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## CH. 55

### WEAPONS

#### §55-1

#### Unlawful Use of a Weapon (UW, Aggravated UW, UW/Felon)

#### §55-1(a)

#### Generally

#### United States Supreme Court

**Rehaif v. United States**, \_\_\_\_\_ U.S. \_\_\_\_\_ (No. 17-9560, 6/21/19) Defendant came from the United Arab Emirates to the United States on a student visa but was later dismissed from school and was informed at that time that his “immigration status” would be terminated. Subsequently, he engaged in shooting firearms at a gun range. That conduct led to defendant’s prosecution and conviction under federal statutes making it illegal for felons and illegal aliens to possess firearms [18 USC §922(g)] and providing for imprisonment up to 10 years for anyone who “knowingly violates” [section 922\(g\)](#). 18 USC §924(a)(2).

The Supreme Court concluded that the “knowingly” requirement applies both to defendant’s conduct and status; that is, the government must show that defendant knew that he possessed a firearm and that he knew he was a person barred from possessing a firearm. There is a longstanding presumption that Congress intends a culpable mental state regarding each statutory element of an offense, especially where the statute includes a general mental state provision as it does here. Because [section 924\(a\)\(2\)](#) speaks in terms of “knowingly violat[ing]” [section 922\(g\)](#), and because a violation of 922(g) requires both a conduct and a status element, knowingly applies to both elements.

The Court rejected the State’s argument that ignorance of the law is no excuse, a maxim which generally applies where a defendant claims he did not know his conduct was illegal but not where an individual has a mistaken belief about something which negates an element of the offense.

Because the jury was erroneously instructed that the government was not required to prove that defendant knew he was illegally in the United States, the Court reversed and remanded the matter for further proceedings.

#### Illinois Supreme Court

**People v. Calvillo**, 2022 IL App (1st) 200886 Defendant filed a petition for relief from judgment asking the court to vacate his 2002 conviction for aggravated unlawful use of a weapon and his 2006 conviction for unlawful use of a weapon by a felon pursuant to **People v. Aguilar**, 2013 IL 112116. The circuit court vacated the 2002 AUUW conviction but “transferred” his sentence, *nunc pro tunc* to the date of the original sentencing, to a separate AUUW conviction which had merged at the time of the original sentencing. The circuit court then denied the request to vacate the 2006 UUF conviction, concluding that it was properly predicated on the previously merged AUUW conviction.

The appellate court held that the circuit court exceeded the scope of a *nunc pro tunc* order when, in 2019, it transferred defendant’s 2002 AUUW sentence from the originally-sentenced count to the originally-merged count and then used that newly sentenced count as the predicate to sustain the 2006 UUF conviction. *Nunc pro tunc* orders are limited to incorporating into the record something which was previously done by the court but inadvertently omitted by clerical error. Such orders may not be used to rule on a matter of substance. Whether an order satisfies the legal criteria for a *nunc pro tunc* order is reviewed *de novo*.

Here, the client's merged conviction was not inadvertently omitted from the sentencing order for the 2002 conviction. There was no clerical error to be corrected, and the court's order "transferring" the sentence from one count to another was an improper *nunc pro tunc* order. The appellate court therefore vacated the transferred sentence.

Where a constitutionally infirm AUUW conviction is vacated, leaving in its stead an unsentenced, constitutionally valid finding of guilt on a different charge, the proper course is to remand for sentencing on the constitutionally valid count. The new sentence may not exceed the sentence previously imposed on the now-invalid AUUW conviction. Thus, the matter was remanded for resentencing. This preserves the defendant's right to appeal the previously-unsentenced conviction once the new sentence is imposed.

The court also vacated defendant's 2006 conviction of UUWF. Given that the originally-sentenced 2002 AUUW conviction is void *ab initio*, the 2006 UUWF conviction lacked a valid predicate felony. Resentencing on the previously-merged AUUW count will not serve to provide a valid predicate felony conviction because the date of resentencing will control; it will not be retroactive to the original sentencing date and thus will not pre-date the 2006 UUWF.

**People v. Holmes, 2017 IL 120407** The void *ab initio* doctrine is a State judicial principle holding that a facially unconstitutional statute is void from the beginning. An unconstitutional law confers no right, imposes no duty, and affords no protection. It is as if the law had never been passed. A defendant cannot be prosecuted under a statute that is void *ab initio*.

Where a statute is held unconstitutional because it violates a provision of the United States constitution and not merely as a matter of state constitutional law, the void *ab initio* doctrine is subject to the limited lockstep doctrine. The latter doctrine provides that where a provision of the State constitution has an equivalent provision in the federal constitution, the State constitutional provision will be interpreted in accordance with the United States Supreme Court's interpretation of the federal provision, unless there is reason to believe that the drafters of the Illinois constitution intended a different result.

Here, defendant was arrested for possessing a revolver on a Chicago street. He was charged with two counts of aggravated unlawful use of a weapon based on carrying the weapon on the street and two counts of AUUW for possessing the weapon without a valid FOID card. After the arrest, **People v. Aguilar** held that the sections of the AUUW statute prohibiting the carrying of a weapon were facially unconstitutional as a violation of the Second Amendment. Defendant was subsequently convicted of the counts alleging carrying the weapon without a valid FOID card.

Because the arresting officer learned that defendant did not have a FOID card only after he had made the arrest for carrying the weapon, defendant argued that the probable cause for the arrest was retroactively invalidated under the void *ab initio* doctrine. Defendant argued that it would be improper to prosecute him for not having a FOID card when probable cause for the arrest existed only under a different, unconstitutional statute.

The Supreme Court rejected this argument, noting that federal case law clearly holds that probable cause is not retroactively invalidated because the statute on which an arrest was based is subsequently held unconstitutional. Because strict application of the Illinois void *ab initio* doctrine would conflict with the limited lockstep doctrine, the defense argument was rejected. "[T]he void *ab initio* doctrine does not retroactively invalidate probable cause based on a statute later held unconstitutional on federal constitutional grounds or on State constitutional grounds subject to the limited lockstep doctrine."

**People v. Rutledge**, 104 Ill.2d 394, 472 N.E.2d 438 (1984) Defendant was convicted of possession of a deadly weapon with intent to use it unlawfully. The charge arose from defendant's possession of a gun during an altercation in a store parking lot. Defendant contended that a gun or firearm is not included in ¶24-1(a)(2), which provides that a person commits unlawful use of a weapon when he knowingly "[c]arries or possesses with intent to use the same unlawfully against another, a dagger, dirk, billy, dangerous knife, razor, stiletto, broken bottle or other piece of glass, stun gun or taser or any other dangerous or deadly weapon or instrument of like character." After discussing the history of this provision, its various reenactments, and court decisions interpreting prior versions, the Court concluded that the Legislature did not intend that firearms be included in the term "or any other dangerous or deadly weapon or instrument of like character."

**People v. Greene**, 96 Ill.2d 334, 450 N.E.2d 329 (1983) The Court held that due process was not violated because one section of the Unlawful Use of a Weapons statute made possession of a bomb a Class 3 felony while another section made possession of a bomb merely a misdemeanor. One paragraph was intended to prohibit bombs containing explosives, while the other was intended to prohibit bombs containing "noxious liquid gas." Because the provisions are aimed at separate offenses, the disparity in punishment is reasonable and does not violate due process. The Court also held that the term "bomb" is not unconstitutionally vague.

**People v. Fink**, 91 Ill.2d 237, 437 N.E.2d 623 (1982) The defendant was charged with unlawful use of weapons for possessing a nightstick. The Court held that a nightstick is not a "bludgeon" but is a "billy" within the classification of weapons in the Unlawful Use of Weapons statute.

### **Illinois Appellate Court**

**People v. O'Neal**, 2021 IL App (4th) 170682 The trial court did not err in denying defendant a self-defense instruction. While defendant testified that he shot the complainant in self-defense, the State did not charge him with any crimes predicated on the shooting itself. Rather, the State charged only weapons offenses – unlawful use of a weapon by a felon, and armed habitual criminal.

Whether self-defense is an available defense is a fact-based inquiry driven by consideration of the charges and the specific factual circumstances surrounding the offenses. Here, a self-defense instruction would have been inappropriate and confusing. Defendant's weapon possession was not intertwined with his claimed act of self-defense; he did not grab a gun in reaction to aggression on the part of the complainant. Rather, defendant already possessed the gun prior to engaging in the altercation.

**People v. Cross**, 2019 IL App (1st) 162108 At sentencing for convictions of sexual assault and aggravated kidnapping, the State cited in aggravation defendant's prior convictions of aggravated unlawful use of a weapon and unlawful use of a weapon by a felon. The Appellate Court vacated those prior convictions under **In re N.G.**, 2018 IL 121939, and remanded the matter for resentencing. While the court had conducted a thorough sentencing hearing, the court found it "more prudent" to remand the matter for a new sentencing hearing "where the trial court may impose the same sentence or a different one."

**People v. Daniels**, 2016 IL App (1st) 142130 Defendant pled guilty to aggravated unlawful use of a weapon. 720 ILCS 5/24-1.6(a)(1)(3)(B). After serving his sentence, defendant filed a 2-1401 petition challenging his conviction because it was based on a statute held facially unconstitutional in **Aguilar**, 2013 IL 112116. The trial court denied the petition.

On appeal, the State conceded that defendant's conviction should be vacated. The Appellate Court agreed. Although **Aguilar** only addressed subsection (3)(A), the underlying rationale extended to defendant's conviction under subsection (3)(B). Subsection (3)(A) prohibits the possession of an uncased firearm that is "loaded and immediately accessible," while subsection (3)(B) prohibits the possession of an uncased firearm that is "unloaded and the ammunition for the weapon is immediately accessible." Unless **Aguilar** applied to subsection (3)(B), the constitution would illogically prohibit the possession of an unloaded gun but not the possession of a loaded gun. **Aguilar** thus applies to subsection (3)(B).

**People v. Dunmore**, 2013 IL App (1st) 121170 Defendant entered a negotiated guilty plea to an unlawful use of a weapon charge, and was sentenced to 18 months' probation and ordered to pay fines and fees. After his probation was revoked for committing another offense, he was sentenced to two years in prison. Defendant had completed his sentence by the time of this appeal, and challenged only the revocation of probation and the assessment of fees and fines.

While the appeal was pending, the Supreme Court issued **People v. Aguilar**, 2013 IL 112116, which held that the statute to which defendant pleaded guilty (5/24-1.6(a)(1), (a)(3)(A)) was unconstitutional on its face. The court rejected defendant's request that it leave the conviction intact and limit its consideration to the revocation of probation and payment of fees and fines.

Once **Aguilar** held that the section of the Criminal Code on which the plea rested was facially unconstitutional, the statute was rendered void *ab initio*. In addition, judicial decisions declaring a statute unconstitutional apply to cases pending on direct review. Because defendant's conviction was void and courts have an independent duty to vacate void orders, **Aguilar** required that the void conviction be vacated once it came before the court.

**People v. Richardson**, 2013 IL App (2d) 120119 As a matter of first impression, the court found that at a jury trial for unlawful possession of a weapon by a felon while wearing body armor, the trial judge properly admitted a police officer's lay opinion that a vest worn by the defendant qualified as "body armor." The officer testified that the vest had the same fit and style as the armored vest the officer wore every day. In addition, the officer removed the vest's inserts and testified that they were intended to cover vital organs and protect such areas from bullets. Thus, the officer did not merely give an opinion that the vest was body armor, but demonstrated to the jury the basis for that conclusion.

The court rejected defendant's argument that because the vest was not submitted for scientific testing, it was impossible for the jury to conclude that it was not "fake body armor." That argument was based on pure speculation, as there was no evidence to support a conclusion that the body armor was fake. Furthermore, the officer removed plates from the vest and concluded that they were capable of stopping bullets. Finally, because the vest was admitted into evidence, the jury could draw its own conclusion about its nature.

**People v. Kohl**, 364 Ill.App.3d 495, 847 N.E.2d 150 (2d Dist. 2006) Defendant, who was on parole, was charged with two counts of unlawful possession of a weapon by a felon based upon the State's claim that a knife with finger grips constituted "metal knuckles." Under Illinois

law, defendant could be convicted of unlawful possession of a weapon by a felon based upon mere possession of "metal knuckles," but could be convicted of the same offense based on possession of a knife only if he intended to use the knife unlawfully.

The primary objective when construing the meaning of a statute is to give effect to the legislature's intent. In doing so, a court must presume that the legislature did not intend unjust, inconvenient, or absurd results. In addition, any ambiguity in a penal statute must be construed in favor of the accused.

Because the term "metal knuckles" is not defined by the statute the court examined several dictionary definitions before concluding that the term should be defined as a device which fits across the fingers and which is intended to both protect the fingers and increase the power and impact of a punch. The court concluded that a knife does not constitute "metal knuckles" merely because it has finger grips which would make contact with a victim's body only if the knife blade was buried in his or her body. "Metal knuckles are in a category of weapons primarily designed to inflict injury by strengthening the power of a punch."

**People v. Grant**, 339 Ill.App.3d 792, 791 N.E.2d 100 (1st Dist. 2003) The Appellate Court rejected the argument that the Aggravated U UW statute (720 ILCS 5/24-1.6(a)(1)(3)(A)) violates due process because it does not require a culpable mental state, and therefore may criminalize innocent conduct. Aggravated unlawful use of a weapon is committed when the defendant knowingly carries in a vehicle an uncased, loaded and immediately accessible firearm.

**People v. Shields**, 337 Ill.App.3d 1063, 787 N.E.2d 342 (1st Dist. 2003) A handgun was not "immediately accessible," as required to sustain a conviction for aggravated unlawful use of a weapon, where it had been concealed in a woman's glove and placed under the hood of a car next to the battery. A weapon is "immediately accessible" if it is within "easy reach" of the defendant. The court rejected the State's argument that the weapon was "immediately accessible" because defendant was standing outside the car and was "seconds away" from the weapon. The evidence made it clear that defendant was ordered out of the car by the police.

**People v. Velez**, 336 Ill.App.3d 261, 783 N.E.2d 226 (2d Dist. 2003) Under 720 ILCS 5/24-1(a)(1), the offense of unlawful use of a weapon occurs where a person knowingly sells, manufactures, purchases, possesses, or carries any "knife, commonly referred to as a switchblade knife, which has a blade which opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife." The court held that a knife with a blade that was designed to open automatically when a button on the handle was pressed, but did not operate in that manner because the knife did not function properly, was prohibited under §24-1(a)(1). Therefore, defendant committed the offense of U UW although his knife did not open automatically when the button was pushed. The court noted that in **People v. Martinez**, 285 Ill.App.3d 881, 674 N.E.2d 944 (1st Dist. 1996), the defendant was convicted of U UW for possessing a broken stun gun which was incapable of producing an electrical current. "Like the stun gun in **Martinez**, the character of the knife in this case did not change merely because it did not operate properly." Because the U UW statute reflects a strong public policy discouraging items which "have the appearance or characteristics" of a prohibited weapon, a defendant "may be found guilty of U UW if he possesses a malfunctioning or inoperable" weapon.

**People v. Robinson**, 319 Ill.App.3d 459, 748 N.E.2d 624 (2d Dist. 2001) Under 720 ILCS 5/24-1(a)(7)(iii), U UW is committed by possession of a bomb only where the bomb contains

"an explosive substance of over one-quarter ounce. . ."

**People v. Olsen**, 302 Ill.App.3d 512, 707 N.E.2d 116 (1st Dist. 1998) Defendant was convicted of violating 720 ILCS 5/24-1(a)(7), which defines the offense of unlawful use of weapons as knowingly manufacturing or possessing any "bomb, bomb-shell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to, black powder bombs and Molotov cocktails or artillery projectiles." The Court reversed the conviction, finding that the evidence was insufficient to prove guilt beyond a reasonable doubt.

Under **People v. Greene**, 96 Ill.2d 334, 450 N.E.2d 329 (1983), §24-1(a)(7) applies only to "explosive devices" (i.e., those designed to cause unlawful destruction or injury when detonated). The devices which defendant manufactured did not explode - in fact only one burned at all. The State's expert claimed only that they could explode depending on the fuel-to-air mixture inside each device, and a defense expert had to alter the devices' design to get them to burn and testified that the fuel-to-air ratio of the original devices would have prevented them from exploding. Finally, defendant testified that she was trying to make lanterns.

**People v. Martin**, 121 Ill.App.3d 196, 459 N.E.2d 279 (2d Dist. 1984) The defendant was charged with and convicted of unlawful use of weapons under ¶24-1(a) (armed and masked in such a manner as to conceal his identity). The testimony showed that during the incident the offender wore "tinted pink or peach glasses and a ski hat." However, an eyewitness testified that the glasses were not sunglasses and did not interfere with her view of the subject. The Court held that the evidence fell "far short of establishing that defendant was masked in such a manner as to conceal his identity."

## **§55-1(b)** **Constitutionality**

### **United States Supreme Court**

**United States v. Rahimi**, 602 U. S. \_\_\_\_ (2024) The Supreme Court reversed the Fifth Circuit's holding that a firearm statute was unconstitutional. The statute, 18 U. S. C. §922(g)(8), barred certain individuals with a restraining order, including those who were found by the judge to pose a credible threat to an intimate partner, from possessing firearms. The defendant in this case was found to have fired his weapon in the direction of the mother of his child after abusing her in public. A court entered a restraining order, which included the finding that he posed a threat to his partner. He was later found in possession of a firearm, pled guilty under Section 922(g)(8), and, on appeal, lodged a facial challenge to the statute under the second amendment. In the aftermath of **Bruen**, the Fifth Circuit held the statute unconstitutional.

The 8-1 Supreme Court majority held that barring individuals who pose a credible threat to others from possessing a firearm "fits neatly" within the nation's tradition of firearm regulation. The court held that under **Bruen**, courts should determine whether there is a tradition of "relevantly similar" firearm regulations, and consider whether the challenged regulation is "consistent with the principles that underpin the Nation's regulatory tradition." If so, the challenged regulation is constitutional as long as it doesn't reach "to an extent beyond what was done at the founding." The majority found two such "relevantly similar" laws: the "surety laws" of the 18th century, which required gun owners to post bonds upon a finding of reasonable cause to believe the individual would engage in future violence or

breach of the peace; and “going armed” laws, which prohibited individuals from carrying dangerous weapons in such a manner so as to disrupt the public order or “terrify the good people of the land.” Like the surety and going armed laws, [Section 922\(g\)\(8\)](#) only disarms individuals who have been found to represent a credible threat by a court of law, and the disarmament is temporary. Together, these laws “confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”

The majority declared that the Fifth Circuit and dissent misconstrued the degree of similarity between the challenged regulation and its historical analogue required by **Bruen**. **Bruen** made clear that “a historical twin” is not required. But Justice Thomas’ dissent sought to explain that surety and going armed laws were very different from [section 922\(g\)\(8\)](#). **Bruen** looked at both the reason for the historical law and the method used to enforce the regulation – the “how and why” of the challenged regulation. Both are required to constitute a historical analogue. In Thomas’ view, neither surety laws nor going armed law satisfy this test. Surety laws merely fined the individual, they did not lead to disarmament and imprisonment, and thus do not satisfy the “how” requirement. The “affrays” and “going armed” laws were aimed against armed rebels of the King of England, not domestic abusers, thus could not satisfy the “why” requirement. In fact, Thomas believes the second amendment was a reaction to and refutation of such laws. Additionally, such laws were in fact criminal statutes, disarming individuals only through punishment for past conduct, unlike the civil restraining order process which disarms the individual in order to prevent future behavior.

The opinion has five concurrences. Justice Sotomayor, joined by Justice Kagan, celebrated the majority’s embrace of a far broader definition of “historical analogue” than the exacting definition endorsed by the dissent. This concurrence noted that in the dissent’s view, the “law is trapped in amber” regardless of any changes in technology or societal problems, or the recognition that a given founding-era solution was inadequate to address such problems. Justice Barrett’s concurrence echoed this concern, and added that the lack of a particular historical firearm regulation does not mean that any such legislation would have been unconstitutional; this assumes “founding-era legislatures maximally exercised their power to regulate, thereby adopting a ‘use it or lose it’ view of legislative authority.” These justices, along with Justice Jackson, whose concurrence focused on the desperate need for more guidance from the court given widespread confusion in the lower courts’ attempts to apply **Bruen**, enthusiastically embraced the “principles” approach to finding a historical analogue. As Justice Barrett concluded, such principles can be general, though not so general as to “water down the right.” In this case, the majority “settles on just the right level of generality” when it concludes that America has a tradition of preventing dangerous persons from possessing firearms.

**New York State Rifle & Pistol Association, Inc. v. Bruen**, 597 U.S. \_\_\_\_ (2022) A New York statute criminalizing the possession of a gun without a license, inside or outside of the home, violates the second and fourteenth amendments, because the statute requires an applicant to show “proper cause” for needing a license, defined as a “special need for self-protection distinguishable from the general community.” Unlike a “shall issue” licensing regime, which requires the state to provide a license if the applicant meets certain objective criteria, the New York “may issue” regime’s “special need” requirement prohibits ordinary citizens from exercising their right to carry a firearm outside the home for self-defense.

Lower courts have consistently affirmed “may issue” regimes, including in this case. But the supreme court found that these courts have been doing so by improperly using a “means-end” scrutiny test. Pursuant to **Heller** and **McDonald**, if the second amendment’s

plain text covers an individual's conduct, it presumptively protects that conduct. The government cannot justify its regulation by asserting that it promotes an important interest. Because the scope of the second amendment rests in its text and its history, it does not depend on an interest-balancing inquiry. "Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."

The court admitted that determining whether a regulation comports with historical tradition will not always be straightforward. Obviously, if the "societal problem" targeted by the regulation had persisted in the 18th century and yet no distinctly similar regulatory efforts had been made at the time, the challenged regulation is inconsistent with historical tradition. Similarly, if the societal problem had been addressed by "materially different means," this would constitute evidence that the new regulation falls outside of the historical tradition. But other cases might involve unprecedented societal concerns or technological changes that render the historical tradition more difficult to ascertain. In such cases, courts would have to take the fixed meaning of the second amendment and "apply it to circumstances beyond those the Founders specifically anticipated."

In determining whether a modern regulation, even one addressing a societal problem not contemplated by the framers, is consistent with historical tradition, courts should look at whether the statute at issue imposes a comparable burden on the right to self-defense as an historical analogue, and whether that regulatory burden is comparably justified. The historical regulation need not be identical to the modern regulation at issue, and a modern regulation may be shown by analogy to have a comparable historical regulation. Here, the court did not find a historical tradition of regulation requiring citizens to show a "special need for self-protection" before obtaining a licence to possess a firearm.

New York cited a variety of sources in support of the historical tradition of this type of regulation, and these sources ranged from the late 1200s to the early 1900s. But unless the earliest of these traditions could be shown to have lasted uninterrupted throughout the centuries, the most weight should be accorded to those sources close in time to the passage of the second amendment in 1791. After reviewing these sources, the court found the history ambiguous. For example, while the 1328 Statute of Northampton imposed a blanket restriction on carrying arms in public, the majority noted that the statute seemed to apply to lances and armor, and was not enforced against daggers, which were commonly carried and are a closer analogue for today's firearms. When in the 17th century the statute was used to prosecute a prominent detractor of the king for carrying a firearm, the prosecution failed because the statute was found to be essentially obsolete, and, even if it reflected common law, it could not be enforced without a specific showing of malice.

Several colonial-era laws used similar language to the Statute of Northampton, but all qualified their ban on carrying weapons to those who spread "fear" or "terror" in doing so. Other colonial laws banning "dangerous and unusual weapons" are not analogous, because firearms today are not considered unusual but rather the "quintessential self-defense weapon." Notably, respondents could point to only three such laws.

The numerous public-carry restrictions cited by New York that arose after the passage of the second amendment all imposed less of a burden on public carry than the New York statute. Many banned only concealed carry, and if they went further by banning open carry, courts often found them unconstitutional. Other statutes required citizens to post bond before carrying a weapon in public, but these contained presumptions in favor of allowing possession, and were rarely enforced. The majority did concede that, around the time of the ratification of the fourteenth amendment, Texas upheld a law identical to the New York law, requiring citizens to have a special need for self-defense. But it found this single example did not outweigh the foregoing historical evidence. Thus, there was not historical tradition of

banning firearms in the manner of the New York statute, and it therefore violated the second amendment.

Six justices joined the majority, and four wrote or joined special concurrences. Two of the justices (Roberts, Kavanaugh) wrote to clarify that had New York imposed a different burden – “shall issue” rather than the discretionary “may issue” – for granting a license, it would have been constitutional. The 43 states who already employ objective shall-issue licensing regimes may continue to do so. This concurrence also noted that the second amendment continues to allow for a variety of gun regulations, as **Heller** held, and these include prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding firearms in sensitive places.

Justice Barrett wrote to express her concerns about lingering questions over the “historical tradition” analysis, such as which sources, and from what era, deserve the most weight. Justice Alito wrote to chide the dissent for citing statistics showing the prevalence of mass shootings, suicides and domestic disputes involving firearms. He argued that these facts “obscure” the limited holding of the majority, which is that the government may not “effectively prevent[ ] its law-abiding residents from carrying a gun” for self-defense, and says nothing about who may lawfully possess a gun, what types of guns are protected, or what requirements a government may impose.

The dissent argued that the majority erred in deciding the case on the pleadings, without an evidentiary record of how the statute actually operates in practice. The dissent discussed at length the prevalence of gun violence, to make the point that it is a complex problem that ought to be solved by legislatures, who are attuned to the unique needs of their states, rather than courts. Finally, the dissent noted the lack of precedent for the purely historical analysis created by the majority, and argued that this analysis will be impossible to apply accurately. As an example, it noted that after **Heller** found an individual right to bear arms outside of the military, many historians proved this understanding of history incorrect by showing that the English right to “have arms” was strictly tied to military service, and many linguistics experts proved that the phrase “bear arms” was, at the time of the founding, almost exclusively used to refer to military service. As for the historical analysis conducted by the majority here, the dissent offered a detailed and lengthy rebuttal, pointing out misunderstandings, counterexamples, and the arbitrary nature of the weight accorded to various sources.

**McDonald v. Chicago**, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) In **District of Columbia v. Heller**, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the court found that the 2<sup>nd</sup> Amendment includes the right to possess handguns in one’s home for the purpose of self-defense. **Heller** invalidated a federal act prohibiting the possession of handguns in homes in the District of Columbia.

**Heller** recognized, however, that the right to keep and bear arms does not allow a citizen to keep or carry a weapon for all purposes. In particular, the **Heller** court specifically stated that it did not intend to cast doubt on such regulatory measures as: (1) prohibiting the possession of firearms by felons and the mentally ill, (2) restricting firearms in sensitive places such as schools and government buildings, and (3) imposing conditions on the commercial sale of firearms.

Here, the Supreme Court found that the 2<sup>nd</sup> Amendment applies to the States through the due process clause of the 14<sup>th</sup> Amendment. The court invalidated two municipal ordinances which in effect banned the possession of handguns by most private citizens.

Section 1 of the 14<sup>th</sup> Amendment provides that States may not abridge “the privileges

or immunities of citizens of the United States” or deprive “any person of life, liberty, or property, without due process of law.” The court declined to reconsider its precedent concerning the scope of the “privileges and immunities” clause, finding that under modern jurisprudence the application of the Bill of Rights to the States is determined under the 14<sup>th</sup> Amendment’s due process clause.

Whether specific protections of the Bill of Rights apply to the States depends on whether the particular right in question has been “incorporated” into the concept of “due process” under the 14<sup>th</sup> Amendment. A right is incorporated if it is fundamental to the Constitution’s “scheme of ordered liberty and system of justice.” Rights which are deeply rooted in the nation’s history and tradition are deemed to be fundamental, and are therefore applied to the States.

The right to bear arms for the purpose of self-defense is deeply rooted in the nation’s history and tradition, and is therefore a fundamental right to be applied to the States through the 14<sup>th</sup> Amendment. The court did not elaborate on the extent to which States may constitutionally regulate the possession and ownership of firearms, but held that the municipal ordinances at issue here were clearly unconstitutional.

### **Illinois Supreme Court**

**People v. Villareal**, 2023 IL 127318 The Supreme Court upheld the constitutionality of the unlawful possession of a firearm by a street gang member statute, 720 ILCS 5/24-1.8(a)(1), against eighth amendment and due process challenges.

Defendant first argued that the statute violates substantive due process under the fourteenth amendment because it: (1) criminalizes mere gang association without requiring a nexus between the association and the conduct prohibited under the statute; and (2) is vague.

When a statute does not impact a fundamental constitutional right, the rational basis test applies to due process claims. Under this test, the statute must be rationally related to a legitimate state interest. While defendant argued that the statute does not require any connection between the gang association and the underlying offense of unlawfully possessing a firearm, the Supreme Court disagreed, and held that increasing the penalty for the unlawful possession of a firearm in public when the offender is a gang member was a rational method of accomplishing the legislative goal of protecting innocent citizens from gang violence.

Defendant also asserted that the statute violated due process because it did not require criminal intent or knowledge. One definition of “streetgang member” under 740 ILCS 147/10, is “any person who actually and in fact belongs to a gang,” a definition with no mental state as to the gang’s illegal activities. The Court disagreed, finding that the plain language of the statute defining “streetgang” includes active membership. The legislative history confirmed that the statute meant to impose liability only on members actively involved. Because active membership implies participation in criminal activity, statute has an adequate *mens rea*.

Defendant’s vagueness challenge was premised on the notion that the statute inadequately defines membership, leaving defendants liable for mere association or friendship which does not rise to the level of membership. The Court disagreed, pointing to the “highly detailed” statutes defining gangs and gang members, and noting again the “active participation” requirement. Similarly, in the context of the statute, a person of ordinary intelligence would have a reasonable opportunity to understand what it means to “associate” with a gang.

The Court also rejected the eighth amendment challenges. Defendant first argued that the statute unconstitutionally increases an individual's sentence based solely on his status as a gang member. The court saw no issue with this fact, given that the statute was intended to reach active gang members and that gangs were defined as criminal organizations. Defendant also asserted that the statute was facially unconstitutional because it punished involuntary gang members. The court found that a facial challenge could not succeed unless defendant established either that all members joined involuntarily, or that the statute was unconstitutional in all applications. Because defendant did not challenge the constitutionality of the portion of the statute aimed at willing members engaged in criminal activity, a facial challenge could not succeed.

**In re N.G., 2018 IL 121939** In a child-custody case involving a father's attempt to vacate a prior conviction for aggravated unlawful use of a weapon ("AUUW") pursuant to **Aguilar**, the Illinois Supreme Court repudiated its analysis in **People v. McFadden, 2016 IL 117424**. In **McFadden**, the court upheld an unlawful use of a weapon by a felon ("UUWF") conviction based on a prior AUUW conviction that was facially unconstitutional and void *ab initio* under **Aguilar**. It reasoned that, although **Aguilar** may provide a basis for vacating defendant's AUUW conviction, it did not automatically overturn that conviction. Thus when defendant committed UUWF he had a valid felony conviction that made it unlawful for him to possess firearms.

The N.G. court recognized that **McFadden** improperly followed a line of cases involving procedurally defective prior convictions, and ignored relevant authority, including **Montgomery v. Louisiana, 577 U.S. \_\_ (2018)**, involving facially unconstitutional statutes. Under the latter, the prior conviction is not only void, but it cannot be used in any subsequent proceedings, even if the prior conviction was not invalidated until after the subsequent conviction. Courts confronted with extant void convictions have a duty to invalidate the conviction and any findings reliant on that conviction.

**People v. Chairez, 2018 IL 121417** The Illinois Supreme Court vacated the circuit court's judgment finding unlawful use of a weapon under Section 24-1(a)(4), (c)(1.5), which prohibits the possession of a firearm within 1000 feet of a public park, school, courthouse, and public transit facility, violates the Second Amendment, but affirmed the judgment finding the public park provision facially unconstitutional. The circuit court's ruling finding the entire subsection unconstitutional violated **People v. Mosley, 2015 IL 115872**, because the State alleged a violation only of the public park provision, not the remaining provisions contained in subsection (c)(1.5). As such, defendant lacked standing to challenge the provision as a whole.

In finding the public park provision unconstitutional, the court first rejected the defendant's argument that the case is controlled by **People v. Burns, 2015 IL 117387**. **Burns** found defendant's aggravated unlawful use of a weapon conviction unconstitutional pursuant to **Aguilar**, despite the fact that defendant's prior felony conviction elevated the class of the offense. Although simple UUW under 24-1(a)(4) is unconstitutional, and violation of the public park provision increases the class of the offense, **Burns** is distinguishable because the public park provision of the UUW statute is not a sentencing enhancement but a separate offense, as evidenced by its placement separate and apart from the sentencing provisions of the UUW statute.

To determine whether restrictions on the use and possession of firearms violate the Second Amendment, courts first determine whether the statute affects protected conduct

and, if so, courts analyze the statute using a heightened means-end level of scrutiny. Here, the Supreme Court did not address whether the Second Amendment protected the 1000-foot perimeter of a public park, and instead chose to “assume some level of scrutiny must apply to **Heller’s** ‘presumptively lawful’ regulations.” The court settled on intermediate scrutiny conducted on a sliding scale - severe restrictions require strong governmental justifications, while minor restrictions could be more easily justified. The Supreme Court agreed with defendant that the public park restriction imposed a severe burden (a blanket ban without exceptions) on a core right of the Second Amendment (right to bear arms in public). The restriction would essentially deprive people living near parks the ability to protect themselves on their property, and the lack of notice as to where the 1000 foot zone begins would result in inadvertent violations. Because the State failed to justify this severe infringement with data, statistics, or other evidence, the statute could not survive the heightened level of scrutiny.

Finally, the court found the public park provision severable from the remainder of subsection (c)(1.5). The Uuw statute did not contain a severability provision, and therefore severability is controlled by Section 1.31 of the Statute on Statutes. Under this provision, the question becomes whether the invalidated portion is inseparable, or whether the legislature’s intent can be achieved without the severed portion. Here, removal of the public park provision does not diminish the statute’s ability to accomplish its aim of protecting the public, and therefore it is severable.

**People v. Mosley, 2015 IL 115872** To convict a defendant of aggravated unlawful use of a weapon, the State must prove beyond a reasonable doubt that the defendant was either carrying a firearm on his person or in his vehicle ([720 ILCS 5/24-1.6\(a\)\(1\)](#)) or was carrying or possessing a firearm while on a public way ([720 ILCS 5/24-1.6\(a\)\(2\)](#)), and that one of the factors set forth in subsection (a)(3) exists. Defendant was charged with three factors here: (1) the firearm was uncased, loaded and immediately accessible ((a)(3)(A)), (2) defendant had not been issued a valid FOID card ((a)(3)(C)); and (3) the firearm was a handgun and defendant was under 21 and was not engaged in lawful activities under the Wildlife Code ((a)(3)(I)). Section 24-1.6(d) provides that AUUW is a Class 4 felony unless certain circumstances mandate a greater sentence.

Under **Aguilar**, defendant’s convictions for carrying an uncased, loaded firearm on his person and on a public way were unconstitutional. Therefore, the trial court properly vacated those convictions. However, the court rejected the argument that the FOID card and under 21 provisions were inseparable from the above offenses.

The issue of severability involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. ([5 ILCS 70/1.31](#)).

Removing the provision struck down by **Aguilar** does not undermine the remaining factors, which can be executed on their own. Because the FOID card and “under 21” restriction stand independently of the provision that was held unconstitutional in **Aguilar**, both provisions are severable.

When analyzing a Second Amendment challenge, the court applies a two-step process. First, the court conducts a textual and historical analysis to determine whether the challenged law imposes a burden on conduct that was understood to be within the scope of the Second Amendment’s protection at the time of ratification. If the challenged law

regulates activity which fell outside the scope of the Second Amendment right as it was understood at the relevant historical time, the regulated activity is categorically unprotected and is not subject to further Second Amendment review.

If the historical evidence is inconclusive or suggests that the regulated activity is protected, then the court must apply the appropriate level of scrutiny and inquire into the strength of the State's justification for regulating or restricting the activity.

The defense acknowledged that the possession of weapons by persons under the age of 18 falls outside the protection of the Second Amendment, but argued that the Second Amendment rights of persons between the ages of 18 and 21 are violated by subsections (a)(1), (a)(3)(C) and (a)(1), (a)(3)(I), which restrict the possession of weapons b

The court concluded that there is no recognized right for minors to own and possess firearms, and that restrictions on the ability of minors to possess weapons have traditionally been interpreted as lasting until age 21. Thus, the possession of handguns by persons between 18 and 21 constitutes conduct that is outside the scope of Second Amendment protection.

The court also found that the FOID card requirement is a reasonable and legitimate regulation of the right to possess weapons.

The court rejected the argument that equal protection is violated by the distinction in subsections (a)(3)(C) and (a)(3)(I) between persons who are over and under 21 years of age. The court rejected the argument that strict scrutiny applies and found that there is a rational basis for the distinction because: (1) the State has a legitimate interest in protecting the public and police from the possession and use of dangerous weapons, and (2) given the immaturity and impulsivity of youth, that interest is served by restricting the possession of weapons by persons under the age of 21.

The court declined to consider whether the FOID card provision violates due process as applied to persons between the age of 18 and 20, finding that the record was insufficient to support the argument. The court also noted that persons who are under 21 and who wish to obtain a FOID card may either obtain the consent of their parents or appeal to the Director of the State Police.

[720 ILCS 5/24-1.6\(d\)\(2\)](#) provides that where the defendant is 18 years of age or older and the factors listed in both (A) and (C) are present, a first conviction of AUUW is a Class 4 felony carrying a minimum sentence of one year. The mandatory sentence factor was unconstitutional because subsection (d)(2) incorporates the offense created by subsection (a)(3)(A), which was held to be unconstitutional in **Aguilar**. However, the court concluded that the provisions of the statute were severable from the impermissible mandatory minimum sentencing term of (d)(2), and that the remainder of the AUUW statute therefore remains in effect.

**People v. Burns, 2015 IL 117387** The aggravated unlawful use of a weapon statute provides, in part:

- (a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
  - (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person . . . [,] or
  - (2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town . . . ; and
  - (3) One of the following factors is present:
    - (A) the firearm possessed was uncased, loaded and immediately

accessible at the time of the offense; . . .

(C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card[.] . . .

(d) Sentence. Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years. Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or another jurisdiction is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years. [720 ILCS 5/24-1.6](#).

Thus, to convict of aggravated unlawful use of a weapon, the State must prove beyond a reasonable doubt that the defendant was either carrying a firearm on his person or in his vehicle ([720 ILCS 5/24-1.6\(a\)\(1\)](#)) or was carrying or possessing a firearm while on a public way ([720 ILCS 5/24-1.6\(a\)\(2\)](#)), and that one of the factors set forth in subsection (a)(3) was present. Under [720 ILCS 5/24-1.6\(d\)](#), AUUW is a Class 4 felony unless the defendant has previously been convicted of a felony, in which case the offense is a Class 2 felony.

In [People v. Aguilar, 2013 IL 112116](#), the Supreme Court held that §24-1.6(a)(1), (a)(3)(A) is facially unconstitutional because it constitutes a ban on the right to keep and bear arms under the Second Amendment. On rehearing, the court modified the opinion to state that the finding of unconstitutionality was limited to the “Class 4 form” of AUUW.

The court stated that there is no “Class 4 form” or “Class 2 form” of AUUW, and that it erred in the **Aguilar** modified opinion by limiting the opinion to the “Class 4 form” of the offense. The elements of AUUW are contained in subsection (a) of the statute, and the offense is complete when those elements are established. The distinctions between Class 4 and Class 2 are created by subsection (d) of the statute, which affects sentencing but does not create “separate and distinct” offenses of AUUW.

Thus, contrary to the modified opinion in [Aguilar](#), §24-1.6(a)(1), (a)(3)(A) “is facially unconstitutional, without limitation.” In other words, Section 24-1.6(a)(1), (a)(3)(A) cannot serve as the basis for an AUUW conviction of any class.

The court rejected the State's argument that §24-1.6(a)(1), (a)(3)(A) is not facially unconstitutional because it presents no constitutional problems when applied to persons with prior felony convictions. When assessing whether a statute is facially unconstitutional because it violates the constitution in all applications, a court will consider only scenarios in which the statute actually authorizes or prohibits the conduct at issue.

Because as enacted by the legislature the offense defined by §24-1.6(a)(1), (a)(3)(A) does not include as an element that the offender has a prior felony conviction, any possible application to prior felons could not be considered in deciding whether the statute is facially unconstitutional.

**In re Jordan G., 2015 IL 116834** The respondent minor was charged in a delinquency petition with three counts of aggravated unlawful use of a weapon and one count of unlawful possession of a firearm. The AUUW counts alleged that respondent carried an uncased, loaded, and immediately accessible firearm in a vehicle (§24-1.6(a)(1), (a)(3)(A)), carried a handgun in a vehicle while he was under the age of 21 ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(I\)](#)), and carried a firearm in a vehicle without having been issued a FOID card ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(C\)](#).) The unlawful possession of a firearm count alleged that respondent was under the age of 18 years and carried a firearm which was capable of being concealed on his person ([720 ILCS 5/24-3.1\(a\)\(1\)](#)).

The trial court dismissed the three AUUW counts after finding that §24-1.6 had been found facially unconstitutional on Second Amendment grounds in [Moore v. Madigan](#), 702 F.3d 933 (7th Cir. 2012).

[Moore](#) and [People v. Aguilar](#), 2013 IL 112116, held only that the Second Amendment was violated by a “blanket prohibition on carrying weapons in public.” In fact, the modified [Aguilar](#) opinion specifically stated that the holding was limited to finding that the Class 4 form of AUUW (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d)) was facially unconstitutional because it enacted a comprehensive ban on the possession of an uncased, loaded and immediately accessible firearm. Both [Moore](#) and [Aguilar](#) specifically noted that reasonable restrictions on Second Amendment rights are permitted.

The court rejected the argument that the FOID and “under 21” provisions cannot be severed from the provision found unconstitutional in [Aguilar](#). The issue of severability involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. (5 ILCS 70/1.31).

AUUW is comprised of carrying a weapon (subsections (a)(1) and (a)(2)) where one of several factors is present, including that the firearm is uncased, loaded and immediately accessible, the person possessing the firearm does not have a FOID card, or the person possessing the weapon is under the age of 21. Thus, subsection (a)(3)(A), which was invalidated in [Aguilar](#), is just one of several aggravating factors that can operate in conjunction with subsections (a)(1) and (a)(2) to constitute the substantive AUUW offense. The court concluded that removing the provision struck down by [Aguilar](#) does not undermine the remaining factors, which can be executed on their own. Thus, the FOID card and “under 21” restriction stand independently of the provision that was held unconstitutional in [Aguilar](#).

When analyzing a Second Amendment challenge, the court applies a two-step process. First, the court conducts a textual and historical analysis to determine whether the challenged state law imposes a burden on conduct that was understood to be within the scope of the Second Amendment’s protection at the time of ratification. If the challenged law regulates activity which fell outside the scope of the Second Amendment right as it was understood at the relevant historical time, the regulated activity is categorically unprotected and is not subject to further Second Amendment review.

If the historical evidence is inconclusive or suggests that the regulated activity is protected, then the court must apply the appropriate level of scrutiny and inquire into the strength of the State’s justification for regulating or restricting the activity.

The defense acknowledged that the possession of weapons by persons under the age of 18 falls outside the protection of the Second Amendment, but argued that the Second Amendment rights of persons between the ages of 18 and 21 are violated by subsections (a)(1), (a)(3)(C) and (a)(1), (a)(3)(I), which restrict the possession of weapons by persons under the age of 21.

The court concluded that there is no recognized right for minors to own and possess firearms, and that restrictions on the ability of minors to possess weapons have traditionally been interpreted as lasting until age 21. Thus, the possession of handguns by persons between 18 and 21 constitutes conduct that is outside the scope of Second Amendment protection.

The court rejected the State’s request that it modify the [Aguilar](#) holding that the Class 4 form of aggravated unlawful use of a weapon is unconstitutional on its face.

**People v. Schweih, 2015 IL 117789** The court held that under its recent decision in **People v. Williams, 2015 IL 117470**, the offense of aggravated unlawful use of a weapon (AUUW) under 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under 430 ILCS 65/2. Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

The court reversed the judgment of the circuit court declaring this section of the AUUW statute unconstitutional.

**People v. Williams, 2015 IL 117470** Under the identical elements test of the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), when different offenses contain identical elements but different sentences, the penalties are unconstitutionally disproportionate and the offense with the greater penalty cannot stand.

The court held that the offense of aggravated unlawful use of a weapon (AUUW) under 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) and (a)(2), (a)(3)(C) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under 430 ILCS 65/2(a)(1). Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

A defendant violates section 2(a)(1) of the FOID Card Act by possessing a firearm without having a FOID card in his possession. A defendant violates section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute by carrying a firearm outside the home without a valid FOID card. A defendant violates section 24-1.6(a)(2), (a)(3)(C) of the AUUW statute by carrying or possessing a firearm on any public way without a valid FOID card. The State must prove the additional location element to establish the offense of AUUW. By contrast, the FOID Card Act has no location element. A defendant can violate the FOID Card Act by possessing a firearm in his home, but such conduct would not be a violation of AUUW. The elements of the two offenses are thus not identical.

The court reversed the judgment of the circuit court declaring these sections of the AUUW statute unconstitutional and remanded the cause with directions to reinstate the charges against defendant.

**People v. Aguilar, 2013 IL 112116** The Second Amendment protects an individual's right to keep and bear arms for the purpose of self-defense, and is applicable to the states through the due process clause of the Fourteenth Amendment. While the need for self-defense is most acute in the home, the constitutional right to armed self-defense is broader than the right to have a gun in one's home. The Second Amendment guarantees not only the right to "keep" arms, but also the right to "bear" arms, which implies a right to carry a loaded gun outside the home. Because the Class 4 form of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d)) categorically prohibits the possession and use of an operable weapon for self-defense outside the home, it violates the Second Amendment on its face.

In a footnote, in response to the State's rehearing petition, the court emphasized that its holding was limited to the Class 4 form of the statute, and it was making no finding, express or implied, with respect to the constitutionality of any other section or subsection of the AUUW statute.

The right to keep and bear arms for self-defense is not unlimited and may be subject to reasonable regulation. The United States Supreme Court has not identified the possession of handguns by minors as conduct that may be constitutionally regulated, but laws banning

the juvenile possession of firearms have been commonplace for almost 150 years, and comport with longstanding practice of prohibiting classes of persons whose possession poses a particular danger to the public from possessing firearms. While many colonies permitted or even required minors to own and possess firearms for purposes of militia service, no right for minors to own or possess firearms existed at any time in the history of the nation. Therefore, the unlawful possession of firearms statute prohibiting persons under 18 years of age from possessing any firearm of a size that may be concealed on the person ([720 ILCS 5/24-3.1\(a\)\(1\)](#)) comports with the Second Amendment.

The court reversed defendant's conviction for AUUW and affirmed his conviction for unlawful possession of a firearm.

Garmen, C.J., dissented upon the denial of rehearing. It would be preferable for the court in response to the State's rehearing petition to allow the parties to fully brief and argue the constitutionality of other sections and subsections of the statute.

Theis, J., dissented upon the denial of rehearing. The majority's unexplained modification of its decision upon denial of rehearing adopts an entirely new way of analyzing the constitutional claim by incorporating the sentencing provisions into its analysis. This new holding has the potential to alter the court's constitutional jurisprudence and create a host of practical problems for law enforcement. It is unsupported by any authority. Rehearing should have been granted to allow the parties to address whether the statute is unconstitutional in all of its applications.

**[Wilson v. County of Cook, 2012 IL 112026](#)** The Supreme Court reversed the trial court's dismissal of a challenge to the constitutionality of a Cook County ordinance banning assault weapons, and remanded the cause for further proceedings.

The court concluded that the record was insufficient to conclude that a Second Amendment challenge to the ban could not succeed. The U.S. Supreme Court has held that the Second Amendment protects a law-abiding citizen's use of a handgun for self-defense in the home. (See [District of Columbia v. Heller, 554 U.S. 570 \(2008\)](#) and [McDonald v. City of Chicago, 561 U.S. 742, 130 S. Ct. 3020, 177 L.Ed.2d 894 \(2010\)](#)). However, the Second Amendment does not protect the right to keep and carry any weapon in any manner and for any purpose. In particular, the Second Amendment does not protect the possession of weapons that are not typically possessed by law-abiding citizens for lawful purposes such as self-defense. Furthermore, U.S. Supreme Court precedent allows for regulation of the possession of firearms by felons and the mentally ill, restrictions on firearms in places such as schools and government buildings, and laws imposing conditions on the commercial sale of firearms.

Because the ordinance in question is not an absolute ban on the possession of all firearms for self-defense, but instead covers only a particular subset of weapons which are capable of firing rapidly, delivering a large number of shots without reloading, and creating a high risk of collateral damage, the court found that it is impossible to determine on this record whether assault weapons fall within the scope of the Second Amendment. The court noted, however, that there is little evidence that assault weapons are used for self-defense by most citizens and that many of the same types of weapons have been banned for at least ten years by federal law and various state and municipal ordinances.

Because it cannot be ascertained on this record whether the possession of assault weapons is protected by the Second Amendment, the court remanded the cause for further proceedings, including the development of a complete record.

The court rejected the plaintiff's argument that the ordinance is void for vagueness

and violates equal protection. The void for vagueness doctrine has two purposes: to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, and to provide reasonable standards for enforcement in order to prevent arbitrary and discriminatory enforcement.

The court concluded that the county ordinance is not unconstitutionally vague, noting that the plaintiff's argument demonstrated that there is little question as to the scope of the ordinance.

The court also rejected the argument that the ordinance violates equal protection, finding that when read in its entirety the ordinance does not arbitrarily differentiate between two owners with similar firearms.

### Illinois Appellate Court

**People v. Mobley**, 2023 IL App (1st) 221264 Defendant was convicted of unlawful use of a weapon by a felon. The predicate felony was escape. On appeal, he argued that under **Bruen**, the UUWF statute is unconstitutional as applied to him. He contended that, as a non-violent offender, the second amendment protected his conduct because there is no historical tradition of preventing nonviolent felons from possessing a gun.

The appellate court affirmed. As in **People v. Baker**, 2023 IL App (1st) 220328, the court held that the **Bruen** test applies only to firearm regulations affecting "law-abiding citizens." See **Bruen**, 142 S. Ct. at 2132-33 ("While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do [believe] that **Heller** and **McDonald** point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense.") The court found support in **Heller**, which stated that laws barring felons from possessing guns are "presumptively lawful."

Defendant was not "law-abiding" because in addition to the predicate escape conviction, he had 13 other convictions, including for violent crimes. The court left open the possibility that a defendant with only non-violent priors may argue that he or she is a law-abiding citizen. See, e.g., **Range v. Attorney General**, 69 F.4th 96 (3d Cir. 2023) (ban on felon possession unconstitutional as applied to a defendant whose prior conviction was "making a false statement to obtain food stamps").

**People v. Matthews**, 2022 IL App (4th) 210752 The court vacated as void *ab initio* defendant's 1990 and 1992 convictions for unlawful use of a weapon because they were identical to the version of that offense held facially unconstitutional in **People v. Gamez**, 2017 IL App (1st) 151630. Likewise, the court vacated defendant's 1994 convictions of unlawful use of a weapon by a felon as void because they were predicated on defendant's aforementioned UUW convictions. Finally, the court vacated defendant's armed habitual criminal conviction because one of the predicate offenses on which it was based was defendant's 1994 UUWF conviction. Since the UUWF conviction was being vacated, it could no longer serve as a predicate offense, and thus defendant's AHC conviction could not stand.

The court reached each of these issues despite defendant's failure to raise them in his post-conviction petition because the unconstitutionality of the underlying UUW convictions rendered those convictions, and each of the subsequent offenses based on those convictions, void. While a defendant generally forfeits any issue not included in his post-conviction petition, a voidness challenge may be raised at any time and in any court and is not subject to forfeiture.

On appeal, defendant also challenged his sentence for aggravated discharge of a firearm, arguing that he should be resentenced because the trial court erroneously considered his void UUI convictions in aggravation at sentencing. The appellate court declined to reach that issue, however, because it was not raised in defendant's petition. While a void prior conviction is incompetent evidence at sentencing, it does not render the sentence itself void.

**People v. Brooks, 2022 IL App (3d) 190761** The offense of aggravated unlawful use of a weapon as defined by 720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5) and (a)(3)(C), which makes it a Class 4 felony to possess a loaded, uncased and accessible firearm on a public street or another's property, without either a FOID card or a concealed carry permit, is not disproportionate to the misdemeanor offense of unlawful use of a weapon under 720 ILCS 5/24-1(a)(4)(i), (ii), (iii), and (iv). The latter potentially criminalizes less serious conduct, such as possession of an unloaded weapon that is accessible and uncased.

**People v. Villareal, 2021 IL App (1st) 181817** Defendant was convicted of unlawful possession of a weapon by a street gang member. The Appellate Court majority rejected the defendant's eighth amendment challenge. Although courts have found that the criminalization of status to be unconstitutional, such as the criminalization of narcotics addiction or the targeting of gang members in loitering statutes, the majority found the instant statute distinguishable. The majority reasoned that the criminal act in this case was illegal firearm possession, not just one's status as a gang member. And while the crime is enhanced by status, the definition of "street gang" member is sufficiently detailed to require specific criminal behavior before one qualifies for the enhancement.

The dissent noted that other jurisdictions have found that increases in criminal culpability based solely on status are unconstitutional. And while the definition of street gang is detailed, it casts too wide a wide net by implicating even those members who lack knowledge of the gang's criminal activity.

**People v. Baxton, 2020 IL App (5th) 150500** Defendant was convicted of AUUW under section 24-1.6(a)(1), (a)(3)(E). This provision provides that a person commits the offense of AUUW when he simultaneously carries a firearm on his person when not on his land or in his own abode or fixed place of business and was engaged in a misdemeanor violation of the Cannabis Control Act. Defendant argued that the statute violates the Second Amendment.

Likening the provision to the FOID card requirement upheld in prior cases, the Appellate Court rejected defendant's constitutional challenge. A provision which seeks to limit a class of people the legislature reasonably believes to be more dangerous does not infringe on the core principles of the Second Amendment.

**People v. Barefield, 2019 IL App (3d) 160516** In light of **N.G.**, defendant's 2-1401 petition raised a valid claim that, if his armed habitual criminal conviction was predicated on a version of aggravated unlawful use of a weapon invalidated by **Aguilar**, his conviction should be reduced. However, defendant's petition did not establish that his AHC conviction was predicated on an unconstitutional AUUW. While appellate counsel provided a copy of the indictment in the predicate case, showing defendant was charged with a count later invalidated by **Aguilar**, he must provide evidence that he was actually convicted of that count. The court remanded for further 2-1401 proceedings, rejecting the dissent's belief that appellant's failure to provide a sufficient record should preclude remand. The court noted that defendant attempted to provide the correct information, and that the state of the law was in flux given that **N.G.** was decided during briefing.

**People v. Webb**, 2019 IL 122951 Portion of unlawful use of weapons statute banning possession of stun gun or taser under 720 ILCS 5/24-1(a)(4) is facially unconstitutional. Stun guns and tasers are “bearable arms” entitled to Second Amendment protection; the Second Amendment is not limited to only those instruments in existence at the time of the nation’s founding. Stun guns and tasers are not exempted from the statute by virtue of the Concealed Carry Act because the Act only provides licenses for “firearms” and does not cover stun guns and tasers. Section 24-1(a)(4) acts as a categorical ban on carrying those weapons in public in violation of the Second Amendment.

**People v. Cunningham**, 2019 IL App (1st) 160709 Portion of unlawful use of weapon statute criminalizing possession of a firearm by a non-resident on public housing property under 720 ILCS 5/24-1(a)(4), (c)(1.5) is not an unconstitutional infringement on second amendment rights. Individuals can still exercise their self-defense rights by not entering public housing property, so the provision does not operate as a complete ban. And, the State has an interest in protecting the safety of individuals on public housing property, which is a reasonable justification to support the restriction. The statute’s limited burden on second-amendment rights survives heightened intermediate scrutiny.

**People v. Bell**, 2018 IL App (1st) 153373 The unlawful use of a weapon statute prohibiting possession of a firearm in a public park, 720 ILCS 5/24-1(a)(10), (c)(1.5), is constitutional. The Appellate Court rejected the defendant’s reliance on **People v. Aguilar**, 2013 IL 112116 and **People v. Burns**, 2015 IL 117387, finding the public park provision is an element of the offense and not a provision which enhances the sentence of the broad firearm ban found unconstitutional in **Aguilar**.

It then undertook the two-part second-amendment analysis, asking whether the statute encroaches on a constitutional right and, if so, whether it passes intermediate scrutiny. As in **People v. Chairez**, 2018 IL 121417, the State failed to provide sufficient evidence that a public park is a “sensitive area” under **Heller**, and therefore the restriction may impact a constitutional right. Moving to step two, the Appellate Court held that, unlike **Chairez**, which found that the 1000-feet-from-a-park restriction failed intermediate scrutiny, the prohibition here survives. The **Chairez** court was primarily concerned with the lack of notice as to the start of the 1000-foot zone, but no such concerns exist here because the statute explicitly defines the prohibited area as the boundaries of the park itself.

A concurring justice would uphold the statute on the grounds that a public park is clearly a “sensitive area” under **Heller** meaning there is no constitutional right to possession of a weapon in a park and the statute need not pass intermediate scrutiny.

**People v. Green**, 2018 IL App (1st) 143874 The unlawful use of a weapon statute criminalizing possession of a loaded weapon on a public street or in a vehicle within 1000 feet of school is unconstitutional. The restriction infringes on the core of the Second Amendment and therefore the State has the burden of showing a “very strong public-interest justification.” As in **People v. Chairez**, 2018 IL 121417, which struck down the 1000-feet-from-a-park ban, the State failed to show that the 1000-feet-from-a-school ban mitigates school violence. Accordingly, the State could not meet its burden of showing a close fit between the restriction on gun possession within 1000 feet of a school and the protection of children. Thus, the statute is facially unconstitutional. (This decision pertains only to the pre-2015 version; the current version exempts those with concealed-carry licenses.)

**People v. Gamez**, 2017 IL App (1st) 151630 In **Moore v. Madigan**, 702 F.3d 933 (7th Cir. 2012), the federal court of appeals held that the version of the unlawful use of a weapon statute that was in effect in 2010 (720 ILCS 5/24-1(a)(4)) was facially unconstitutional under the Second Amendment. In **Aguilar**, 2013 IL 112116, the Illinois Supreme Court held that the version of the aggravated unlawful use of a weapon statute that was in effect in 2008 (720 ILCS 5/24-1.6(a)(1), (a)(3)(A)) was facially unconstitutional.

Under **Moore** and **Aguilar**, the version of the unlawful use of a weapon statute that was in effect in 1996 was also facially unconstitutional. The 1996 UWF statute provides that a defendant commits UWF when he knowingly carries or possesses a firearm in a vehicle or on his person, except on his own land, abode, or fixed place of business. 720 ILCS 5/24-1(a)(4). The only differences between the 2006 statute and the other two statutes was that the 2010 statute contains additional exceptions for the transportation of firearms under certain circumstances, and the 2008 statute requires the State to prove that the firearm was uncased, loaded, and immediately accessible. The 1996 statute thus represents an even wider ban on the possession of firearms. If the 2008 and 2010 statutes violated the Second Amendment, it necessarily followed that the 2006 statute also violated the Second Amendment.

Defendant's conviction was vacated.

**People v. Rush**, 2014 IL App (1st) 123462 The unlawful use of a weapon by a felon (UWF) statute makes it unlawful for a convicted felon to possess a firearm. 720 ILCS 5/24-1.1(a). The statute however does not apply to convicted felons who have been granted relief under the Firearm Owners Identification (FOID) Card Act. The FOID Card Act allows any felon, whose conviction is more than 20 years old, to apply to the Director of the Department of State Police or petition the circuit court requesting relief from the prohibitions of the UWF statute. 430 ILCS 65/10(c)(1).

As a convicted felon, defendant was prohibited from possessing a weapon and was ineligible for relief under the FOID Card Act since his conviction was less than 20 years old. Defendant argued that as applied to him this statutory scheme violated the Second Amendment and his right to due process and equal protection.

Banning the possession of firearms by felons does not impose a burden on conduct within the scope of the Second Amendment. The court relied on the language of **People v. Aguilar**, 2013 IL 112116, where the Illinois Supreme Court specifically found that the right to bear arms is subject to certain restrictions, and reaffirmed the validity of longstanding prohibitions on the possession of weapons by a felon. Restricting the right of convicted felons to possess guns thus does not implicate the Second Amendment.

Even if it did, however, the statute would not be unconstitutional since the appropriate level of scrutiny would be rational basis, and the UWF statute bears a rational relationship to the State's legitimate interest in protecting the health, safety, and general welfare of its citizens from the danger posed by convicted felons being in possession of weapons.

The statute as applied also does not violate defendant's right to due process and equal protection. The court rejected defendant's argument that the statutory process to obtain a FOID card is arbitrary because it grants some felons the right but denies it to others. The State's 20-year waiting period is a legitimate exercise of its interest in placing restrictions on the possession of weapons by felons, and there is nothing arbitrary about it.

**People v. Fields**, 2014 IL App (1st) 130209 Defendant was convicted of aggravated

unlawful use of a weapon under 720 ILCS 5/24-1.6(a)(1), (a)(3)(I), which defines the offense as carrying a pistol, revolver, or other firearm on or about one's person or any vehicle or concealed on or about one's person except when on one's land or legal abode, "or on the land or in the legal dwelling of another person as an invitee with that person's permission." The court rejected defendant's argument that as part of its burden of proof the State was required to show that defendant was not an invitee of a resident of the apartment building in which he was arrested. The General Assembly intended to require the defense to bear the burden of proving by a preponderance of the evidence that a statutory exemption to the AUUW is present.

720 ILCS 5/24-1.6(a)(1), (a)(3)(I), creates the offense of AUUW where a person who is under the age of 21 possesses a firearm under specified circumstances. In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court found that the Class 4 form of AUUW violated the Second Amendment. Here, defendant argued that the blanket prohibition of firearm possession by a person under the age of 21 also violates the Second Amendment.

The court rejected this argument, finding that the limitation of possession of firearms by persons under the age of 21 has historical roots and does not affect conduct at the core of the Second Amendment. Applying the intermediate scrutiny test, the court concluded that the prohibition on handgun possession by persons under the age of 21 is reasonably related to the substantial governmental interests of limiting the possession of firearms by a subset of the general population which is likely to be less responsible and mature and deterring illegal activity by a group of citizens which is at risk for engaging in illegal, gang-related activity.

**People v. Grant**, 2014 IL App (1st) 100174-B In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court held that the Second Amendment is violated by provisions of the aggravated unlawful use of a weapon statute which prohibit possession of a loaded or immediately accessible firearm outside the home. Citing its prior decisions, the Appellate Court held that **Aguilar** does not invalidate sections of the aggravated unlawful use of a weapon statute which prohibit carrying a firearm on one's own land, abode, or place of business if "the person possessing the firearm has not been issued a currently valid [FOID] card" (720 ILCS 5/24-1.6(a)(1), (a)(3)(C)), and carrying or possessing a firearm on a public street or land without having been issued a valid FOID card (720 ILCS 5/24-1.6(a)(2), (a)(3)(C)). See also **People v. Henderson**, 2013 IL App (1st) 113294; **People v. Taylor**, 2013 IL App (1st) 110166). The court concluded that requiring a valid FOID card constitutes a meaningful and valid regulation of Second Amendment rights.

The court rejected the argument that there was insufficient evidence to establish that defendant had not been issued a currently valid FOID card. Defendant responded in the negative when asked by police whether he had a "current valid FOID card," and he did not present a valid card to the officers. The court rejected defendant's claim that his response to officers meant only that he did not have a FOID card on his person, finding that there was a reasonable basis to believe that no FOID card had been issued. And, there was independent evidence to corroborate defendant's statement because he at no time produced a valid FOID card or requested an opportunity to retrieve such a card, told officers he had purchased the handgun from a "crack head" rather than a licensed firearm dealer, and fled when he saw the police car.

The court rejected the argument that the proportionate penalties clause of the Illinois Constitution is violated because possession of a weapon without a valid FOID card is a Class 4 felony under the aggravated unlawful use of a weapon statute, but the misdemeanor offense

of violating the FOID Card Act is composed of identical elements. The court found that because the elements of the offenses are not identical, no proportionate penalties violation occurred.

First, the misdemeanor offense occurs when a person acquires or possesses a firearm, while the AUUW offense specifies that the defendant must “carry” the weapon on his person or in a vehicle ((a)(1)) or while on public land ((a)(2)). Second, the AUUW statute excludes possession on one’s own land or fixed place of business, while the misdemeanor offense has no such exclusion. Third, the misdemeanor offense requires that defendant have the FOID card in his possession when he acquires or possesses a firearm, while the AUUW statute requires only that defendant has been issued a valid card and not that he have it in his possession.

**People v. Gayfield**, 2014 IL App (4th) 120216-B Defendant was convicted of aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6 (a)(1), (a)(3)(A) for carrying a firearm that was concealed, loaded, and immediately accessible. That offense is generally a Class 4 felony. However, because defendant had previously been convicted of a felony, the offense was enhanced to a Class 2 felony under 720 ILCS 5/24-1.6 (d)(3).

In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court held that the Class 4 version of AUUW violates the Second Amendment because it categorically prohibits the possession and use of a firearm outside the home for purposes of self-defense. However, the **Aguilar** court expressed no opinion concerning the constitutionality of any other form of AUUW.

The elements of AUUW as charged here and in **Aguilar** were that: (1) defendant carried a prohibited firearm in a prohibited area, and (2) the firearm was uncased, loaded, and immediately accessible. 720 ILCS 5/24-1.6 (d)(3) is merely a sentence enhancement provision and that defendant’s prior felony conviction was not an element of the offense.

Because the elements of Class 2 AUUW are identical to the elements of the Class 4 offense that was invalidated in **Aguilar**, the court concluded that the Class 2 version of AUUW based on a prior felony conviction also violates the Second Amendment.

**People v. Henderson**, 2013 IL App (1st) 113294 **People v. Aguilar**, 2013 IL 112116 held that the aggravated unlawful use of a weapon offense defined in 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) violates the Second Amendment because it imposes a categorical prohibition on the right to carry a firearm outside one’s home for the purpose of self-defense. Here, the court concluded that the statutory subsection at issue in **Aguilar** is severable from the portions of the statute creating the offense of aggravated unlawful use of a weapon based on possession of a firearm without a valid FOID card (720 ILCS 5/24-1.6 (a)(2), (a)(3)(C)).

Under 720 ILCS 5/24-1.6, aggravated unlawful use of a weapon occurs when a weapon is possessed under specified circumstances and one of nine aggravating factors is present. **Aguilar** held one of those nine factors to be unconstitutional - carrying an uncased, loaded, and immediately accessible firearm while not on one’s own land or with the permission of the landowner. Section (a)(3)(C) involves a completely different aggravating factor - possessing a weapon without having been issued a valid FOID card. The aggravating factor held unconstitutional in **Aguilar** was not inseparably connected to the FOID provision, and the legislature would have enacted the latter provision even had it omitted the former. In reaching this conclusion, the court noted that reviewing courts are obligated to uphold the constitutionality of legislative enactments where possible, that the eight factors not involved in **Aguilar** are unrelated to the factor struck down in that case, and that neither the

“completeness nor the executability” of the entire statute was undermined by the [Aguilar](#) decision. Under these circumstances, it can be concluded that the legislature did not intend for the statute to stand or fall as a whole.

In addition, although [Aguilar](#) and [Moore v. Madigan](#), 702 F. 3d 933 (7th Cir. 2012) held that the Second Amendment protects the right to carry weapons outside one’s home for purposes of self-defense, both cases also note that Second Amendment rights are subject to reasonable regulation. The FOID requirement is such a reasonable regulation.

The court rejected the argument that the FOID provision is facially unconstitutional because persons under the age of 21 have a Second Amendment right to armed self-defense, but the FOID statute ([430 ILCS 65/4\(a\)\(2\)\(i\)](#)) bars persons under the age of 21 from owning firearms without parental permission and without any individualized determination of dangerousness. First, because the core of the Second Amendment does not include the right of an 18 to 20-year-old to possess a handgun in public for the purpose of self-defense, only intermediate scrutiny applied. Second, on the same day [Aguilar](#) was decided, the court issued [Coram v. State](#), 2013 IL 113867, which decided whether persons with prior convictions for domestic battery can obtain a FOID card. Because the three separate opinions in [Coram](#) applied the FOID act without raising any questions concerning its constitutionality, the court concluded that [Coram](#) strongly supports the conclusion that the FOID Card Act is constitutional as applied to persons under the age of 21.

The court rejected the argument that the legislature’s passage of the new Firearm Concealed Carry Act, which took effect after the offense here, indicates that the previous aggravated unlawful use of a weapon statute is unconstitutional in its entirety. The court noted that the new Act did not repeal the version of the AUUW statute at issue here and in fact imposed additional restrictions on persons who wish to obtain permits to carry concealed weapons, including a minimum age of 21 and the requirement to obtain a FOID card.

Because defendant failed to show that the statute creating the offense of AUUW based on the failure to obtain a valid FOID card was unconstitutional, and defendant was convicted but not sentenced on that charge, the cause was remanded to the trial court for imposition of sentence on that count.

[People v. Campbell](#), 2013 IL App (4th) 120635 Defendant was convicted of multiple counts of aggravated battery and aggravated unlawful use of a weapon, and was sentenced to concurrent terms of five years imprisonment on one count of aggravated battery and on aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\)](#). Defendant appealed.

The aggravated unlawful use of a weapon conviction was void because in [People v. Aguilar](#), 2013 IL 112116, the Supreme Court found that the Second Amendment is violated by the provision of the statute on which defendant was convicted. The court rejected the State’s argument that because defendant was a convicted felon and [Aguilar](#) did not invalidate long-standing prohibitions of possession of firearms by felons, the conviction could be affirmed. The court stated:

The State seems to misunderstand the nature of the Supreme Court's decision in [Aguilar](#). The court . . . did not merely hold that section 24-1.6(a)(1), (a)(3)(A) . . . was unconstitutional as applied in that case - the court held that the statute was unconstitutional *on its face*. . . . A statute is facially unconstitutional if there are no circumstances in which it could be validly applied. . . . [N]either defendant’s status as a felon nor any other factor could render his conviction under that provision of the aggravated unlawful use of a weapon statute constitutional.

Furthermore, a conviction based on defendant's status as a felon would be improper where the jury was not instructed to find whether defendant was a felon and its verdict did not reflect such a finding.

The State did not charge defendant under [720 ILCS 5/24-1.1](#), which generally prohibits felons from possessing firearms. Instead, the State charged only that defendant had violated [5/24-1.6\(a\)\(1\)](#), [\(a\)\(3\)\(A\)](#), which has no specific provision relating to possession of a weapon by a felon.

Because defendant's aggravated unlawful use of a weapon conviction rested on a statutory provision which has been declared unconstitutional on its face, that conviction was void and must be reversed. Because the jury also found defendant guilty of aggravated unlawful use of a weapon under [§24-1.6\(a\)\(1\)](#), [\(a\)\(3\)\(C\)](#), which involves possession of a firearm without a valid FOID card, the cause was remanded with directions to enter judgment and sentence on that count.

**People v. Williams**, 2011 IL App (1st) 091667-B [720 ILCS 5/24-1.6\(a\)\(1\)](#) defines aggravated unlawful use of a weapon as carrying a concealed weapon when one of several aggravating circumstances is present. [720 ILCS 5/24-1.1](#) defines unlawful use of a weapon by a felon as the possession of a weapon or ammunition by a person who has been convicted of a felony. Defendant was convicted of aggravated unlawful use of a weapon and unlawful use of a weapon by a felon for possessing a loaded handgun on a public street.

The Appellate Court rejected the argument that [§§5/24-1.6\(a\)\(1\)](#) and [5/24-1.1](#) violate the Second Amendment as interpreted by **McDonald v. City of Chicago**, 561 U.S. \_\_\_, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), and **District of Columbia v. Heller**, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). **McDonald** and **Heller** hold only that the Second Amendment protects the right to possess handguns in the home for purposes of self-defense. In both decisions, the Supreme Court stated that the holdings do not implicate the ability of a State to restrict the possession of weapons outside the home or by convicted felons.

Because the right to possess a loaded handgun in the home for purposes of self-defense is not implicated by [§5/24-1.6\(a\)\(1\)](#) or by [§5/24-1.1](#), neither statute violates the Second Amendment.

**People v. Alvarado**, 2011 IL App (1st) 082957 In **District of Columbia v. Heller**, 545 U.S. 570 (2000), the Supreme Court found that the Second Amendment was violated by a total ban on the possession of a handgun in the home for purposes of self-defense. **Heller** concluded, however, that the Second Amendment right to possess weapons is not unlimited and does not protect the right to possess weapons outside the home.

Citing Illinois appellate precedent, the court found that the Second Amendment is not violated by the aggravated unlawful use of a weapon statute ([720 ILCS 5/24-1.6\(a\)\(1\)\(a\)\(3\)\(C\)](#)), which bans carrying loaded firearms where the possessor is not on his or her land or in his or her home or fixed place of business and without having been issued a FOID card.

The court also rejected the argument that [§24-1.6\(a\)\(1\)\(a\)\(3\)\(I\)](#) of the AUUW statute violates the Second Amendment because it criminalizes the carrying of handguns for self-defense by 18, 19 and 20-year-old adults. The legislature intended to deter 18 to 20-year-old adults from carrying handguns because that age group is at a greater risk of gang activity and more likely to endanger juveniles. Applying the "intermediate" standard of review, court concluded that the statute serves a substantial important governmental interest and that there is a reasonable fit between the challenged provision and the goal in question.

The court rejected the argument that §24-1.6(a)(1)(a)(3)(I) violates equal protection in that it prohibits only adults who are 18, 19, and 20 from exercising the constitutional right to bear arms. The equal protection clause requires that the government treat similarly situated persons in a similar manner. The right to equal protection does not preclude the State from drawing distinctions between different categories of people, but merely prohibits different treatment of persons who have been placed into separate classes on the basis of criteria that are wholly unrelated to the purpose of the legislation.

Because the AUUW statute does not infringe on the core of the Second Amendment – the right to possess a handgun in the home for self-defense purposes - the appropriate standard is either intermediate scrutiny or the rational basis test. The court concluded that for equal protection purposes, the AUUW statute satisfies the intermediate scrutiny and rational basis tests for the same reasons that it satisfies the intermediate scrutiny test for purposes of a Second Amendment challenge.

### §55-1(c)

#### **Felony Based on Prior Conviction**

##### **United States Supreme Court**

**Lewis v. U.S.**, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) Defendant, who had been previously convicted of a felony in state court, was convicted under a federal statute prohibiting possession of a firearm by a person who has been convicted of a felony in federal or state court. The defendant challenged his conviction on the ground that the prior conviction had been obtained in the absence of counsel. However, the prior conviction had not been overturned. The Supreme Court affirmed the federal conviction. Although an uncounseled felony conviction cannot be used for certain purposes, it is not invalid for all purposes. Use of such a conviction as the basis for imposing a civil firearms disability (enforceable by a criminal sanction) is not improper. A convicted felon may challenge the validity of the prior conviction or otherwise remove his disability before obtaining a firearm, but may not collaterally attack the prior conviction through a subsequent federal prosecution.

##### **Illinois Supreme Court**

**People v. Moore**, 2020 IL 124538 Trial counsel's performance was deficient where he did not offer to stipulate to defendant's felon status at defendant's jury trial for unlawful possession of a weapon by a felon. Defendant's prior conviction was for first degree murder. **People v. Walker**, 211 Ill. 2d 317 (2004), adopted the reasoning of **Old Chief v. United States**, 519 U.S. 172 (1997), and held that where only a defendant's felon status is at issue, a court should generally exclude the name and nature of the defendant's prior conviction because it has no probative value and carries a substantial danger of unfair prejudice..It would have been objectively unreasonable for the trial court to have refused a stipulation had it been offered.

Defendant was prejudiced by counsel's error. **Walker** made clear that the nature of a defendant's prior conviction has little probative value where it is only relevant to defendant's felon status and instead carries a high risk of prejudice because of the tendency to "overpersuade." Here, the only real issue was whether defendant possessed the firearm, and on that question the evidence was closely balanced. The arresting officer testified that during a traffic stop, defendant made a movement toward the center console, acted nervously, and volunteered that he had a loaded firearm in the console. There was a video of the stop, but no audio, and the video did not show any movement toward the center console. The gun was not tested for fingerprints. Defendant testified that he did not reach toward the center console and did not tell the officer he had a gun in the car. The owner of the gun testified that she

accidentally left the gun in defendant's car the day before, and she produced a receipt confirming that the gun belonged to her. This was a "classic case of closely balanced evidence." Thus, the error in telling the jury that defendant's prior conviction was for murder was prejudicial. Defendant was denied the effective assistance of counsel, requiring reversal and remand for a new trial.

**In re N.G.**, 2018 IL 121939 (8/9/18) In a child-custody case involving a father's attempt to vacate a prior conviction for aggravated unlawful use of a weapon ("AUUW") pursuant to **Aguilar**, the Illinois Supreme Court repudiated its analysis in **People v. McFadden**, 2016 IL 117424. In **McFadden**, the court upheld an unlawful use of a weapon by a felon ("UUWF") conviction based on a prior AUUW conviction that was facially unconstitutional and void *ab initio* under **Aguilar**. It reasoned that, although **Aguilar** may provide a basis for vacating defendant's AUUW conviction, it did not automatically overturn that conviction. Thus when defendant committed UUWF he had a valid felony conviction that made it unlawful for him to possess firearms.

The N.G. court recognized that **McFadden** improperly followed a line of cases involving procedurally defective prior convictions, and ignored relevant authority, including **Montgomery v. Louisiana**, 577 U.S. \_\_ (2018), involving facially unconstitutional statutes. Under the latter, the prior conviction is not only void, but it cannot be used in any subsequent proceedings, even if the prior conviction was not invalidated until after the subsequent conviction. Courts confronted with extant void convictions have a duty to invalidate the conviction and any findings reliant on that conviction.

**People v. Zimmerman**, 239 Ill.2d 491, 942 N.E.2d 1228 (2010) 720 ILCS 5/24-1.6(a)(3)(D) creates the offense of aggravated unlawful use of a weapon for possession of a weapon by a person who has been adjudicated delinquent for an act which would have been a felony if committed by an adult. The court concluded that the plain language of §24-1.6 establishes that the prior juvenile adjudication is an element of aggravated unlawful use of a weapon, and not merely a factor enhancing the sentence for misdemeanor unlawful use of a weapon.

The court noted that §24-1.6 defines the offense of aggravated unlawful use of a weapon, and does not merely enhance the sentence for misdemeanor UUW, which is defined in a different section. The court also noted that §24-1.6 contains eight other factors, all of which constitute elements of the offense, and that it would have been illogical for the General Assembly to include one sentence enhancing factor.

Because the prior juvenile adjudication was an element of the offense, 725 ILCS 5/111-3(c) does not apply. (Section 111-3(c) states that the charge must include a prior conviction used to enhance the sentence for an offense, but the prior conviction is not to be disclosed to the jury.) Thus, the trial court did not err by informing the jury of a stipulation that defendant had a prior juvenile adjudication which satisfied the requirement of the offense.

### **Illinois Appellate Court**

**People v. Baker**, 2023 IL App (1st) 220328 The appellate court affirmed defendant's conviction for unlawful use of a weapon by a felon, despite the fact that it was based on a predicate felony committed at age 17. Although defendant argued on appeal the predicate was invalid because if committed at the time of the instant offense, it would have been disposed of in juvenile rather than adult court, defendant did not make this argument below. In fact, defendant stipulated to both the existence of the prior offense, and to its satisfaction of the element of the current offense.

Importantly, defendant had other adult convictions that would have satisfied the UUW/felon statute. As such, the integrity of the system was not at stake such that the plain error rule would require the court to overlook defendant's forfeiture and stipulation.

**People v. Tolliver**, 2022 IL App (2d) 210080 A new trial was required because defendant was willing to stipulate to the two prior convictions that qualified him to be charged as an armed habitual criminal, and the trial court erred in admitting evidence of the names of those convictions.

The Illinois Supreme Court has held that a defendant is entitled to stipulate to felon status for purposes of the UUW/felon statute. **People v. Walker**, 211 Ill. 2d 317 (2004). And if counsel fails to make such a request, defendant may be able to establish ineffective assistance of counsel. **People v. Moore**, 2020 IL 124538. It's true that armed habitual criminal is different, in that the State has to prove that defendant has been convicted of specific, qualifying offenses. Nevertheless, the rationale of Walker was applied to an armed habitual criminal case in **People v. Taylor**, 2022 IL App (5th) 180192, and the appellate court here agreed with that analysis. Under either scenario, the stipulation that defendant has been convicted of two qualifying offenses allows the State to meet its burden of proving the element of the offense, while avoiding the unnecessary prejudicial impact.

**People v. Dawson**, 2022 IL App (1st) 190422 Defendant argued that the State failed to prove him guilty of armed habitual criminal because he committed the two predicate offenses – two armed robberies – when he was 17. Reviewing the issue *de novo* due to the undisputed facts underlying the claim, and finding no forfeiture given the State's failure to argue forfeiture, a majority of the appellate court reduced defendant's conviction to aggravated unlawful use of a weapon for possessing a firearm without a FOID card.

Armed habitual criminal in this case required proof that defendant had been convicted of two prior forcible felonies. Robbery is a forcible felony. Defendant committed the robberies at issue in 2013, at which time 17 year-olds were prosecuted in adult court under the Juvenile Court Act. In 2014, however, the Act was amended to allow for the prosecution of 17 year-olds in juvenile court. Thus, if the robberies had been committed in 2017, when defendant was alleged to have committed armed habitual criminal, they could have been handled in juvenile court and may not have resulted in a "conviction" but rather a finding of delinquency.

The language of the AHC statute uses the present tense (convictions must be for offenses characterized as forcible felonies "as defined in Section 2-8"). So while in one sense the defendant "was convicted" of two forcible felonies, if age is taken into account, the acts he committed are not necessarily "defined as" forcible felony convictions under current law. Although courts have split over whether to consider defendant's age at the time the predicate was committed when analyzing the sufficiency of the prior convictions, the majority here found it dispositive that the State had the burden of proof. It therefore found the evidence insufficient.

**People v. Taylor**, 2022 IL App (5th) 180192 Defendant alleged ineffective assistance of counsel where, in his trial for armed habitual criminal, counsel did not offer to stipulate to defendant's felon status, as required by **People v. Moore**, 2020 IL 124538. The State argued that, unlike **Moore**, which involved a charge that required only proof of any prior felony conviction, the armed habitual criminal statute requires the State to prove defendant had two or more prior convictions of the specific type enumerated as qualifying offenses in the statute. Thus, the type of conviction had probative value.

The Appellate Court agreed with defendant, because even under the more exacting requirements of the armed habitual criminal statute, the parties could stipulate that defendant had two prior felony convictions which met the qualifications of the statute, without divulging the type of convictions. If defendant is willing to stipulate that his prior convictions satisfy the armed habitual criminal statute, the admission of those felonies into evidence would serve no evidentiary purpose other than to expose defendant to the risk of unfair prejudice.

Here, counsel performed unreasonably where he never objected when the prior convictions were detailed in the charging instrument, opening statements, closing argument, jury instructions, and the certified copies of conviction, which were entered into evidence. These repeated references, along with the prejudicial nature of the prior offenses – aggravated battery resulting in great bodily harm and unlawful delivery of a controlled substance – and the circumstantial nature of the State’s case, rendered counsel’s performance prejudicial.

**People v. Irrelevant**, 2021 IL App (4th) 200626 Defendant pled guilty to armed habitual criminal. Defendant moved to withdraw his plea, arguing in part that he the factual basis failed to prove his guilt, because he committed one of the predicate felonies at age 17.

The Appellate Court affirmed. The issue of whether AHC (or mandatory Class X sentencing) may rest on a predicate offense that, under current law, would result in a juvenile adjudication, has generated a split in the Appellate Court and is pending before the Supreme Court in **People v. Stewart**, 2020 IL App (4th) 180533. The Appellate Court here sided with the State and other Fourth District decisions, reasoning that the AHC statute merely requires that defendant had the qualifying prior convictions at the time he possessed the firearms, and that age is not an element of the prior convictions. Moreover, defendant’s prior conviction – a burglary committed at age 17 – would still be subject to discretionary transfer to adult court under current law, so the argument that it would be treated as a delinquency is speculative.

**People v. Smith**, 2021 IL App (1st) 190421 At defendant’s trial on charges of armed habitual criminal and UUW/felon, the defense refused to stipulate that certified statements of prior convictions – one bearing defendant’s name, “Rashawn Smith,” the other bearing the name “Rashawn T. Smith” – proved the necessary qualifying convictions of the charged offenses. The State did not present any testimony verifying that these convictions involved the same defendant, and no date of birth corroborated the matching name. The trial court found defendant guilty. During post-trial motions, the court took judicial notice of matching IR numbers, and denied the motion.

On appeal, the certified statements of conviction were not a part of the appellate record. While appellant has a duty to present a sufficient record, and an incomplete record will trigger a presumption favorable to the appellee, the rule is relaxed where the appellant bears no fault for the incomplete record. Here, appellate counsel explained that many attempts were made to obtain the records, but the impound order did not list the statements of conviction and the trial attorneys were unable to produce them. The Appellate Court held that counsel presented sufficient evidence of due diligence in attempting to obtain the records, so it would not indulge a presumption in favor of the appellee or resolve any doubts against the appellant.

Turning to whether the State proved defendant’s prior convictions beyond a reasonable doubt, the general rule for purposes of certified statements of conviction is that identity of name gives rise to a rebuttable presumption of identity of person. For one of the

prior convictions, however, the certified statement of conviction did not match defendant's name; rather, it contained an extra middle initial. While the State charged defendant in the instant case with an AKA referencing the name with the middle initial, this was legally insufficient to prove defendant was the same "Rashawn T. Smith" that was convicted in the prior case. Furthermore, the court erred in taking judicial notice of the IR numbers *sua sponte* after the close of evidence. Once the parties rested, the court was obligated to rule on the evidence presented at trial. Thus, the State failed to prove defendant committed one of the prior convictions cited as an element of AHC, and that conviction was reversed. The second prior, which did not include the middle initial, was subject to the presumption of identity because the names matched. Defendant did not rebut this presumption, so the court upheld defendant's conviction for UUV/felon.

**People v. Johnson**, 2021 IL App (1st) 200912 The Appellate Court affirmed the dismissal of defendant's 2-1401 challenging his UUV/felon conviction. Defendant alleged that his conviction must be vacated because it was based on a prior murder conviction that had been subsequently vacated. He cited **In re N.G.**, 2018 IL 121939. The Appellate Court found the case distinguishable. **N.G.** applies only when the prior conviction was based on a facially unconstitutional statute rendering it void. Here, although defendant's prior conviction was vacated for constitutional reasons, the statute under which he was convicted was not unconstitutional. Therefore, defendant had a valid felony at the time he was charged and convicted of UUV/felon.

The Appellate Court also rejected defendant's argument that a certificate of innocence in the murder case, issued after the circuit court's dismissal of the instant 2-1401, further compelled reversal. The certificate of innocence was not part of the record on appeal, and in ruling on the propriety of the circuit court's ruling, the Appellate Court would not look beyond the record.

**People v. Schultz**, 2019 IL App (1st) 163182 To determine whether a prior out-of-state conviction qualifies as a "forcible felony," courts should look to the residual clause of 720 ILCS 5/2-8, which includes any felony where defendant contemplated, or was willing to use, force or violence. A felony can be determined to be forcible either by looking to the elements of the offense itself or, if not inherently forcible, by looking at the particular facts of the prior offense. Here, the trial stipulation that defendant had been convicted in Michigan of assault with a dangerous weapon was adequate to prove a forcible felony. Although no statutory reference was included, the stipulation was sufficient to prove that the Michigan assault was forcible because assault necessarily involves the use or threat of force.

**People v. McGee**, 2016 IL App (1st) 141013 To convict a defendant of being an armed habitual criminal (AHC), the State must prove that defendant possessed a firearm after having two or more convictions for any qualifying offense, including various weapons offenses. 720 ILCS 5/24-1.7(a). To convict a defendant of unlawful use of weapons by a felon (UUVF), the State must prove that defendant possessed a firearm after having any previous felony conviction. 720 ILCS 5/24-1.1(a).

Defendant was convicted of AHC based on prior convictions for aggravated unlawful use of weapons (AUUV) in 2007 and several weapons offenses in 2008. Defendant was also convicted of UUVF based on the prior convictions for weapon offenses in 2008. The trial court merged the two convictions and sentenced defendant for AHC.

On appeal, defendant argued that his convictions were improper because the prior

felony convictions were based on statutes that were declared facially unconstitutional in [People v. Aguilar, 2013 IL 112116](#) and [People v. Burns, 2015 IL 117387](#). The Appellate Court agreed that the AHC conviction was improper but found that the UUWF conviction was not.

The 2007 AUUW conviction was based on a portion of the AUUW statute that had been declared facially unconstitutional making it void ab initio. That particular AUUW conviction thus could not serve as one of the necessary predicate offenses for the AHC conviction. The AHC conviction was vacated.

In the 2008 case, however, defendant was convicted of multiple weapons offenses, including two counts of AUUW without a valid firearm owner's identification (FOID) card. The statute for that particular portion of AUUW was upheld in [People v. Mosley, 2015 IL 115872](#). Since defendant had a constitutionally valid qualifying felony in the 2008 case, the State proved all the elements of UUWF.

The court specifically held that the charging instrument did not need to identify the correct prior felony to properly charge and obtain a conviction for UUWF. All the charging instrument needed to allege was that defendant had a prior felony conviction. Here the State did not identify the form of AUUW that had passed constitutional muster. Instead, it identified another offense that was unconstitutional. But the identity of the exact offense was mere surplusage, and thus unnecessary to properly charge and obtain a conviction for UUWF.

The court affirmed the UUWF conviction and remanded for sentencing on that offense.

[People v. Smith, 2016 IL App \(2d\) 130997](#) At defendant's sentencing for armed robbery with a firearm, the trial court erred by considering as aggravation a prior conviction of aggravated unlawful use of a weapon under [720 ILCS 5/24-1.6\(a\)\(3\)\(A\)](#). The prior AUUW was a Class 2 felony due to defendant's prior convictions.

The court acknowledged that in [People v. Aguilar, 2013 IL 112116](#), the Supreme Court invalidated only the Class 4 version of aggravated unlawful use of a weapon. However, in [People v. Burns, 2015 IL 117387](#), the court reconsidered the issue and found that the statute is facially unconstitutional in its entirety. Thus, both the Class 2 and Class 4 versions of aggravated unlawful use of a weapon violate the constitution.

A sentencing court may not consider, as a factor in aggravation, a prior conviction that was based on a statute which was later declared unconstitutional. Because the prior aggravated unlawful use of a weapon conviction was based on the statute held unconstitutional in [Aguilar](#) and [Burns](#), defendant's sentence was vacated and the cause remanded for re-sentencing.

[People v. Smith, 2016 IL App \(1st\) 140496](#) Defendant was convicted of Unlawful Use of a Weapon by a felon, which carries a Class 2 felony sentence when committed by a person who is not confined in a penal institution but who has been convicted of a forcible felony. [720 ILCS 5/24-1.1\(e\)](#). A "forcible felony" is defined as treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and "any other felony which involves the use or threat of physical force or violence against any individual." [720 ILCS 5/2-8](#). Defendant contended that his prior conviction for aggravated battery of a peace officer was not a forcible felony and therefore could not be used to enhance his conviction.

Because in 1990 the legislature amended the definition of “forcible felony” to include only aggravated batteries resulting in great bodily harm or permanent disability or disfigurement, it did not intend that all aggravated batteries were included in the definition of “forcible felonies.” Thus, where defendant’s prior conviction of aggravated battery to a peace officer was based on aggravated battery causing bodily harm to a police officer and not on great bodily harm or permanent disability or disfigurement, it was not a forcible felony.

The court rejected the argument that aggravated battery of a peace officer is a forcible felony under the residual clause for felonies that are not specifically listed but which involve the use or threat of violence or force. The court concluded that the residual clause is limited to offenses that are not specifically listed in the statute.

Because the trial court erred by using the prior conviction to enhance the aggravated battery conviction to a Class 2 offense, the cause was remanded for re-sentencing on a Class 3 felony.

**People v. Campbell**, 2014 IL App (1st) 112926 The court reiterated precedent holding that neither the armed habitual criminal statute (720 ILCS 5/24-1.7(a)) nor the unlawful use of weapon by a felon statute (720 ILCS 5/24.1.1(a)) violate the Second Amendment where the defendant possessed ammunition and a firearm in his home after having been convicted of a felony. The Second Amendment permits reasonable regulation of the use and possession of firearms by felons, and no reviewing court in any jurisdiction has found that the Constitution is violated by a statute prohibiting felons from possessing firearms or ammunition in his or her home.

**People v. Gayfield**, 2014 IL App (4th) 120216-B Defendant was convicted of aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6 (a)(1), (a)(3)(A) for carrying a firearm that was concealed, loaded, and immediately accessible. That offense is generally a Class 4 felony. However, because defendant had previously been convicted of a felony, the offense was enhanced to a Class 2 felony under 720 ILCS 5/24-1.6 (d)(3).

In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court held that the Class 4 version of AUUW violates the Second Amendment because it categorically prohibits the possession and use of a firearm outside the home for purposes of self-defense.

The elements of AUUW as charged here and in **Aguilar** were that: (1) defendant carried a prohibited firearm in a prohibited area, and (2) the firearm was uncased, loaded, and immediately accessible. 720 ILCS 5/24-1.6 (d)(3) is merely a sentence enhancement provision and that defendant’s prior felony conviction was not an element of the offense.

Because the elements of Class 2 AUUW are identical to the elements of the Class 4 offense that was invalidated in **Aguilar**, the court concluded that the Class 2 version of AUUW based on a prior felony conviction also violates the Second Amendment.

**People v. Rush**, 2014 IL App (1st) 123462 The unlawful use of a weapon by a felon (UUWF) statute makes it unlawful for a convicted felon to possess a firearm. 720 ILCS 5/24-1.1(a). The statute however does not apply to convicted felons who have been granted relief under the Firearm Owners Identification (FOID) Card Act. The FOID Card Act allows any felon, whose conviction is more than 20 years old, to apply to the Director of the Department of State Police or petition the circuit court requesting relief from the prohibitions of the UUWF statute. 430 ILCS 65/10(c)(1).

As a convicted felon, defendant was prohibited from possessing a weapon and was ineligible for relief under the FOID Card Act since his conviction was less than 20 years old.

Defendant argued that as applied to him this statutory scheme violated the Second Amendment and his right to due process and equal protection.

Banning the possession of firearms by felons does not impose a burden on conduct within the scope of the Second Amendment. The court relied on the language of **People v. Aguilar**, 2013 IL 112116, where the Illinois Supreme Court specifically found that the right to bear arms is subject to certain restrictions, and reaffirmed the validity of longstanding prohibitions on the possession of weapons by a felon. Restricting the right of convicted felons to possess guns thus does not implicate the Second Amendment.

Even if it did, however, the statute would not be unconstitutional since the appropriate level of scrutiny would be rational basis, and the UUWF statute bears a rational relationship to the State's legitimate interest in protecting the health, safety, and general welfare of its citizens from the danger posed by convicted felons being in possession of weapons.

The statute as applied also does not violate defendant's right to due process and equal protection. The court rejected defendant's argument that the statutory process to obtain a FOID card is arbitrary because it grants some felons the right but denies it to others. The State's 20-year waiting period is a legitimate exercise of its interest in placing restrictions on the possession of weapons by felons, and there is nothing arbitrary about it.

**People v. Wooden**, 2014 IL App (1st) 130907 Under 725 ILCS 5/111-3(c) when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction to give the defense notice. In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice under §111-3(c) is required only if the prior sentence that would enhance the sentence is not an element of the charged offense.

Here, the State charged defendant with unlawful use of a weapon by a felon, alleging that the prior felony was vehicular hijacking. The prior conviction for vehicular hijacking was used to elevate the offense from a Class 3 to a Class 2 felony on the basis that it was a forcible felony. 720 ILCS 5/24-1.1(e).

Defendant argued that he was improperly convicted of a Class 2 felony because the State did not give him notice that it would seek an enhanced sentence. Defendant further argued that **Easley** did not apply to his case because vehicular hijacking is not per se a forcible felony. A defendant commits vehicular hijacking when he knowingly takes a motor vehicle from a person by the use or imminent threat of force. 720 ILCS 5/18-3(a). A forcible felony includes several specifically enumerated felonies and any other felony which involves the use or threat of physical force or violence against any person. 720 ILCS 5/2-8. Vehicular hijacking thus falls within the definition of forcible felony and **Easley** controls the outcome of this case. Defendant's sentence was affirmed.

**People v. Campbell**, 2013 IL App (4th) 120635 Defendant was convicted of multiple counts of aggravated battery and aggravated unlawful use of a weapon, and was sentenced to concurrent terms of five years imprisonment on one count of aggravated battery and on aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6(a)(1), (a)(3)(A). Defendant appealed.

The aggravated unlawful use of a weapon conviction was void because in **People v. Aguilar**, 2013 IL 112116, the Supreme Court found that the Second Amendment is violated by the provision of the statute on which defendant was convicted. The court rejected the State's argument that because defendant was a convicted felon and **Aguilar** did not

invalidate long-standing prohibitions of possession of firearms by felons, the conviction could be affirmed. The court stated:

The State seems to misunderstand the nature of the Supreme Court's decision in [Aguilar](#). The court . . . did not merely hold that section 24-1.6(a)(1), (a)(3)(A) . . . was unconstitutional as applied in that case - the court held that the statute was unconstitutional *on its face*. . . . A statute is facially unconstitutional if there are no circumstances in which it could be validly applied. . . . [N]either defendant's status as a felon nor any other factor could render his conviction under that provision of the aggravated unlawful use of a weapon statute constitutional.

Furthermore, a conviction based on defendant's status as a felon would be improper where the jury was not instructed to find whether defendant was a felon and its verdict did not reflect such a finding.

The State did not charge defendant under [720 ILCS 5/24-1.1](#), which generally prohibits felons from possessing firearms. Instead, the State charged only that defendant had violated 5/24-1.6(a)(1), (a)(3)(A), which has no specific provision relating to possession of a weapon by a felon.

Because defendant's aggravated unlawful use of a weapon conviction rested on a statutory provision which has been declared unconstitutional on its face, that conviction was void and must be reversed. Because the jury also found defendant guilty of aggravated unlawful use of a weapon under §24-1.6(a)(1), (a)(3)(C), which involves possession of a firearm without a valid FOID card, the cause was remanded with directions to enter judgment and sentence on that count.

**People v. Garvin**, 2013 IL App (1st) 113095 The Appellate Court upheld the unlawful use of weapons by a felon statute (UUWF), specifically its prohibition of possession of firearm ammunition by a felon, against a Second Amendment challenge. The UUWF statute does not regulate conduct that is constitutionally protected by the Second Amendment. The Second Amendment does not protect the right of felons to possess firearms, including firearm ammunition.

Even if the Second Amendment did protect the right of felons to possess firearm ammunition, the constitutional challenge fails under any level of scrutiny. The statute is a valid exercise of Illinois's right to protect the health, safety, and general welfare of its citizens from the potential danger posed by convicted felons in possession of firearms or firearm ammunition.

**People v. Taylor**, 2013 IL App (1st) 110166 In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court held that the aggravated UUW statute ([720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(A\)](#)) violated the Second Amendment because it was a flat ban on carrying guns outside the home. But the court also held that the right to possess and use a firearm was not unlimited and is subject to meaningful regulations.

A different subsection of the statute prohibits the possession of firearms by persons who do not obtain a FOID card. [720 ILCS 5/24-1.6\(a\)\(1\), \(a\)\(3\)\(C\)](#). This subsection is not a comprehensive ban on possession and carrying firearms. It only affects those who do not possess a FOID card.

Courts have not applied a consistent level of scrutiny to determine whether a restriction placed on the right to keep and bear a firearm is reasonable. The appellate court concluded that it need not determine which approach is correct, as the FOID card restriction is constitutional under any approach.

The FOID card requirement seeks to protect the public from individuals carrying

firearms who should not be permitted to do so. Requiring compliance with the FOID card requirement is the least restrictive way to meet this compelling state interest, and therefore strict scrutiny is satisfied.

Under the “text, history, and tradition” approach, the court assesses whether a firearm law regulates activity falling outside the scope of the Second Amendment right as it was understood at the time of the amendment’s adoption. A state law restricting an individual’s Second Amendment right to bear arms may prevail when guns are forbidden to a class of persons who present a higher than average risk of misusing a gun. The FOID card requirement is such a law. It is the state’s method to prevent those who present a higher than average risk of misusing a gun (such as minors, felons, or the mentally ill) from legally carrying one in public places.

Therefore the FOID card requirement is not facially unconstitutional.

**People v. Spencer, 2012 IL App (1st) 102094** Reiterating recent precedent, the Appellate Court rejected the argument that the unlawful use of a weapon by a felon statute ([720 ILCS 5/24-1.1\(a\)](#)) violates the Second Amendment. The court noted that U.S. Supreme Court precedent provides that States do not act unconstitutionally by prohibiting the possession of firearms by felons.

The court also rejected the argument that [720 ILCS 5/24-1.1\(a\)](#) is unconstitutional because the prohibition against felons possessing weapons applies even where the convictions were for nonviolent felonies. Defendant failed to litigate the issue in the trial court; furthermore, the U.S. Supreme Court has not limited the States’ ability to prohibit possession of firearms by felons to persons with convictions for violent felonies.

**People v. Powell, 2012 IL App (1st) 102363** The rule against double enhancement prohibits use of a single factor both as an element of an offense and as a basis for imposing a more harsh sentence. However, the rule does not apply where the legislature clearly expresses its intention to enhance the penalty based upon some aspect of the crime. The best indication that the legislature intended such an enhancement lies in the statutory language itself.

[720 ILCS 5/24-1.1\(e\)](#) provides that unlawful use of a weapon by a felon is a Class 3 felony with a sentence of two to 10 years if the prior conviction was for a non-forcible felony, but a Class 2 felony with a sentence of three to 14 years if the prior conviction was for a forcible felony. Section 5/24-1.1(e) does not involve an enhancement of a Class 3 felony to a Class 2 felony based on the nature of the prior conviction. Instead, the legislature chose to define unlawful use of a weapon by a person who has been convicted of a forcible felony as a Class 2 felony. Thus, under the plain language of the statute there is no enhancement of a lesser offense due to the nature of the prior conviction.

And, if §5/24-1.1(e) was found to involve an enhancement based on whether the prior conviction was for a forcible felony, the plain language of the statute demonstrates clear legislative intent to increase the class of the offense based on the fact that the prior conviction was for a forcible felony.

**People v. McIntyre, 2011 IL App (2d) 100889** To convict defendant under an accountability theory of unlawful possession of a weapon by a felon, the State must first establish a *prima facie* case against the principal. An essential element of that offense is that the principal is a convicted felon. Although defendant was a convicted felon, the principal was not. Because absent that evidence, the State failed to prove that the principal committed

the offense of unlawful possession of a weapon by a felon, defendant could not be convicted of that offense under an accountability theory.

**People v. Williams**, 2011 IL App (1st) 091667-B 720 ILCS 5/24-1.6(a)(1) defines aggravated unlawful use of a weapon as carrying a concealed weapon when one of several aggravating circumstances is present. 720 ILCS 5/24-1.1 defines unlawful use of a weapon by a felon as the possession of a weapon or ammunition by a person who has been convicted of a felony. Defendant was convicted of aggravated unlawful use of a weapon and unlawful use of a weapon by a felon for possessing a loaded handgun on a public street.

The Appellate Court rejected the argument that §§5/24-1.6(a)(1) and 5/24-1.1 violate the Second Amendment as interpreted by **McDonald v. City of Chicago**, 561 U.S. \_\_\_, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), and **District of Columbia v. Heller**, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). **McDonald** and **Heller** hold only that the Second Amendment protects the right to possess handguns in the home for purposes of self-defense. In both decisions, the Supreme Court stated that the holdings do not implicate the ability of a State to restrict the possession of weapons outside the home or by convicted felons.

Because the right to possess a loaded handgun in the home for purposes of self-defense is not implicated by §5/24-1.6(a)(1) or by §5/24-1.1, neither statute violates the Second Amendment.

**People v. Gibson**, 403 Ill.App.3d 942, 934 N.E.2d 611 (2d Dist. 2010) To prove the elements of unlawful possession of a weapon by a felon beyond a reasonable doubt, the person who possessed the weapon must be shown to be a convicted felon. Where an alleged accomplice had a prior felony conviction but there was no evidence that either of the principals had ever been convicted of a felony, the State failed to establish the offense beyond a reasonable doubt. The court reversed the alleged accomplice's conviction for unlawful possession of a weapon by a felon.

**People v. Carmichael**, 343 Ill.App.3d 855, 799 N.E.2d 401 (1st Dist. 2003) Unlawful use of a weapon by a felon (by a person who is not confined to a penal institution) is a Class 3 felony carrying a prison sentence of between two and 10 years. Where the offense is committed by a person who has been convicted of a "forcible felony," however, it is a Class 2 felony carrying a sentence of not less than three nor more than 14 years. (720 ILCS 5/24-1.1(e)). Because armed violence is a "forcible felony" only if in a particular case it involved the use or threat of physical force (see **People v. Belk**, 203 Ill.2d 187, 784 N.E.2d 825 (2003)), the trial court erred by imposing a Class 2 sentence where the State failed to present evidence concerning the circumstances of defendant's prior armed violence conviction.

**People v. Harris**, 343 Ill.App.3d 1014, 798 N.E.2d 1259 (4th Dist. 2003) Under **People v. Peete**, 318 Ill.App.3d 961, 743 N.E.2d 689 (4th Dist. 2001) and **People v. Walker**, 335 Ill.App.3d 102, 779 N.E.2d 268 (2d Dist. 2002) the trial court may not refuse a defendant's offer to stipulate to a prior conviction that is offered to prove his status as a felon. At defendant's jury trial for unlawful possession of a weapon by a felon, the trial court committed plain error by refusing to accept an offer to stipulate to defendant's four prior felony convictions.

**People v. Parker**, 335 Ill.App.3d 474, 781 N.E.2d 1092 (1st Dist. 2002) Without deciding whether in a close case the trial court abuses its discretion by permitting the State to show

the nature of the prior conviction where the defendant is charged with unlawful use of a weapon by a felon the court held that at least where the evidence of defendant's knowing possession of a weapon is overwhelming and the trial court limits the jury's use of the prior conviction to the question of defendant's status as a felon, any risk that the nature of the prior felony conviction will prejudice the defendant is "so low as to be negligible." In light of the overwhelming evidence and the limiting instruction, the trial court did not abuse its discretion by permitting the State to show that defendant's prior conviction was for second degree murder.

**People v. Brown**, 325 Ill.App.3d 733, 759 N.E.2d 582 (3d Dist. 2001) Where the name on a certified copy of conviction is identical to the defendant's name, the State may rely on a presumption that defendant is the person named in the certified copy. Under such circumstances, the admission of the certified copy establishes beyond a reasonable doubt that defendant is a convicted felon. If the presumption is not established, or is rebutted by the defense, the State must introduce additional evidence to prove that defendant is the person named on the certified copy. Where the prior conviction was in the name "John Brown," but defendant was charged as "John E. Brown," the absence of a middle initial on the certified copy defeated the presumption of identity. The court rejected the State's argument that a middle initial is irrelevant to the presumption of identity. Compare **People v. West**, 298 Ill.App.3d 58, 697 N.E.2d 1216 (1st Dist. 1998) (where there is a discrepancy between the defendant's name and the name shown on the certified record of the prior conviction, but the certified copy includes a photograph of the person convicted of the prior offense, the trial court may compare the photograph with the defendant's appearance and determine that defendant is the person who was previously convicted).

**People v. Peete**, 318 Ill.App.3d 961, 743 N.E.2d 689 (4th Dist. 2001) Adopting the reasoning of **Old Chief v. U.S.**, 519 U.S. 172 (1997), the court held that the trial court should require the State to accept a defense offer to stipulate to a prior conviction that is an element of the crime charged. The court found that there is an undue risk of unfair prejudice if the prior felony is proven before the jury. The court also noted that where the trial court accepts such a stipulation, the IPI instructions may need to be modified to remove reference to the specific felony in question.

**People v. Moton**, 277 Ill.App.3d 1010, 661 N.E.2d 1176 (3d Dist. 1996) In a stipulated bench trial, defendant was convicted of unlawful use of a weapon by a felon. Defendant was originally charged by indictment as "William Moton." However, several months later a new indictment was returned charging defendant as "William Moton a/k/a William B. Morton a/k/a William Morten." Both indictments charged that defendant was in possession of a handgun on a specified date and that he had previously been convicted of a felony for selling cocaine in Shelby County, Tennessee. At trial, the only evidence of a prior conviction was a certified copy of a Tennessee felony conviction against "William B. Morton." The prosecutor argued that a presumption of identity applied because the defense had not objected to the indictment's inclusion of the alias "William B. Morton." The Appellate Court reversed, holding that the evidence was insufficient to establish a prior conviction.

A certified copy of a prior conviction gives rise to a rebuttable presumption of identity where the name on the certified record is the same as that of the defendant. However, the mere fact that an alias is included in the charging instrument does not give rise to the presumption of identity where the conviction lists only the alias and not defendant's actual name.

**People v. Gober**, 146 Ill.App.3d 499, 496 N.E.2d 1226 (4th Dist. 1986) The Court found that a previous conviction was not proven by defendant's statements to police that he had "just got out of the penitentiary for shooting someone," because those statements did not reveal the offense of which defendant had been convicted.

Furthermore, a prior conviction was not proven beyond a reasonable doubt by a document from a Mississippi circuit court showing that a "Lester Gober" had been convicted of manslaughter in 1975 and sentenced to eighteen years. Although the document was signed by the judge presiding over the proceedings and certified as a true copy by the circuit clerk, a prior conviction can be proved only by the record or an authenticated copy showing the caption, return of indictment in open court by the grand jury, indictment and arraignment of the defendant, impaneling of the jury and final judgment of the court. Here, the document introduced by the State was merely a "certified" copy of a "docket entry" and not an "authenticated" copy of conviction.

**People v. Phillips**, 150 Ill.App.3d 531, 502 N.E.2d 80 (3d Dist. 1986) Defendant pleaded guilty to two UUW offenses, one that occurred in January and one that occurred in June. His probation sentences were subsequently revoked, and he was sentenced to 180 days imprisonment for the January offense and three years imprisonment for the June offense. The second sentence was imposed under a section of the statute which provided that a "person convicted of a second or subsequent [UUW] violation . . . commits a Class 4 felony." The Court held that an enhanced penalty should not be imposed until the defendant "has had the opportunity to reform after being punished for his first conviction." Since this defendant committed both offenses before being convicted of either, he did not have an opportunity to reform. The sentence for the June offense was reduced.

#### **§55-1(d)**

#### **FOID Cards and Concealed Carry Licenses**

#### **Illinois Supreme Court**

**People v. Harvey**, 2024 IL 129357 The supreme court affirmed defendant's conviction for aggravated unlawful use of a weapon. The AUUW statute exempts those who possess or carry the weapon "in accordance with the Firearm Concealed Carry Act, by a person who has been issued a currently valid license under the Firearm Concealed Carry Act." 720 ILCS 5/24-1(a)(10)(iv). Defendant argued the State failed to prove beyond a reasonable doubt that this exemption did not apply to defendant. The supreme court agreed with the appellate court's holding that the State's proof was sufficient.

To prove that defendant had not been issued a currently valid license ("CCL"), the State called two police officers to testify that when they found defendant in possession of a gun, they asked if he had a CCL, and defendant said "no." Defendant argued that this evidence was insufficient to prove he didn't own a CCL. First, defendant argued the answer was vague – he may have meant that he didn't have the license on his person. Second, defendant argued this evidence violated the *corpus delicti* rule. The State countered that the *corpus delicti* rule didn't apply, and regardless, it had no obligation to prove defendant lacked a CCL, because the statute allows proof that the possession was "not in accordance with the Firearm Concealed Carry Act," a requirement of which is to produce the license when asked by police.

The court first held that under section 24-1(a)(10)(iv), the State had to prove defendant actually lacked a CCL, not just that the possession was not in accordance with the

Carry Act. The plain language of the Carry Act itself states that those in violation “shall only be subject to the penalties under this Section and shall not be subject to the penalties under \*\*\* paragraph \*\*\* (10) of subsection (a) of Section 24-1.” To harmonize this language with that of section 24-1(a)(10)(iv), the court held that it was required to interpret subsection 24-1(a)(10)(iv) as exempting anyone who owns a CCL, even if they are not otherwise in compliance with the Carry Act (e.g., able to produce the CCL to the officers). (Two justices disagreed with this interpretation, and would have held that defendant’s failure to produce the CCL in accordance with the Carry Act (a)(10)(iv) was enough to remove the protection of the exemption.)

The court next ruled that defendant’s answers were not so vague as to raise a doubt that he did not own a CCL. While one interpretation of his response was that he did not have the license with him, the standard of review on appeal is whether any rational trier of fact could have found defendant guilty, viewing the evidence in a light most favorable to the State. Given this deferential standard, the trial court’s interpretation that he lacked a license altogether was not so unreasonable as to warrant reversal.

Finally, the *corpus delicti* rule did not apply to defendant’s statement. Defendant argued that the rule applies to all evidence relevant to establishing any element of the offense. But the court held that the rule applies only when the harm it seeks to limit – false confessions – is present. In this case, defendant’s statement was not a confession, *i.e.*, an admission that he committed the elements of the offense. Rather, it was a factual answer to a question, relevant to only one element of the offense. As in [People v. Dalton, 91 Ill. 2d 22 \(1982\)](#), where the court found no *corpus delicti* violation when the defendant’s statement established his age (also an element of the offense), defendant’s answer here is the type of objective, inherently reliable statement to which the *corpus delicti* rule need not apply.

A concurring justice found this holding to be an unjustified and illogical diminishment of the *corpus delicti* rule, and would have affirmed on the basis that defendant’s inculpatory statement was sufficiently corroborated by facts such as defendant’s furtive movement to conceal the weapon and his failure to ask the officers for an opportunity to retrieve the CCL.

**People v. Holmes, 2017 IL 120407** The void *ab initio* doctrine is a State judicial principle holding that a facially unconstitutional statute is void from the beginning. An unconstitutional law confers no right, imposes no duty, and affords no protection. It is as if the law had never been passed. A defendant cannot be prosecuted under a statute that is void *ab initio*.

Where a statute is held unconstitutional because it violates a provision of the United States constitution and not merely as a matter of state constitutional law, the void *ab initio* doctrine is subject to the limited lockstep doctrine. The latter doctrine provides that where a provision of the State constitution has an equivalent provision in the federal constitution, the State constitutional provision will be interpreted in accordance with the United States Supreme Court’s interpretation of the federal provision, unless there is reason to believe that the drafters of the Illinois constitution intended a different result.

Here, defendant was arrested for possessing a revolver on a Chicago street. He was charged with two counts of aggravated unlawful use of a weapon based on carrying the weapon on the street and two counts of AUUW for possessing the weapon without a valid FOID card. After the arrest, **People v. Aguilar** held that the sections of the AUUW statute prohibiting the carrying of a weapon were facially unconstitutional as a violation of the Second Amendment. Defendant was subsequently convicted of the counts alleging carrying the weapon without a valid FOID card.

Because the arresting officer learned that defendant did not have a FOID card only after he had made the arrest for carrying the weapon, defendant argued that the probable cause for the arrest was retroactively invalidated under the void *ab initio* doctrine. Defendant argued that it would be improper to prosecute him for not having a FOID card when probable cause for the arrest existed only under a different, unconstitutional statute.

The Supreme Court rejected this argument, noting that federal case law clearly holds that probable cause is not retroactively invalidated because the statute on which an arrest was based is subsequently held unconstitutional. Because strict application of the Illinois void *ab initio* doctrine would conflict with the limited lockstep doctrine, the defense argument was rejected. “[T]he void *ab initio* doctrine does not retroactively invalidate probable cause based on a statute later held unconstitutional on federal constitutional grounds or on State constitutional grounds subject to the limited lockstep doctrine.”

**People v. Schweihs**, 2015 IL 117789 The court held that under its recent decision in **People v. Williams**, 2015 IL 117470, the offense of aggravated unlawful use of a weapon (AUUW) under 720 ILCS 5/24-1.6(a)(1),(a)(3)(C) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under 430 ILCS 65/2. Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

The court reversed the judgment of the circuit court declaring this section of the AUUW statute unconstitutional.

**People v. Holmes**, 241 Ill.2d 509, 948 N.E.2d 617 (2011) The aggravated U UW statute exempts from its prohibition firearms that are “unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner’s Identification Card.” 720 ILCS 5/24-1.6(c)(iii). In **People v. Diggins**, 235 Ill.2d 48, 919 N.E.2d 237 (2009), the court held that a firearm stored in the center console of a vehicle qualifies for the exemption as a firearm enclosed in a case.

The defendant was charged with aggravated U UW for carrying an “uncased, loaded and immediately accessible” firearm in his vehicle in violation of 720 ILCS 5/24-1.6(a)(1)(3)(A). Relying on **Diggins**, the court held that the State failed to prove that the firearm was uncased where it was undisputed that the police recovered the firearm from within a closed and latched backseat armrest, because that container “fell within the meaning of a case under section 24-1.6.”

A person commits the offense of aggravated U UW when he carries a firearm in his vehicle and “has not been issued a currently valid Firearm Owner’s Identification Card.” 720 ILCS 5/24-1.6(a)(1)(3)(C). The FOID Card Act provides that no person may acquire or possess a firearm in Illinois without a FOID card, but exempts from its requirement “[n]onresidents who are currently licensed or registered to possess a firearm in their resident state.” 430 ILCS 65/2(b)(10).

The non-resident exemption of subsection (b)(10) is incorporated into the U UW statute, and therefore a valid permit or license from another state can substitute for the FOID card requirement of 720 ILCS 5/24-1.6(a)(1)(3)(C). Reading the statutes separately would result in the absurdity that an out-of-state resident who transports into Illinois a firearm legally registered in his home state would be exempt from misdemeanor prosecution under the FOID Card Act, but could be prosecuted as a felon under the aggravated U UW statute.

Defendant was charged with aggravated U UW for failing to have a FOID card. Because the non-resident exception of the FOID Card Act is incorporated into the U UW

statute, the trial court erred in excluding, as irrelevant, evidence that defendant had a valid gun permit from Indiana, the state of his residence. Defendant did not need to have the Indiana permit in his possession at the time of his arrest in order to claim the exemption, because the aggravated UUV statute requires only that defendant have been issued a currently valid FOID card.

### Illinois Appellate Court

**People v. Fields**, 2024 IL App (4th) 210194-B Defendant was convicted of unlawful possession of a firearm without a valid FOID card in violation of 430 ILCS 65/2(a)(1). The appellate court affirmed, and defendant filed a petition for leave to appeal. The supreme court ordered the appellate court to reconsider in light of its decision in **People v. Ramirez**, 2023 IL 128123 (2023).

Defendant had a concealed carry license and a FOID card at the time she was found in possession of a firearm, but the police determined that both had been revoked. According to the arresting officer's testimony during the motion to suppress, defendant claimed she was unaware they had been revoked. At trial, however, the trial court granted the State's motion *in limine* to bar defendant from testifying that she was unaware of the revocation, finding knowledge was not an element of the offense.

On remand to the appellate court in light of **Ramirez**, the parties agreed this ruling was in error. In **Ramirez**, the offense required the State to prove: (1) the defendant possessed a firearm; and (2) the firearm was defaced. The court held that when a possessory offense lacks a *mens rea*, the default *mens rea* is knowledge. And under 720 ILCS 5/4-3(b), a mental state should apply to all elements of the offense. Thus, the State had to prove knowledge of both possession and the fact that the weapon was defaced.

Here, the instant offense required the State to prove: (1) defendant possessed a firearm; and (2) defendant's FOID card was revoked. As in **Ramirez**, section 4-3(b) requires that the *mens rea* of knowledge must apply to both elements. Thus, the parties agreed that the trial court erred in granting the motion *in limine* and not requiring proof of knowledge of the revocation. Unlike **Ramirez**, however, the court would not remand for a new trial. In that case, binding appellate court precedent held that the "defaced" element had no *mens rea*, while here, no such caselaw addressed the FOID statute. As such, there was no change in law that would allow the State to circumvent the defendant's protection against double jeopardy.

**People v. Shelly**, 2024 IL App (3d) 220432 Defendant was convicted of unlawful possession of a firearm without a FOID card. In the trial court, defendant had argued that the State failed to prove him guilty beyond a reasonable doubt because it offered no evidence he was aware that his FOID card had been revoked. Defendant renewed that argument on appeal.

Relying on **People v. Ramirez**, 2023 IL 128123, where the Supreme Court held that a charge of possession of a defaced firearm requires proof both that defendant knowingly possessed a firearm and also had knowledge that it was defaced, the court here held that the State was required to prove defendant's knowledge that his FOID card had been revoked. "Criminalizing the possession of a firearm without proving the defendant had knowledge his FOID card was invalid would penalize otherwise innocent conduct and would run afoul of the second amendment."

The matter was reversed and remanded for a new trial, consistent with **Ramirez**, which had been decided after defendant's trial in this case. Double jeopardy does not preclude retrial of a defendant whose conviction is vacated based on a post-trial change in the law.

**In re Gabriel W., 2017 IL App (1st) 172120** To prove AUUW based on lack of a Firearm Owner's Identification (FOID) card, the State must establish that respondent had not been issued a FOID card, not just that he didn't have one in his possession. Testimony by a police officer that respondent did not present him with a FOID card is insufficient to prove that respondent has not been issued a FOID card. Therefore, the Appellate Court vacated respondent's adjudication for AUUW based on the lack of a FOID card.

**People v. Lozano, 2017 IL App (1st) 142723** A defendant commits the offense of unlawful possession of a firearm by a street gang member when he possesses a firearm in public, does not have a valid FOID card, and is a member of street gang. [720 ILCS 5/24-1.8\(a\)\(1\)](#). Street gang means any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining of three or more people with an established hierarchy that through its membership or the agency of any member engages in a course of criminal activity. A course of criminal activity means two or more gang-related criminal offenses committed within Illinois when: (1) at least one offense was committed after January 1, 1993; (2) both offenses were committed within five years of each other; and (3) at least one offense involved the solicitation, conspiracy, or attempt to commit, or the actual commission of, any felony. [740 ILCS 147/10](#).

The evidence showed that defendant possessed a firearm in public, did not have a valid FOID card, and was a member of the Two-Six "street gang." A Chicago Police Officer testified as an expert on street gangs that the Two-Sixes have been in existence since the 1970s and have a well-structured hierarchy, "almost like a corporation." The Two-Sixes use violence to control their territory including "murder, shootings, intimidation, arson, anything they could possibly think of to attack rival gang members."

Based on this evidence the jury convicted defendant of unlawful possession of a firearm by a street gang member.

The Appellate Court, with one justice dissenting, reversed the conviction, holding that the State failed to prove that the Two-Sixes were a street gang as defined by statute. Although the gang expert testified that the Two-Sixes use violence to control their territory, there was no evidence about the time frame of these crimes. The evidence thus failed to show, as required by statute, that any criminal acts occurred after January 1, 1993, or that two such offenses were committed within five years of each other.

**People v. Wiggins, 2016 IL App (1st) 153163** Defendant, a resident of Texas, was convicted of two counts of aggravated unlawful use of a weapon for possessing a weapon in his car without a FOID card and possessing a firearm on his person without a FOID card. [430 ILCS 65/2\(b\)\(10\)](#) creates an exemption to the FOID card requirement for non-residents of Illinois "who are currently licensed or registered to possess a firearm in their resident state." Defendant argued that the FOID card exemption applied because Texas allows its citizens to possess a weapon without obtaining a license and because defendant obtained a permit to possess a firearm while serving in the United States Army Reserves at Ft. Bliss, TX.

The court rejected defendant's arguments.

The FOID card exception applies only to residents of states which require their citizens to either obtain a license or register in order to possess a firearm. The legislature did not intend to create an exception for the residents of states which did not have a licensing or registration requirement with a vetting process to ensure that a gunowner satisfied certain safety or eligibility requirements. Thus, the Texas statutory scheme permitting the carrying

of weapons without any licensing or registration requirement does not qualify Texas residents for the FOID card exemption.

Similarly, defendant's military permit did not satisfy the requirements for the FOID card exception. Section 2(b)(10) refers to a licensing and registration process in the defendant's "resident state," not a regulatory process for possessing weapons on a military base. In addition, although the legislature created exemptions from the AUUW statute for armed forces members who are engaged in official duties, it did not choose to create such an exemption for military personnel who were not involved in official duties.

The Illinois FOID card requirement does not violate the Second Amendment as applied to a resident of a state that does not have a state licensing requirement. **Aguilar** recognizes a Second Amendment right to possess a firearm for self-defense outside the home. However, **Aguilar** also found that the right to possess a weapon is not unlimited and may be subjected to meaningful regulation. In **People v. Mosley**, 2015 IL 115872, the Illinois Supreme Court found that the FOID card requirement of the AUUW statute is a meaningful and justifiable regulation of firearms possession.

Although defendant was ineligible for a FOID card because he was a Texas resident, and Texas does not have a licensing process for the mere possession of a weapon, the court noted that Texas does have licensing for carrying a concealed weapon that is substantially similar to the process in Illinois for obtaining a FOID card. Thus, defendant could have qualified to possess a weapon in Illinois by obtaining a Texas concealed carry permit.

**People v. Larson**, 2015 IL App (2d) 141154 A defendant who commits possession of a firearm without a valid firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1)), is guilty of a Class A misdemeanor if he does not possess a currently valid FOID card "but is otherwise eligible" to obtain one. 430 ILCS 65/14(b). He is guilty of a Class 3 felony if he does not possess a currently valid FOID card and "is not otherwise eligible" to obtain one. 430 ILCS 65/14(c)(3). He is also guilty of a Class 3 felony if his FOID card is "revoked." 430 ILCS 65/14(c)(1).

An order of protection was entered against defendant with an expiration date of February 14, 2011. As a result of the order of protection, the Illinois State police revoked defendant's FOID card. On February 14, 2011, officers discovered defendant in possession of firearm. On that date, the order of protection had expired, so defendant was eligible to obtain a new FOID card, but had not yet done so. Defendant was convicted of a Class 3 felony under section 14(c)(1) since his FOID card was revoked.

Defendant argued on appeal that because he was eligible to obtain a FOID card at the time the firearm was discovered, he should have been convicted of a Class A misdemeanor under section 14(b), failing to possess a FOID card but eligible to obtain one. Defendant argued that both section 14(b) and 14(c)(1) applied to his case, and thus under the rule of lenity, the more lenient interpretation of the statute should be used.

The Appellate Court rejected defendant's argument. The court held that using the proper tools of statutory construction, it was clear that section 14(c)(1) applied to defendant, not section 14(b). Since the statute was not ambiguous, the rule of lenity did not apply.

First, defendant's argument would improperly render the word "revoked" in section 14(c)(1) meaningless. Section 14(b) provides for situations where a defendant has no FOID card but is eligible to obtain one. Section 14(c)(3) provides for situations where a defendant has no FOID card and is not eligible to obtain one. Under defendant's interpretation, the only salient consideration in determining whether the offense is a misdemeanor or a felony is whether defendant is eligible to obtain a FOID card. But if that were the case, then sections

14(b) and 14(c)(3) would be entirely dispositive of the outcome, and the “revoked” language of section 14(c)(1) would be rendered meaningless. Instead, the statute treats a revoked FOID card more seriously than a non-possessed FOID card and punishes the former more severely.

Second, section 14(b) applies to the general category of cases where a defendant does not possess a FOID card. Section 14(c)(1) by contrast applies to the narrower subset of cases where a FOID card has been revoked. Accordingly, section 14(c)(1) is controlling.

**People v. Akins**, 2014 IL App (1st) 093418-B The Appellate Court reiterated precedent holding that aggravated unlawful use of weapon convictions based on possession of weapons without a FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C)) or possession of weapons on a public way without a FOID card (720 ILCS 5/24-1.6(a)(2), (a)(3)(C)) do not violate the Second Amendment. Citing **People v. Henderson**, 2013 IL App (1st) 113294, the court concluded that aggravated unlawful use of a weapon based upon the lack of a FOID card is severable from the offenses found unconstitutional in **People v. Aguilar**, 2013 IL 112116, and does not unconstitutionally deny the right to bear arms to persons who are between 18 and 20 years old.

**In re Angel P.**, 2014 IL App (1st) 121749 Under **People v. Aguilar**, 2013 IL 112116, the minor’s adjudication based on possession of a firearm while not on one’s own property must be vacated. However, the court concluded that **Aguilar** permits adjudications based on aggravated unlawful use of a weapon based on failing to have a FOID card, AUUW by a person who is under the age of 21 and not involved in lawful activities under the Wildlife Code, and AUUW based on a previous delinquency adjudication for an offense that would have been a felony had it been committed by an adult.

#### **§55-1(e)**

##### **Location**

##### **Illinois Supreme Court**

**People v. Izzo**, 195 Ill.2d 109, 745 N.E.2d 548 (2001) 720 ILCS 5/21-6, which prohibits possessing or storing certain weapons "in any building or on land supported in whole or in part with public funds . . . without prior written permission from the chief security officer for such land or building," is not unconstitutionally vague for failing to define the phrase "chief security officer." In addition, the statute was not unenforceable because it had not been published on school grounds or the students notified of its provisions; "one's ignorance of the law does not excuse unlawful conduct."

##### **Illinois Appellate Court**

**People v. Fields**, 2014 IL App (1st) 130209 Defendant was convicted of aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6(a)(1), (a)(3)(I), which defines the offense as carrying a pistol, revolver, or other firearm on or about one’s person or any vehicle or concealed on or about one’s person except when on one’s land or legal abode, “or on the land or in the legal dwelling of another person as an invitee with that person’s permission.” The court rejected defendant’s argument that as part of its burden of proof the State was required to show that defendant was not an invitee of a resident of the apartment building in which he was arrested. The court concluded that the General Assembly intended to require the defense to bear the burden of proving by a preponderance of the evidence that a statutory exemption to the AUUW is present.

## §55-1(f)

### Age

#### Illinois Appellate Court

**In re Gabriel W.**, 2017 IL App (1st) 172120 To prove respondent's age for purposes of AUUW based on possession of a firearm while being under 21, and for UPF while under age 18, the State may rely on respondent's own testimony at a pretrial suppression hearing that he was 15 years old, as in **In re Brown**, 71 Ill. 2d 151 (1978). Moreover, respondent in this case stated he was 15 years old at arraignment, and stipulated to juvenile jurisdiction. Additionally, a police officer testified to respondent's age at trial without objection.

**In re Angel P.**, 2014 IL App (1st) 121749 Under **People v. Aguilar**, 2013 IL 112116, the minor's adjudication based on possession of a firearm while not on one's own property must be vacated. However, the court concluded that **Aguilar** permits adjudications based on aggravated unlawful use of a weapon based on failing to have a FOID card, AUUW by a person who is under the age of 21 and not involved in lawful activities under the Wildlife Code, and AUUW based on a previous delinquency adjudication for an offense that would have been a felony had it been committed by an adult.

**In re S.M.**, 2015 IL App (3d) 140687 Defendant was charged in juvenile court with unlawful possession of a concealable handgun by a person under 18 years of age. 720 ILCS 5/24-3.1(a)(1). The State did not present any evidence establishing defendant's age, which was an element of the offense. During closing argument, defendant pointed out this failure, and in rebuttal the State asked the trial court to take judicial notice of the court record showing that the court's juvenile jurisdiction attached for minors under 18 years of age. The trial court agreed with the State, finding that as a matter of jurisdiction defendant was under 18, otherwise he would have been tried in adult court.

The Appellate Court reversed defendant's adjudication, holding that the State failed to prove defendant was under 18, an element of the offense, and that the trial court could not properly fill in that missing proof by taking judicial notice of defendant's age.

**Illinois Rule of Evidence 201** allows a trial court to take judicial notice of certain facts which are not subject to reasonable dispute, meaning they are generally known in the local population or are capable of accurate and ready determination by consulting sources of unquestioned accuracy. A court may take judicial notice of its own records, including the status of pleadings in a juvenile proceeding.

The State charged defendant in juvenile court, which has exclusive jurisdiction to adjudicate criminal offenses committed by minors under the age of 18, and defendant did not file a motion to dismiss the charges. But procedural silence regarding allegations in a charging document cannot be construed as a judicial admission to an element of the offense. The failure of defendant to contest specific allegations in the charge did not absolve the State of its obligation to prove the elements of an offense.

Additionally, defendant's age was not technically a jurisdictional requirement since juvenile court is simply a division of the circuit court. Defendant's silence with respect to jurisdiction thus did not constitute an admission that he was under 18 at the time of the offense.

The trial court could not fill in the State's missing proof by taking judicial notice of defendant's unsworn statement during arraignment that he was 16 years old. Not only was the statement unsworn, it was also self-incriminating, since defendant gave the answer in response to a direct question from the court about his age, an element of the offense. If this

statement could be considered on appeal to provide the necessary proof of age, it would prevent defendant from any meaningful opportunity to challenge this element at trial, or to challenge the admission of his statement as violating his right against self-incrimination.

And, the trial court could not take judicial notice of an adjudicative fact without first reopening the evidentiary portion of the trial. Here, defendant pointed out the missing proof during its closing argument. The State was not entitled to have a “do-over” by asking the court in its rebuttal argument to supplement the completed evidence pursuant to judicial notice.

**People v. Fields**, 2014 IL App (1st) 130209 720 ILCS 5/24-1.6(a)(1), (a)(3)(I), creates the offense of AUUW where a person who is under the age of 21 possesses a firearm under specified circumstances. In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court found that the Class 4 form of AUUW violated the Second Amendment. Here, defendant argued that the blanket prohibition of firearm possession by a person under the age of 21 also violates the Second Amendment.

The court rejected this argument, finding that the limitation of possession of firearms by persons under the age of 21 has historical roots and does not affect conduct at the core of the Second Amendment. Applying the intermediate scrutiny test, the court concluded that the prohibition on handgun possession by persons under the age of 21 is reasonably related to the substantial governmental interests of limiting the possession of firearms by a subset of the general population which is likely to be less responsible and mature and deterring illegal activity by a group of citizens which is at risk for engaging in illegal, gang-related activity.

## **§55-1(g)**

### **Exemptions**

#### **Illinois Supreme Court**

**People v. Tolbert**, 2016 IL 117846 In deciding whether an exemption from a criminal statute is an element that must be charged and proved by the State, courts do not look solely at where the exemption is placed in the statute. Instead, courts determine more generally whether the legislature intended the exemption to be “descriptive” of the offense, or whether it intended only to withdraw certain acts or persons from the operation of the statute.

A defendant charged with aggravated unlawful use of a weapon for possessing a firearm while under 21 years of age will not be criminally liable if he possessed the firearm while “on the land or legal dwelling of another person as an invitee with that person’s permission.” 720 ILCS 24-1.6(a)(1), (a)(3)(1). The exemption is located in both the statute describing the offense and in a separate section specifically titled “Exemptions.” 720 ILCS 5/24-2(b)(5). The exemptions section also states that a charging instrument does not need to “negative any exemptions,” and that the “defendant shall have the burden of proving such an exemption.” 720 ILCS 5/24-2(h).

Defendant was convicted of aggravated unlawful use of a weapon while under the age of 21 for possessing a firearm on the property of another person. The State did not charge or prove that defendant was not an invitee on that person’s property.

The Supreme Court held that the invitee requirement was not an element of the offense that the State was required to plead and prove at trial. The plain language of section 24-2 established that the legislature intended the invitee requirement to be an exemption to the offense, not an element. It was therefore the defendant’s burden to prove his entitlement to the exemption, not the State’s obligation to charge and prove that it did not exist.

The Supreme Court vacated the Appellate Court's decision reversing defendant's conviction and remanded the cause for consideration of defendant's remaining issues.

**People v. Holmes**, 241 Ill.2d 509, 948 N.E.2d 617 (2011) The aggravated U UW statute exempts from its prohibition firearms that are “unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner's Identification Card.” 720 ILCS 5/24-1.6(c)(iii). In **People v. Diggins**, 235 Ill.2d 48, 919 N.E.2d 237 (2009), the court held that a firearm stored in the center console of a vehicle qualifies for the exemption as a firearm enclosed in a case.

The defendant was charged with aggravated U UW for carrying an “uncased, loaded and immediately accessible” firearm in his vehicle in violation of 720 ILCS 5/24-1.6(a)(1)(3)(A). The State failed to prove that the firearm was uncased where it was undisputed that the police recovered the firearm from within a closed and latched backseat armrest, because that container “fell within the meaning of a case under section 24-1.6.”

A person commits the offense of aggravated U UW when he carries a firearm in his vehicle and “has not been issued a currently valid Firearm Owner's Identification Card.” 720 ILCS 5/24-1.6(a)(1)(3)(C). The FOID Card Act provides that no person may acquire or possess a firearm in Illinois without a FOID card, but exempts from its requirement “[n]onresidents who are currently licensed or registered to possess a firearm in their resident state.” 430 ILCS 65/2(b)(10).

The non-resident exemption of subsection (b)(10) is incorporated into the U UW statute, and therefore a valid permit or license from another state can substitute for the FOID card requirement of 720 ILCS 5/24-1.6(a)(1)(3)(C). Reading the statutes separately would result in the absurdity that an out-of-state resident who transports into Illinois a firearm legally registered in his home state would be exempt from misdemeanor prosecution under the FOID Card Act, but could be prosecuted as a felon under the aggravated U UW statute.

Defendant was charged with aggravated U UW for failing to have a FOID card.

Because the non-resident exception of the FOID Card Act is incorporated into the U UW statute, the trial court erred in excluding, as irrelevant, evidence that defendant had a valid gun permit from Indiana, the state of his residence. Defendant did not need to have the Indiana permit in his possession at the time of his arrest in order to claim the exemption, because the aggravated U UW statute requires only that defendant have been issued a currently valid FOID card.

**People v. Diggins**, 235 Ill.2d 48, 919 N.E.2d 327 (2009) Under 720 ILCS 5/24-1.6(c)(iii), a person who holds a valid FOID card is not guilty of aggravated unlawful use of a weapon if the weapon is “unloaded and enclosed in a case, firearm carrying box, shipping box, or other container.” The court rejected the State's argument that the statutory exception applies only to “cases” that are intended to carry firearms, noting that such an interpretation is not supported by the plain language of the statute and would render parts of the statute meaningless.

The court also rejected the reasoning of **People v. Cameron**, 336 Ill.App.3d 548, 784 N.E.2d 438 (4th Dist. 2003), which required that a case or container be “portable” in order to qualify for the §24-1.6(c)(iii) exception. The court noted that the legislature did not include a portability requirement in the statute.

Because the legislature did not specifically define the term “case” for purposes of §24-1.6(c)(iii), the term is presumed to have its ordinary and popularly understood meaning - a

“box or receptacle to contain or hold something.” The court concluded that a compartment in the center console of a vehicle is a “case” under this definition, and that enclosure of an unloaded weapon in such a compartment therefore qualifies for the statutory exception.

In view of disputed evidence in the record, the cause was remanded for the lower court to determine whether the weapons in question were “enclosed” at the time of the stop.

**People v. Smith**, 71 Ill.2d 95, 374 N.E.2d 472 (1978) The Court held that the defendant has the burden of proving, by a preponderance of the evidence, that the exemption of inaccessibility applies. See also, **People v. Hesler**, 289 Ill.App.3d 1084, 682 N.E.2d 1224 (4th Dist. 1997) (defendant failed to present sufficient evidence to establish that his weapon was disassembled when he placed it in his truck, as opposed to being disassembled only when he saw police officers at a roadside safety check).

**People v. Lofton**, 69 Ill.2d 67, 370 N.E.2d 517 (1977) In order to come within the security guard exemption of the UYW statute, the defendant must carry on his person documentation that he is a security guard who has received the training required by statute. It is not sufficient for a person claiming the exemption to merely produce the documentation in court.

**People v. McKnight**, 39 Ill.2d 577, 237 N.E.2d 488 (1968) A loaded pistol that was four to five inches under the front seat of the automobile was “immediately accessible” and did not come within statutory exemption.

### **Illinois Appellate Court**

**People v. Wiggins**, 2016 IL App (1st) 153163 Defendant, a resident of Texas, was convicted of two counts of aggravated unlawful use of a weapon for possessing a weapon in his car without a FOID card and possessing a firearm on his person without a FOID card. 430 ILCS 65/2(b)(10) creates an exemption to the FOID card requirement for non-residents of Illinois “who are currently licensed or registered to possess a firearm in their resident state.” Defendant argued that the FOID card exemption applied because Texas allows its citizens to possess a weapon without obtaining a license and because defendant obtained a permit to possess a firearm while serving in the United States Army Reserves at Ft. Bliss, TX.

The court rejected defendant’s arguments.

The FOID card exception applies only to residents of states which require their citizens to either obtain a license or register in order to possess a firearm. The legislature did not intend to create an exception for the residents of states which did not have a licensing or registration requirement with a vetting process to ensure that a gunowner satisfied certain safety or eligibility requirements. Thus, the Texas statutory scheme permitting the carrying of weapons without any licensing or registration requirement does not qualify Texas residents for the FOID card exemption.

Similarly, defendant’s military permit did not satisfy the requirements for the FOID card exception. Section 2(b)(10) refers to a licensing and registration process in the defendant’s “resident state,” not a regulatory process for possessing weapons on a military base. In addition, although the legislature created exemptions from the AUW statute for armed forces members who are engaged in official duties, it did not choose to create such an exemption for military personnel who were not involved in official duties.

The Illinois FOID card requirement does not violate the Second Amendment as applied to a resident of a state that does not have a state licensing requirement. **Aguilar** recognizes a Second Amendment right to possess a firearm for self-defense outside the home.

However, **Aguilar** also found that the right to possess a weapon is not unlimited and may be subjected to meaningful regulation. In **People v. Mosley**, 2015 IL 115872, the Illinois Supreme Court found that the FOID card requirement of the AUUW statute is a meaningful and justifiable regulation of firearms possession.

Although defendant was ineligible for a FOID card because he was a Texas resident, and Texas does not have a licensing process for the mere possession of a weapon, the court noted that Texas does have licensing for carrying a concealed weapon that is substantially similar to the process in Illinois for obtaining a FOID card. Thus, defendant could have qualified to possess a weapon in Illinois by obtaining a Texas concealed carry permit.

**People v. Irby**, 2015 IL App (3rd) 130429 Defendant was charged with aggravated unlawful use of a weapon for knowingly carrying an “uncased, loaded, and immediately accessible” firearm in a vehicle. 720 ILCS 5/24-1.6(a)(1), (3)(A). The parties stipulated that officers searched the car of defendant’s girlfriend after a traffic violation and found a loaded handgun under the right rear passenger seat. The stipulation made no mention whether the firearm was cased. Although the vehicle belonged to defendant’s girlfriend and was parked, defendant was considered to be in control because he was seated in the driver’s seat.

The State’s burden of proof included showing that the weapon was uncased, and declined to infer that the weapon was uncased merely because the defense failed to present any evidence to the contrary. Defendant’s conviction was reversed.

**People v. Fields**, 2014 IL App (1st) 130209 Defendant was convicted of aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6(a)(1), (a)(3)(I), which defines the offense as carrying a pistol, revolver, or other firearm on or about one’s person or any vehicle or concealed on or about one’s person except when on one’s land or legal abode, “or on the land or in the legal dwelling of another person as an invitee with that person’s permission.” The court rejected defendant’s argument that as part of its burden of proof the State was required to show that defendant was not an invitee of a resident of the apartment building in which he was arrested. The court concluded that the General Assembly intended to require the defense to bear the burden of proving by a preponderance of the evidence that a statutory exemption to the AUUW is present.

**People v. Bruner**, 285 Ill.App.3d 39, 675 N.E.2d 654 (4th Dist. 1996) Exemption under 720 ILCS 5/24-2(i) (for unloaded weapons enclosed in case and transported by holder of valid FOID card) applied to unloaded gun contained in case and carried in purse as defendant attempted to enter the courthouse. The Court rejected the argument that the exemption was intended to apply only when the gun was being transported to a particular location (e.g., to one’s home after purchase or to a hunting site), and not while merely “walking down the street.”

**People v. Williams**, 266 Ill.App.3d 752, 640 N.E.2d 1275 (1st Dist. 1994) The fact that a gun is unloaded does not render it inaccessible under 720 ILCS 5/24-2(b)(4). Declining to follow **People v. Freeman**, 196 Ill.App.3d 375, 553 N.E.2d 780 (3d Dist. 1990), the Court concluded that the inaccessibility exemption concerns only the proximity of a weapon to the defendant and his capability to reach it, and the exemption for a “broken down” weapon requires that the gun be disassembled and non-functioning.

**People v. Jastrzemski**, 196 Ill.App.3d 1037, 554 N.E.2d 583 (1st Dist. 1990) Defendant was

convicted of unlawful use of weapons by a felon for having a gun under the hood of his car. Defendant argued that the gun was not "on or about his person" or "immediately accessible." The Court held that to sustain a conviction the weapon need not be "immediately accessible" In addition, the gun was "on or about [defendant's] person" since defendant knew that the gun was under the hood of his car, which he was driving.

**People v. Freeman**, 196 Ill.App.3d 370, 553 N.E.2d 780 (3d Dist. 1990) The defendant was convicted of UUC for carrying a handgun in his car. A pistol cylinder was found in defendant's pocket, while the remainder of the pistol was in a box on the front seat. Defendant had separated the pistol from the cylinder to transport it. The Court held that defendant proved the statutory exemption of "transportation of weapons broken down in a nonfunctioning state or not immediately accessible". The Court stated that a "broken down cylinderless pistol, incapable of being fired, not in immediate operating condition, and not immediately accessible to the defendant, is not a deadly weapon within the purview of the unlawful-use-of-weapons statute."

**People v. Anderson**, 117 Ill.App.3d 806, 454 N.E.2d 34 (1st Dist. 1983) Defendant was convicted of UUC for possessing a loaded revolver while in the apartment of a person named Elston. Elston testified that he lived alone in the apartment. Paragraph 24-1(a)(10) prohibits carrying a firearm within a city "except when on [defendant's] land or in his own abode or fixed place of business." The Court held that although Elston's testimony established that defendant was not in her own abode, the State failed to prove that she was not on her own land or fixed place of business. Because the State failed to prove the essential elements of the offense, the conviction was reversed.

**People v. Johnson**, 49 Ill.App.3d 567, 364 N.E.2d 590 (1st Dist. 1977) Defendant was properly convicted of UUC for having a pistol in a holster on the rear seat of his car, in which he was a front-seat passenger. The pistol was immediately accessible because it would have been very easy for defendant to reach into the back seat and pick up the weapon. See also, **People v. Bolling**, 181 Ill.App.3d 845, 537 N.E.2d 1100 (2d Dist. 1989).

**People v. Cook**, 46 Ill.App.3d 511, 361 N.E.2d 81 (1st Dist. 1977) Inaccessibility of a pistol was proven by the evidence; both State and defense evidence showed that the pistol was under the car hood while defendant was in the front seat behind the steering wheel. To get the gun, defendant would have had to get out of the car, walk to the front, and open the hood.

**People v. Wilson**, 29 Ill.App.3d 1033, 332 N.E.2d 6 (1st Dist. 1975) The statutory exception for possession of a weapon on one's land or in one's abode does not apply to public areas of an apartment building. See also, **People v. Cosby**, 118 Ill.App.2d 169, 255 N.E.2d 54 (1st Dist. 1969) (exception for "fixed place of business" does not include a taxicab).

**People v. Taylor**, 28 Ill.App.3d 186, 328 N.E.2d 325 (1st Dist. 1975) A conviction for carrying a concealed weapon was reversed because the State failed to prove that defendant was not at his "own abode" at time of the incident. Defendant testified that he lived at the apartment in question "off and on" and had clothes there. The Court held that the "abode" is not equivalent to a "permanent abode" or "residence." Thus, even where one has a permanent address, another apartment may be an "abode" for purposes of the UUC statute.

**People v. Staples**, 8 Ill.App.3d 400, 410 N.E.2d 592 (3d Dist. 1980) A revolver in a storage box in the bed of a pickup truck was not immediately accessible to the driver.

#### **§55-1(h)**

##### **Ammunition**

##### **Illinois Appellate Court**

**People v. Garvin**, 2013 IL App (1st) 113095 The Appellate Court upheld the unlawful use of weapons by a felon statute (UUWF), specifically its prohibition of possession of firearm ammunition by a felon, against a Second Amendment challenge. The UUWF statute does not regulate conduct that is constitutionally protected by the Second Amendment. The Second Amendment does not protect the right of felons to possess firearms, including firearm ammunition.

Even if the Second Amendment did protect the right of felons to possess firearm ammunition, the constitutional challenge fails under any level of scrutiny. The statute is a valid exercise of Illinois's right to protect the health, safety, and general welfare of its citizens from the potential danger posed by convicted felons in possession of firearms or firearm ammunition.

**People v. Anthony**, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011) As a matter of first impression, the Appellate Court held that the plain language of the current version of **720 ILCS 5/24-1.1(e)** permits multiple convictions for unlawful use of a weapon by a felon where the defendant possesses a loaded weapon. Defendant's convictions for possession of the weapon and possession of the ammunition in the clip were affirmed.

Although **People v. Carter**, 213 Ill.2d 295, 821 N.E.2d 233 (2004), held that the simultaneous possession of a firearm and ammunition gives rise to only one offense, the court noted that the legislature subsequently amended the unlawful possession of a weapon by a felon statute to provide that "[t]he possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation." (**720 ILCS 5/24-1.1(e)**).

In dissent, Justice Gordon concluded that only one conviction of unlawful possession of a weapon by a felon may be entered for possession of a single loaded firearm. Justice Gordon concluded that the amendment in response to **Carter** did not resolve whether multiple convictions can be entered for the possession of a loaded firearm, and that under the majority's analysis there would be an absurd result because separate convictions could be ordered for the possession of the firearm and for each round of ammunition in the clip. Justice Gordon concluded that the amendment was ambiguous on this point and should be interpreted to permit only a single conviction for possession of a loaded firearm.

#### **§55-1(i)**

##### **Multiple Convictions for Same Incident**

##### **Illinois Supreme Court**

**People v. Almond**, 2015 IL 113817 Defendant, a convicted felon, was properly convicted of two separate firearm offenses based on his simultaneous possession of a firearm and the firearm ammunition that was loaded in the gun. The court held that the UUW by a felon statute specifically authorizes two separate convictions for simultaneously possessing a firearm and firearm ammunition, and the two convictions did not violate the one act/one crime rule.

The UUW by a felon statute makes it unlawful for a person who has been convicted of a felony to possess any firearm or firearm ammunition. **720 ILCS 5/24-1.1(a)**. The statute

specifically states that “the possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation.” 720 ILCS 5/24-1.1(e). The court held that based on this language, the statute unambiguously authorizes separate convictions when a felon possesses a loaded firearm: a conviction for possessing the firearm, and a conviction for possessing the ammunition inside the firearm.

The court also held that multiple convictions did not violate the one act/one crime rule. Under that rule, a defendant may not be convicted of multiple offenses based on the same physical act. But multiple convictions are permitted in cases where a defendant commits several acts, even if they are interrelated. An act is defined as any overt or outward manifestation that will support a conviction.

Here defendant possessed two separate and distinct items of contraband, a firearm and ammunition. Although his possession was simultaneous, that fact alone did not render his conduct a single act. Instead, defendant committed two separate acts: possession of a firearm and possession of ammunition. Each act was materially different, even if both items were possessed simultaneously.

**People v. Carter**, 213 Ill.2d 295, 821 N.E.2d 233 (2004) In the absence of an express statutory provision to the contrary, statutes outlawing the possession of contraband do not authorize multiple convictions for the simultaneous possession of several items of contraband. 720 ILCS 5/24-1.1(a), which prohibits the possession of "any firearm or any firearm ammunition" by a person who has been convicted of a felony, does not authorize multiple convictions for the simultaneous possession of multiple types of firearms and ammunition. Therefore, defendant could properly be convicted of only one count of unlawful possession of weapons by a felon where he simultaneously possessed a .22 caliber handgun, a .25 caliber handgun, and 2 clips of ammunition.

### **Illinois Appellate Court**

**In re Angel P.**, 2014 IL App (1st) 121749 The minor was charged with four counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (a)(1)(3), (a)(3)(A), (a)(3)(C), (a)(3)(D), (a)(3)(I)) based on possessing a firearm, two counts of unlawful possession of a firearm (720 ILCS 5/24-3.1(a)(1), (2)) based on possessing the same weapon, and one count of possession of firearm ammunition without a FOID card (430 ILCS 65/2(a)(2)). The court concluded that only one of the six counts charging possession of a firearm could be the basis of a delinquency adjudication, because all of the counts were based on a single act of possessing a pistol.

However, the court concluded that the defendant could also be convicted of possession of firearm ammunition without a FOID card (430 ILCS 65/2(a)(2)) although the ammunition which the minor possessed was loaded in the pistol which formed the basis for the AUUW conviction. The court found that the unambiguous language of the FOID Card Act allows separate convictions for possession of both a firearm and the ammunition which it contains. In addition, the court cited **People v. Sotelo**, 2012 IL App (2nd) 101046, where convictions were affirmed for the simultaneous possession without a FOID card of three firearms and a separate box of ammunition.

**People v. Sotelo**, 2012 IL App (2d) 101046 430 ILCS 65/2(a) defines the offenses of unlawful possession of a firearm and unlawful possession of ammunition:

- (a)(1) No person may acquire or possess any firearm, stun gun, or taser . . . without having in his possession a [FOID] card. . . .
- (2) No person may acquire or possess firearm ammunition

within this State without having in his or her possession a [FOID] card.

Under [People v. King](#), 66 Ill. 2d 551, 363 N.E.2d 838 (1977), multiple convictions are prohibited for offenses carved from a single physical act or, with regard to multiple acts, where one of the offenses is a lesser included offense of the other. However, **King** does not prohibit multiple convictions for the simultaneous possession of multiple firearms without a FOID card. Although the “singular act of failing to possess a FOID card could not sustain multiple convictions of an offense comprised *solely of that act*, failing to possess a FOID card may serve as a common element of multiple offenses that include additional physical acts - possession of different firearms, or of firearm ammunition.”

However, the court concluded that the General Assembly did not intend to authorize multiple convictions for the simultaneous possession of multiple weapons without a FOID card. In determining whether the legislature intended to permit multiple convictions, the court is required to determine the “allowable unit of prosecution” for §65/2(a). Where a statute is ambiguous as to the allowable unit of prosecution, the court “must adopt a construction which favors the defendant.”

In [People v. Carter](#), 213 Ill. 2d 295, 821 N.E.2d 233 (2004), the Illinois Supreme Court concluded that a statute which prohibited the possession of “any firearm or any firearm ammunition” was ambiguous because it could be read as providing either that the possession of each firearm constituted a separate offense, or as providing that the simultaneous possession of multiple firearms and ammunition constitute only a single offense. Because the statute was ambiguous, the **Carter** court adopted an interpretation that favored the defendant and held that the simultaneous possession of multiple firearms and ammunition constituted only a single offense.

The court reached the same conclusion concerning §65/2(a)(1), which uses similar language to the statute in [Carter](#). Thus, because the legislature did not intend that the simultaneous possession of multiple firearms constitutes multiple violations of §65/2(a)(1), two of three of defendant’s convictions under (a)(1) must be vacated.

The court reached the opposite conclusion concerning the possession of ammunition, however. The court concluded that had the General Assembly intended the simultaneous possession of firearms and ammunition to constitute a single unit of prosecution, it would have placed the firearms and ammunition provisions in a single statute rather than in two separate subsections. The court concluded that the structure of §65(a) showed that the General Assembly intended to permit separate convictions for possession of firearms without a FOID card and possession of ammunition without a FOID card. Thus, defendant’s conviction for possession of ammunition was affirmed.

## §55-2

### Discharge of a Firearm

#### Illinois Supreme Court

[People v. Hartfield](#), 2022 IL 126729 As defendant fled from the scene of an armed robbery, he turned and fired a gun. At the time, four police officers were pursuing him. The State charged him with armed robbery and four counts of aggravated discharge of a firearm. Although evidence suggested defendant fired multiple rounds, the charging documents differentiated each count based only on the victim, one charge per officer. The State argued in closing that regardless if defendant fired one round or four, he should still be convicted of four counts of aggravated discharge based on the presence of four officers.

During deliberations, the jury sent the following note to the circuit court: “Does suspect need to know there were 4 cops on the scene in the area where gun was fired to be guilty of all four counts of [aggravated] discharge of firearm?” The court responded “No” and informed the jury that it must determine which officers “may have been in the line of fire” at the time of the discharge. Defendant was convicted of and sentenced on all counts.

The Appellate Court, finding a one-act/one-crime violation, vacated three of the four aggravated discharge convictions and remanded for resentencing. The State appealed, and defendant cross-appealed.

The Supreme Court first discussed defendant’s allegations on cross-appeal, including a challenge to the response to the jury note. The defense position below, offered only after the court proposed to answer “no,” and not after it decided to further instruct the jury about the “line of fire,” was that no answer was needed other than to refer to the given instructions. The Supreme Court disagreed. A jury question evincing confusion over a point of law should be answered substantively by the trial court.

But the Supreme Court also found that the answer here was deficient. Regardless of whether the first answer—“no”—was an accurate statement of law, the second answer—“You must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged”—is not an accurate statement of law. The offense of aggravated discharge requires the jury to determine whether a peace officer *was* in the direction of discharge; but the second answer instructed the jury to determine whether a peace officer *may* have been in the line of fire. Additionally, it is not clear that “in the line of fire” is an accurate way to describe the statutory element “in the direction of.” Thus, the instruction reduced the State’s burden of proof by suggesting the State need only prove the officers “may” have been in the line of fire, and, by referring to “line of fire” rather than “in the direction of,” the response may have caused the jury to find defendant guilty based on conduct that is not an element of the offense.

Although defendant forfeited this claim by not objecting to the proposed response, substantial jury instruction errors may be reviewed under Rule 451(c), which is co-extensive with the plain error doctrine. The Supreme Court has previously found that a single erroneous instruction might be cured by other instructions or by some other showing of a lack of prejudice. But two directly conflicting instructions on an essential element, one stating the law correctly and the other erroneously, cannot be cured this way because it’s impossible to determine which instruction the jury was following. Such an error affects the integrity of the judicial system itself, and must be presumed prejudicial.

Because the issue might arise on retrial, the court went on to decide the question posed in the State’s PLA – whether a single discharge in the direction of multiple peace officers can support multiple convictions of aggravated discharge of a firearm. This question was initially raised under the one-act, one-crime rule, but a threshold question to reaching the one-act, one-crime rule is to determine the unit of prosecution of the offense at issue. The unit of prosecution of an offense refers to what act or course of conduct the legislature has prohibited for purposes of a single conviction and sentence. Here, the question is whether the offense of aggravated discharge commands a single conviction per discharge or a single conviction per person in the direction of a discharge.

Determining the unit of prosecution is a question of statutory interpretation. Where legislative intent is not clear, courts should apply the rule of lenity to determine the appropriate unit of prosecution.

The State, citing one-act, one-crime authority, asserted that the unit of prosecution is determined by the number of victims. The Supreme Court disagreed. One-act, one-crime analysis applies when two distinct offenses are carved from a single act, whereas unit-of-

prosecution analysis determines how many times the same offense has been committed in a particular course of conduct. While the number of victims may control in a one-act, one-crime analysis, it does not control in a unit of prosecution analysis. Rather, in determining the unit of prosecution, the court looks to the language of the statute to determine what precisely has been prohibited by the legislature and in what unit of time, actions, or instances that crime is committed once.

Here, the aggravated discharge statute is violated when a defendant, *inter alia*, discharges a firearm in the direction of a person he or she knows to be a peace officer. The Supreme Court could discern no legislative intent with regard to the unit of prosecution; it was not clear whether multiple crimes occurred with each discharge or each officer, or both or neither. Noting that the legislature often chooses to define the unit of prosecution, the absence of any such language here resulted in ambiguity and required application of the rule of lenity. Thus, a single discharge in the direction of multiple peace officers constitutes a single offense.

### **Illinois Appellate Court**

**People v Cunningham**, 2019 IL App (1st) 160709 To prove the “reckless” element of reckless discharge, the State must establish that defendant consciously disregarded a substantial and unjustifiable risk to the bodily safety of another. The evidence at defendant’s trial was that an apartment resident arrived home to find defendant and other individuals emerging with defendant stating, “I’m shot.” Defendant admitted to accidentally shooting himself. On these facts, the State failed to prove recklessness where there was no evidence of how defendant shot himself, no evidence that defendant was impaired, and no evidence as to when the shot was fired or whether anyone else was even present at the time.

**People v. Peel**, 2018 IL App (4th) 160100 The State proved reckless discharge of a firearm by showing defendant’s act of firing a gun in his front yard of a residential neighborhood constituted reckless behavior and endangered the bodily safety of an individual. The State need not prove that anyone was in the vicinity, but only potential victims, and even accepting the defendant’s disputed claim that he fired the weapon into the ground, the potential for ricochet did endanger others.

**People v. Grant**, 2017 IL App (1st) 142956 The offense of reckless discharge of a firearm is committed by “discharging a firearm in a reckless manner which endangers the bodily safety of an individual.” 720 ILCS 5/24-1.5(a). The court concluded that the legislature intended that the offense occurs when the person who recklessly discharges a firearm endangers the bodily safety of an individual other than himself. “[T]he term ‘an individual’ . . . refers to someone other than the defendant.”

The court concluded that the evidence was insufficient to sustain the conviction for reckless discharge of a firearm where defendant accidentally shot himself in the hand while trying to “clear” a firearm which belonged to another resident of his apartment. No one else was in the apartment, and there was no evidence that at the time the weapon discharged anyone was in the other apartment in the same building. Furthermore, the record did not show that anyone on the street was near the apartment when the weapon discharged or that the apartment building was in close proximity to other buildings. Because there was no evidence that any other person was in the vicinity when defendant accidentally shot himself in the hand, the evidence was insufficient to show that defendant’s reckless actions exposed “an individual” to danger.

Defendant’s conviction for reckless discharge of a firearm was reversed.

**People v. Olivieri**, 2016 IL App (1st) 152137 To establish reckless discharge of a firearm, the State must prove that the defendant discharged a firearm in a reckless manner which endangered the bodily safety of an individual. 720 ILCS 5/24-1.5(a). A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise. An accident is not equated with recklessness.

The State failed to prove that defendant acted recklessly in discharging a firearm. Defendant had placed live rounds in his pistol when he went for a walk, and upon returning to his apartment attempted to unload the pistol but accidentally fired a round. The round went through the apartment wall and into an adjacent apartment.

The court noted that unlike precedent cited by the State, defendant was not intoxicated and was not threatening anyone. Instead, he was merely attempting to unload a pistol. Under these circumstances, defendant did not engage in any reckless conduct.

Because the element of recklessness was not proved beyond a reasonable doubt, defendant's conviction for reckless discharge of a firearm was reversed.

### §55-3

#### Armed Habitual Criminal

#### Illinois Supreme Court

**People v. Gray**, 2024 IL 127815 Defendant was arrested and charged with being an armed habitual criminal. As charged here, the offense required proof that defendant possessed any firearm after having been "convicted" of two or more felonies listed in the statute. 720 ILCS 5/24-1.7. At trial, the parties stipulated that defendant had "two prior qualifying felony convictions for the purpose of sustaining the charge of armed habitual criminal." The stipulation did not specify the particular convictions, but the indictment listed a 2007 conviction of unlawful use of a weapon by a felon and a 2002 conviction of manufacture or delivery of a controlled substance, both of which would satisfy the statute.

On appeal, defendant argued that the State had not proved beyond a reasonable doubt that he had two qualifying predicate convictions. More specifically, defendant argued that because he was only 17 at the time of the 2002 offense, it was not a qualifying "conviction" for purposes of the armed habitual criminal charge in 2016 where, under the law as it existed in 2016, that charge would have been brought in juvenile court not in adult criminal court. That is, even though defendant had been prosecuted in criminal court at the time of his 2002 conviction, the 2014 amendments to the Juvenile Court Act raised the age for juvenile jurisdiction to 17, meaning his 2002 conviction no longer qualified as a "conviction." Defendant relied on **People v. Stewart**, 2022 IL 126116, in support.

The supreme court found the stipulation dispositive. The stipulation obviated the need for the State to present any evidence of the facts of the underlying convictions, and thus defendant could not challenge the sufficiency of the evidence of the stipulated facts on appeal. And, while defendant might argue ineffective assistance of his trial counsel for entering into the stipulation where there was a potential challenge to the 2002 predicate conviction, an essential component of an ineffective assistance claim is prejudice, and such a claim would fall short on that basis here where the record showed that defendant also had a 2008 conviction which would have qualified as an appropriate predicate and could have been relied upon had counsel challenged the 2002 predicate.

**People v. Carter**, 2021 IL 125954 The State conceded it did not provide sufficient evidence to convict defendant of armed habitual criminal predicated on armed robbery and aggravated battery. Aggravated battery is not a proper qualifying offense unless it is a forcible felony, meaning it results in great bodily harm or permanent disability or disfigurement. Here, the record did not show that the predicate aggravated battery was a forcible felony.

The Supreme Court criticized the Appellate Court for affirming defendant's conviction. The Appellate Court erroneously blamed defendant for a deficiency in the record with regard to the specifics of the prior conviction. But the principle that the appellant is responsible for a complete record does not apply when the record, on its face, showed that the State never proved the necessary elements of armed habitual criminal.

The Appellate Court also erred when it cited the use of an appendix in refusing to consider the prior indictment, which defendant attached to his brief. The reason the indictment should not have been considered was because it was irrelevant, as the record itself showed the State failed to prove its case. Next, the Appellate Court erred when it cited defendant's failure to object below, which improperly shifted the burden of proof from the State to the defendant.

Finally, the Appellate Court misapplied the standard of review; although the court was obligated to view the evidence in the light most favorable to the State, this does not mean that a reviewing court should presume that the State proved its case where the record fails to contain the elements of the offense.

### Illinois Appellate Court

**People v. Harris**, 2024 IL App (3d) 230406 Defendant moved *in limine* to dismiss a charge of armed habitual criminal, arguing that the four predicate convictions listed in the indictment were all brought in a single case, such that the charge failed to sufficiently allege that defendant had previously been convicted "two or more times" of predicate offenses. The trial court agreed and the State appealed. The appellate court reinstated the offense.

Under section 114-1(a)(8) of the Code of Criminal Procedure, a defendant may file a pretrial motion to dismiss a criminal charge for failure to state an offense. When a defendant files such a motion, the trial court must determine whether the charging instrument strictly complies with the requirements of section 111-3 of the Code of Criminal Procedure. Section 111-3 requires, *inter alia*, that the elements of the offense be set forth.

The elements of armed habitual criminal, as charged here, are: (1) possession of any firearm; (2) after having been convicted "a total of 2 or more times of any combination of" a Class 3 or higher violation of the Controlled Substances or Cannabis Control Acts. The State had argued that defendant had in fact been convicted of four such offenses, and that, while he pled guilty to all of these offenses at the same time, there was no limitation in the AHC statute that would prevent the use of convictions that were brought in the same indictment. Plus, the State noted, the predicate offenses weren't even committed on the same day.

Applying the rules of statutory interpretation, and following the reasoning of **People v. Patterson**, 2018 IL App (1st) 160610, the appellate court agreed with the State. The AHC statute is clear and unambiguous in that it allows the State to use two or more drug offenses that occurred on separate days but were charged in the same indictment to satisfy the predicate offense element of the statute. The court noted, as did **Patterson**, that the legislature indicated in other recidivist statutes how to include language mandating sequential prosecutions for predicate offenses. It did not include such language here, and therefore its intent was clear to allow for the use of separate convictions entered simultaneously.

**People v. Hawthorne**, 2024 IL App (1st) 220127 On appeal from a conviction of armed habitual criminal (AHC) under 720 ILCS 5/24-1.7, defendant argued that one of his two predicate convictions – delivery of heroin in 2012 – should not be considered a “conviction” at all because he was only 17 at the time of the offense and, under an intervening change to the Juvenile Court Act, that drug conviction would have been a juvenile adjudication. After noting that appellate court opinions have been split on this issue, the court sided with the decisions concluding that defendant’s conviction was a proper predicate for an AHC charge.

The AHC statute applies where a defendant possesses a firearm “after having been convicted” two or more times of qualifying predicate offenses. Defendant was convicted of a qualifying drug charge in 2012, and he remains convicted of that 2012 offense today. The fact that the statute includes as one category of qualifying predicate offenses any drug offense that “is punishable as a Class 3 felony or higher” does not alter the analysis here. The “is punishable” language describes the offense itself; it does not change whether the outcome of the prior prosecution was a conviction. Defendant’s 2012 drug offense was then, and is now, “punishable as a Class 3 felony or higher.”

Additionally, the court noted that the “is punishable” language is absent from the two other categories of qualifying offenses, such that if the court accepted defendant’s interpretation that this language altered the status of the prior conviction it would only do so as to predicate drug offenses under subsection (a)(3) but not predicate forcible felonies under (a)(1) or predicate enumerated offenses under (a)(2). Such an anomaly would be unreasonable. Finally, there is no guarantee defendant would have been adjudicated in juvenile court because he could have been subject to a discretionary transfer to adult court. Accordingly, the appellate court affirmed.

**People v. Kelley**, 2024 IL App (1st) 230569 Defendant argued that Illinois’s Armed Habitual Criminal (AHC) statute, 720 ILCS 5/24-1.7, is unconstitutional under the second amendment. Citing the test set forth in **New York State Rifle & Pistol Ass’n. v. Bruen**, 597 U.S. 1 (2022), defendant argued that the State could not show any historical analogue for AHC’s categorical and permanent ban and thus it is facially unconstitutional. But, the appellate court found no need to conduct a historical analysis because the second amendment protects the right of “ordinary, law-abiding citizens,” while AHC restricts the rights of felons. Such restrictions are constitutionally permissible.

Similarly, the court rejected defendant’s argument that AHC violates the Illinois constitution’s arms provision. Defendant asserted that the Illinois provision protects a broader set of people, including felons, because it uses the phrase “individual citizen” rather than “the people.” But the court found no support for that position, either in the case law or in historical documents surrounding adoption of the language in the Illinois constitution. Illinois has not departed from “the long-established principle that the state’s police power includes the ability to control who may bear arms.”

Further, Kelly’s prohibition on gun possession was attributable not only to his status as a felon but also to the fact that he was still on parole at the time he was arrested in this case. Further, he did not have a valid FOID card or concealed carry license, and he had a lengthy history of criminal offenses, including offenses involving violence. Thus, the Court found no basis for an as-applied challenge here.

**People v. Brooks**, 2023 IL App (1st) 200435 The appellate court affirmed a conviction for armed habitual criminal over defendant’s argument that the State failed to prove constructive possession. The gun was found in a safe in a one bedroom apartment. Documents belonging to defendant were also in the safe, and defendant had keys to the apartment. A

police officer testified that defendant admitted to keeping the gun for protection, although this statement was not documented.

While defendant's brother testified that the apartment in fact had two bedrooms, and that the gun was found in the bedroom belonging to him, the trial court did not believe this testimony, and the appellate court would not disturb this credibility finding.

The appellate court also refused to take judicial notice of evidence defendant attempted to produce on appeal showing the apartment had two bedrooms. Therefore, on this record, a rational trier of fact could have found that the defendant had both knowledge of the gun and maintained control over the area where it was found.

**People v. Wallace, 2023 IL App (1st) 200917** The State proved defendant guilty of armed habitual criminal beyond a reasonable doubt, despite the fact that defendant committed one of the predicate offenses, armed robbery, at age 17, and that an armed robbery now committed at age 17 would result in a juvenile adjudication. The plain language of the AHC statute requires only a showing that defendant was convicted of the forcible felony, and that the offense is still a forcible felony at the time of the gun possession which triggers the AHC charge.

Here, armed robbery was a forcible felony when defendant committed it in 2008, and it was still a forcible felony when defendant committed AHC in 2019. While the legislature amended the juvenile statute in 2014 so that armed robbery committed by a 17 year-old would result in a juvenile adjudication rather than a criminal conviction, this amendment is irrelevant because it was not retroactive, and nothing in the amendment suggested it should be read into the AHC statute.

The appellate court found **People v. Gray, 2021 IL App (1st) 191086** wrongly decided. The **Gray** court found the defendant's age operated as an element of the offense, but this finding ignored that the only elements of AHC are possession of a firearm and two past qualifying convictions. The statute makes no reference to age. The court also found defendant's reliance on **People v. Stewart, 2022 IL 126116**, unpersuasive, as that case dealt with the Class X sentencing provision that, in describing the predicate offenses, includes the language "now classified," which suggests a reassessment of the prior conviction. This language is absent from the AHC statute.

**People v. Matthews, 2022 IL App (4th) 210752** The court vacated as void *ab initio* defendant's 1990 and 1992 convictions for unlawful use of a weapon because they were identical to the version of that offense held facially unconstitutional in **People v. Gamez, 2017 IL App (1st) 151630**. Likewise, the court vacated defendant's 1994 convictions of unlawful use of a weapon by a felon as void because they were predicated on defendant's aforementioned UUW convictions. Finally, the court vacated defendant's armed habitual criminal conviction because one of the predicate offenses on which it was based was defendant's 1994 UUWF conviction. Since the UUWF conviction was being vacated, it could no longer serve as a predicate offense, and thus defendant's AHC conviction could not stand.

The court reached each of these issues despite defendant's failure to raise them in his post-conviction petition because the unconstitutionality of the underlying UUW convictions rendered those convictions, and each of the subsequent offenses based on those convictions, void. While a defendant generally forfeits any issue not included in his post-conviction petition, a voidness challenge may be raised at any time and in any court and is not subject to forfeiture.

On appeal, defendant also challenged his sentence for aggravated discharge of a firearm, arguing that he should be resentenced because the trial court erroneously considered

his void UUV convictions in aggravation at sentencing. The appellate court declined to reach that issue, however, because it was not raised in defendant's petition. While a void prior conviction is incompetent evidence at sentencing, it does not render the sentence itself void.

**People v. Tolliver**, 2022 IL App (2d) 210080 A new trial was required because defendant was willing to stipulate to the two prior convictions that qualified him to be charged as an armed habitual criminal, and the trial court erred in admitting evidence of the names of those convictions.

The Illinois Supreme Court has held that a defendant is entitled to stipulate to felon status for purposes of the UUV/felon statute. **People v. Walker**, 211 Ill. 2d 317 (2004). And if counsel fails to make such a request, defendant may be able to establish ineffective assistance of counsel. **People v. Moore**, 2020 IL 124538. It's true that armed habitual criminal is different, in that the State has to prove that defendant has been convicted of specific, qualifying offenses. Nevertheless, the rationale of Walker was applied to an armed habitual criminal case in **People v. Taylor**, 2022 IL App (5th) 180192, and the appellate court here agreed with that analysis. Under either scenario, the stipulation that defendant has been convicted of two qualifying offenses allows the State to meet its burden of proving the element of the offense, while avoiding the unnecessary prejudicial impact.

**People v. Dawson**, 2022 IL App (1st) 190422 Defendant argued that the State failed to prove him guilty of armed habitual criminal because he committed the two predicate offenses – two armed robberies – when he was 17. Reviewing the issue *de novo* due to the undisputed facts underlying the claim, and finding no forfeiture given the State's failure to argue forfeiture, a majority of the appellate court reduced defendant's conviction to aggravated unlawful use of a weapon for possessing a firearm without a FOID card.

Armed habitual criminal in this case required proof that defendant had been convicted of two prior forcible felonies. Robbery is a forcible felony. Defendant committed the robberies at issue in 2013, at which time 17 year-olds were prosecuted in adult court under the Juvenile Court Act. In 2014, however, the Act was amended to allow for the prosecution of 17 year-olds in juvenile court. Thus, if the robberies had been committed in 2017, when defendant was alleged to have committed armed habitual criminal, they could have been handled in juvenile court and may not have resulted in a "conviction" but rather a finding of delinquency.

The language of the AHC statute uses the present tense (convictions must be for offenses characterized as forcible felonies "as defined in Section 2-8"). So while in one sense the defendant "was convicted" of two forcible felonies, if age is taken into account, the acts he committed are not necessarily "defined as" forcible felony convictions under current law. Although courts have split over whether to consider defendant's age at the time the predicate was committed when analyzing the sufficiency of the prior convictions, the majority here found it dispositive that the State had the burden of proof. It therefore found the evidence insufficient.

**People v. Irrelevant**, 2021 IL App (4th) 200626 Defendant pled guilty to armed habitual criminal. Defendant moved to withdraw his plea, arguing in part that he the factual basis failed to prove his guilt, because he committed one of the predicate felonies at age 17.

The Appellate Court affirmed. The issue of whether AHC (or mandatory Class X sentencing) may rest on a predicate offense that, under current law, would result in a juvenile adjudication, has generated a split in the Appellate Court and is pending before the Supreme Court in **People v. Stewart**, 2020 IL App (4th) 180533. The Appellate Court here sided with the State and other Fourth District decisions, reasoning that the AHC statute merely

requires that defendant had the qualifying prior convictions at the time he possessed the firearms, and that age is not an element of the prior convictions. Moreover, defendant's prior conviction – a burglary committed at age 17 – would still be subject to discretionary transfer to adult court under current law, so the argument that it would be treated as a delinquency is speculative.

**People v. Smith, 2021 IL App (1st) 190421** At defendant's trial on charges of armed habitual criminal and UUV/felon, the defense refused to stipulate that certified statements of prior convictions – one bearing defendant's name, "Rashawn Smith," the other bearing the name "Rashawn T. Smith" – proved the necessary qualifying convictions of the charged offenses. The State did not present any testimony verifying that these convictions involved the same defendant, and no date of birth corroborated the matching name. The trial court found defendant guilty. During post-trial motions, the court took judicial notice of matching IR numbers, and denied the motion.

On appeal, the certified statements of conviction were not a part of the appellate record. While appellant has a duty to present a sufficient record, and an incomplete record will trigger a presumption favorable to the appellee, the rule is relaxed where the appellant bears no fault for the incomplete record. Here, appellate counsel explained that many attempts were made to obtain the records, but the impound order did not list the statements of conviction and the trial attorneys were unable to produce them. The Appellate Court held that counsel presented sufficient evidence of due diligence in attempting to obtain the records, so it would not indulge a presumption in favor of the appellee or resolve any doubts against the appellant.

Turning to whether the State proved defendant's prior convictions beyond a reasonable doubt, the general rule for purposes of certified statements of conviction is that identity of name gives rise to a rebuttable presumption of identity of person. For one of the prior convictions, however, the certified statement of conviction did not match defendant's name; rather, it contained an extra middle initial. While the State charged defendant in the instant case with an AKA referencing the name with the middle initial, this was legally insufficient to prove defendant was the same "Rashawn T. Smith" that was convicted in the prior case. Furthermore, the court erred in taking judicial notice of the IR numbers *sua sponte* after the close of evidence. Once the parties rested, the court was obligated to rule on the evidence presented at trial. Thus, the State failed to prove defendant committed one of the prior convictions cited as an element of AHC, and that conviction was reversed. The second prior, which did not include the middle initial, was subject to the presumption of identity because the names matched. Defendant did not rebut this presumption, so the court upheld defendant's conviction for UUV/felon.

**People v. McGhee, 2020 IL App (3d) 180349** Defendant's conviction for armed habitual criminal was reversed because an Iowa conviction for burglary in the second degree was not a proper predicate offense. The legislature intended the enumerated list of offenses in the forcible felony statute to refer to Illinois offenses. For a foreign jurisdiction conviction to serve as a valid predicate, it must either satisfy the elements of one of the enumerated Illinois offenses or fall within the residual clause ("any other felony which involves the use or threat of physical force or violence against any individual").

The statutory elements of an Iowa conviction for second degree burglary are not necessarily equivalent to an Illinois burglary. Thus, the Iowa conviction did not satisfy the elements of an Illinois burglary. And, proof of an Iowa second degree burglary does not necessarily entail the use of violence or force. Further, the State failed to present any

evidence of the underlying facts of defendant's Iowa conviction, or even which subsection of the Iowa statute formed the basis of defendant's conviction. Thus, the court could not find that the Iowa conviction fit within the residual clause.

Because the State failed to show that defendant's Iowa conviction qualified as a forcible felony, the court reversed defendant's conviction for armed habitual criminal and remanded the matter for sentencing on the merged offense of UUWF.

**People v. Bobo, 2020 IL App (1st) 182628** Aggravated robbery was not a forcible felony for purposes of sustaining defendant's armed habitual criminal conviction here. While robbery is specifically enumerated as a forcible felony, aggravated robbery is not. Thus, aggravated robbery can only be a forcible felony if it involves the use or threat of physical force or violence against another. The statute provides that one way aggravated robbery may be committed is where an individual takes property by delivering a controlled substance to another without that person's consent. This can be accomplished solely by deception without resorting to physical force or violence. Here, the record failed to establish the underlying facts of defendant's aggravated robbery conviction and thus it could not be found to be a forcible felony. Accordingly, defendant was not proved guilty beyond a reasonable doubt of being an armed habitual criminal.

**People v. Webb, 2018 IL App (3d) 160403** Whether defendant's prior convictions for aggravated battery constituted "forcible felonies" for purposes of armed habitual criminal is a legal question for the court, and need not be put to a jury. Here, the State properly asked the trial court to judicially notice the indictments from defendant's prior aggravated battery convictions and conclude that the convictions were based on great bodily harm, making them forcible felonies. The fact that defense counsel successfully struck the mention of "great bodily harm" from the stipulation and jury instructions did not negate the court's finding.

**People v. Ephraim, 2018 IL App (1st) 161009** To be guilty of armed habitual criminal (AHC), an individual must have two or more prior convictions of certain enumerated offenses or "a forcible felony." Aggravated battery to a peace officer is not one of the enumerated offenses, nor does it constitute a forcible felony absent proof that it resulted in great bodily harm or permanent disability or disfigurement. The Appellate Court reversed defendant's AHC conviction because the State did not prove the requisite injury from defendant's underlying aggravated battery to a peace officer conviction.

**People v. Martin, 2018 IL App (1st) 152249** Armed habitual criminal statute was not unconstitutional as applied to defendant whose two qualifying prior convictions were non-violent and more than 20 years old. Defendant knew he was a twice-convicted felon when he chose to possess a firearm. Defendant did not seek restoration of his right to possess firearm but rather only challenged the constitutionality of the law after he was arrested. Also, the fact that defendant's first felony conviction was for conduct committed when he was 17 years old and would no longer qualify as an adult felony in Illinois was irrelevant.

The State argued against reaching the as-applied challenge because it was not raised in the trial court. The Appellate Court distinguished **People v. Mosley, 2015 IL 115872**, where the record was inadequate for as-applied review, and concluded that the record here contained all relevant facts, including information about defendant's prior felony convictions, his age, lack of other criminal history, and rehabilitation. Plus, the State did not identify any additional facts necessary to the Court's review of the issue.

**People v. McGee**, 2016 IL App (1st) 141013 To convict a defendant of being an armed habitual criminal (AHC), the State must prove that defendant possessed a firearm after having two or more convictions for any qualifying offense, including various weapons offenses. 720 ILCS 5/24-1.7(a). To convict a defendant of unlawful use of weapons by a felon (UUWF), the State must prove that defendant possessed a firearm after having any previous felony conviction. 720 ILCS 5/24-1.1(a).

Defendant was convicted of AHC based on prior convictions for aggravated unlawful use of weapons (AUUW) in 2007 and several weapons offenses in 2008. Defendant was also convicted of UUWF based on the prior convictions for weapon offenses in 2008. The trial court merged the two convictions and sentenced defendant for AHC.

On appeal, defendant argued that his convictions were improper because the prior felony convictions were based on statutes that were declared facially unconstitutional in **People v. Aguilar**, 2013 IL 112116 and **People v. Burns**, 2015 IL 117387. The Appellate Court agreed that the AHC conviction was improper but found that the UUWF conviction was not.

The 2007 AUUW conviction was based on a portion of the AUUW statute that had been declared facially unconstitutional making it void ab initio. That particular AUUW conviction thus could not serve as one of the necessary predicate offenses for the AHC conviction. The AHC conviction was vacated.

In the 2008 case, however, defendant was convicted of multiple weapons offenses, including two counts of AUUW without a valid firearm owner's identification (FOID) card. The statute for that particular portion of AUUW was upheld in **People v. Mosley**, 2015 IL 115872. Since defendant had a constitutionally valid qualifying felony in the 2008 case, the State proved all the elements of UUWF.

The court specifically held that the charging instrument did not need to identify the correct prior felony to properly charge and obtain a conviction for UUWF. All the charging instrument needed to allege was that defendant had a prior felony conviction. Here the State did not identify the form of AUUW that had passed constitutional muster. Instead, it identified another offense that was unconstitutional. But the identity of the exact offense was mere surplusage, and thus unnecessary to properly charge and obtain a conviction for UUWF.

The court affirmed the UUWF conviction and remanded for sentencing on that offense.

**People v. Sanderson**, 2016 IL App (1st) 141381 Defendant was convicted of armed habitual criminal based on having a prior conviction for attempted residential burglary. The only evidence of the prior conviction was a certified copy of conviction which provided no details about the circumstances of the prior offense.

Defendant's conviction for attempted residential burglary, which was not a specifically enumerated forcible felony, also did not fall within the residual clause since it was "neither by definition nor by circumstance a forcible felony."

First, the elements of the offense do not include a specific intent to carry out a violent act. Residential burglary is defined as entering or remaining within a dwelling place with the intent to commit a felony or theft. 720 ILCS 5/1903(a). A defendant could be guilty of attempted residential burglary by simply testing the window of a home that he knew was vacant, or by casing a home, finding it unexpectedly occupied and leaving precisely to avoid a violent confrontation.

Second, since the State presented no evidence about the circumstances of defendant's prior conviction, there was no showing that defendant contemplated the use of force in this

particular offense.

**People v. White, 2015 IL App (1st) 131111** Domestic battery is not listed as one of the specified “forcible felonies” that can serve as the basis for an armed habitual criminal conviction. Therefore may be a forcible felony only if: (1) the specific circumstances of the prior conviction in question actually involved the use or threat of physical force or violence, or (2) the offense falls within the residual clause because it inherently involves force or violence. Because the State failed to present evidence concerning the specific circumstances of defendant’s domestic battery conviction, that conviction was a forcible felony only if domestic battery inherently involves the use or threat of force or violence.

Domestic battery can be based either on bodily harm or on physical contact of an insulting or provoking nature with a family or household member. (720 ILCS 5/12-3.2(a)) Clearly, domestic battery based on contact of an insulting or provoking nature does not inherently involve the use or threat of violence, and therefore is not a forcible felony.

By contrast, domestic battery based on inflicting bodily harm to a family or household member, “at first blush, . . . would appear to constitute a forcible felony.” Considering the statute as a whole, however, the court concluded that it would be absurd to find that domestic battery based on bodily harm constitutes a forcible felony where §2-8 was amended in 1990 to provide that aggravated battery constitutes a forcible felony only if it is based on great bodily harm. The court concluded that in light of the 1990 amendments, the legislature could not have intended that domestic battery based on mere bodily harm qualified as a forcible felony.

Because defendant’s domestic battery conviction did not qualify as a forcible felony for purposes of the habitual criminal statute, the habitual criminal conviction was vacated.

**People v. Fields, 2014 IL App (1st) 110311** The court vacated defendant’s armed habitual criminal (AHC) conviction since one of the two prior qualifying offenses necessary to prove AHC was the same Class 4 version of aggravated unlawful use of a weapon (AUUW) that was found to violate the Second Amendment in **People v. Aguilar, 2013 IL 112116**.

A person commits AHC when he possesses a firearm after having been convicted of two qualifying offenses. 720 ILCS 5/24-1.7. The prior convictions are elements of the offense. One of the prior convictions the State charged and proved in this case was a Class 4 AUUW conviction. Since that offense is based on a statute found to be facially unconstitutional and hence void ab initio in **Aguilar**, the State failed to prove an essential element of AHC. “A void conviction for the Class 4 form of AUUW found to be unconstitutional in **Aguilar**, cannot now, nor can it ever, serve as the predicate offense for any charge.” Accordingly, the AHC conviction was vacated.

**People v. Coleman, 409 Ill.App.3d 869, 948 N.E.2d 795 (1st Dist. 2011)** The Armed Habitual Criminal Statute (720 ILCS 5/24-1.7) prohibits the receipt, sale, possession, or transfer of a firearm after having been convicted two or more times of a forcible felony or certain specified offenses. Defendant was convicted of violating the Armed Habitual Criminal Statute based upon his commission of unlawful use of a weapon by a felon and aggravated unlawful use of a weapon after having been previously convicted of unlawful use of a weapon by a felon and burglary.

Defendant argued that the State failed to prove that he had been previously convicted of two qualifying offenses because the name on one of the certified copies of prior conviction was for “Jessie Coleman,” rather than for “Jesse Coleman,” the name by which defendant

was charged. The Appellate Court rejected the argument that the proof of the prior conviction was inadequate.

Identity of name gives rise to a rebuttable presumption of identity. If the presumption is not rebutted, the certified copy of the prior felony conviction, without more, meets the burden of proving the prior conviction beyond a reasonable doubt. However, if the presumption does not apply or is rebutted, the State must introduce additional evidence to meet its burden of showing that the defendant is the person who was convicted.

The Appellate Court concluded that where the defense did not object at trial to the State's request to admit the certified copy of the prior conviction and failed to claim that defendant was not the person named in the certified copy, the variance between "Jesse" and "Jessie" did not defeat the presumption of identity. Because defendant failed to rebut the presumption, the evidence was sufficient to establish that he had the required prior convictions. Defendant's conviction for armed habitual criminal was affirmed.

The court adopted recent precedent holding that the Armed Habitual Criminal Statute does not violate the Second Amendment by criminalizing the mere possession of a firearm. The court adopted the reasoning of [People v. Ross](#), 407 Ill.App.3d 931, 947 N.E.2d 776 (1st Dist. 2011), which concluded that the decisions in [District of Columbia v. Heller](#), 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) and [McDonald v. City of Chicago](#), 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) did not recognize a Second Amendment right for a convicted felon to possess a handgun, either in or outside of the home.

[People v. Davis](#), 405 Ill.App.3d 585, 940 N.E.2d 712 (1st Dist. 2010) The offense of armed habitual criminal prohibits the possession of a firearm by one who has been previously convicted of two or more qualifying offenses. [720 ILCS 5/24-1.7\(a\)](#). Making the specified prior convictions elements of the offense, rather than sentencing enhancements to be considered by the judge, does not violate due process merely because some prejudice may result to the defendant.

Where the defendant is willing to stipulate to the fact of his prior conviction, the court abuses its discretion in admitting the record of the prior conviction because the risk of unfair prejudice substantially outweighs the discounted value of the record of conviction. [Old Chief v. U.S.](#), 519 U.S. 172 (1997). The armed habitual criminal statute requires that the State prove not just that defendant has a prior felony conviction, but that defendant had two or more specific qualifying felonies. Therefore, the reasoning of [Old Chief](#) does not support a due process challenge to the armed habitual criminal statute.

Supreme Court Rule 451(g) permits a bifurcated trial where the State provides notice pursuant to [725 ILCS 5/11-3\(c-5\)](#) that it intends to rely on a fact, other than the fact of a prior conviction, that is not an element of the offense to increase the range of penalties for an offense beyond the statutory maximum. This statute is inapplicable to armed habitual criminal because the prior convictions are elements of the offense and not sentencing enhancements. Due process does not require a bifurcated trial for armed habitual criminal.

## **§55-4**

### **Other Weapons Offenses**

#### **Illinois Supreme Court**

[Caulkins v. Pritzker](#), 2023 IL 129453 In January 2023, Illinois enacted the Protect Illinois Communities Act, which included what is commonly referred to as the "assault weapons ban" ("the ban"). The ban restricts access to assault weapons and large capacity magazines, but

contains exceptions for law enforcement and other trained professionals and for individual who possessed such items before the ban became effective. In the trial court, the plaintiffs successfully argued that the ban violated equal protection and constituted special legislation in violation of the Illinois Constitution. The circuit court rejected the plaintiffs' argument that the entire Act violated the three-readings requirement of the Illinois Constitution. The defendants appealed, and in the supreme court the plaintiffs also argued that the ban violated the second amendment. The supreme court reversed the trial court and upheld the ban.

First, the court refused to consider the second amendment claim because the plaintiffs had not raised it in the trial court and, in fact, had expressly disclaimed it in their pleadings. The only reference to the second amendment in the complaint was in the context of the two challenges that were raised – equal protection and special legislation. And, the plaintiffs expressly stated in their pleadings below that the question was not whether the “weapons classification” survives constitutional challenge. “The theory under which a case is tried in the circuit court cannot be changed on review, and an issue not presented to or considered by the circuit court cannot be raised for the first time on review.”

Second, the majority concluded that the trained professionals and grandfathered possessors exemptions contained in the ban did not deny equal protection or constitute special legislation. The threshold question for an equal protection analysis is whether the claimant is similarly situated to the comparison group. This requires that the two groups be “alike in all relevant respects.” The special legislation clause of the Illinois constitution supplements, and overlaps with, equal protection in that it prohibits the legislature from conferring a benefit or privilege on one group while excluding other similarly situated groups.

Relevant to the similarly-situated inquiry is the purpose of the legislation at issue. Here, the court found the purpose to be to limit the number of assault weapons and large capacity magazines in circulation because such weapons and magazines are most likely to result in a mass shooting.

Plaintiffs argued that they were similarly situated to trained professionals because all were law-abiding gun owners and FOID card holders with second amendment rights. The court found an important distinction in the fact that those in the trained professionals group must undergo specialized firearms training relative to their employment and accordingly have greater responsibility in the safe handling and storage of firearms. Thus, the two classifications were not alike in all relevant respects.

Similarly, the court concluded that the plaintiffs were not similarly situated to “grandfathered” possessors. Those who already possessed assault weapons and large capacity magazines have a reliance interest based on their acquisition before the ban took effect. And, while those individuals may retain possession of what they already have, they may not acquire additional items subject to the ban. In that regard, then, they are subject to the same restrictions as the plaintiffs. Because the plaintiffs failed to establish that they are similarly situated to the exempt groups, their equal protection and special legislation challenges failed.

A dissent would have found that the trained professionals and grandfathered possessor classifications do not further the legislation's claimed purpose. On that basis, the dissent would have concluded that the ban constituted improper special legislation.

Finally, the court held that the plaintiffs were barred from renewing their three-readings claim where they failed to cross-appeal that issue. Specifically, the trial court had rejected the three-readings claim below and accordingly did not invalidate the entire Public Act containing the assault weapons ban. Thus, the circuit court judgment was partially adverse to the plaintiffs, and they needed to cross-appeal their three-readings claim in order for the court to have jurisdiction to consider it. A dissent would have reached this claim,

would have found the three-readings rule violated, and would have invalidated the Public Act 102-1116 in its entirety.

**People v. Ramirez, 2023 IL 128123** In order to prove a defendant guilty beyond a reasonable doubt of possession of a defaced firearm under [720 ILCS 5/24-5\(b\)](#), the State must prove knowing possession and also that the defendant knew that the firearm was defaced. Section 24-5(b) provides, “a person who possesses any firearm upon which any such importer’s or manufacturer’s serial number has been changed, altered, removed or obliterated commits a Class 3 felony.” While this section contains no specific *mens rea* requirement, the Court observed that when a possessory offense does not include a particular mental state and the legislature has not indicated an intent to treat the offense as an absolute liability offense, knowledge is the appropriate mental state.

Defacement is an essential element of the offense. It is what makes possession of the firearm a crime. It also ensures that the statute comports with the second amendment. Accordingly, the implied mental state of knowledge must apply to both elements, possession and defacement.

Defendant’s conviction of possession of a defaced firearm was reversed and the matter remanded for a new trial. Retrial was not barred by double jeopardy because existing precedent at the time of defendant’s original trial, **People v. Lee, 2019 IL App (1st) 162563**, held that the State did not have to prove defendant’s knowledge of the defacement.

**People v. Murray, 2019 IL 123289** To prove a defendant guilty of possession of a firearm by a street gang member, the State must produce specific evidence in accordance with the statute’s definition of a street gang; namely, that defendant belonged to a group of 3 or more persons with an established hierarchy that . . . engages in a course or pattern of criminal activity.” [740 ILCS 147/10 \(West 2012\)](#). “Course or pattern of criminal activity” is defined, in part, as (1) two or more gang-related criminal offenses committed in whole or in part within this State; (2) that at least one such offense was committed after January 1, 1993, the effective date of the Act; (3) that both offenses were committed within five years of each other; and (4) that at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any offense defined as a felony or forcible felony under the Criminal Code of 2012.

Here, the parties agreed that defendant identified as a member of the Latin Kings, and a police gang expert testified that the Latin Kings met the statutory definition of a “street gang.” But the Illinois Supreme Court majority held that without evidence of two qualifying offenses under [section 147/10](#), the State failed to prove defendant guilty of being a street gang member beyond a reasonable doubt. The legislature clearly insisted on proof of specific crimes, and the State’s approach of allowing an expert opinion to stand in for that proof violated defendant’s right to due process.

### **Illinois Appellate Court**

**People v. Reinking, 2024 IL App (4th) 230486** Defendant was charged with unlawful delivery of a firearm under section 24-3(A)(e), which prohibits giving a firearm to someone who has been treated in a mental institution within the previous five years. The State alleged defendant violated the statute by returning an AR-15 to his son after his involuntary stay in a hospital’s mental health unit.

The parties stipulated to several facts, including to the nature and length of the son’s stay at the hospital and the fact that defendant “gave” the weapon to his son within the

prohibited time period. The issues at trial were whether defendant knew that his son received treatment for mental health while in the hospital, as required by the statutory definition of “mental institution,” and whether defendant could “give” the firearm to his son if his son legally owned the firearm. The trial court found defendant guilty. It found defendant’s testimony that he was ignorant of the nature of his son’s hospitalization lacked credibility, given defendant was present for the commitment, and visited his son in the hospital. The court also found defendant “gave” the firearm to his son as contemplated by the statute.

On appeal, defendant argued the court erred in denying a pretrial motion to dismiss because the indictment failed to state the nature of the charge, and because the statute is unconstitutionally vague. The appellate court affirmed. Although defendant argued the charge did not specify the unlawful “giving” conduct, and “giving” can have different meanings, the indictment tracked the language of the statute and need not have specified the exact means by which the conduct was carried out. Nor is the statute unconstitutionally vague. Defendant argued that no person could understand that the “giving” of a firearm also encompassed “returning” a firearm to its lawful owner. The appellate court held that a person of ordinary intelligence could understand these acts to be one and the same. The plain language of the statute conveys its purpose – preventing the mentally ill from obtaining firearms, regardless of how or why the firearm is given.

The appellate court also held the State proved defendant’s knowledge that his son had been treated in a mental institution. Defendant argued the trial court should have accepted his testimony that he was hard of hearing and therefore didn’t understand why or where his son was being taken by the police. But defendant admitted that he knew his son had been claiming his phone was hacked by Taylor Swift and was acting erratically. The defendant also visited his son in the mental hospital. A rational trier of fact could have found defendant knew the nature of his son’s hospitalization.

Finally, the appellate court affirmed the trial court’s rejection of defendant’s ineffectiveness claim after a **Krankel** hearing. Defendant argued that his attorney should not have stipulated to the fact that he “gave” his son the firearm and that he objected to this stipulation. But defense counsel testified that defendant later agreed to all of the stipulations after consultation. The appellate court would not re-weigh the credibility findings of the trial court. Defendant also argued that his attorney should have presented a defense based on a conversation defendant had with the sheriff’s office before returning the firearm, in which he was told that doing so was legal under the FOID Act. Nor would the appellate court question counsel’s strategic decisions. But defense counsel was examined at length during the hearing and explained why he chose to instead focus on defendant’s knowledge. The appellate court would not question counsel’s strategic decision to settle on an alternative valid defense.

**People v. Figueroa**, 2020 IL App (2d) 160650 State failed to prove defendant guilty of possession of a firearm by a street gang member where the State’s gang expert testified that the Latin Kings were a street gang but did not present any evidence of a “course or pattern of criminal activity” as required by the statute. See **People v. Murray**, 2019 IL 123289. The State requested that the court remand for a new trial, but the court declined. The proper remedy was reversal because the error was not that the expert’s testimony was inadmissible but rather that an element of the offense was not proved. Instead of reversing outright, however, the court reduced the conviction to the lesser-included offense of aggravated unlawful use of a weapon.

**People v. Starks**, 2019 IL App (2d) 160871 Collapsible, metal baton, which was weighted at one end and could be opened with the flick of the wrist, constituted a “bludgeon” within the

plain meaning of 720 ILCS 5/24-1(a)(1). The metal baton was not the same as a nightstick or “billy,” which are covered under section 5/24-1(a)(2) and require the State to prove the additional element that defendant intended to use the nightstick or billy against another.

**People v. Beck**, 2019 IL App (1st) 161626 The Appellate Court reversed defendant’s conviction for possession of a firearm by a street gang member, but upheld convictions for aggravated UUW.

To prove defendant was a street gang member, the State must provide evidence consistent with the statute’s definition of “street gang.” Thus, the State must prove defendant is a member of a group that engaged in a pattern of criminal activity as defined by the statute, including proving two or more offenses within a prescribed date range, defined as “gang-related.” Here, the State offered testimony about the defendant’s purported gang, the Black P. Stones, generally describing their involvement in violence and narcotics. But the testimony did not describe two specific offenses as required by statute. Thus, the State failed to show that defendant was a member of a street gang. Although the officer in this case did testify that the Black P. Stones were a street gang, this opinion could not satisfy the statutory requirement because he was not qualified as an expert.

**People v. Lee**, 2019 IL App (1st) 162563 Rejecting a challenge to defendant’s conviction for possession of a firearm with defaced identification marks under section 24-5(b), the majority of the Appellate Court followed **People v. Stanley**, 397 Ill. App. 3d 598, 609 (1st Dist. 2009). Under this precedent, the State had to prove only that defendant knowingly possessed the firearm and that the firearm’s serial number was altered, obliterated, or removed. The statute does not require knowledge of the alteration. Nor did the trial court err when it responded to a jury note asking whether knowledge of defacement was required; the court had discretion to accurately respond to a question on a point of law about which the jury indicated doubt or confusion. Justice Ellis disagreed and would have found **Stanley** wrongly decided because absent a knowledge requirement for the defacement element, the statute imposes strict liability.

**People v. Deleon**, 2015 IL App (1st) 131308 Defendant was convicted of unlawful sale or delivery of a firearm, which prohibits the delivery of a firearm, incidental to a sale, within 72 hours after “application for its purchase has been made.” Application is defined as “when the buyer and seller reach an agreement to purchase a firearm.” 720 ILCS 5/24-3(A)(g).

The evidence showed that defendant acted as the straw purchaser of a firearm for his friend, Hill, at a store in Indiana. At Hill’s request, defendant picked out the gun and paid for it with Hill’s money. Four days later, defendant and Hill returned to Indiana, defendant picked up the gun and the gave it to Hill after they returned to Illinois.

The Appellate Court held that the State failed to prove defendant guilty beyond a reasonable doubt. The record contained no evidence that defendant and Hill reached an agreement to purchase the gun that would have triggered the 72 hour waiting period. Instead, the evidence showed that defendant and Hill reached an agreement for defendant to act a straw purchaser to obtain the gun for Hill. Since the agreement to provide services is not an agreement to purchase, the transfer of the gun from defendant to Hill did not trigger a waiting period.

**People v. Shreffler**, 2015 IL App (4th) 130718 Unlawful use of weapons is committed by selling, manufacturing, purchasing, possessing or carrying a rifle with a barrel of less than 16 inches in length or any weapon made from a shotgun “if such a weapon as modified has

an overall length of less than 26 inches.” Defendant was convicted in a stipulated bench trial of three counts of unlawful use of weapons for possessing two illegal shotguns and one illegal rifle. The Appellate Court held that the evidence was insufficient to sustain the convictions.

The court acknowledged that there are two methods of measuring the length of a shotgun: one recognized by the Bureau of Alcohol, Tobacco and Firearms, measuring a straight line that is parallel to the bore of the weapon; and another, which ATF does not approve, measuring a straight line between the two farthest points of the weapon.

Here, the ATF-approved measurement indicated that defendant’s shotguns were 25¼ inches and 25¾ inches respectively. However, the non-ATF method would have resulted in both shotguns having overall lengths greater than 26 inches.

The court concluded that had the General Assembly wanted to require use of the ATF-approved method it would have so specified in the statute. In the absence of any statutory direction, the term “overall length” is to be given its plain and ordinary meaning of the “longest” or “longer” dimension of the weapon. Because defendant’s shotguns were greater than 26 inches when measured from the tip of the barrel to the most distant part of the stock, the evidence was insufficient to sustain the convictions based on possession of the shotguns.

The court also concluded that the evidence was insufficient to find that defendant possessed a rifle with a barrel that was less than 16 inches in length. It was undisputed that the barrel measured 11½ inches without the “screw on, screw off flash suppressor” that was attached, but would have exceeded 16 inches if the flash suppressor was included in the measurement.

Illinois law does not specifically define the term “barrel” for purposes of the offense of unlawful use of a weapon, but the dictionary meaning of “barrel” is “the part of a gun that the bullets go through when the gun is fired.” A bullet fired from the rifle in question would have traveled through the flash suppressor. In addition, because the statute is ambiguous, the rule of lenity requires that the statute be interpreted most favorably to the defendant. The court concluded that the flash suppressor should have been included in the measurement.

**People v. Sito, 2013 IL App (1st) 110707** A person commits the offense of unauthorized possession or storage of weapons when he possesses any knife with a blade of at least three inches in length in any building supported in whole or in part with public funds without prior written permission from the chief security officer for the building. [720 ILCS 5/21-6\(a\)](#); [720 ILCS 5/33A-1\(c\)\(2\)](#).

A knife has a blade of at least three inches if it measures at least three inches from hilt to the tip of the blade.

“Blade” is not defined by the Criminal Code, but should be given its plain and ordinary meaning. The dictionary defines “knife” as a cutting instrument consisting of a sharp blade fastened to a handle. “Blade” is defined as the cutting part of the implement or the flat-edged cutting part of a sharpened tool or weapon. Because a knife is composed of two components, what is not a handle is a blade. There is no distinction between the sharpened edge of a blade and its non-sharpened edge. The legislature was concerned with the entire portion of a knife that could penetrate a body after an initial incision was created by the sharpened edge.

Although the statute does not set forth a culpable mental state, the appropriate mental state for the offense is knowledge.

Unauthorized possession or storage of weapons is not an absolute liability offense. An offense is an absolute liability offense only if it is a misdemeanor not punishable by incarceration or a fine exceeding \$500, or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described. [720 ILCS 5/4-9](#).

Unauthorized possession or storage of weapons is a Class A misdemeanor punishable by incarceration. [720 ILCS 5/21-6\(a\)](#); [730 ILCS 5/5-8-3\(a\)\(1\)](#). Nowhere in the enactment of the statute did the legislature expressly indicate an intent to impose absolute liability.

Possession offenses typically require proof of knowing possession. A material element of every offense is a voluntary act and possession is a voluntary act only if the offender knowingly procures or receives the thing possessed. [720 ILCS 5/4-1](#); [720 ILCS 5/4-2](#). Therefore, knowledge is the proper mental state to be applied.

The trial judge erroneously struck the element of knowledge from the instructions submitted to the jury. Because this resulted in the jury essentially being instructed not to consider defendant's testimony that he was not aware that he had a knife, the error was not harmless beyond a reasonable doubt.

**People v. Runge**, 346 Ill.App.3d 500, 805 N.E.2d 632 (3d Dist. 2004) A conviction for possession of contraband in a penal institution was reversed because the contraband - a canister of pepper spray - was not a "weapon" under [720 ILCS 5/31A-1.1\(c\)\(2\)\(v\)](#). Section 31A-1.1(c)(2)(v) defines a "weapon" as any of several "devices or implements designated in subsections (a)(1), (a)(3) and (a)(6)" of [720 ILCS 5/24-1](#), and "any other dangerous weapon or instrument of like character." Section §24-1 includes several specific weapons, but specifically excludes "an object containing a non-lethal noxious liquid gas or substance designed solely for personal defense carried by a person 18 years of age or older." ([720 ILCS 5/24-1\(a\)\(3\)](#)). The court concluded that the pepper spray in question was expressly excluded from being a "weapon" under §24-1(a), and therefore was not a "dangerous weapon or instrument of like character" under §31A-1.1(c)(2)(v).

## **§55-5**

### **Proof of Possession**

#### **United States Supreme Court**

**County Court v. Allen**, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) Statute creating a "permissive" presumption that all occupants of an auto are in possession of any firearm found therein was upheld. As applied to the facts of this case, there was a "rational connection between the basic facts proved and the ultimate fact presumed and the latter is more likely than not to flow from the former."

#### **Illinois Supreme Court**

**People v. Jones**, 2023 IL 127810 Defendant was convicted of unlawful possession of ammunition by a felon after police found two bullets in her glove box during a traffic stop. When police confronted defendant with the bullets, she stated that they belonged to her husband. At trial, defendant's husband claimed ownership of the bullets, describing how he often used defendant's car to transport his gun, for which he possessed a FOID card.

During deliberations, the jury asked for a definition of "knowingly." The defense agreed with the State that no additional instruction was required. Defense counsel reasoned that the definition would inform the jury that "knowing" could mean awareness of a "substantial probability" that something exists.

Defendant was convicted and sentenced to two years in prison. On appeal, the appellate court rejected a reasonable doubt challenge, and a due process and ineffectiveness claim for the lack of a jury instruction defining knowledge.

The Supreme Court affirmed. It first held that a rational trier of fact could have found knowing, constructive possession of the bullets. Defendant was driving the car alone and was its only registered owner. She therefore exercised exclusive control over the glove box where

the ammunition was found, meaning she had constructive possession. And where possession is established, an inference of culpable knowledge can be drawn from the surrounding facts and circumstances. While the defense put forth evidence that the bullets belonged to the husband, the credibility of that evidence was a determination for the trier-of-fact.

Nor did the lack of an instruction defining “knowledge” deprive defendant of her due process right to a fair trial or her right to effective assistance of counsel. A due process argument was not available, because counsel’s rejection of the instruction was more than mere forfeiture, it was invited error. Thus, plain error review was not available. Furthermore, counsel’s decision was sound trial strategy, as the “substantial probability” language contained in the instruction created a mental state akin to recklessness and could have reduced the chances for an acquittal.

**People v. Wise**, 2021 IL 125392 Unlawful possession of a weapon under 720 ILCS 5/24-1.1(a) requires that the weapon be “on or about [the defendant’s] person.” Thus, the statute prohibits both actual (“on”) and constructive (“about”) possession of a firearm.

Defendant was driving a minivan, with two passengers – one in the middle row of seats, and one in the back row. When the police searched the vehicle (due to a “strong odor of burnt cannabis”), a .357 Derringer was discovered concealed inside a glove on the third row seat, near one of the passengers. An officer testified that the firearm was 5-to-10 feet behind defendant, out of his reach. The officer also said defendant admitted that he knew the firearm was in the vehicle and that it belonged to a friend who was not in the van at the time of the traffic stop. Defendant testified and denied that he had admitted knowing the gun was in the van. The gun’s owner testified that he had borrowed the van from defendant’s brother a few weeks before this traffic stop and had inadvertently left the gun in the van when he returned it.

It was undisputed that defendant did not have actual possession where the gun was in the backseat of the minivan he was driving at the time of a traffic stop. The question, then, was whether he had constructive possession. That is, did defendant have knowledge of the presence of the firearm and did he exercise immediate and exclusive control over the area where it was found. An individual’s status as the driver of a vehicle does not put him in possession of everything within the passenger area when there are other passengers who may be the ones in possession of contraband. Here, even if defendant knew the gun was in the van, it was out of his reach and there was no evidence he ever actually possessed it. Defendant’s conviction was reversed outright.

### **Illinois Appellate Court**

**People v. Crumpton**, 2024 IL App (1st) 221651 The State failed to prove constructive possession of a weapon beyond a reasonable doubt where defendant was one of five occupants of the car in which the gun was found. Although defendant was in the passenger seat under which the gun was found, and officers testified they saw defendant bend down and pop up quickly, most of the factors for constructive possession outlined in **People v. Bailey**, 333 Ill. App. 3d 888, 891 (2002), militate against a finding of constructive possession: the officers never saw defendant with the gun, no DNA or fingerprints were taken from the gun, the gun was not registered to defendant, defendant was not the owner of the car, the gun was not visible without looking directly underneath the passenger seat, there was no evidence that defendant had an adequate amount of time to discover the gun beneath his seat before the car was pulled over, and the firearm was relatively small. The court also noted that the body cam footage did not show defendant’s purported movement.

**People v. Hampton, 2024 IL App (1st) 230171** The appellate court majority found first-prong plain error because the trial court failed to instruct the jury that armed habitual criminal requires knowing possession in a closely balanced case.

At the time of trial there was no AHC pattern instruction. The trial court instructed the jury that “a person commits AHC when he possesses any firearm after previously being convicted of two qualifying felony offenses.” While this language tracked the statute, it failed to accurately state the law because under **People v. Ramirez, 2023 IL 128123**, when a possessory criminal statute lacks an explicit mental state, the implied mental state is knowledge.

First-prong plain error occurred because the evidence was closely balanced. The defendant argued at trial that he was unaware of the gun’s presence in the car. He told the police that the car belonged to his girlfriend and the gun was hidden underneath the seat. Defendant’s girlfriend testified the gun and car belonged to her. Multiple jury notes indicated that the jury was closely divided.

The dissent pointed out that in the time between the verdict and the instant decision, the rules committee created pattern instructions for AHC which mirror the instructions given here. The majority found, however, that these pattern instructions misstate the law because they omit a mental state. The majority noted that all other pattern instructions involving the possession of a weapon include knowledge as an element.

**People v. Carpenter, 2024 IL App (1st) 220970** Defendant was not proved guilty beyond a reasonable doubt of unlawful possession of a weapon by a felon or aggravated unlawful use of a weapon. Defendant was stopped by multiple police officers while driving an older-model vehicle with a broken taillight and a small object hanging from the rearview mirror. He was ordered out of the vehicle. Defendant said he had borrowed the car, which belonged to his girlfriend’s friend; he did not know the friend’s last name. The officers asked defendant if he had any drugs or weapons, and defendant responded that he did not. The police then searched the car and, thirteen minutes later, found the gun between the metal frame and cushioning of the driver’s seat. Ultimately, the court found defendant guilty on a theory of constructive possession.

The appellate court reversed, concluding that the State failed to prove that defendant had the requisite knowledge of the gun’s presence to establish constructive possession. Carpenter did not own the car. There was no evidence he had ever used it before, and no evidence of how long he had been in possession of the vehicle on this occasion. With regard to the gun, it was not quickly discovered, but rather only found during an extremely thorough search of the vehicle when police pulled back the foam within the driver’s seat. Two different officers sat on that seat before the gun was discovered, and neither reported feeling any sort of hard object within. On this evidence, there was nothing from which a rational trier of fact could infer defendant had knowledge of the weapon.

Included in the majority decision is a discussion of the problematic police practice of using “stereotypical thinking and hunches” and “dubious investigative techniques” to perpetuate the practice of initiating traffic stops on the basis of “driving while Black” (DWB). Though the majority stated that DWB did not enter its legal analysis and decision, it noted the need to ensure that the law is fairly and consistently applied to all persons and cited several factors which may indicate that a stop is predicated on DWB. The dissent criticized the majority’s inclusion of this discussion in its opinion, noting that because the issue was not raised by defendant, the State had no opportunity to respond.

**People v. Mallett, 2023 IL App (1st) 220920** The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of constructively possessing the firearm recovered from the locked glove compartment of her vehicle. While defendant was not in actual possession of the firearm and made no statements suggesting she had knowledge of it, her status as the vehicle's owner and driver were factors to be considered in determining whether she had knowledge of and control over the weapon. The evidence established that defendant's key ring held the key which unlocked the glove compartment. And, although there was a passenger in the front seat of the vehicle, there was no evidence that the passenger had access to a key to unlock the glove compartment. Further, defendant's status as the vehicle's owner and driver weighed "heavily" in favor of finding that she had knowledge of the gun's presence. Accordingly, defendant's conviction of aggravated unlawful use of a weapon was affirmed.

**People v. Brooks, 2023 IL App (1st) 200435** The appellate court affirmed a conviction for armed habitual criminal over defendant's argument that the State failed to prove constructive possession. The gun was found in a safe in a one bedroom apartment. Documents belonging to defendant were also in the safe, and defendant had keys to the apartment. A police officer testified that defendant admitted to keeping the gun for protection, although this statement was not documented.

While defendant's brother testified that the apartment in fact had two bedrooms, and that the gun was found in the bedroom belonging to him, the trial court did not believe this testimony, and the appellate court would not disturb this credibility finding.

The appellate court also refused to take judicial notice of evidence defendant attempted to produce on appeal showing the apartment had two bedrooms. Therefore, on this record, a rational trier of fact could have found that the defendant had both knowledge of the gun and maintained control over the area where it was found.

**People v. Donald, 2023 IL App (1st) 211557** The evidence was sufficient to find defendant guilty of unlawful use of a weapon by a felon. Parole agents conducting a check on defendant's home testified that they found him sleeping in a basement bedroom. They found a gun in the top drawer of a dresser located only a few feet away from the bed. The agents also saw male clothing in defendant's size, and defendant's IDOC personal property inventory form sitting on top of the dresser. Even though defendant's mother testified that the bedroom did not belong to defendant, the trial court was best positioned to credit the State's witnesses, and defendant had sufficient control over the bedroom such that he had constructive possession of the gun.

**People v. Hilson, 2023 IL App (5th) 220047** The prove defendant guilty beyond a reasonable doubt of being an armed habitual criminal, the State must establish that defendant knowingly possessed a firearm after having been convicted two or more times of a qualifying offense. Here, defendant stipulated to having been convicted of the necessary predicate offenses but challenged the proof that he knowingly possessed the firearm found under the driver's seat of a vehicle which he was driving but did not own.

When reviewing a challenge to the sufficiency of the evidence, the court looks at the evidence presented at trial in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. While there was no eyewitness testimony that defendant ever had the gun in his actual possession, there was circumstantial evidence sufficient to establish that he at least had constructive possession. The gun was found under defendant's seat, and defendant admitted he had been driving the vehicle for at least a couple of hours at the time of the stop.

Defendant initially refused to exit the vehicle when he was ordered to do so, and his hands were not visible for a period of time after the initiation of the traffic stop and before he did exit the vehicle. The gun's location was accessible only to the driver. And, a mixture of DNA evidence from the grip of the gun revealed defendant as a major contributor. Viewing this evidence in the light most favorable to the prosecution, defendant was proved guilty beyond a reasonable doubt.

**People v. Mosley, 2023 IL App (1st) 200309** Defendant argued that the State failed to prove beyond a reasonable doubt that he possessed a firearm which was recovered from the floorboard of a vehicle in which he was a passenger. In particular, defendant noted that he did not own the vehicle, and three other adults were also present in the vehicle at the time of the traffic stop. While one officer testified that he saw defendant place an object on the floor of the vehicle, another officer said he did not observe defendant put anything on the floor. The officers were not wearing body cameras, and no physical evidence linked defendant to the firearm.

Viewing the evidence in the light most favorable to the prosecution, the appellate court found that a rational fact finder could find beyond a reasonable doubt that defendant possessed the weapon. The jury could properly choose to believe the testimony of the officer who said he saw defendant put something on the floor, especially given that the gun was recovered from the area where defendant had been seated in the vehicle. Accordingly, the appellate court affirmed defendant's conviction of unlawful possession of a weapon by a felon.

**People v. Cook, 2021 IL App (3d) 190243** Police discovered a gun on the floor of a van, just behind the driver's seat. Three men occupied the van. They sat in the passenger seat, rear driver's-side seat, and rear passenger-side seat. The driver was outside of the van pumping gas. A red hat, identified as belonging to defendant, was covering the gun.

Defendant, who was in the rear passenger-side seat, was charged with armed habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon. On appeal, he alleged the State failed to prove his possession of the gun. He argued the gun was closer to the occupant in the rear driver's-side seat, and thus he did not have exclusive or primary control over the gun.

The Appellate Court disagreed. The gun was accessible to defendant, it was linked to him by the red hat, and even if another occupant was closer, defendant was close enough to have "immediate access and control" over the weapon, as required by **People v. Wise, 2021 IL 125392**. The court affirmed the convictions, though vacated the aggravated UUV pursuant to the one-act/one-crime rule.

**People v. Davis, 2021 IL App (3d) 180146** Evidence was insufficient to establish defendant's constructive possession of firearms and a scale containing cocaine residue found in a residence searched pursuant to a warrant. While there was evidence that defendant had sold drugs from that residence on two prior occasions, he was not present in the residence on the date it was searched. Thus, defendant did not have immediate access to the drugs and firearms when they were found.

The State failed to establish defendant's control over the residence where there was no evidence that he owned, rented, or lived there. In fact, there was uncontradicted evidence that defendant lived elsewhere. Defendant was seen coming and going from the residence on the date of the search and the day prior, but those observations merely established his presence, not habitation. Mail with defendant's name was found in the residence, but the State presented no evidence as to whether it was recent mail. And, there was mail addressed

to other persons throughout the residence, as well. Additionally, while defendant's wallet was found in the home, his identification in that wallet did not list the residence as his address.

Further, the State failed to establish defendant's relationship to the seized items. No physical evidence linked defendant to the contraband. In addition to the named tenant, defendant and another individual were seen coming and going from the residence in the days before the search. Those other individuals were just as likely as defendant to have brought the contraband into the home. The firearms were found on the top shelf in the closet of the named tenant's bedroom, and the scale containing cocaine residue was stored out-of-sight in a kitchen cabinet. The evidence was insufficient to prove beyond a reasonable doubt that defendant had knowledge and control over the contraband. Accordingly, his convictions were reversed.

**People v. Hines, 2021 IL App (1st) 191378** The unlawful use of a weapon by a felon statute provides it is unlawful for a felon to knowingly possess a firearm "on or about his person or on his land or in his own abode or fixed place of business." This language is meant to encompass all places, and location is not an essential element of the offense.

Here, two guns were found in an apartment where defendant was also present. Defendant told the police that a friend had dropped off the guns earlier in the day, and defendant had put them under the dresser where they were found. Defendant was on electronic home monitoring and was wearing an ankle band at the time the apartment was searched and the guns were recovered. Even if the State did not offer direct proof that the apartment was defendant's residence, there was ample evidence to establish that he had constructive possession of the guns where he was in the residence, had knowledge of the location of the firearms, and had control over them when he decided where to hide them.

**People v. Walker, 2020 IL App (1st) 162305** The State failed to prove defendant's constructive possession of ammunition beyond a reasonable doubt. The ammo was found in a dresser in his family's house, at which he sometimes slept and where he was discovered by police. Although defendant made statements suggesting ownership of the ammo, the Appellate Court found insufficient corroborating evidence in violation of the *corpus delicti* rule.

The only connection that the defendant had to the bullets was that he was sleeping in the apartment where they were found. The State could not establish defendant had constructive possession – knowledge or immediate and exclusive control – where he was in a different room, the bullets were inside a dresser drawer in the bedroom and not in plain view, two other individuals were in the room where the bullets were found when the police entered, there was nothing linking the defendant to the residence, such as bills, clothing, or personal belongings, and defendant introduced evidence that he lived at a different residence.

**People v. McLaurin, 2020 IL 124563** An officer observed defendant carrying a chrome object she believed to be a gun. Defendant entered a van, the officer followed, and the van was stopped by other officers. These officers patted down defendant and the other occupants but found no gun. Shortly thereafter, officers recovered a gun under the van. While no officers saw the defendant place the gun there, the initial officer testified that it looked like the object she saw defendant carrying. However, the gun was not introduced into evidence at trial. The Appellate Court reversed the conviction, finding an insufficient nexus between the object defendant was seen carrying and the gun under the van.

The Supreme Court reversed the Appellate Court and upheld the conviction. Although not overwhelming, and although the State "took a risk" by not introducing the gun at trial,

the State did provide sufficient circumstantial evidence to withstand a reasonable doubt challenge on appeal. The officers' descriptions, which were based on clear observations and were not impeached, as well as the proximity of the gun to the van, satisfied the standards enunciated in similar cases such as [People v. Washington, 2012 IL 107993](#) and [People v. Wright, 2017 IL 119561](#).

[People v. Edwards, 2020 IL App \(1st\) 170843](#) The State charged defendant with unlawful use of a weapon by a felon after he was seen in a car with a gun, and the gun was tossed from the car during police pursuit. During deliberations, the jury asked for a definition of "possession." The trial court decided to give the jury the definitional instructions for both actual and constructive possession. Defense counsel objected, arguing that the case had never been about constructive possession and therefore the defense did not have the opportunity to rebut the claim in closing argument. The objection was overruled, defendant was convicted, and defense counsel did not include the issue in a post-trial motion.

Citing [People v. Alexander, 2019 IL App \(3d\) 160709](#), the Appellate Court held that the trial court erred by instructing the jury on a theory of guilt not advanced at trial. The court held that this error violated defendant's constitutional right to closing argument. The error was not forfeited despite it not being raised in a post-trial motion, because under [People v. Cregin, 2014 IL 113600](#), a reviewing court should review constitutional errors raised at trial even if not included in a post-trial motion. The error was harmless, however, because there was sufficient evidence of actual possession, such that the jury did not need to consider constructive possession.

[People v. Smith, 2020 IL App \(3d\) 160454](#) A rational trier-of-fact could find that defendant jointly possessed two shotguns in his car, despite his and his passenger's testimony that the passenger alone possessed weapons and that defendant did not know about them. Other circumstances - including the fact that the men were brothers, were traveling cross-country together, and that the shotguns were not well-hidden - would allow for a rational inference that defendant did in fact jointly possess the shotguns. The dissent would have reversed the conviction, noting that the car was packed with luggage and camping gear, the guns were originally obtained by the passenger, and that the brothers were not getting along, such that an inference of joint possession would be speculative.

[People v. Wise, 2019 IL App \(3d\) 170252](#) Defendant drove a van with three rows of seats. One man sat in the passenger seat and another sat in the third row. After a traffic stop and search, police found a handgun hidden in a glove sitting on the third row bench. Defendant admitted he knew the firearm was in the van but denied it belonged to him. Defendant was convicted of unlawful possession of weapon by a felon.

On appeal, defendant alleged that the State failed to prove he had the weapon "on or about his person" as required by the unlawful possession of weapon statute. A majority of the court agreed. The court refused to equate "on or about the person" with "possession." Thus, the question was not whether defendant constructively possessed the gun, but whether defendant had actual physical possession of the firearm or was in such close proximity that it could be readily used as though on the person. Here, where the gun sat 5 to 10 feet behind defendant, it was not on or about his person.

[People v. Alexander, 2019 IL App \(3d\) 160709](#) Evidence at defendant's trial for unlawful use of a weapon by a felon included that police recovered a gun from the ground along the

route of defendant's flight from a traffic stop. During deliberations, the jury requested a definition of "possession." Over defense objection, the court gave IPI 4.16, which discusses both actual and constructive possession. Because the State had proceeded only on a theory of actual possession, it was error to give IPI 4.16. The instruction introduced constructive possession as a new theory of the case, and defendant did not have the opportunity to address it during the trial.

**People v. Terrell, 2017 IL App (1st) 142726** Constructive possession exists where a defendant has no personal control over the contraband but has control over the area where it is found. The State must prove that the defendant had knowledge of the presence of the contraband and exercised "immediate and exclusive" control over the area where it was found. Generally, living in the location where contraband is found is sufficient proof of the control required for constructive possession.

During a search of a two-bedroom apartment, the police found a hidden compartment in a hallway closet that contained drugs, money, digital scales, mixing agents and containers, firearms and ammunition. As they were conducting the search, the police saw defendant in a pickup parked in front of the apartment. The police found a hidden compartment in the pickup that was similar in some ways to the hidden compartment in the hallway closet, but contained no drugs, weapons, or paraphernalia.

The Appellate Court held that the State failed to prove that defendant had constructive possession of the items found in the hidden compartment of the hallway closet. Evidence of residency often takes the form of rent receipts, utility bills or mail, none of which were linked to defendant in this case. The items that were linked to defendant - prescription bottles, probation card, passport, framed photo, and the bag of large men's clothing - were insufficient to tie defendant to the contraband located in a hidden compartment. The court found the connection between the hallway compartment and the compartment in the pick-up "to be tenuous at best." And the mere fact that defendant was found sitting in a pick-up near the apartment - mere presence - did not prove constructive possession.

**People v. Fernandez, 2016 IL App (1st) 141667** A defendant has constructive possession of contraband where he knows the contraband was present and exercised "immediate and exclusive" control over the area where the contraband was found.

The police obtained a search warrant for a house and garage. On the evening before they conducted the search, the police saw defendant get out of a car and engage in a suspected narcotics transaction. The police arrested defendant and found him in possession of suspected heroin. They also recovered keys from defendant. The following morning the police searched the home and garage. The keys found on defendant opened the locks to both the home and the garage.

The police found an unidentified man in the house. In a bedroom, the police found a gun underneath a mattress, a passport and insurance cards with defendant's name, and framed photographs of defendant and the woman in the car. The closet had men's and women's clothing. The police found more framed photographs of defendant and the woman in the living room. In the garage, the police found three guns, ammunition, and heroin in a broken van with flat tires. The parties stipulated that defendant received mail at another address.

On these facts, the State failed to prove defendant was in constructive possession of the heroin and guns found inside the house and garage. Evidence of residency, which often takes the form of rent receipts, utility bills, or mail, did not link defendant to the house and garage. Instead, the only mail addressed to defendant linked him to another residence.

Although the police found numerous personal effects tied to defendant in the house and defendant's keys unlocked the house and garage doors, none of this evidence showed defendant's control over the premises. And the presence of another man in the house weighed against a finding that defendant controlled the premises.

Further, all the contraband was concealed, either under a mattress or inside the inoperable van. Even assuming defendant had access to the house and garage, nothing suggested he knew about the hidden contraband.

The court reversed defendant's convictions.

**In re Nasie M.**, 2015 IL App (1st) 151678 Following a bench trial, defendant was convicted of several gun offenses, all of which required proof that he possessed a gun. The State's evidence showed that the police spoke with defendant at a vacant lot where he had been shot in the foot. Defendant was taken to the hospital and the police went to his girlfriend's apartment, where they found a gun under a mattress. The gun contained a live, unfired cartridge.

Defendant initially told the officer that he had been shot by two assailants who were behind him, then told the officer that he had been carrying a gun, accidentally shot himself in the foot and then took the gun back to his girlfriend's house. At trial, by contrast, defendant testified that two men fired several shots at him as he attempted to flee from them.

The Appellate Court reversed outright defendant's convictions for the weapons offenses holding that the State failed to prove that defendant possessed a firearm. The State had provided no reason why defendant's admission that he possessed the gun should be presumed to be more credible than his trial testimony. Moreover, the version of events in the admission were "not necessarily corroborated" by the other evidence. Under that version, defendant would have had to shoot himself in the foot, run or hop to his girlfriend's apartment, get rid of the gun, and then return to the scene of the shooting where he spoke to the police, all within a short span of time.

The court gave little weight to the significance of the officer's observation of a gunshot wound to the top of defendant's foot since the officer was not an expert in gunshot wounds. The court also noted the absence of eyewitness testimony, forensic evidence and medical evidence. The court thus concluded that the State failed to prove defendant's guilt beyond a reasonable doubt.

**People v. Smith**, 2015 IL App (1st) 132176 "Knowing possession" may be either actual or constructive. The State establishes constructive possession by demonstrating that the defendant knew of the weapon's presence and exercised control over the area where it was found.

The State offered sufficient circumstantial evidence for a rational trier of fact to conclude that defendant had constructive possession of a gun that was found in a bag that was left on a bus after all passengers had disembarked. Not only did the driver state that defendant claimed ownership, but the fact that defendant approached the driver just after the latter exited the bus with the bag supported an inference that defendant hoped to regain control over the bag. In addition, the bag was found in the last row, where defendant had been sitting, and was unzipped so that the handle of a pistol was visible. Finally, defendant's statement to the driver that the bag contained a BB gun created a reasonable inference of knowing possession because defendant had not been shown the contents of the bag but claimed to know what it contained.

**People v. Moore**, 2015 IL App (1st) 140051 Defendant was convicted of unlawful

possession of ammunition by a felon and possession of a controlled substance after police officers executed a search warrant for the home of defendant's great-grandmother. Defendant was observed jumping out a window as police approached the house. Officers recovered ammunition from a desk in the living room and from the basement rafters, and also found what they suspected to be cocaine in the rafters. In addition, in one of three bedrooms officers discovered mens' clothing and a letter that was addressed to the defendant at the house.

Defendant's great-grandmother testified that defendant did not live at the house, but that he had been at the house on the day of the search and had received mail there. In addition, defendant's sister and a friend testified that he did not live at the house.

The Appellate Court reversed the convictions, finding that the evidence failed to prove that defendant had constructive possession of the contraband.

Where the defendant was not observed in the presence of the recovered contraband, the State was required to prove constructive possession. To establish constructive possession, the State must show that the defendant had knowledge of the contraband and exercised immediate and exclusive control over the area where the contraband was found. Even taken most favorably to the State, the evidence did not establish that defendant had knowledge of the contraband. Although officers found mail addressed to defendant and men's clothing in the bedroom, the contraband was not found in the bedroom. In addition, the mail had been postmarked more than six months earlier and the clothing was not specifically linked to defendant. And, defendant's flight was only one factor and must be considered with all of the other evidence.

Even had the State proven that defendant knew of the contraband, there would have been insufficient evidence that he had immediate and exclusive control over the area where the contraband was found. There was insufficient evidence here to show that defendant lived on the premises. Not only was the letter found in the bedroom six months old, but the clothing was not shown to belong to defendant. In addition, defendant presented three witnesses who testified that he did not live at the house. Under these circumstances, defendant did not have exclusive control of the area where the contraband was found.

**People v. Falco, 2014 IL App (1st) 111797** Defendant was convicted of possession of a firearm with defaced identification marks, which is defined as possessing any firearm where the importer's or manufacturer's serial number has been defaced, altered, removed, or obliterated. [720 ILCS 5/24-5\(b\)](#). The statute does not explicitly state the applicable mens rea. The jury was instructed with a non-IPI instruction which tracked the language of the statute but, like the statute, omitted any reference to a mental state.

Counsel was ineffective for failing to request an instruction informing the jury that to prove defendant guilty of the charged offense, the State had to prove that he knowingly or intentionally possessed the firearm. Although the statute does not specify a mental state, Illinois law is clear that the State must prove that the defendant intentionally or knowingly possessed the firearm, although the State does not have to prove that defendant knew of the defacement.

Where the statute does not specify a mental state, and instead one is implied, it is not always necessary to instruct the jury on the necessary mental state. Here, the implied mental state of intent and knowledge was specific enough to require instruction. Typical possession cases, such as unlawful use of a weapon, require the State to prove knowing possession and the corresponding IPI instructions inform the jury of this element.

There is no IPI instruction for the offense at issue here, but the jury should have been given a modified instruction that included the appropriate mental state as one of the elements of the offense. In the absence of such an instruction, the jury could have concluded

that this was a strict liability offense; there was no likelihood that the jury would have understood that knowledge was the appropriate mental state or that knowledge applied only to possession, not to defacement.

**People v. Alicea, 2013 IL App (1st) 112602** To sustain a conviction for unlawful use of a weapon by a felon, the State is required to prove that defendant had knowing possession of the weapon and that he had a prior felony conviction. Possession of the weapon can be either actual or constructive. Where the defendant is not found in actual possession of the weapon, the State must prove constructive possession. Constructive possession is shown by evidence that defendant had knowledge of the presence of the weapon, and the immediate and exclusive control over the area where it was found.

In the course of executing a search warrant for drugs in an apartment, the police recovered guns in an armoire under men's clothing and under a mattress in the front bedroom. A U.S. Treasury check addressed to defendant dated a day prior to the search was found in that same bedroom. One of defendant's sons and a young child were present when the warrant was executed. The son, who had been recently released from jail, told the police that he was there with his child to visit the child's grandfather, and was staying in the apartment only for a few days until he found another place to live.

Defendant's daughter testified that defendant had lived in the apartment with her, but at the time of the search lived with his girlfriend. The daughter lived in the apartment with her daughter and her two brothers. A photograph of the bathroom taken at the time of the search depicting three toothbrushes and a woman's sanitary products corroborated her testimony. The daughter testified that defendant's Veteran's Administration check still came to the apartment, and she would take it to defendant for his signature and deposit it. Defendant's girlfriend also testified that defendant lived with her. Defendant had used the apartment's address two months prior on his application for a driver's license, and he ran a business with cars on the street outside the apartment with his daughter.

While the evidence tying defendant to the apartment was sufficient to support an inference that he lived there, it was not sufficient in the face of the other evidence to prove defendant's possession and control of the bedroom beyond a reasonable doubt. Although the trial judge had found the testimony of defendant's daughter and girlfriend incredible and confusing, the Appellate Court concluded that those characterizations were not borne out by its review of the record. It also believed it reasonable that defendant's son would not want to admit to the police that he was a resident of the apartment where guns and drugs were found. Because the State failed to prove that defendant constructively possessed the weapons, the court reversed defendant's convictions.

**People v. Wright, 2013 IL App (1st) 111803** To prove that defendant constructively possessed a weapon, the State must prove defendant's knowledge of the weapon and that defendant exercised immediate and exclusive control over the area where the weapon was found. The mere presence of a weapon is insufficient to prove that defendant had knowledge of the weapon.

Police witnesses testified that the police chased defendant and another person down a flight a stairs into a basement area where the other person fell over the defendant. The police recovered a gun that protruded from under the torso of the prone defendant. Three other persons were already present in the basement. Defendant did not live or work in the building.

This evidence was insufficient to prove that defendant possessed the gun. None of the

witnesses saw a gun in defendant's hands or noticed him make any action consistent with discarding the gun. No physical evidence connected him to the gun. The mere presence of the gun did not prove that defendant had knowledge of it. There was no evidence that defendant exercised exclusive or immediate control over the area where the weapon was found.

**People v. Sams, 2013 IL App (1st) 121431** When defendant is not found in actual possession of a firearm, to prove that defendant unlawfully possessed the weapon, the State must prove constructive possession. The State establishes constructive possession by proving beyond a reasonable doubt that (1) defendant knew that a firearm was present, and (2) exercised immediate and exclusive control over the area where the firearm was found. Mere presence in the vicinity or access to the area where the firearm is found is insufficient to establish constructive possession.

The State failed to prove beyond a reasonable doubt that the defendant constructively possessed a firearm. A caller to 911 mentioned defendant's name and that he had pointed a gun at her son, but she did not describe the offender or the gun or state that she had witnessed the events she described first hand. The officers who responded to the call did not observe defendant in actual possession of a gun and no physical evidence connected defendant to a gun. The evidence was only that defendant walked out of a house he was visiting, and the police found a gun under a couch when they later conducted a search of the house with the owner's consent. The police had not noticed the gun when they first entered the home, and never even saw defendant in the same room where they found the gun.

**People v. McIntyre, 2011 IL App (2d) 100889** To prove that the defendant constructively possessed a weapon, the State had to establish that defendant had: (1) knowledge of the presence of the weapon, and (2) immediate and exclusive control over the area where the weapon was found. Knowledge of the presence of the weapon is not the equivalent of possession. Nor is proximity to the weapon sufficient to show possession. A defendant's status as the owner-driver of a car does not prove his possession of everything within the passenger area when there are passengers present who may possess the contraband. Possession may be held jointly by the owner-driver and other passengers, but the evidence must support the conclusion that the defendant had control, or the ability to exercise control, over the contraband.

Defendant had knowledge of the presence of the weapon when his passenger fired shots from the front passenger seat of defendant's car. But defendant, who was the owner-driver of the car, did not have control, or the ability to exercise control, over the weapon, where the police found the gun in an opening between the plastic base of the front-passenger seat and the leather portion of that seat, on the side of the seat closest to the front-passenger door. The court reversed defendant's conviction for unlawful possession of a weapon by a felon.

**People v. Hampton, 358 Ill.App.3d 1029, 833 N.E.2d 23 (2d Dist. 2005)** The evidence was insufficient to sustain a conviction for unlawful use of a weapon. In a constructive possession case, the State proves the offense of unlawful use of a weapon where it shows that the defendant had knowledge of the presence of a weapon and immediate and exclusive control over the area in which it was found. The court acknowledged Illinois precedent that the location of a weapon may give rise to an inference of constructive possession which is sufficient to sustain a conviction, at least where no other evidence creates a reasonable doubt of guilt. The court found, however, that such precedent concerns contraband found in the defendant's residence or living quarters. The court found that a loaded handgun is rarely

present in the glove compartment of a vehicle without the knowledge of the driver. To prove unlawful use of a weapon based on the presence of a weapon under such circumstances, therefore, the State must prove that the defendant "had regular, ongoing control over the vehicle that he was driving, similar to the regular and ongoing control that one has over his own living quarters." Such control can be shown by evidence that the defendant owns or regularly drives the vehicle.

In this case, the State proved only that defendant was driving the car at the time of the stop, not that he had ever driven the car before or had any level of control over it. In addition, the State failed to present other evidence from which defendant's knowledge of the weapon could be inferred. The factors to be considered in this inquiry include: (1) the visibility of the weapon from defendant's location in the vehicle; (2) the amount of time in which defendant could have observed the weapon; (3) any gestures or movements suggesting an effort by the defendant to retrieve or conceal the weapon; and (4) the size of the weapon. None of these factors showed that defendant knew of the weapon in the glove compartment. First, the gun was small and found inside a sock in the glove compartment, and thus would not have been visible to defendant as he drove. Second, the vehicle belonged to defendant's deceased brother, but defendant had never driven it before the date of his arrest. Third, defendant had been driving only a few minutes before the stop, and the officer who conducted the stop testified that defendant made no furtive movements.

**People v. Bailey**, 333 Ill.App.3d 888, 776 N.E.2d 824 (3d Dist. 2002) Knowing possession is an essential element of unlawful use of a weapon; otherwise, individuals could be convicted of an offense merely because they are in a vehicle in which a weapon is found. "Knowing possession" may be actual or constructive. Constructive possession requires a showing that the defendant: (1) knew that a weapon was present, and (2) exercised immediate and exclusive control over the area where the weapon was found. Knowledge of the existence of a firearm may be proved through circumstantial evidence; however, a defendant's mere presence, without more, does not establish knowledge that a weapon is present.

Here, the State failed to prove beyond a reasonable doubt that defendant knew that a weapon was under the seat of a vehicle in which he was a passenger. Because the arresting officer testified that the weapon was not visible until he looked under the seat, the weapon was not visible to defendant as he sat in the car. No fingerprints were taken from the gun, which had never been reported as stolen or transferred. Similarly, the automobile in which the weapon was found had never been reported as stolen, and the State failed to establish any relationship between defendant and the owner of either the car or the weapon. Finally, neither of the arresting officers indicated that defendant made any gestures indicating he was trying to retrieve or hide a weapon.

**People v. Seibech**, 141 Ill.App.3d 45, 489 N.E.2d 1138 (3d Dist. 1986) Although a person driving his own car is presumed to knowingly possess a firearm found within it, that presumption was rebutted by the uncontradicted defense testimony. Defendant testified that earlier in the day he had driven two men to an area where they hunted. Later that day defendant drove the men home. Defendant said that he had not known that one of the hunters had left a rifle on the back floorboard. One of the hunters corroborated defendant's testimony and said that he had inadvertently left his rifle on the floor of defendant's car. The hunter's testimony was "plausible" and "could not reasonably be disregarded by the jury." Thus, in view of the hunter's uncontradicted testimony and the "tenuous nature of the inference," it "cannot be said that the State established beyond a reasonable doubt that defendant knowingly possessed a firearm."

**People v. Davis**, 50 Ill.App.3d 163, 365 N.E.2d 1135 (3d Dist. 1977) The fact that defendant was a passenger in an automobile in which a shotgun was found was not sufficient to support a conviction for UUW. Although the UUW statute permits a presumption that every passenger in an automobile is in possession of any weapon present therein, the State must also prove that the possession was "knowing." Here, the prosecution introduced no evidence from which defendant's knowledge of the gun could be inferred. Compare, **People v. McKnight**, 39 Ill.2d 577, 237 N.E.2d 488 (1968) (circumstantial evidence of possession was sufficient where "defendant made motions with his right hand and a dipping motion of the shoulder prior to being stopped," a companion was armed, and a loaded pistol was found under his seat).

**People v. Coburn**, 25 Ill.App.3d 542, 323 N.E.2d 559 (1st Dist. 1975) A conviction for possession of shotgun with a barrel of less than 18 inches was reversed. The stock of a shotgun was found adjacent to the defendant, who was sleeping, and a barrel was found "in another location in the basement." There was no evidence that the barrel belonged to the stock, and it could have been designed for a second sawed-off shotgun found in another part of the basement.

#### **§55-6**

##### **Proof of Concealment**

##### **Illinois Supreme Court**

**People v. Gokey**, 57 Ill.2d 433, 312 N.E.2d 637 (1974) The element of "concealment" was sufficiently proved where gun fell from defendant's trouser leg. See also, **People v. Ostrand**, 35 Ill.2d 520, 221 N.E.2d 499 (1966); **People v. Euctice**, 371 Ill. 159, 20 N.E.2d 83 (1939).

##### **Illinois Appellate Court**

**People v. House**, 29 Ill.App.3d 994, 331 N.E.2d 72 (1st Dist. 1975) The evidence showed that defendant was standing at the rear of his property with an unconcealed revolver in his hand. When police approached, defendant threw the gun into a partially full garbage can several paces from him. The Court held that defendant was not carrying a concealed weapon when the gun was in the garbage can; the gun was not accessible for immediate use, and retrieving it would have required an appreciable change of position by defendant.

#### **§55-7**

##### **Proof Item is a Firearm**

##### **Illinois Supreme Court**

**People v. Wright**, 2017 IL 119561 To prove armed robbery with a firearm, the State must prove that defendant was armed with a device designed to expel a projectile by action of an explosion, expansion of gas, or escape of gas. 720 ILCS 5/18-2(a)(2); 430 ILCS 65/1.1. The definition of firearm specifically excludes any pneumatic, spring, paint ball, or BB gun.

Here, a witness with experience firing guns testified that codefendant told him "this is a robbery" and showed him what "looked like" a black semi-automatic gun. The witness was 100% certain it was an actual firearm. He also testified that he later felt "something sharp," like the barrel of a gun, against his back. Another witness testified that codefendant told her she was being robbed and she saw the handle of a gun. A third witness testified he had seen guns before and believed codefendant's gun was a nine millimeter pistol.

The Supreme Court held that this evidence, when viewed in the light most favorable to the State, was enough to prove defendant guilty of armed robbery with a firearm. The court held that this evidence “was not so unreasonable, improbable, or unsatisfactory that no rational trier of fact could have found” defendant guilty.

Defendant’s conviction was affirmed.

### **Illinois Appellate Court**

**People v. Turner, 2024 IL App (4th) 230641** The offense of disarming a peace officer requires proof that defendant took a “weapon” from a peace officer. **720 ILCS 5/31-1a**. Defendant argued the State failed to prove him guilty of this offense because he took pepper spray from the officer, and pepper spray is not a “weapon.” The appellate court held that pepper spray is a weapon.

The dictionary definition of “weapon” is “[a]n instrument of attack or defense in combat.” A broad definition of “weapon” may include both intrinsic weapons (objects designed to be used as instruments of attack), and improvised weapons (objects that are merely susceptible to being used as instruments of attack). Defendant argued that only intrinsic weapons qualify under section 31-1a, because the broader definition would “erroneously include instruments such as pencils, police radios, and the like.” The appellate court did not decide whether the statute encompasses improvised weapons, because “pepper spray’s intended function is to injure or temporarily disable another person; therefore it is an intrinsic weapon.”

Defendant pointed out that section 24-1(a)(3) defines “weapon” and asked the court to apply that definition to 31-1a. But section 24-1(a)(3) does not explicitly state that it should supply the definition of “weapon” for section 31-1a, and section 31-1a lacks any express language incorporating section 24-1(a)(3). Moreover, on several occasions, Illinois appellate courts have upheld factual findings that pepper spray constituted a dangerous weapon under the default interpretation of that term.

**People v. Travis, 2024 IL App (3d) 230113** The State presented sufficient evidence to prove defendant possessed an actual firearm and therefore committed armed habitual criminal. The evidence consisted of the testimony of a police officer who reviewed a video of defendant and his cousins holding what appeared to be handguns. The officer testified he was well-acquainted with firearms, including the specific model held by defendant, which he identified as a Taurus PT111 9-millimeter. That same model of firearm was later found in defendant’s cousin’s apartment. Thus, the unrebutted evidence established defendant’s possession of a firearm.

**People v. Moore, 2023 IL App (1st) 211421** The appellate court found sufficient evidence that defendant used a firearm during an armed robbery. Citing **People v. McLaurin, 2020 IL 124563**, and **People v. Wright, 2017 IL 119561**, the appellate court held that eyewitness testimony alone may suffice to prove the existence of a real firearm. Here, two witnesses described what defendant was holding to be a “gun.”

While defendant pointed out that in **McLaurin** and **Wright**, the eyewitness account was either from someone with expertise in firearms, or corroborated by the recovery of a firearm, the appellate court held that these factors were not required to uphold a conviction. Under the any-rational-trier-of-fact standard, the record contained sufficient support for the finding, including the fact that the descriptions were unimpeached, the witnesses provided some detail (a “barrel” and a “cowboy gun”), and defendant threatened to shoot the victim. While defendant posited that the gun may have been an “antique firearm,” which is excluded

from the statutory definition of “firearm,” this argument was not made before the trial court and no direct evidence supported this possibility.

**People v. Collins, 2021 IL App (1st) 180768** The trial court did not error when it rejected defendant’s proposal to include the bracketed instructions contained in [IPI Crim. No. 18.35G](#). The pattern instruction includes the basic definition of a firearm, while the bracketed information provides exceptions to the definition, including for BB guns or paint guns. The committee notes state that the bracketed information should be included when appropriate. Here, the trial contained no evidence that the object held by defendant and identified by one witness as a real firearm, was either a BB gun or a paint gun. Thus the bracketed instruction containing these exclusions would not be appropriate in this case.

Furthermore, the evidence was sufficient to establish firearm possession beyond a reasonable doubt. Although no gun was recovered, a video showed defendant threatening one of the victims with an object that appeared to be a firearm. Coupled with another victim’s testimony that defendant carried a “semiautomatic,” which he recognized based on his own familiarity with guns, and threatened to kill him, suggesting the firearm was real, the circumstantial evidence was sufficient under **People v. McLaurin, 2020 IL 124563**.

**People v. Joseph, 2021 IL App (1st) 170741** The State proved that defendant possessed a firearm beyond a reasonable doubt. The victim testified that defendant approached her with a “gun,” and threatened to shoot her. When asked what “type” of gun, the witness stated: “I don’t know nothing about no guns, so I don’t know what kind of gun it was.” Defendant argued that this testimony separated the instant case from **People v. McLaurin, 2020 IL 124563**, where the court confirmed that circumstantial evidence can suffice to prove possession of a firearm, as opposed to possession of a BB gun or toy gun. Defendant noted that in **McLaurin** and the cases it relied on, **People v. Washington, 2012 IL 107993**, and **People v. Wright, 2017 IL 119561**, additional evidence bolstered the witnesses’ testimony (corroborating testimony, recovered firearm, etc).

The Appellate Court held that sufficient evidence existed here. Not only did the victim call the object a gun, defendant threatened to shoot the victim. A rational jury could infer from this threat that the object was a real firearm. And, the victim’s testimony concerning her lack of knowledge about guns referred only to the “type” of gun defendant carried, not whether or not the object was in fact a firearm.

**People v. Boyd, 2021 IL App (1st) 182584** Defendant’s conviction of armed robbery affirmed. Victim, who stated that defendant was holding a gun, testified that he was familiar with guns because he had handled them at a gun range. Further, the evidence showed that defendant struck the victim in the face with the weapon multiple times, causing fractures and other injuries. Under **People v. McLaurin, 2020 IL 124563**, and **People v. Wright, 2017 IL 119561**, the testimony of a single witness that the weapon was a firearm can be sufficient to satisfy the State’s burden of proof.

**People v. McLaurin, 2020 IL 124563** An officer observed defendant carrying a chrome object she believed to be a gun. Defendant entered a van, the officer followed, and the van was stopped by other officers. These officers patted down defendant and the other occupants but found no gun. Shortly thereafter, officers recovered a gun under the van. While no officers saw the defendant place the gun there, the initial officer testified that it looked like the object she saw defendant carrying. However, the gun was not introduced into evidence at trial. The

Appellate Court reversed the conviction, finding an insufficient nexus between the object defendant was seen carrying and the gun under the van.

The Supreme Court reversed the Appellate Court and upheld the conviction. Although not overwhelming, and although the State “took a risk” by not introducing the gun at trial, the State did provide sufficient circumstantial evidence to withstand a reasonable doubt challenge on appeal. The officers’ descriptions, which were based on clear observations and were not impeached, as well as the proximity of the gun to the van, satisfied the standards enunciated in similar cases such as [People v. Washington, 2012 IL 107993](#) and [People v. Wright, 2017 IL 119561](#).

[In re Jaheim W., 2020 IL App \(1st\) 191748](#) The State proved that defendant carried a “firearm” as required by the UUC statute, where an officer testified that she saw defendant holding a “gun” while sitting in a vehicle, that he dropped the “firearm” when ordered out of the car, and that she recovered the “firearm” immediately thereafter. This testimony provided sufficient evidence from which the trier-of-fact could find the “firearm” element satisfied, even if the gun was not described or introduced into evidence.

In affirming the conviction, the court distinguished [People v. McLaurin, 2018 IL App \(1st\) 170258](#), where an officer saw defendant holding a chrome object from 50 feet away, before discovering a gun nearby, without stating that the defendant placed it there. Here, the officer was within a few feet of the defendant, and recovered the gun exactly where she saw him drop it. But, the Appellate Court further cautioned:

While we find the evidence to be sufficient in this case, we do wish to express that when the State fails to produce the weapon, a photograph of it, or some other documentary evidence to substantiate its existence, it does so at its own peril. Had the trial court not absolutely credited Officer Blocker’s testimony in this case, there likely would have been a failure of proof as to the existence of a firearm. In recognition of [McLaurin](#) and the other cases cited by respondent, courts are rightfully on high alert that the State must affirmatively prove the existence of a statutorily defined firearm to substantiate convictions on charges like those present in this case.

[People v. Clifton, 2019 IL App \(1st\) 151967](#) To prove armed robbery with a firearm, the State bears the burden of establishing that the object meets the definition of a “firearm” under the FOID Card Act, specifically that the object is designed to expel a projectile by action of an explosion, expansion of gas, or escape of gas. Defendant challenged the sufficiency of the State’s evidence that he possessed a firearm, where that evidence consisted solely of lay witness testimony describing what he observed as a black revolver, either .32 or .38 caliber, held within inches of his face.

The Appellate Court upheld defendant’s conviction of armed robbery with a firearm on this evidence, noting longstanding precedent allowing proof of a firearm by lay witness testimony. In affirming, the Court stated it was troubled by cases allowing proof of a firearm with testimony that “does not come close” to detailing the technical features of a firearm as described in the FOID Card Act. However, the Court was compelled by Supreme Court precedent to affirm defendant’s conviction on such testimony.

[People v. Charles, 2018 IL App \(1st\) 153625](#) Victim’s testimony that defendant had a “gun” was sufficient to establish that he was armed with a firearm for purposes of aggravated kidnapping and aggravated criminal sexual assault statutes. A witness is not required to have

expertise or even familiarity with firearms for the trier of fact to credit her testimony that the object was a firearm.

**People v. McLaurin, 2018 IL App (1st) 170258** Evidence was insufficient to prove that the item that a police officer saw in defendant's hand was a firearm for purposes of the armed habitual criminal statute. The officer said she saw defendant holding a silver handgun when he entered a van, and a chrome handgun was found under the van after the police initiated a traffic stop and ordered the occupants out of the vehicle a short time later. However, the officer could not say whether she had observed a revolver or a semi-automatic gun because of the way defendant was holding the item, and she was approximately 50 feet away when she saw it. And, there was no evidence as to how the gun came to be located under the van where none of the six officers at the scene testified to seeing defendant or any other occupant of the van discard it there.

The court acknowledged several armed robbery cases upholding convictions based on unequivocal testimony that defendant held a firearm, even where no firearm was recovered, but purported to distinguish those cases because proof of the use of a firearm is not an element of the underlying offense of robbery but merely an aggravating factor to support a more serious version of the offense. Because the officer here could not provide more specific testimony about the object she observed, the court concluded that the State did not prove the essential element that the item met the statutory definition of a "firearm."

**People v. Fields, 2017 IL App (1st) 110311-B** The State proved beyond a reasonable doubt that defendant was armed and hence guilty of armed robbery. The offense of armed robbery as charged in this case required proof that defendant possessed a firearm. **720 ILCS 5/18-2(a)(2)**. A firearm is defined by statute as any device designed to expel a projectile by action of an explosion or expansion or escape of gas. **430 ILCS 65/1.1**. The statute also contains several exceptions to this general definition, such as pneumatic guns, spring guns, paint ball guns, and BB guns.

Although the statute contains exceptions, the term firearm is defined broadly, and contrary to defendant's argument that the State must prove the existence of a firearm by direct or physical evidence, the unequivocal testimony of a witness that defendant possessed a gun is sufficient circumstantial evidence that defendant was armed. Here, a witness testified that defendant held a black gun at his side during the robbery. There was no evidence suggesting that the gun falls within any of the statutory exceptions to the broad general definition of a firearm. The State thus proved defendant guilty of armed robbery.

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