

No.
IN THE
SUPREME COURT OF THE UNITED STATES

DARYL FRYER, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari
To The Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In 2005, Daryl Fryer was found guilty of possessing a handgun under Illinois' aggravated unlawful use of a weapon ("AUUW") statute, which, at the time, banned possession of firearms outside the home. In 2012, the State of Illinois relied on Fryer's prior AUUW conviction to prove him guilty of armed habitual criminal ("AHC"), an offense that criminalizes possession of a firearm after two or more convictions of specific, enumerated felonies, including AUUW. In 2013, the Illinois Supreme Court held that the subsection of the AUUW statute under which Fryer was convicted was facially unconstitutional and void *ab initio*. The Illinois appellate court rejected Fryer's challenge to the state's use of his prior void AUUW conviction to meet an essential element of the AHC offense.

The question presented is whether it violates the Constitution for Illinois to use a void conviction obtained under a facially unconstitutional statute as an element of a subsequent charge and conviction.

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- Appendix B: Illinois Supreme Court’s order denying Fryer’s petition for leave to appeal, entered on September 27, 2017, reported at *People v. Fryer*, __ N.E.3d __, No. 122273, 2017 WL 4386371 (Ill. 2017).

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PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Illinois Appellate Court

The petitioner, Daryl Fryer, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois appellate court (Appendix A) is reported at *People v. Fryer*, __ N.E.3d __, 2017 IL App (1st) 141409-U, and is not published. The order of the Illinois Supreme Court denying leave to appeal (Appendix B) is reported at *People v. Fryer*, __ N.E.3d __, No. 122273, 2017 WL 4386371 (Ill. 2017).

JURISDICTION

On April 14, 2017, the Illinois appellate court issued its decision. The Illinois Supreme Court denied a timely filed petition for leave to appeal on September 27, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution, Due Process Clause

No person shall be ... deprived of life, liberty, or property, without due process of law[.]

Fourteenth Amendment to the United States Constitution, Due Process Clause

No state shall ... deprive any person of life, liberty, or property, without due process of law[.]

720 ILCS 5/24-1.7 Armed habitual criminal.

(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:

(1) a forcible felony as defined in Section 2-8 of this Code;

(2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05; or

(3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher.

(b) Sentence. Being an armed habitual criminal is a Class X felony.

STATEMENT OF THE CASE

In 2005, Daryl Fryer pleaded guilty to possessing a firearm under Illinois' aggravated unlawful use of a weapon ("AUUW") statute (720 ILCS 5/24-1.6(a)(1)/(3)(A)), which, at the time, banned possession of firearms outside the home. *People v. Fryer*, No. 05 CR 1871501; (R. A41-42) In a separate case in 2009, Fryer was convicted of unlawful use of a weapon by a felon ("UUWF") under Illinois' felon-in-possession statute (720 ILCS 5/24-1.1(a)). *People v. Fryer*, No. 09 CR 1551601; (R. A41-42)

In the early morning hours of November 2, 2011, Chicago police were dispatched to the 8500 block of South Damen Avenue in Chicago in response to a call regarding a domestic disturbance. The officers spoke with Daryl Fryer's girlfriend at the scene, who told them that she had been in a "verbal altercation" with Fryer, after which Fryer left with her vehicle, a black Ford Explorer. As she was speaking to the police, Fryer's girlfriend suddenly yelled out and pointed out a black Ford Explorer traveling on Damen Avenue, and told the officers that it was hers. The officers stopped the Ford Explorer, which Fryer was driving. Fryer was unable to produce a driver's license and an officer observed an open container of beer in the center console. The police asked Fryer to exit the vehicle and after he complied, one of the officers observed the handle of a handgun wedged between the driver's seat and the center console. The officer recovered the handgun and arrested Fryer.

As a result of this traffic stop and recovery of a firearm, the State of Illinois charged Fryer with, *inter alia*, armed habitual criminal ("AHC") under 720 ILCS 5/24-1.7(a). (C. 32-43) The state relied on Fryer's 2005 AUUW conviction and his 2009 UUWF conviction as the two predicate convictions to support the AHC charge. *People*

v. Fryer, 2017 IL App (1st) 141409-U, ¶9 (April 14, 2017) (unpublished order); (see Appendix A). After an unsuccessful motion to quash arrest, Fryer entered a guilty plea to the AHC charge and was sentenced to eight years in prison. (R. A36-44)

Subsequently, the Illinois Supreme Court held in 2013 that the subsection of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A)) under which Fryer had been convicted in 2005, was facially unconstitutional and void *ab initio*. *People v. Aguilar*, 2 N.E.3d 321, 327-28 (Ill. 2013). In a clarification of *Aguilar*, the Illinois Supreme Court declared that “[a]n unconstitutional statute does not ‘become constitutional’ simply because it is applied to a particular category of persons who could have been regulated had the legislature seen fit to do so.” *People v. Burns*, 79 N.E.3d 159, 165-66 (Ill. 2015) (declaring the offense of aggravated unlawful use of a weapon, as set forth in section 24-1.6(a)(1), (a)(3)(A), facially unconstitutional and “not enforceable against anyone”).

On December 9, 2013, Fryer, acting *pro se*, filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401 of the Illinois Code of Civil Procedure, in which he argued that *Aguilar* rendered his prior gun convictions for AUUW and UUWF unconstitutional and that the elements that established his AHC conviction no longer existed. (R. C18-19) Appointed counsel later amended the petition to contest the validity of the AUUW predicate offense. (R. C34-68) The petition sought to expunge the AHC conviction. At a hearing on April 25, 2014, the circuit court granted the petition, vacated Fryer’s guilty plea, and reinstated nine counts previously dismissed as a result of the guilty plea. (E. I4-I6) The state filed a notice of appeal, and the

circuit court granted the state's motion to stay the circuit court proceedings pending resolution of the appeal. (R. J4)

Originally, the Illinois appellate court agreed and affirmed the circuit court's order vacating Fryer's AHC guilty plea and reinstating the original charges. *People v. Fryer*, 2015 IL App (1st) 141409-U, ¶¶ 2, 39.

The state then filed a petition for leave to appeal to the Illinois Supreme Court. The court denied the state's petition but issued a supervisory order instructing the Illinois appellate court to reconsider its decision in light of *People v. McFadden*, 61 N.E.3d 74, 824-84 (Ill. 2016). In *McFadden*, the Illinois Supreme Court held that the defendant's prior unconstitutional AUUW conviction could serve as a predicate felony under Illinois's felon-in-possession statute, known as unlawful use of a weapon by a felon ("UUWF"). *Id.* at 82-84. *McFadden* based its ruling on this Court's decision in *Lewis v. United States*, 445 U.S. 55 (1980), which held that a defendant's prior uncounseled conviction in violation of the defendant's Sixth Amendment right to counsel could serve as a predicate felony for a conviction under a similar federal felon-in-possession statute. *McFadden*, 61 N.E.3d at 80-82.

The parties submitted supplemental briefs in the appellate court on the applicability of *McFadden* to Fryer's case. Fryer argued that *McFadden* did not control, as *McFadden* concerned Illinois's UUWF statute, which requires proof of a defendant's felon status at the time of the offense, not conviction for a specific offense. Fryer was convicted of AHC, a more serious offense that punishes individuals for possessing a gun after having been convicted of two or more specific, enumerated

felonies. Fryer alternatively argued that *McFadden* was wrongly decided in that it ignored this Court's binding authority.

The Illinois appellate court, relying upon *McFadden*, held that even though Fryer's prior AUUW conviction "stemm[ed] from the statutory provision held unconstitutional in *Aguilar*," it could still serve as a predicate for his AHC conviction because it had not been vacated at the time of the AHC offense. *People v. Fryer*, ___ N.E.3d ___, 2017 IL App (1st) 141409-U at ¶44. The appellate court recognized that the UUWF statute at issue in *McFadden* requires proof of the defendant's felony status, whereas the AHC statute at issue here requires proof of convictions for specifically enumerated crimes. *Id.* at ¶ 36-39. The appellate court characterized this as a "distinction without a difference." *Id.* at ¶ 37. The appellate court also held that this Court's decisions in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), and *Ex parte Siebold*, 100 U.S. 371 (1879), were not applicable to Fryer's case because he "was not seeking to vacate his prior conviction ***, but instead was challenging his status as a convicted felon at the time of his trial." *Fryer*, N.E.3d ___, 2017 IL App (1st) 141409-U at ¶43-44, quoting *People v. Perkins*, 63 N.E.3d 207, 210 (Ill. App. Ct. 2016). Relying on *Lewis*, the appellate court held that because Fryer's prior AUUW conviction had not been vacated at the time of his arrest for AHC, it could properly serve as a predicate for his AHC conviction. *Fryer*, ___ N.E.3d ___, 2017 IL App (1st) 141409-U at ¶44. The court reversed the circuit court's judgment granting Fryer's petition for relief from judgment. *Id.* at ¶45.

Fryer timely filed a petition for leave to appeal in the Illinois Supreme Court, arguing that his prior AUUW convictions obtained pursuant to a statute that had been

declared facially unconstitutional could not properly serve as a predicate felony for AHC. The Illinois Supreme Court denied leave to appeal. *People v. Fryer*, __ N.E.3d __, No. 122423, 2017 WL 4386847 (Ill. September 27, 2017).

REASON FOR GRANTING CERTIORARI

This Court should grant review to determine whether a state may use a conviction based on a facially unconstitutional statute as a predicate offense in a subsequent prosecution.

Prior to 2013, Illinois had some of the most restrictive gun control laws in the nation, including its aggravated unlawful use of a weapon (“AUUW”) statute, which criminalized possession of a firearm outside the home. *See Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (“Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home[.]”) (emphasis in original). In *People v. Aguilar*, the Illinois Supreme Court held that the subsection of the AUUW statute banning possession of a firearm outside the home was facially unconstitutional under the Second Amendment and, thus, void *ab initio*. *People v. Aguilar*, 2 N.E.3d 321, 327-28 (Ill. 2013). Despite the clear implications of that ruling – both under the due process clause and the Second Amendment – Illinois continues to use convictions invalidated by *Aguilar* as predicate felonies to convict people of other offenses.

Daryl Fryer is one such person. Fryer was convicted of armed habitual criminal (“AHC”), an offense that criminalizes firearm possession for individuals previously convicted of two or more specific, enumerated felonies, including AUUW. Fryer challenged the state’s use of his prior AUUW conviction, based on the subsection of the statute declared facially unconstitutional in *Aguilar*, to prove an essential element of AHC. The Illinois appellate court denied Fryer relief and affirmed his conviction in accordance with the Illinois Supreme Court’s decision in *People v. McFadden*, 61 N.E.3d 74 (Ill. 2016), *petition for cert. denied*, 137 S.Ct. 2291 (June 26, 2017) (No. 16-7346). In *McFadden*, the court held that a prior void conviction for AUUW may be

used to prove a defendant's felon status and convict him of unlawful use of a weapon by a felon ("UUWF"), Illinois's felon-in-possession statute. *McFadden* relies largely on this Court's decision in *Lewis v. United States*, 445 U.S. 55 (1980). That reliance, however, was misplaced; *Lewis* did not address the use of a prior conviction that was facially unconstitutional and void *ab initio*, as was the case for *McFadden* and *Fryer*, and many other Illinois defendants.

Underlying the courts' holdings in *Fryer* and *McFadden* was the fact that neither defendant had vacated his prior void AUUW conviction before possessing a handgun. *Fryer*, N.E.3d ___, 2017 IL App (1st) 141409-U, ¶43-44 (April 14, 2017); *McFadden*, 61 N.E.3d at 82-83. Unlike the defendant in *Lewis*, who never availed himself of the multiple options to remove his civil firearm disability before possessing a firearm, including vacating his procedurally-flawed conviction, *see Lewis*, 445 U.S. at 56-57, neither *Fryer* nor *McFadden* could have vacated their AUUW convictions before 2013, when the Illinois Supreme Court in *Aguilar* finally declared the relevant subsection of the AUUW statute facially unconstitutional. *See People v. Dawson*, 934 N.E.2d 598, 607 (Ill. App. Ct. 2010) (rejecting identical challenge to constitutionality of AUUW; ultimately abrogated by *Aguilar*); *People v. Montyce H.*, 959 N.E.2d 221, 227 (Ill. App. Ct. 2011) (same). Thus, the Illinois courts' holdings contemplate a legal and practical impossibility.

Illinois' use of convictions derived from facially unconstitutional statutes to prove an element of a subsequent offense violates this Court's well-established precedent. An offense created by a facially unconstitutional statute is not a crime and can be given no legal effect, *see Ex parte Siebold*, 100 U.S. 371, 376-77 (1879);

Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718, 724 (2016). Further, constitutionally infirm convictions “cannot be used in a subsequent proceeding ‘either to support guilt or enhance punishment for another offense.’” *United States v. Bryant*, 579 U.S. ___, 136 S. Ct. 1954, 1962 (2016) (quoting *Burgett v. Texas*, 389 U.S. 109, 115 (1967)). This Court should grant review to prevent Illinois’ continued use of prior void convictions to meet essential elements of subsequent offenses in violation of this Court’s precedent and the Constitution.

a. A state may not use a prior void conviction under a facially unconstitutional statute at a subsequent prosecution.

Possession of a handgun outside the home is not a crime. Illinois nevertheless persists in treating it as such in prosecutions for subsequent offenses because of the Illinois Supreme Court’s ruling in *McFadden*. In *McFadden*, the state used the defendant’s prior AUUW conviction under a facially unconstitutional statute as a predicate felony to prove him guilty of UUWF, Illinois’ felon-in-possession offense. *McFadden*, 61 N.E.3d at 80-84. The appellate court here relied on *McFadden* to sanction the state’s use of Fryer’s prior AUUW conviction under the same facially unconstitutional statute as a predicate felony to prove him guilty of AHC, a distinct offense requiring proof of two or more specific types of crimes. *Fryer*, N.E.3d ___, 2017 IL App (1st) 141409-U at ¶44. In so ruling, the Illinois courts have failed to grasp that AUUW is not and never has been a crime. Illinois may not, consonant with due process, use convictions under the facially unconstitutional portions of the AUUW statute to prove a subsequent offense.

Indeed, this Court has repeatedly and consistently held that “[a]n offence created by [an unconstitutional law] is *not a crime*.” *Ex parte Siebold*, 100 U.S. at 376

(emphasis added); *see also Montgomery*, 577 U.S. ___, 136 S. Ct. at 724. “If a law is invalid as applied to the criminal defendant’s conduct, the defendant is entitled to go free.” *Bond v. United States*, 564 U.S. 211, 227 (2011) (Ginsburg, J., concurring). “In short, a law ‘beyond the power of Congress,’ for any reason, is ‘no law at all.’” *Id.* at 227-28 (quoting *Nigro v. United States*, 276 U.S. 332, 341 (1928)).

Due process, moreover, is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty, or property as a result.

North Carolina v. Pearce, 395 U.S. 711, 739 (1969) (Black, J., concurring and dissenting in part).

The Illinois Supreme Court disregarded this Court’s jurisprudence when it decided *McFadden*. In endorsing the state’s use of the prior void AUUW conviction as a predicate felony, *McFadden* found it irrelevant that such a prior conviction “may subsequently turn out to be invalid for any reason and subject to vacatur under the void *ab initio* doctrine[.]” *McFadden*, 61 N.E.3d at 81. The court concluded that the so-called “potential invalidity” of the defendant’s prior conviction was inconsequential based on this Court’s decision in *Lewis v. United States*, 445 U.S. 55 (1980). *McFadden*, 61 N.E.3d at 80-83. However, as Illinois Supreme Court Justice Kilbride correctly noted in his dissent, *Lewis* did not address a prior conviction under a facially unconstitutional statute. *Id.* at 87 (Kilbride, J., dissenting, joined by Burke, J.).

In *Lewis*, the defendant’s prior conviction for breaking and entering was used as a predicate felony to prove him guilty of receiving and possessing a specified firearm

in violation of 18 U.S.C. App. § 1202(a)(1) (1968). *Lewis*, 445 U.S. 56-59. That prior conviction for breaking and entering was not declared void, but was instead “extant” though “flawed” because of a procedural constitutional violation, specifically, failure to provide the defendant counsel. *Id.* at 56. While there was error in the proceedings leading to the defendant’s prior and uncounseled conviction, the conduct for which he stood accused was a properly criminalized act. *See McFadden*, 61 N.E.3d at 87 (Kilbride, J., dissenting, joined by Burke, J.) (observing that Lewis’s conviction was never void and always remained valid).

The difference between *Lewis* and *McFadden* is crucial. In *Lewis*, the defendant committed a crime; his conviction was unconstitutional because it was obtained in a constitutionally-flawed proceeding. In *McFadden* and *Fryer*, the defendants engaged in conduct that was later determined to be lawful under the Second Amendment. Indeed, the conduct that was the basis for both McFadden’s and Fryer’s prior convictions – possession of a handgun – is constitutionally-protected conduct that the state had no power to criminalize. *Aguilar*, 2 N.E.3d at 327-28; *Moore*, 702 F.3d at 940, 942. Thus, contrary to the defendant in *Lewis*, whose conviction was “extant” though “flawed,” McFadden’s and Fryer’s convictions are void and can be given no legal effect. *See Montgomery*, 577 U.S. ___, 136 S. Ct. at 724; *Ex parte Siebold*, 100 U.S. at 377.

This Court’s recent decision in *Montgomery* – ignored by *McFadden* and dismissed by the appellate court here – reaffirms the fundamental principle that facially unconstitutional laws have no legal effect. In *Montgomery*, this Court held the prohibition of mandatory life sentences without parole for juvenile offenders set forth in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012) was a new substantive rule,

which must be given retroactive effect. *Montgomery*, 577 U.S. ___, 136 S. Ct. at 736-77. In reaching this decision, this Court explained that unlike procedural rules, substantive rules “set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State’s power to impose.” *Id.* at 729. “It follows,” the Court continued, “that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.” *Id.* at 729-30. *Montgomery* examined and reaffirmed this Court’s ruling in *Ex parte Siebold*: “A conviction under an unconstitutional law ‘is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.’” *Id.* at 730-31 (quoting *Ex parte Siebold*, 100 U.S. at 376-77).

Illinois’ use of prior convictions obtained under facially unconstitutional statutes permits the state to punish anew for conduct once criminalized but now recognized as constitutionally protected. This practice amounts to “state-sponsored condemnation” of constitutionally-protected behavior and a fundamental right. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (second amendment guarantee of the individual right to bear arms is a fundamental right); *See Lawrence v. Texas*, 539 U.S. 558, 575-76 (2003) (striking down state’s anti-sodomy statute and addressing stigma and “collateral consequences” associated with statute, including requirement that one identify conviction under statute on job application forms); *see also Loving v. Virginia*, 388 U.S. 1, 7-12 (1967) (striking down state prohibition and punishment of marriages based on racial classifications); *MacDonald v. Moose*, 710 F.3d 154, 155-56, 166-67 (4th Cir. 2013) (holding state’s anti-sodomy law was unconstitutional and state could not convict an individual under criminal solicitation statute where predicate felony was based on

unconstitutional anti-sodomy law). It is unthinkable that a pre-*Loving* conviction based on an interracial marriage could later be used to establish an element of an offense. The situation is no different here.

The District Court for the Northern District of Georgia addressed a similar situation, where a defendant was convicted of a subsequent offense based on a prior conviction under a facially unconstitutional statute. In *Green v. Georgia*, 51 F. Supp. 3d 1304, 1306 (N.D. Ga. 2014), *appeal docketed*, No. 14-14635-CC (11th Cir. Oct. 14, 2014), the court held that Green could not be convicted for failing to register as a sex offender based on a previous conviction under an unconstitutional anti-sodomy statute. *Green* characterized the infirmity of the prior sodomy conviction as “a unique constitutional defect which warrants special treatment among alleged constitutional violations” and rejected the state’s argument that it had an interest in preserving the integrity of prior convictions:

Just as it is unthinkable that a conviction of miscegenation entered before *Loving* . . . was decided could be used after that decision to establish an element of a crime, so is it unthinkable that a conviction based on constitutionally protected private consensual sexual conduct entered before *Powell* or *Lawrence* was decided could be so used.

Id. at 1311, 1316.

The same conclusion must be reached in this case. Like the use of a state statute to criminalize sodomy or interracial marriage, the use of a state statute that exceeds the state’s power to criminalize conduct protected by the Second Amendment is “a unique constitutional defect which warrants special treatment among alleged constitutional violations.” *Id.* at 1311. It is unthinkable that a conviction based on a facially unconstitutional statute, which previously criminalized conduct protected by

the Second Amendment, can be used to establish an element of a crime. But, that is exactly what Illinois is doing.

b. A state may not use a constitutionally infirm conviction to prove an essential element of a subsequent offense.

Regardless of whether the Illinois Supreme Court correctly held that *Lewis v. United States* permits use of a void conviction as a predicate offense to prove felon status in a subsequent prosecution, that reasoning does not apply to AHC, the offense of which Fryer was convicted. Contrary to the status-based felon-in-possession offenses at issue in *McFadden* and *Lewis*, Illinois' AHC statute requires proof of *two or more specific, enumerated felonies* to obtain a conviction. The state's use of Fryer's prior void AUUW conviction as one of those required predicate felonies contravenes this Court's precedent in *Burgett v. Texas*, 389 U.S. 109 (1967), and *United States v. Bryant*, 579 U.S. ___, 136 S. Ct. 1954 (2016), and violates the Constitution.

Illinois' AHC statute under which Fryer was convicted differs from the UUWF statute at issue in *McFadden*, in that the AHC statute does not require mere proof of felon "status" in order to support a conviction. *McFadden*, 61 N.E.3d at 78, 82 (noting that felon-in-possession statute, which is a status offense that imposes a firearm disability, requires proof of defendant's felon *status*, not a specific felony conviction); *see also Lewis*, 445 U.S. at 66-67 (finding that "any felony conviction, even an allegedly invalid one," was sufficient to impose "a civil firearms disability, enforceable by a criminal sanction"). Rather, AHC "demonstrates an unmistakable purpose to criminalize recidivist offenders" for firearm possession after they have been convicted of two or more specific types of felonies: (1) a forcible felony; (2) certain firearms offenses, including AUUW; or (3) certain violations of the Illinois Controlled

Substances Act or the Cannabis Control Act. *People v. Adams*, 935 N.E.2d 693, 699 (Ill. App. Ct. 2010); 720 Ill. Comp. Stat. 5/24-1.7(a)(1)-(3) (West 2010). *See also* 720 Ill. Comp. Stat. 5/24-1.7(b) (classifying AHC as a Class X felony, highest class of felony other than first-degree murder); 730 Ill. Comp. Stat. 5/5-4.5-25(a) (West 2010) (noting Class X sentence is six to thirty years in prison).

The Illinois appellate court in *Fryer* dismissed the differences between the statutes as a “distinction without a difference.” *Fryer*, N.E.3d ___, 2017 IL App (1st) 141409-U at ¶37-38, *quoting People v. Perkins*, 63 N.E.3d 209-10 (Ill. App. Ct. 2016). Contrary to the appellate court’s suggestion, however, Illinois’ use of a constitutionally infirm conviction to prove an essential element of AHC, a recidivist statute requiring proof of specific prior conduct, violates another line of this Court’s precedent. Indeed, in *Burgett*, this Court held that the defendant’s prior conviction in violation of his Sixth Amendment right to counsel could not be used “either to support guilt or enhance punishment for another offense[.]” *Burgett*, 389 U.S. at 115; *see also Bryant*, 579 U.S. ___, 136 S. Ct. at 1962 (same).

In *Bryant*, this Court recently recognized that *Burgett* prohibited the state from using a constitutionally infirm conviction “in a subsequent proceeding to prove the prior-felony element of a recidivist statute” and called *Burgett*’s holding “undisputed.” *Bryant*, 579 U.S. ___, 136 S. Ct. at 1962. Agreeing with *Burgett*, this Court stated in *Bryant* that to permit use of “a constitutionally infirm conviction . . . would cause ‘the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right.’” *Id.* (quoting *Burgett*, 389 U.S. at 115). This Court defined valid convictions as “those that, when rendered, did not violate the Constitution.” *Id.* at

1965 (citing *Nichols v. United States*, 511 U.S. 738, 748-79 (1994)); *see also United States v. Tucker*, 404 U.S. 443, 448 (1972) (holding it impermissible to use at sentencing an invalid, uncounseled prior conviction in aggravation); *Loper v. Beto*, 405 U.S. 473, 483 (1972) (plurality opinion) (disallowing the use of an uncounseled prior conviction to impeach the general credibility of the defendant because it “lacked reliability”). Void, unconstitutional convictions, like those that violate *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963), must also be subject to collateral attack. *Custis v. United States*, 511 U.S. 485, 496 (1994). In fact, even in *Lewis*, this Court cited *Burgett*, *Tucker*, and *Loper* to recognize that “an uncounseled felony conviction cannot be used for certain purposes.” *Lewis*, 445 U.S. at 66.

Those “certain purposes” are precisely how Fryer’s prior void AUUW conviction was used here: to support his guilt under the AHC statute. Under this Court’s precedent, Illinois’ use of that prior constitutionally infirm conviction to prove Fryer guilty of AHC is unconstitutional.

C. This case presents an excellent vehicle for this Court to decide the constitutionality of using prior void convictions as substantive evidence for a subsequent offense.

This case presents a pure question of constitutional law. Indeed, the facts here are clear, undisputed, and straightforward. Fryer was convicted in 2005 of AUUW. The very section under which he was convicted was subsequently declared facially unconstitutional and void *ab initio* in 2013. The state used that void conviction as a predicate felony to satisfy an essential element of and obtain Fryer’s conviction for AHC in 2012. Thus, this Court can decide the constitutionality of Illinois’ use of such

void, unconstitutional convictions without having to resolve any factual questions or procedural impediments.

CONCLUSION

For the foregoing reasons, petitioner, Daryl Fryer, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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