

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

Nos. 121939 & 121961 (consolidated)

IN THE
SUPREME COURT OF ILLINOIS

<p>IN THE INTEREST OF N.G. a/k/a N.F., a Minor</p> <p>PEOPLE OF THE STATE OF ILLINOIS,</p> <p style="padding-left: 100px;">Plaintiff-Appellant,</p> <p style="text-align: center;">v.</p> <p>FLOYD F.,</p> <p style="padding-left: 100px;">Defendant-Appellee.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>On Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-16-0277</p> <p>There on Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 11-JA-152</p> <p>The Honorable PAULA GOMORA, Judge Presiding.</p>
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REPLY BRIEF OF PLAINTIFF-APPELLANT

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E-FILED
10/2/2017 1:38 PM
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ORAL ARGUMENT REQUESTED

ARGUMENT

The People of the State of Illinois (“People”) appeal from an appellate court judgment vacating a felony conviction on review of an order entered in a juvenile court proceeding to terminate parental rights. The circuit court terminated the rights of Defendant-Appellee Floyd F. (“Defendant”) to parent his minor child, N.G., on the ground that his three felony convictions established a rebuttable presumption of depravity. Before the appellate court, Defendant argued for the first time that one of the convictions was void because it was based on a facially unconstitutional statute. The appellate court agreed. Reasoning that a void judgment may be challenged at any time and in any court, it “vacated” the conviction and reversed the circuit court’s order.

In their opening brief before this Court, the People argued that the appellate court’s attempt to vacate the conviction was improper for two independent reasons. First, the conviction could not be vacated in a juvenile court proceeding because, under this Court’s decision in *Malone v. Cosentino*, 99 Ill. 2d 29, 32-33 (1983), a final judgment rendered by a court having jurisdiction of the parties and the subject matter cannot be collaterally attacked except through one of the three forms of action authorized by statute: habeas corpus, post-conviction, and relief from judgment.

It is true that in *People v. Dennis Thompson*, 2015 IL 118151, ¶ 32, this Court characterized a conviction based on a facially unconstitutional statute as

void. But as the People explained, finding Defendant's conviction void is both inconsistent with this Court's definition of voidness as jurisdictional and unnecessary to protect his constitutional rights, and would have unintended and undesirable consequences.

Second, the appellate court could not relieve Defendant of the statutory disability predicated on his conviction (the rebuttable presumption of depravity) before that conviction was properly vacated. Even if Defendant's conviction were void within the meaning of the voidness doctrine, its use in this case should still be upheld because, in *People v. McFadden*, 2016 IL 117424, ¶¶ 21-31, *cert. denied*, 85 U.S.L.W. 3601 (U.S. June 26, 2017) (No. 16-7346), this Court held that a person's felon status remains until he clears the conviction from his records through the judicial process or other affirmative means such as a pardon.

In his responsive brief in this Court, Defendant has failed to directly address these arguments. He has deprecated the first argument by claiming that the People "assume[]" that his conviction is voidable rather than void (AE Br. 5), even though their opening brief devoted approximately 12 pages of argument to the issue. And he says nothing at all about the People's second argument concerning *McFadden*. Instead, he proposes that this Court affirm the appellate court's decision to (1) vindicate the principle of *stare decisis* and (2) prevent him from being denied a fundamental liberty interest. (*Id.* at 6-8). Neither of these propositions has merit.

First, Defendant asks this Court to adhere to its prior decisions, including *McFadden* and *Dennis Thompson*. (*See id.* at 5-6). But he misconstrues *McFadden*. He suggests that this Court's statement that a facially unconstitutional *statute is void ab initio* and cannot be enforced implies that a *conviction* based on such a statute is void. (*See id.* at 4-6) (citing *McFadden*, 2016 IL 117424, ¶ 17). But *McFadden* comes closer to suggesting that such a conviction is voidable. As noted in the partial dissent, *McFadden*, 2016 IL 117424, ¶ 70 (Kilbride, J., concurring and dissenting in part), the majority's decision had the same effect, as a practical matter, as if it had found the conviction at issue to be voidable.

In fact, the *McFadden* majority did not choose either alternative. It did not rely either explicitly or implicitly on the distinction between void and voidable judgments. Instead, it concluded that the defendant's conviction could serve as a valid predicate for a subsequent offense as a matter of statutory interpretation. *See id.* at ¶¶ 22-31. Following the United States Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55, 60-67 (1980), *McFadden* held that where a statute requires the State to prove only the fact of a conviction, *i.e.*, the defendant's felon status — as opposed to proving the predicate offense at trial — the legislature intends that the conviction be treated as valid until the defendant has cleared his status by direct appeal or collateral attack. *See* 2016 IL 117424, ¶¶ 22-31.

Thus, *McFadden* reached the same result that *Malone* did, although it got there by a different route. *McFadden* confirms that the consequences of finding convictions based on facially unconstitutional statutes to be voidable are constitutionally tolerable — it certainly offers no justification for finding them void.

As for *Dennis Thompson*, a departure from *stare decisis* is justified with regard to this case. The purpose of the doctrine is to ensure that “the law will not change erratically, but will develop in a principled, intelligible fashion.” *People v. Castleberry*, 2015 IL 116916, ¶ 19 (quoting *People v. Colon*, 225 Ill. 2d 125, 145-46 (2007)). It is not “an inexorable command.” *Id.* So it does not prevent this Court from acting “where good cause or compelling reasons justify departing from precedent.” *Id.* As the People explained in their opening brief (AT Br. 14-17), the same considerations that led this Court to abolish the void sentencing rule in *Castleberry* should lead it to reject *Dennis Thompson*’s rule that a conviction based on a facially unconstitutional statute is void. Likewise, the same reasoning that led this Court to depart from *stare decisis* in *Castleberry*, see 2015 IL 116916, ¶ 19, should lead it to do so here. Indeed, doing so will bring clarity and consistency to this important area of the law.

Finally, Defendant contends that this Court should reject the People’s arguments in order to protect his fundamental liberty interest in parenting his child. (AE Br. 6-8). But the balance of interests is more complicated than he acknowledges because the child has a potentially countervailing interest that

the rebuttable presumption of depravity is meant to protect. Moreover, a ruling in the People's favor would not necessarily leave him without recourse. As the People suggested in their opening brief (*see* AT Br. 29), if this Court believes that Defendant has not had a sufficient opportunity to seek to vacate his conviction properly, it can remand the case to the circuit court for a determination whether the equities allow for a stay of its unfitness determination to give him additional time to do so.

In sum, Defendant has failed to directly refute the People's arguments, and his arguments for affirming the appellate court's decision based on *stare decisis* and his fundamental liberty interest in parenting his child lack merit. Therefore, this Court should hold that the appellate court erred in vacating Defendant's conviction in a juvenile court proceeding and in relieving him of his felon status before his conviction was properly vacated.

CONCLUSION

For these reasons, and those in their opening brief, the People ask this Court to reverse the appellate court's judgment or, in the alternative, order it to remand the case to the circuit court with instructions to consider whether to stay its determination of unfitness to give Defendant an opportunity to seek a proper vacatur of his conviction.

Respectfully submitted,

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October 2, 2017

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 or words contained in the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 314(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 6 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on October 2, 2017, I electronically filed the foregoing Reply Brief of Plaintiff-Appellant 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, are not registered service contacts on the Odyssey eFileIL system, and thus 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 October 2, 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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