the intent to impose absolute liability–for many such prohibitions require a culpable mental state.

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

c. Section 3-703 does not evince clear legislative intent that the license-plate offense is absolute liability.

Sroga argued that if the license-plate offense at issue in section 3-703 is interpreted as imposing absolute liability, it would cover innocent conduct, such as the owner of two cars mistakenly putting the wrong license plate on each car. (Defendant's Br. at 17) And Sroga argued that this minor offense poses no immediate danger to the public that would make a mental state irrelevant to the imposition of criminal liability. (Defendant's Br. at 17) The State responds that such innocent conduct results in a vehicle that cannot be accurately identified, without arguing why this goal is so important that a mental state is irrelevant. (State's Br. at 18) All criminal statutes are based on some public policy, but a public policy must be especially important before absolute liability can be inferred. *See People v. Sevilla*, 132 Ill. 2d 113, 122 (1989) (with the exception of those offenses in which public policy favors absolute liability, it would be unjust to subject a person to a severe penalty for an offense that might be committed without fault).

And while the State has an interest in preventing the incorrect identification of cars, the State has an equally important interest in not criminalizing innocent conduct. *See People v. Tolliver*, 147 Ill. 2d 397, 403 (1992) (in holding that section 4-104(a)(2) of the Vehicle Code, which prohibits possessing title without complete assignment, requires knowledge and criminal purpose, this Court noted that while the State has a legitimate interest in preventing car theft, the State has an equally important interest in protecting otherwise-innocent conduct from criminal prosecution); *see also People v. DeVoss*, 150 Ill. App. 3d 38, 40-41 (3rd Dist. 1986) (statute

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

proscribing any driver or passenger from carrying an open liquor container within the passenger area did not set forth an absolute-liability offense; the appellate court implied an element of knowledge because a judicial determination that the statute established absolute liability would lead to a variety of unintended results, such as making it an offense for a passenger to accept a ride home not knowing that the driver was transporting liquor).

Consistent with the need for an important public policy for imposing absolute liability are other Vehicle Code misdemeanor offenses concerning vehicle registration and title that require a mental state so as not to punish innocent conduct. In addition to the statute on possessing an incomplete title, addressed in *Tolliver*, 147 Ill. 2d 397, the Vehicle Code contains statutes (1) prohibiting the display of evidence of insurance to a police officer, among others, knowing that there is no valid liability insurance in effect (625 ILCS 5/3-710 (2022)); and (2) prohibiting the knowing provision of false information on an application for a vehicle title or registration or for the purpose of obtaining a military license plate (625 ILCS 5/3-712(a) and (b) (2022)).

And other statutes in the Vehicle Code have been interpreted as being deficient for lacking the element of criminal purpose. *E.g., People v. Wright*, 194 Ill. 2d 1, 28-30 (2000) (section 5-401.2 of the Vehicle Code punishing certain persons for failing to maintain records relating to the acquisition and disposition of vehicles and parts violated due process as it did not provide for a criminal purpose, although it included the mental state of knowledge); *People v. DePalma*, 256 Ill. App. 3d 206, 211-12 (2d Dist. 1994) (the

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

knowledge requirement of section 4-103(a)(4) of the Vehicle Code, making possession of a vehicle with knowledge that the vehicle identification number had been removed a felony, had to be read to mean knowledge with intent to defraud or intent to commit a crime because otherwise a person with no criminal purpose would be subject to felony punishment).

Sroga argued that, under the appellate court's analysis pointing to the section 3-703 offense of "knowingly permit[ting]" the unauthorized use of certain documents, all the other section 3-703 offenses without a mental state would be interpreted as absolute-liability offenses. (Defendant's Br. at 18-19) And Sroga argued that under this statutory interpretation, a person lending evidence of title without knowing that the other person was not entitled to its use would be punished while a person permitting someone else to use the same document without the requisite knowledge would not be punished. (Defendant's Br. at 19-20) The State responds that the differentiation between lending and permitting makes sense because one could "permit" the use merely by taking inadequate measures to prevent someone from gaining access. (State's Br. at 16) The State's proposed examples of how, without a mental-state requirement, one would commit the offense do not comport with the plain meaning of "permit": parking outside at night or not hiding a license plate from a roommate. (State's Br. at 17) Using the plain meaning, it should be concluded that the permitting offense would be committed only by giving the license plate to someone to use. Thus, the appellate court's analysis does not support the conclusion that section 3-703 clearly indicates absolute liability for the license-plate offense.

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

The State also argues that the inclusion of mental states elsewhere in the Vehicle Code supports the inference that omission of a mental state for the section 3-703 offense at issue is evidence of intent to impose absolute liability. (State's Br. at 15) But this Court has held, to the contrary, that the "mere absence of express language describing a mental state does not *per se* lead to the conclusion that none is required." *People v. Valley Steel Products Co.*, 71 Ill. 2d 408, 424 (1978). The inclusion of mental states in other statutes unrelated to the offense at issue in section 3-703 has no bearing on whether its omission of a mental state means none should be implied. In other words, the mere inclusion of mental states in other statutes does not clearly indicate the intent to impose absolute liability in section 3-703, as required by section 4-9.

d. The mental state of knowledge should be implied.

Sroga argued that the mental state of knowledge should apply to the section 3-703 license-plate offense. (Defendant's Br. at 22-23) The State replies that if section 3-703 does not impose absolute liability, then a reckless mental state should apply. (State's Br. at 18 *et seq.*) But there is no indication that legislature intended recklessness; the conduct barred by section 3-703 is not of the type typically conducted recklessly. 720 ILCS 5/4-6 (2012). The State does not explain what "substantial and unjustifiable risk" results from the improper use of a license plate or what the standard of care a reasonable person would exercise and from which one could "grossly deviate." *See* 720 ILCS 5/4-6 (2022) (definition of recklessness).

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

In support, the State cites *People v. Anderson*, 148 Ill. 2d 15, 24 (1992), which inferred a reckless mental state, but the misdemeanor offense was hazing. (State's Br. at 19) This Court found that recklessness was appropriate because the intention was to deter conduct that was likely to result in physical injury. *Anderson*, 148 Ill. 2d at 24. Improper license-plate usage does not involve the risk of physical harm.

The few Vehicle Code offenses requiring a reckless mental state similarly prohibit a very different type of behavior, involving the risk of physical harm: reckless driving of a car (625 ILCS 5/11-503 (2022)), operating a motorcycle on one wheel (625 ILCS 5/11-403.2 (2022)), reckless driving of an all-terrain vehicle (625 ILCS 5/11-1427 (2022)), and reckless driving of a vehicle in the vicinity of a bicyclist or others not in a vehicle (625 ILCS 5/11-703(e) (2022)).

Similarly, offenses in the Criminal Code of 2012 based on reckless conduct involve the risk of physical harm:

- reckless conduct: when a person, by any means lawful or unlawful, recklessly performs an act that causes bodily harm, endangers the safety of another person, or causes great bodily harm or permanent disability or disfigurement to another person (720 ILCS 5/12-5 (2022));
- reckless discharge of a firearm (720 ILCS 5/24-1.5 (2022));
- reckless homicide (720 ILCS 5/9-3 (2022));
- reckless homicide of an unborn child (720 ILCS 5/9-3.2 (2022));
- common carrier recklessness: when a person, having personal management or control of or over a public conveyance used for the common carriage of persons, recklessly endangers the safety of others (720 ILCS 5/12-5.5 (2022));
- unlawful discharge of firearm projectiles (720 ILCS 5/24-3.2 (2022));
- mob action: includes the reckless use of force or violence disturbing the public peace (720 ILCS 5/25-1 (2022));

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

- criminal damage to property: includes when a person recklessly by means of fire or explosive damages property of another (720 ILCS 5/21-1 (2022)); and

- abuse or criminal neglect of long-term-care-facility resident (720 ILCS 5/12-4.4a (2022)).

It is an unreasonable conclusion that the legislature intended a reckless mental state for the section 3-703 license-plate offense. It is logical that if the legislature intended two different mental states for the identical offenses where one was the uncommon mental state of recklessness, then the legislature would have explicitly provided for mental states.

That the legislature intended a more culpable mental state for section 4-104(a)(4) by virtue of the penalty being greater than the penalty for section 3-703 is not the only conclusion to be made, contrary to the State's implication. (State's Br. at 9) The statutes are in different articles of the Vehicle Code. Section 4-104(a)(4) is in the article entitled "anti-theft laws" while section 3-703 is in the article entitled "offenses against registration and certificate of title laws or revocation of registration or certificate of title." Rather, the most likely reason for the difference in punishments is legislative carelessness in inadvertently creating the two identical offenses. *See State v. Campbell*, 279 Kan. 16, 106 P.3d 1129, 1138 (2005) (where statutes are identical, it is likely to be a consequence of legislative carelessness). Had the legislature intended to punish the same conduct performed with knowledge more severely than performed recklessly, the legislature would have enacted one statute in one article, providing for different sentences depending on whether the offense was committed knowingly or recklessly.

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

B. As the elements of section 4-104(a)(4) are identical to those contained in section 3-703 but is punished more harshly, section 4-104(a)(4) violates the proportionate-penalties provision of the Illinois Constitution.

The State does not argue that if the elements are identical, then the proportionate-penalties clause is not violated.

C. As there is no prior version of section 4-104(a)(4) that was a Class C misdemeanor, the remedy is to reverse Sroga's conviction.

Sroga argued that as there was no prior version of section 4-104(a)(4) that punished the offense as a misdemeanor of up to 30 days' imprisonment, his conviction must be reversed. (Defendant's Br. at 24-26) The State does not dispute the history of the offense's punishment. (State's Br. at 28)

Nor does the State dispute that the remedy to vacate the conviction under section 4-104(a)(4) is required by *People v. Hauschild*, 226 Ill. 2d 63 (2007). (State's Br. at 28) However, the State argues that this Court should overrule its holding in *Hauschild* as to the remedy for a proportionate-penalties violation: a remand for resentencing under the statute as it existed prior to the amendment. (State's Br. at 28 *et seq.*) Specifically, the State argues that *Hauschild* departed from the earlier decision of *People v. Christy*, 139 Ill. 2d 172 (1990), which affirmed the appellate court's holding that the appropriate remedy was sentencing on the uncharged identical offense with the lesser penalty. (State's Br. at 23, 27, 31)

But while *Christy,* 139 Ill. 2d 172, did affirm the reversal of a conviction for armed violence and the relief of resentencing for the uncharged, identical offense of aggravated kidnaping, based on a proportionate-penalties violation, the issue of the propriety of that

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

resentencing was not raised in the case. Indeed, this Court in *People v. Clemons*, 2012 IL 107821, ¶ 59, rejected the State's similar reliance on *Christy*. The State argued in *Clemons* that the defendant should be sentenced under an uncharged offense. 2012 IL 107821, ¶ 57. This Court rejected that argument, holding that, "Unlike *Hauschild*, however, *Christy contains no discussion or analysis of the appropriate remedy, and for this reason, Christy is not controlling*." (Emphasis added.) *Clemons*, 2012 IL 107821,¶¶ 58-59. Thus, this Court has continued to apply the *Hauschild* remedy and has rejected the State's position that the remedy is incorrect.

The State argues that the Class C sentence for section 3-703 could be imposed on Sroga because an identical offense with a lesser penalty is a lesser included offense. (State's Br. at 25) A defendant in a criminal prosecution has a fundamental due-process right to notice of the charges brought against him. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006); U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. For this reason, a defendant may not be convicted of an uncharged offense. *Kolton*, 219 Ill. 2d at 359. An exception to the rule barring conviction of an uncharged offense allows a conviction only for a "lesser-*included* offense." *Id.* at 360. This is because a lesser included offense is implicitly charged. *People v. Knaff*, 196 Ill. 2d 460, 472 (2001). However, an identical offense is not a lesser *included* offense. One cannot be convicted of an uncharged identical offense. *See Clemons*, 2012 IL 107821, ¶ 58 (defendant having been convicted of armed robbery could not be sentenced under the uncharged identical offense of armed violence).

The State cites in support the Code's definition of the term "included

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

offense." 720 ILCS 5/2-9 (2012). (State's Br. at 25) The definition encompasses a "lesser included offense" but also includes an offense that is proven by the same facts required to establish the charged offense. 720 ILCS 5/2-9 (2022). The State has not cited to any case holding that because of section 2-9's reference to the "same" facts, one can be convicted of an uncharged offense that is not a lesser included offense. And such a result would be contrary to the holding of *Clemons*, 2012 IL 107821, ¶ 58.

The State also argues that Supreme Court Rule 615(b)(3) allows Sroga to be sentenced under section 3-703. (State's Br. at 24) This rule gives a reviewing court the power to "reduce the degree of the offense." (State's Br. at 36) This power is inapplicable here because the offense in section 3-703 is identical to the offense in section 4-104(a)(4) and thus is not a *lesser degree* of offense to which Sroga's conviction can be *reduced*. *Cf. People v. Williams*, 267 Ill. App. 3d 870, 880 (1st Dist. 1994) (pursuant to Supreme Court Rule 615(b)(3), the court reduced the degree of the offense of possession of possession with intent of more than 100 grams but less than 400 grams of cocaine to the offense of possession with intent of more than 15 grams but less than 100 grams). Thus, Supreme Court Rule 615(b)(3) does not give this Court the power to change Sroga's conviction to the uncharged section 3-703.

Clemons rejected a similar State argument that the defendant could be sentenced for an uncharged identical offense: "the State cites no authority for the proposition that the charging instrument may be modified on appeal so that the State may proceed under a different statute." 2012 IL 107821, ¶ 58. This Court also held: "The State elected to prosecute defendant under the

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

armed robbery statute. Defendant, having been convicted of that offense, must be sentenced pursuant to the armed robbery statute." *Clemons*, 2012 IL 107821, ¶ 58; *see also People v. Jamison*, 197 Ill. 2d 135, 162 (2001) (where conduct constitutes more than one possible criminal offense, the State has exclusive discretion to decide which charge should be brought against a defendant).

Sroga also cited *People v. Tellez-Valencia,* 188 Ill. 2d 523, 526 (1999), which held that on appeal the charging instruments could not be amended to change the name of the charged offense of predatory criminal sexual assault of a child to aggravated criminal sexual assault. (Defendant's Br. at 27) The State argues that *Tellez-Valencia* is distinguishable because it did not involve a proportionate-penalties violation. (State's Br. at 35-36) However, there is no reason why the general principle of not allowing charges to be changed after conviction cannot apply where a sentence violated the proportionate-penalties clause.

Moreover, double jeopardy protects a defendant from a second prosecution for the same offense, not only after acquittal, but also after the State has obtained a conviction. *People v. Placek*, 184 Ill. 2d 370, 376 (1998). As the State chose to prosecute Sroga only under section 4-104(a)(4), it cannot seek on appeal to convict him of the uncharged section 3-703 offense. The charging instrument against Sroga cannot now be modified, and he cannot be resentenced under section 3-703.

In challenging *Hauschild*'s holding that the proper remedy is to remand for resentencing under the statute as it existed prior to the

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

amendment, 226 Ill. 2d at 88-89, the State takes issue with *Hauschild*'s reliance on *People v. Gersch*, 135 Ill. 2d 384 (1990), and cases relying on the *Gersch* principle. (State's Br. at 28-31) The State argues that this line of cases did not concern a proportionate-penalties violation. (State's Br. at 28-31) But *Gersch* relied on long-standing law holding that the effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the amendment's adoption. *Gersch*, 135 Ill. 2d at 390 (citing *Van Driel Drug Store, Inc. v. Mahin*, 47 Ill. 2d 378, 381 (1970), and *People ex rel. Barrett v. Sbarbaro,* 386 Ill. 581, 590 (1944)). This principle should apply no matter why an amendment is unconstitutional.

The State ignores the reasoning behind the remedy of enforcing the prior statute. While a court can declare a statute unconstitutional, the separation-of-powers clause does not allow a court to repeal or otherwise render the statute nonexistent. *People v. Blair*, 2013 IL 114122, ¶ 30. It is for that reason that when a court finds a statute unconstitutional, the court gives no effect to it and will instead apply the prior law. *Blair*, 2013 IL 114122, ¶ 30 (giving *Hauschild* as an example of this principle). The same separation-of-powers principle requires that a court that finds a violation of the proportionate-penalties clause enforce the prior constitutional penalty provision. *Id.* It is the legislature that created an unconstitutional relationship between the two identical statutes by choosing disproportionate penalties, and this violation is just as amenable to the remedy of applying the prior law as is another type of constitutional violation.

The State also argues that it is significant that the invalidity of a

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

penalty under the proportionate-penalties clause is not that the statute was infirm from the moment of its enactment. (State's Br. at 31) But it should not matter if a penalty became unconstitutional after inception; when the statute to which it is compared is enacted, the prior version without the constitutional infirmity is then enforced. (State's Br. at 32) It also should not matter to the appropriateness of the remedy of enforcing the prior statute that the legislature had the substantive authority to enact the unconstitutional statute or had enacted it in a procedurally proper manner. (State's Br. at 32)

The State also challenges the *Hauschild* remedy on the basis that this Court improperly relied upon *People v. Lewis*, 175 Ill. 2d 412, 423 (1996) (holding that because the penalty for armed violence predicated on robbery committed with a category I weapon violated the proportionate-penalties clause, the State had no authority to charge the offense). (State's Br. at 33 *et seq.*) The State argues that *Lewis* is inapposite because it concerned a pretrial challenge to the charging instrument. (State's Br. at 33 *et seq.*) But the discussion of *Lewis* to which the State refers was not in the portion of the *Hauschild* opinion discussing the appropriate remedy for the constitutional violation. (State's Br. at 33, citing to *"Hauschild*, 226 Ill. 2d at 87-88 (citing and quoting *Lewis*, 175 Ill. 2d at 422)").

The State also argues that the *Hauschild* remedy unnecessarily infringes on the legislature's authority to set penalties. (State's Br. at 38 *et seq.*) This position is unfounded. The power to set penalties is not unlimited; it is restricted by the constitutional provision requiring proportionate

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

penalties. Ill. Const. art. I, § 11. The legislature's violation of that constitutional provision is the reason for striking of a sentence. The application of the constitutional provision does not thereby interfere with the legislature's authority to set *constitutional* penalties.

The State had argued in *Clemons* that the identical-elements test invaded the legislature's power to set penalties. 2012 IL 107821, ¶ 46. This Court rejected this argument, noting that under the test, a court does not make any subjective determination about the penalty's severity. *Clemons*, 2012 IL 107821, ¶ 46. Similarly, the *Hauschild* remedy does not entail a court's improper infringement on the legislature's exercise of power to set constitutional penalties. Rather, the court's enforcement of the previous, constitutional penalty respects the separation of powers: the court makes no assessment of the propriety of the penalty other than its constitutionality. Nor does the court amend the statute by substituting the penalty provided for the identical offense with the lesser punishment. *See Blair*, 2013 IL 114122, ¶ 30 (the separation-of-powers clause does not allow a court to repeal or otherwise render the statute nonexistent). A court applying the *Hauschild* remedy does not legislate.

The State argues that under *Hauschild* only the prior penalty can be imposed "even though that is the only penalty of the three options that the General Assembly determined was *not* appropriate for the offense at the time of commission." (Emphasis in original) (State's Br. at 39) As noted above, the reason why the prior penalty applies is that courts do not have the authority to strike the prior constitutional version. *See Blair*, 2013 IL 114122, ¶ 30.

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

The State's framing of the *Hauschild* remedy as infringing on legislative power is incorrect. (State's Br. at 39) The *Hauschild* remedy is needed due to the legislature's unconstitutional action of carelesssly enacting identical offenses with different penalties in violation of the proportionate-penalties clause. (State's Br. at 39)

The State also argues that the legislative intent was that a person who commits "a particular offense" receive one of the two penalties. (State's Br. at 40) However, in the case of identical offenses, a defendant can only be sentenced on the charged offense.

The State also argues that the *Hauschild* remedy is unworkable where there is no prior statute that can be constitutionally applied so that defendant avoids criminal liability. (State's Br. at 40-42) First, this would be a rare situation as there are not many proportionate-penalties violations based on two offenses having identical offenses much less such a violation where a prior statutory provision for a sentence cannot be constitutionally applied. Second, if the legislature makes a constitutional error, and if the State fails to charge the identical offense, it is not an absurd result that the conviction should be vacated. In Sroga's case, there was no prior section 4-104(a)(4) providing for a Class C penalty. Thus, no penalty can be imposed, which is the situation that results because the legislature made a constitutional error.

To summarize, this Court in *Clemons*, 2012 IL 107821, already rejected a challenge to the *Hauschild* remedy. The *Christy* remedy is not consonant with the rule allowing a conviction for an uncharged offense only if

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

it is a lesser included offense, and Supreme Court Rule 615(b)(3) does not give a reviewing court the authority to change a conviction to an uncharged identical offense. The *Hauschild* remedy does not infringe on the legislature's power to set penalties as the Court thereby exercises its power to strike down an unconstitutional law.

Conclusion

Nothing in section 3-703, including its use of "shall," clearly indicates that the legislature intended to impose absolute liability for the Class C misdemeanor license-plate offense that is punishable by imprisonment. Under the appellate court's analysis–that because another offense in section 3-703 used the term "knowingly," the license-plate offense required no mental state–the result would be absurd. No public policy is implicated that should override the important interest in not criminalizing innocent conduct. The mental state of knowledge should be inferred for section 3-703 and not recklessness because the offense does not involve a risk of physical harm and as otherwise there is no indication of the intent to impose this uncommon mental state. The State has not provided a compelling reason for this Court to overrule the remedy in *Hauschild*, which does not infringe on the legislature's power to set constitutional penalties.

This Court should reverse the judgment of the appellate court and vacate the conviction.

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

CONCLUSION

For the foregoing reasons, Kevin Sroga, petitioner-appellant, respectfully requests that this Court reverse the appellate court and vacate Sroga's conviction.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

ADRIENNE N. RIVER
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 5475 words.

/s/Adrienne N. River
ADRIENNE N. RIVER
Assistant Appellate Defender

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM

No. 126978

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- KEVIN SROGA, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-1992. There on appeal from the Circuit Court of Cook County, Illinois , No. 1212 474 1801. Honorable Diann K. Marsalek, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Kevin Sroga, 7915 W Cressett Drive, Elmwood Park, IL 60707

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 15, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Kelly Kuhtic
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us

SUBMITTED - 16715549 - Kelly Kuhtic - 2/15/2022 2:09 PM